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Mise à jour sur les développements et proposition de rehausser le niveau de priorité du projet sur le Devoir de vigilance des entreprises en matière de durabilité dans les chaînes de valeur mondiales

(préparé par le Secrétariat)

Sommaire	*Mise à jour sur les résultats de l'atelier exploratoire sur le devoir de vigilance des entreprises en matière de durabilité dans les chaînes de valeur mondiales, tenu les 27 et 28 mai 2024 et proposition de rehausser le niveau de priorité du projet sur la base des résultats de l'atelier*
Action demandée	*Le Conseil de Direction est invité à prendre note des résultats de l'atelier exploratoire et à rehausser la priorité du projet de moyen à élevé, permettant ainsi au Secrétariat de créer un Groupe de travail. Il est également invité à accepter la possibilité d'une coopération ou d'un travail conjoint avec la CNUDCI, si une telle demande lui était adressée.*
Mandat	*Programme de travail 2023-2025*
Niveau de priorité	*Confirmation d'un niveau de priorité élevé*
Documents connexes	*UNIDROIT 2022 C.D. (101) 4; UNIDROIT 2022 C.D. (101) 21; UNIDROIT 2022 A.G. (81) 9; UNIDROIT 2024 C.D. (103) 12; UNIDROIT 2024 C.D. (103) 30*

I. INTRODUCTION

1. Lors de sa 103ème session, le Conseil de Direction a été informé par le Secrétariat de l'organisation d'un atelier exploratoire consacré au projet sur le devoir de vigilance des entreprises en matière de durabilité dans les chaînes de valeur mondiales, qui s'est tenu au siège de l'Institut les 27 et 28 mai 2024. Tous les membres du Conseil de Direction avaient été invites à y participer. Le Secrétariat prévoyait de présenter au Conseil les conclusions de cet atelier et, si celui-ci estimait opportun de constituer un Groupe de travail, de proposer au Conseil de Direction de rehausser le niveau de priorité du projet. Dans un souci d'efficacité et afin d'éviter de repousser la création du Groupe de travail ainsi que le lancement de ses activités après la session ordinaire du Conseil de Direction, la mise à jour des résultats de l'atelier et la proposition de rehausser le niveau de priorité du projet devaient être soumises au Conseil entre les sessions, par le biais d'une procédure écrite.

Ainsi, le présent document a pour objet d'informer les membres du Conseil de Direction des résultats de l'atelier exploratoire et d'inviter le Conseil à rehausser le niveau de priorité du projet de moyen à élevé afin de permettre la création d'un Groupe de travail.

II. HISTORIQUE

2. En 2022, la Banque européenne pour la reconstruction et le développement (BERD) et l'Organisation internationale de droit du développement (OIDD) ont demandé à UNIDROIT d'examiner la possibilité d'engager des travaux sur le devoir de vigilance des entreprises en matière de durabilité dans les chaînes de valeur mondiales (*Corporate Sustainability Due Diligence*, CSDD), compte tenu de son expertise en droit des contrats, considéré comme un levier essentiel pour la mise en œuvre des mesures de durabilité par le biais du droit privé.

3. Le projet doit être replacé dans le contexte des préoccupations croissantes en matière de durabilité, notamment en ce qui concerne la protection des normes environnementales et des droits de l'homme dans les chaînes de valeur mondiales. Les contrats commerciaux sont devenus un instrument essentiel pour assurer la conformité au CSDD dans ces chaînes, et les évolutions du droit des contrats résultant de cette tendance ont soulevé de nombreuses questions juridiques, qui pourraient bénéficier de l'expertise d'UNIDROIT en droit des contrats et en droit commercial.

4. Ainsi, l'"Élaboration d'un document d'orientation sur le devoir de vigilance des entreprises en matière de durabilité dans les chaînes de valeur mondiales" a été inscrit au Programme de travail d'UNIDROIT par l'Assemblée Générale lors de sa 81ème session en décembre 2022 (voir le document UNIDROIT 2022 - A.G. (81) 9), sur recommandation de son Conseil de Direction (voir le document UNIDROIT 2022 - C.D. (101) 21, paras. 115 à 131).

5. Par la suite, l'Institut de droit européen (ELI) a soumis à UNIDROIT une proposition visant à intégrer une évaluation de l'impact de la technologie et de l'utilisation des plateformes dans le contexte des chaînes de valeur mondiales. Comme dans d'autres domaines du droit, la technologie exerce une influence majeure sur le CSDD, y compris sur la structure et le fonctionnement des chaînes de valeur mondiales. Elle a également un impact significatif sur les possibilités de contrôle des performances en matière de durabilité.

6. Lors de sa 101ème session en 2022, le Conseil de Direction a attribué au projet un niveau de priorité moyen et a invité le Secrétariat à mener des travaux exploratoires afin de définir la portée du projet. Au cours de cette session, le Secrétariat a confirmé que les travaux normatifs ne seraient entamés que lorsque les ressources seraient disponibles, suite à l'achèvement d'un autre projet ayant un niveau de priorité élevé. Le Secrétariat estime que les conditions pour procéder à la mise à niveau du projet et commencer les travaux normatifs sont désormais réunies.

7. Tout d'abord, à la demande du Conseil de Direction, le Secrétariat a achevé ses travaux exploratoires en vue du lancement du projet au cours de la période la période 2022-2024. Il a mené des recherches approfondies sur les principaux instruments juridiques et initiatives relatifs au devoir de vigilance des entreprises, tant au niveau international que national. Il a également examiné les collections existantes de clauses types, destinées à développer des clauses contractuelles types en matière de développement durable et à proposer un modèle de dispositions contractuelles claires et applicables. Sur la base de cet examen exhaustif, le Secrétariat a analysé les éléments qui pourraient différencier le document d'orientation potentiel d'UNIDROIT des autres instruments et initiatives existants, afin de combler au mieux les lacunes restantes, compte tenu du mandat et de l'expertise d' d'UNIDROIT. Les résultats de cette recherche ont servi de base aux discussions de l'atelier exploratoire organisé en mai 2024, qui a permis de formuler une recommandation claire concernant la portée du futur instrument. Les résultats de l'atelier sont présentés dans la section III ci-dessous.

8. Ensuite, avec la conclusion, en mai 2024, du projet conjoint CNUDCI/UNIDROIT de Loi type sur les récépissés d'entrepôt - un projet hautement prioritaire qui avait débuté en décembre 2020 - des ressources sont désormais disponibles au sein de l'Institut et peuvent être consacrées à la mise en œuvre d'un nouveau projet tout aussi prioritaire dans le cadre du Programme de travail 2023-2025.

9. Par ailleurs, le Secrétariat est convaincu que le moment est venu de lancer ces travaux normatifs, non seulement en raison de la disponibilité des ressources, mais aussi parce que le projet créerait de fortes synergies avec d'autres projets prioritaires en cours et renforcerait de manière significative le nouveau domaine d'activité de l'Institut, à savoir le droit privé et la durabilité. Les principales considérations et recommandations du Secrétariat à l'intention du Conseil de Direction sont exposées dans la section IV ci-dessous.

III. RÉSULTATS DE L'ATELIER EXPLORATOIRE, 27-28 MAI 2024

10. L'objectif de l'atelier exploratoire, organisé les 27 et 28 mai 2024 au siège d'UNIDROIT à Rome, était de réunir un nombre restreint d'experts invités issus de différentes juridictions et possédant des expériences professionnelles variées. Cet atelier avait pour but d'évaluer le cadre normatif international existant, ainsi que la nécessité et la valeur ajoutée d'un futur instrument d'UNIDROIT sur le sujet, et de fournir des recommandations concernant la forme, la portée et le contenu d'un tel instrument. L'ordre du jour de l'atelier figure à l'Annexe I et fait partie intégrante du Rapport (en anglais seulement).

11. L'atelier a rassemblé certains des experts juridiques les plus renommés au monde dans le domaine de la vigilance des entreprises en matière de durabilité. Les systèmes juridiques représentés incluaient la Chine, les États-Unis d'Amérique, l'Italie, les Pays-Bas, le Portugal, et le Royaume-Uni ainsi que des membres du Conseil de Direction de la Belgique, du Japon et de la Lettonie. Les participants étaient des experts juridiques et économiques issus du milieu universitaire, du secteur privé et d'organisations intergouvernementales, notamment l'Organisation de coopération et de développement économiques (OCDE), la Banque européenne pour la reconstruction et le développement (BERD), l'Organisation internationale de droit du développement (OIDD) et l'Institut de droit européen (ELI). En particulier, des membres du Groupe de travail ayant élaboré les clauses contractuelles types de l'*American Bar Association* (les *American Bar Association's Model Contract Clauses (ABA MCCs) 2.0*) ainsi que ceux ayant contribué au projet de clauses contractuelles types européennes en matière de durabilité (*European Model Clauses (EMCs)*) ont participé à l'atelier. Compte tenu du niveau de priorité moyen du projet, le nombre de participants était limité. Si le Conseil de Direction décidait de rehausser le niveau de priorité du projet pour permettre la création d'un Groupe de travail, le groupe d'experts serait naturellement élargi afin de garantir une représentation plus large sur le plan juridictionnel et professionnel. La liste des participants figure à l'Annexe I et fait partie intégrante du Rapport (en anglais seulement).

12. Les délibérations des participants s'appuyaient sur un document de travail qui exposait les recherches approfondies menées par le Secrétariat, comme mentionné précédemment, et qui avait été distribué avant l'atelier. Ce document visait à proposer un cadre et une structure de départ pour l'atelier, en fournissant des informations générales sur le projet ainsi qu'une liste de problèmes et de questions soumis à l'examen des participants. Il est important de noter que toutes les considérations et recommandations formulées par les membres du Conseil de Direction lors des deux sessions où ce projet figurait à l'ordre du jour — à savoir la 101ème session de juin 2022, au cours de laquelle son inclusion dans le Programme de travail a été proposée, et la 103ème session de mai 2024, où les travaux exploratoires ont été présentés au Conseil — ont été prises en compte. Le document de travail figure à l'Annexe II (en anglais seulement).

13. Sur la base du document de travail, les participants ont examiné les concepts clés des chaînes de valeur mondiales et du devoir de vigilance des entreprises en matière de durabilité. Ils ont analysé attentivement les principaux instruments juridiques et initiatives en matière de devoir de vigilance des

entreprises aux niveaux international, régional et national, et ont identifié les lacunes restantes qu'un futur instrument d'UNIDROIT pourrait combler. À partir de cette évaluation approfondie, les participants ont discuté en détail des questions de fond à inclure dans le futur instrument d'UNIDROIT, ainsi que de la forme que pourrait prendre cet instrument.

14. Dans l'ensemble, l'atelier a conduit les participants à conclure que le cadre international présente d'importantes lacunes dans le traitement des questions urgentes en pratique. Ils ont estimé qu'un futur instrument d'UNIDROIT pourrait effectivement combler ces lacunes et constituer un outil normatif essentiel pour compléter le cadre international existant. Les participants ont unanimement recommandé qu'UNIDROIT élabore un tel instrument, tout en formulant des recommandations concernant sa portée, sa forme et son contenu potentiels. En résumé, en réponse aux lacunes identifiées dans le paysage international, il a été recommandé que le futur instrument fournisse des orientations sur les contrats alignés sur le principe de vigilance, y compris des clauses contractuelles types accompagnées de commentaires. Cela permettrait de: i) offrir aux parties une alternative aux pratiques contractuelles traditionnelles qui ne favorisent souvent pas les objectifs de durabilité, ii) expliquer comment rendre opérationnelles les exigences énoncées dans les instruments internationaux pertinents existants par le biais de contrats, iii) mettre pleinement en œuvre les Principes directeurs des Nations unies relatifs aux entreprises et aux droits de l'homme (UNGP), iv) avoir une application et une légitimité mondiales, v) être développé avec l'inclusion des pays du Sud, vi) reconnaître les questions sectorielles spécifiques, et vii) ne pas se limiter à des types de contrats spécifiques. Le texte intégral du Rapport de synthèse de l'atelier, reflétant les considérations détaillées des participants, est présenté à l'Annexe I (en anglais seulement).

IV. CONSIDÉRATIONS ET RECOMMANDATIONS DU SECRÉTARIAT

15. Compte tenu des résultats des travaux exploratoires, en particulier des conclusions de l'atelier exploratoire, ainsi que de la planification des travaux et de l'allocation des ressources au sein de l'Institut pour la mise en œuvre du Programme de travail 2023-2025, le Secrétariat estime que le moment est venu de créer un Groupe de travail. Les principaux éléments justifiant cette recommandation sont exposés ci-dessous. Une attention particulière a été portée à l'examen approfondi des considérations et recommandations formulées par les membres du Conseil de Direction concernant ce projet, notamment lors de sa 103ème session en mai 2024.

A. Confirmation de la valeur ajoutée d'un futur instrument d'UNIDROIT pour combler les lacunes et les faiblesses importantes du cadre international existant

16. L'une des préoccupations exprimées par les membres du Conseil de Direction et soigneusement prise en compte par le Secrétariat était de s'assurer que le futur instrument ne se superposerait pas aux instruments déjà existants en matière de CSDD. Cet aspect a fait l'objet d'un examen approfondi lors de l'atelier exploratoire. L'avis unanime des participants à l'atelier a confirmé que l'instrument proposé ne se superposerait à aucun des instruments existants, mais qu'il comblerait plutôt plusieurs lacunes importantes et remédierait à diverses faiblesses, comme indiqué ci-après.

Orientations sur la passation de contrats à l'échelle mondiale, dans le cadre de la mise en œuvre des instruments internationaux existants

17. À ce jour, aucun instrument n'existe pour fournir des orientations contractuelles aux acheteurs et aux fournisseurs tout au long des chaînes de valeur à l'échelle mondiale. En particulier, les Principes directeurs de l'OCDE à l'intention des entreprises multinationales sur la conduite responsable des entreprises ("les Principes directeurs de l'OCDE") énoncent les différentes étapes du processus de vigilance, mais n'abordent pas le rôle des contrats dans ces étapes. Aucune des collections de clauses types examinées par les participants, notamment les *Model Contract Clauses de l'American Bar Association 1.0* et *2.0*, ni les *European Model Clauses*, n'adopte une approche globale. Cela se reflète

dans le fait qu'aucune de ces collections de clauses types n'a pleinement mis en œuvre les instruments internationaux, en particulier les Principes directeurs de l'ONU et les Principes directeurs de l'OCDE. L'absence de mise en œuvre d'une approche globale peut s'expliquer par l'historique particulier de la rédaction des clauses types, qui n'ont pas été conçues comme des instruments globaux, mais plutôt pour aider à rendre les règles opérationnelles dans certaines juridictions seulement.

Orientations sur la passation de contrats prenant en compte les enjeux sectoriels

18. L'absence d'orientations sectorielles sur la passation de contrats est une autre lacune majeure dans les instruments actuels. Bien que l'OCDE propose des orientations sectorielles largement adoptées par les entreprises dans la pratique, elles ne traitent pas non plus de la passation de contrats. Le futur instrument pourrait initialement se concentrer sur des orientations intersectorielles, conformément aux Principes directeurs des Nations Unies et aux Principes directeurs de l'OCDE. Il pourrait ensuite reconnaître de nombreuses questions sectorielles et envisager par la suite l'élaboration de clauses spécifiques adaptées aux diverses circonstances de chaque secteur. Par exemple, le commentaire de l'instrument expliquant la collaboration entre acheteurs et fournisseurs pourrait, entre autres, offrir des conseils et des exemples concrets illustrant le fonctionnement de cette collaboration dans la pratique et au sein de différents secteurs. Il pourrait notamment illustrer la collaboration selon qu'une chaîne de valeur donnée comprend de nombreux petits exploitants ou, au contraire, seulement deux ou trois fournisseurs principaux. Par ailleurs, l'instrument pourrait préciser qu'en fonction du modèle contractuel et de la position d'une partie au sein de ce modèle, il peut être avantageux pour cette partie d'inclure dans le contrat un type particulier de clause contractuelle plutôt qu'un autre.

Orientations adoptant une approche inclusive: consolidation de diverses perspectives, élaborées par un Groupe de travail avec une large représentation

19. Lors de la session du Conseil de Direction en mai 2024, les membres du Conseil ont souligné la nécessité d'un instrument équilibré, prenant en compte les différentes perspectives tout au long de la chaîne de valeur, ainsi que le fait que les politiques des entreprises et les règles commerciales entre différents pays sont parfois en conflit. À titre d'analogie, les membres du Conseil ont fait référence aux Principes d'UNIDROIT relatifs aux contrats du commerce international ("les Principes d'UNIDROIT"), notant qu'ils facilitent et promeuvent les transactions en harmonisant le droit des contrats dans différentes régions du monde. Ils ont également souligné que ces principes sont reconnus pour leur équilibre dans la protection des droits et obligations des deux parties à un contrat, ce qui explique leur large acceptation et leur succès durable. Les membres du Conseil ont souligné que, de la même manière, la discussion sur le devoir de vigilance ne devrait pas être envisagée uniquement du point de vue de la chaîne de valeur en amont, mais aussi de celui des entreprises en aval et de la manière dont leurs droits et obligations pourraient être protégés de manière équitable.

20. Les participants à l'atelier conviennent que l'une des valeurs ajoutées qu'un instrument d'UNIDROIT pourrait apporter réside précisément dans sa capacité à prendre en compte les différentes perspectives et circonstances afin d'aboutir à un résultat équilibré, suivant le modèle des Principes d'UNIDROIT. À ce jour, aucune des collections de clauses types existantes n'a été élaborée en adoptant une telle approche. Les *Model Contract Clauses* de l'*American Bar Association* et les *European Model Clauses* sont destinés à des marchés spécifiques et n'ont notamment pas été conçus pour les pays émergents, dont les perspectives n'ont pas été prises en compte. Le futur instrument d'UNIDROIT pourrait ainsi apporter une valeur ajoutée significative en intégrant l'ensemble des perspectives et en élaborant des clauses applicables également dans les pays du Sud. Le Secrétariat soutient cette conclusion de l'atelier.

21. Pour garantir un tel résultat équilibré, il est crucial que l'instrument soit élaboré à travers un processus inclusif qui, conformément à la méthode de travail établie par UNIDROIT, assure l'implication des pays du Sud dans son développement. En effet, les membres du Conseil de Direction ont souligné l'importance de constituer un Groupe de travail composé d'experts représentant différentes régions et

issus de divers milieux afin de garantir un résultat acceptable à l'échelle mondiale. De manière générale, compte tenu de la diversité des États membres d'UNIDROIT, chaque projet doit tenir compte de la provenance géographique de ses experts pour apporter une valeur ajoutée aux différents cadres législatifs nationaux. Cette approche inclusive permettrait de distinguer le projet d'UNIDROIT de toutes les autres initiatives existantes, y compris les *Model Contract Clauses de l'American Bar Association*, les *European Model Clauses* et les futures clauses modèles qui seront développées conformément à l'article 18 de la Directive de l'Union européenne relative au devoir de vigilance des entreprises en matière de durabilité (EU CSDDD).

22. Ce processus offrirait un avantage décisif supplémentaire aux travaux envisagés, étant donné que les collections de clauses types existantes n'ont pas la légitimité d'avoir été élaborées par une institution intergouvernementale internationale. Les orientations d'UNIDROIT en matière de contrats combleraient cette lacune, grâce à leur portée internationale et à leur légitimité en tant qu'organisation d'États membres dotée d'une mission d'intérêt public.

B. Recommandations concernant la portée et le contenu du futur instrument

23. Le Secrétariat a été invité à formuler des recommandations pour mieux définir la portée du futur instrument. Les recommandations suivantes se fondent sur l'évaluation des instruments existants ainsi que sur l'expertise d'UNIDROIT et sont conformes aux idées des participants à l'atelier.

Un instrument technique fournissant des orientations contractuelles, y compris des clauses types

24. Lors de la 103ème session du Conseil de Direction en mai 2024, certains membres du Conseil ont mis en garde contre le fait que le projet d'UNIDROIT ne devrait pas viser à définir de nouvelles normes en matière de développement durable, en évitant les questions politiquement controversées et en se concentrant sur les aspects contractuels, ce qui constituait en effet le mandat naturel du projet au sein d'UNIDROIT. Les membres du Conseil ont plutôt suggéré que le projet pourrait fournir des outils contractuels pour aider les entreprises à se conformer aux cadres et réglementations émergents.

25. Les résultats de l'atelier exploratoire s'alignent parfaitement sur cette position, puisque les participants ont recommandé que le futur instrument soit purement "technique", abordant uniquement les aspects de droit privé et se concentrant sur les orientations contractuelles. Ils ont recommandé que le futur instrument puise ses racines dans le cadre international déjà existant et explique comment mettre en œuvre les exigences qui y sont énoncées (par exemple, les Principes directeurs de l'ONU et de l'OCDE) par le biais de contrats. Le futur instrument n'élaborerait pas de normes en matière de vigilance, mais fournirait plutôt les mécanismes de mise en œuvre des normes applicables existantes dans les contrats au sein de la chaîne de valeur mondiale. Cette approche est non seulement conforme au mandat et à l'expertise d'UNIDROIT, mais répond également à l'importante lacune identifiée par les participants à l'atelier et le Secrétariat dans le cadre international existant: les instruments internationaux existants n'abordent pas le rôle que les contrats en particulier peuvent jouer pour promouvoir le CSDD. Comme mentionné ci-dessus, les Principes directeurs de l'OCDE décrivent toutes les étapes du processus de vigilance, mais n'abordent pas le rôle des contrats dans ces différentes étapes. Il est recommandé que le futur instrument comble cette lacune en fournissant des orientations sur les contrats alignés sur le devoir de vigilance, en transposant effectivement le processus de vigilance dans les contrats. L'instrument pourrait expliquer le rôle qu'un contrat pourrait jouer à chaque étape du processus de vigilance défini dans les Principes directeurs de l'OCDE ou dans d'autres textes internationaux pertinents. Par exemple, les Principes directeurs de l'OCDE précisent que la responsabilité est partagée entre l'acheteur et le fournisseur et ne peut être entièrement transférée de l'acheteur au fournisseur, car toutes les entreprises sont en fin de compte responsables des objectifs de développement durable. Ainsi, les contrats ne doivent pas être utilisés pour transférer la responsabilité aux fournisseurs. Le futur instrument pourrait proposer des clauses établissant une responsabilité partagée entre l'acheteur et le fournisseur pour prévenir les impacts négatifs sur le

développement durable, ainsi qu'un mécanisme de coopération pour atténuer ces impacts le cas échéant.

26. Par ailleurs, un futur instrument fournissant des orientations contractuelles serait utile pour identifier et expliquer les problèmes liés aux pratiques contractuelles actuelles, ainsi que pour proposer d'autres bonnes pratiques en matière de passation de contrats. Parmi les problèmes liés aux pratiques contractuelles actuelles, il convient de noter qu'en cas de manquement aux obligations contractuelles pour des raisons de durabilité, les contrats prévoient généralement le droit à une résiliation immédiate, plutôt qu'à une réparation. De plus, les contrats ne tiennent généralement pas compte de la manière dont les pratiques d'achat de l'acheteur peuvent aggraver la situation, par exemple en imposant un calendrier ou en poussant le fournisseur à faire travailler ses ouvriers pendant un nombre excessif d'heures supplémentaires. Le futur instrument d'UNIDROIT pourrait proposer des clauses prévoyant un mécanisme de réparation, avec résiliation du contrat uniquement si la réparation n'est pas possible.

S'appuyer sur les Principes d'UNIDROIT, en suivant l'approche des précédents instruments de droit des contrats

27. Plusieurs membres du Conseil de Direction ont à nouveau souligné que les Principes d'UNIDROIT étaient un instrument de droit des contrats efficace, largement reconnu et apprécié au niveau international, et qui pourrait servir de modèle pour le futur instrument.

28. Ainsi, le Secrétariat et les participants à l'atelier recommandent que le futur Groupe de travail prenne les Principes d'UNIDROIT comme point de départ. L'approche consistant à utiliser les Principes d'UNIDROIT comme base et référence pour l'élaboration d'un instrument plus spécifique a été fructueuse pour les instruments précédents portant sur les contrats conçus par UNIDROIT avec d'autres organisations, notamment le Guide juridique sur l'agriculture contractuelle UNIDROIT/FAO/FIDA et le Guide juridique sur les contrats d'investissement en terres agricoles UNIDROIT/FIDA (CITA). Par ailleurs, la même approche est actuellement suivie dans le cadre du projet conjoint avec l'Institut du droit des affaires internationales de la Chambre de commerce internationale (Institut de la CCI) sur les contrats d'investissement internationaux, qui met l'accent sur les questions de durabilité abordant des considérations similaires, mais dans le contexte des contrats d'investissement internationaux plutôt que des contrats de la chaîne de valeur.

29. Les Principes d'UNIDROIT sont l'un des instruments internationaux les plus reconnus pour fournir des orientations en matière de contrats commerciaux internationaux. Ils peuvent servir de point de départ pour ce projet, car ils contiennent des principes généraux et des règles spécifiques pouvant être utilisés pour traiter certaines des questions liées à la mise en œuvre des préoccupations en matière de durabilité. D'autre part, ces principes sont nécessairement généraux et ont été, du moins initialement, élaborés en vue de leur application à des contrats commerciaux plus traditionnels. L'utilisation de clauses de durabilité dans les contrats apporte une approche fondamentalement nouvelle au type traditionnel de contrat commercial, car elles redistribuent l'équilibre des pouvoirs entre les parties contractantes et élargissent la portée des parties prenantes au-delà des seules parties contractantes. En tant que tels, les contrats de chaîne de valeur mondiale se distinguent des contrats purement commerciaux, car ils ne sont pas seulement transactionnels, mais créent effectivement une forme de structure constitutionnelle pour une chaîne d'approvisionnement globale (qu'elle soit organisée sous forme de réseau, de toile, de contrat multipartite ou de chaîne de contrats bilatéraux). Ainsi, il est recommandé que le futur instrument précise la nature particulière des contrats relatifs aux chaînes de valeur mondiales, en commentant les dispositions pertinentes des Principes d'UNIDROIT qui peuvent potentiellement s'appliquer à ces chaînes de valeur et en proposant des clauses non couvertes par les Principes d'UNIDROIT.

30. Plus précisément, plusieurs articles des Principes d'UNIDROIT ont été identifiés au cours de l'atelier exploratoire comme une base et une référence utiles pour le futur instrument CSDD. Il s'agit des articles 1.8 (interdiction de se contredire), 1.9 (usages et pratiques), 2.2.1 (représentation), 4.3

(interprétation via les circonstances pertinentes), 5.1.4 (obligation de résultat et obligation de moyens), 5.1.5 (détermination du type d'obligation), 5.1.6 (détermination de la qualité de la prestation), 7.1.2 (fait du créancier), et 7.3.1 (droit à la résolution). Par exemple, l'interprétation de l'article 1.8 (interdiction de se contredire) permet d'introduire un large éventail de questions précontractuelles. La question de savoir si l'adhésion de l'une des parties à un code de conduite crée déjà une attente (comportement attendu) qui pourrait ensuite servir de fondement à une demande d'estoppel peut être examinée. Un autre principe mis en exergue par les participants à l'atelier concerne l'article 1.9 (usages et pratiques), car à l'avenir, l'inclusion de certaines normes de durabilité pourrait devenir si courante sur le marché qu'elle serait intégrée dans le contrat, conformément à la coutume d'un secteur particulier, et ne nécessiterait pas d'être mentionnée. Un autre exemple concerne l'article 7.1.2 (fait du créancier), qui peut être commenté pour traiter le problème des pratiques d'achat par lesquelles l'acheteur contribue à l'inexécution des obligations du fournisseur. Par exemple, si l'acheteur impose un prix ou un délai ou apporte des modifications aux commandes qui poussent le fournisseur à demander à ses ouvriers de faire des heures supplémentaires au-delà de ce qui est autorisé par le code de conduite de l'acheteur, cela équivaudrait à une inexécution. Les conditions stipulées par les acheteurs dans leurs contrats avec les fournisseurs prévoient généralement que tout manquement au code de conduite de l'acheteur donne à ce dernier le droit immédiat de résilier le contrat et de demander des dommages-intérêts au fournisseur.

31. par ailleurs, les participants ont recommandé d'examiner un certain nombre de clauses contractuelles potentielles à inclure dans le futur instrument qui ne sont pas couvertes par les Principes d'UNIDROIT, y compris l'obligation générale de CSDD, les références aux codes de conduite et aux politiques internes, les clauses perpétuelles, la réparation, les droits des tiers, les aspects de droit international privé des droits des tiers, les clauses d'indemnisation, les mécanismes de réclamation et le règlement des différends. Les clauses contractuelles sur le CSDD concernant la chaîne de valeur deviennent de plus en plus répandues et se trouvent principalement dans les clauses types des entreprises transnationales. Le futur instrument pourrait fournir un modèle alternatif. Par exemple, l'obligation générale en matière de CSDD pourrait inclure des mesures d'accompagnement pour les fournisseurs, y compris l'octroi d'une assistance aux petites et moyennes entreprises (PME), comme le prévoit la directive européenne sur le CSDD, qui envisage l'octroi d'une assistance, en particulier aux PME, pour s'assurer que celles-ci disposent effectivement de la capacité de mise en œuvre. Il a également été proposé d'envisager l'inclusion d'une disposition visant à réduire au minimum la charge administrative pour les fournisseurs qui suivent des pratiques d'achat responsables. Les participants ont signalé que les fournisseurs sont déjà submergés par des questionnaires de vigilance, des fiches d'évaluation, des demandes d'information, des audits, etc., émanant d'entreprises qui relèvent ou pourraient relever du champ d'application des lois obligatoires sur la chaîne d'approvisionnement, et que ces fournisseurs ne sont pas en mesure de suivre. Cette situation a pour effet d'augmenter les coûts de production. Parmi les clauses qui ont été ajoutées aux *European Model Clauses*, l'une d'entre elles concerne la structuration des demandes d'information de manière raisonnable afin de ne pas surcharger le fournisseur et d'accepter, par exemple, des questionnaires déjà remplis pour d'autres acheteurs, à moins qu'ils ne répondent manifestement pas aux exigences de l'acheteur. De plus, les participants ont suggéré que le futur instrument devrait prévoir une clause de sortie responsable stipulant que si, pour quelque raison que ce soit (par exemple, un cas de force majeure ou un impact négatif grave auquel il ne peut être remédié), l'acheteur décide de mettre fin au contrat, il doit donner un préavis raisonnable, prendre en compte l'impact négatif causé par la sortie et prendre des mesures pour atténuer cet impact. Il a été proposé d'envisager l'inclusion d'un principe prévoyant une forme de responsabilité partagée ou d'atténuation partagée des effets négatifs dans de telles situations.

Prise en compte du rôle de la technologie dans le processus de vigilance

32. Le Conseil de Direction a invité le Secrétariat à examiner les mécanismes par lesquels la technologie impacte ou interagit avec le processus de vigilance, et à évaluer si cela pourrait faire l'objet d'une analyse distincte, couverte par un autre projet proposé au Conseil lors de sa 103ème session en mai 2024, à savoir le potentiel "projet ELI-UNIDROIT dans le domaine de la technologie et des chaînes

de valeur mondiales" (voir UNIDROIT 2024 - C.D. (103) 12 bis). Ce projet porterait sur la technologie dans les chaînes de valeur mondiales en général, sans se concentrer sur le CSDD. Après mûre réflexion, tous les participants à l'atelier ont convenu de l'importance d'aborder la question de la technologie dans les différentes parties du projet CSDD, considérant que la technologie est omniprésente dans le cadre de ce projet et qu'il n'est donc pas opportun de la séparer.

33. Par ailleurs, les participants à l'atelier ont souligné que le futur instrument d'UNIDROIT sur le CSDD apporterait une valeur ajoutée significative, susceptible de combler les lacunes, en abordant les applications des technologies numériques dans le contexte et aux fins du CSDD, ainsi qu'en évaluant leur effet sur les contrats de la chaîne de valeur.

34. La technologie a un impact sur les contrats de la chaîne de valeur de plusieurs manières, notamment sur la manière dont les clauses sont proposées, convenues et appliquées. Par conséquent, la technologie est essentielle pour comprendre quelles clauses UNIDROIT pourrait aborder. Par exemple, la chaîne de blocs (blockchain) devient l'une des technologies omniprésentes dans les chaînes de valeur mondiales, servant notamment au partage de données et aux clauses auto-exécutoires. Les transactions de données jouent aujourd'hui un rôle majeur dans les contrats de la chaîne de valeur. Plus important encore, les données représentent un élément clé dans une multitude de systèmes et de traitements automatisés de prise de décision. Par conséquent, les solutions juridiques et contractuelles doivent être réexaminées afin de garantir la viabilité et le potentiel des chaînes de valeur mondiales fondées sur les données.

35. L'automatisation représente une macro-catégorie technologique déclenchant une transformation profonde des chaînes de valeur mondiales. Des systèmes automatisés de prise de décision et de traitement sont utilisés tout au long des chaînes de valeur dans le cadre du CSDD. Par exemple, les PME – qui n'ont généralement pas les ressources nécessaires pour mettre en œuvre le nombre croissant d'exigences en matière de vigilance – ont grandement besoin d'automatiser ces exigences grâce à l'intelligence artificielle et à d'autres solutions technologiques. Les implications juridiques et contractuelles liées à l'utilisation de l'intelligence artificielle et d'autres solutions technologiques pour mettre en œuvre les exigences du CSDD constituent un aspect important que le futur instrument devra prendre en compte.

36. De manière plus générale, la technologie numérique a généré de nouvelles architectures en matière d'organisation et de gouvernance, modifiant profondément les modèles de chaînes de valeur mondiales. Ainsi, par exemple, le concept de "leader de la chaîne" doit être adapté à ces nouvelles structures, car, dans le cadre de plusieurs modèles de gouvernance (réseaux, plateformes, contrats multipartites, schémas collaboratifs ou associatifs), une partie (l'opérateur de la plateforme, le fournisseur de premier plan, le gestionnaire du réseau) peut se voir confier certains pouvoirs de supervision et de gouvernance.

C. Recommandations concernant la forme du futur instrument

37. Compte tenu des résultats de la recherche et de l'atelier exploratoire, qui ont mis en évidence une lacune importante dans les instruments internationaux existants concernant l'orientation contractuelle des parties, il est recommandé que le futur instrument prenne la forme d'un guide juridique destiné principalement aux parties contractantes - plutôt que d'une orientation législative adressée aux législateurs. Cela est conforme aux vues exprimées par les membres du Conseil de Direction lors des sessions de juin 2022 et mai 2024. La formulation d'orientations contractuelles relève également de l'expertise principale d'UNIDROIT, comme en témoignent non seulement les Principes d'UNIDROIT mais aussi le nombre d'instruments et de projets élaborés dans leur sillage. Les participants à l'atelier ont recommandé que le guide juridique comprenne des orientations pour la conclusion de contrats, des illustrations et des exemples de bonnes pratiques, ainsi que des clauses types, et soit

conçu de manière à permettre aux parties de se référer au futur instrument d'UNIDROIT dans leurs contrats.

38. Par ailleurs, il a été noté que le futur instrument, bien qu'il soit destiné aux parties privées, pourrait également être utile aux législateurs et aux décideurs politiques, à l'instar des principes d'UNIDROIT et du Guide juridique sur l'agriculture contractuelle. Ces derniers sont directement utilisés par les parties lors de la rédaction des contrats, mais ont également servi de modèles pour les réformes juridiques dans de nombreuses juridictions.

D. Recommandations pour la planification des travaux et l'allocation des ressources au sein du Secrétariat d'UNIDROIT

39. Le Secrétariat recommande de commencer dès maintenant les travaux normatifs dès que la disponibilité des ressources sera confirmée. Ce projet développerait de fortes synergies avec d'autres projets prioritaires en cours et renforcerait, de manière significative, le nouveau domaine d'activité d'UNIDROIT sur le droit privé et la durabilité.

40. Comme indiqué précédemment, avec l'achèvement du projet conjoint CNUDCI/UNIDROIT de Loi type sur les récépissés d'entrepôt, – en particulier l'approbation de la Loi type et de son Guide pour l'incorporation par le Conseil de Direction lors de sa 103ème session en mai 2024 – des ressources au sein du Secrétariat sont désormais disponibles et peuvent être consacrées à la réalisation d'un nouveau projet ayant un niveau de priorité élevé dans le cadre du Programme de travail actuel. Le Secrétariat pourrait, en principe, créer un Groupe de travail et entamer les travaux de fond sur ce projet. a mise en œuvre effective de ce dernier dépend toutefois des conclusions de la discussion relative au nouveau Programme de travail, qui se tiendra lors de la 105ème du Conseil de direction (20-23 mai 2025).

41. Le projet présente de fortes synergies avec d'autres projets en cours de l'Institut, car il peut non seulement tirer parti des discussions et des travaux en cours dans le cadre de ces projets, mais aussi contribuer à l'examen d'aspects spécifiques des autres projets. En particulier, il s'aligne sur le projet conjoint avec l'Institut de la CCI sur les contrats d'investissement internationaux (CII) visant à élaborer des orientations pour promouvoir la modernisation et la normalisation des contrats d'investissement internationaux. Le projet sur les CII explore l'interaction entre les Principes d'UNIDROIT et les dispositions communes des contrats d'investissement internationaux et cherche à répondre à un certain nombre de développements récents dans le domaine du droit de l'investissement international, notamment l'importance croissante accordée à la responsabilité sociale des entreprises et à la durabilité. Par ailleurs, le projet CSDD s'inscrit dans le cadre des travaux en cours sur l'élaboration d'un Guide juridique sur les structures juridiques collaboratives des entreprises agricoles UNIDROIT/FAO/FIDA, qui prend également les Principes d'UNIDROIT comme point de départ et aborde, entre autres, les questions de durabilité en relation avec les entreprises agricoles.

42. De manière plus générale, le projet CSDD s'inscrit parfaitement dans le nouveau domaine d'activité de l'Institut, axé spécifiquement sur le droit privé de la durabilité. Ce domaine comprend, à ce jour, le projet prioritaire en cours sur les crédits de carbone vérifiés, qu'il renforcerait considérablement. La durabilité, en tant qu'objectif politique global, est en lien avec les instruments précédemment élaborés par UNIDROIT dans le domaine du droit privé et de l'agriculture. UNIDROIT est dans une position privilégiée pour apporter une contribution significative aux efforts de la communauté internationale visant à promouvoir la durabilité à travers les instruments uniformes de droit privé de l'Institut.

43. Enfin, il convient de noter que la CNUDCI a organisé les 23 et 24 octobre 2024 un colloque intitulé "Colloque de la CNUDCI sur le droit commercial international à l'appui d'un avenir plus vert", au cours duquel s'est tenue une discussion sur l'"Écologisation de la chaîne d'approvisionnement:

considérations sous l'angle de la CVIM"[1]. Le Colloque visait à examiner comment les instruments existants de la CNUDCI pouvaient contribuer à façonner un "avenir plus vert". La conclusion relative à la CVIM, enregistrée par le Secrétariat de la CNUDCI, indique "a) de rédiger des clauses types pour les contrats de vente internationale de marchandises afin de prendre en compte les différents régimes d'obligations dans le cadre de la CVIM et la loi impérative applicable en matière d'écologisation de la chaîne d'approvisionnement; b) d'élaborer un guide juridique tripartite, en collaboration avec la HCCH et UNIDROIT, sur les instruments uniformes dans le domaine des contrats commerciaux internationaux, l'accent étant mis sur les obligations liées au climat" serait proposée pour examen lors de la prochaine session de la Commission. À la lumière de ce qui précède, et compte tenu des éventuels domaines de recoupement ainsi que de l'esprit de coopération entre les deux organisations, le Secrétariat d'UNIDROIT proposerait d'ouvrir le projet CSDD d'UNIDROIT à la coopération et à la coordination avec la CNUDCI, y compris au développement d'un instrument conjoint, sous réserve que la proposition susmentionnée du Secrétariat de la CNUDCI en faveur d'une coopération ou de travaux conjoints soit approuvée par la Commission et qu'UNIDROIT reçoive une proposition à cet effet.

V. ACTION DEMANDÉE

44. *Le Conseil de Direction est invité à prendre note des résultats de l'atelier exploratoire sur le projet d'élaboration d'un document d'orientation sur le devoir de vigilance des entreprises en matière de durabilité dans les chaînes de valeur mondiales, tenu à l'Institut les 27 et 28 mai 2024. Le Conseil est également invité à rehausser le niveau de priorité du projet de moyen à élevé afin de permettre la création d'un Groupe de travail, dès lors que des ressources suffisantes pourront y être allouées. Par ailleurs, le Conseil de Direction est invité à accepter la possibilité d'une coopération ou d'un travail conjoint avec la CNUDCI, si une telle demande lui était adressée.*

[1] Le Rapport complet peut être consulté ici.

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

ANNEXE I

EN

Exploratory Workshop on
Corporate Sustainability Due Diligence in
Global Value Chains

Rome, 27 - 28 May 2024

UNIDROIT 2024
Study 87 – E.W. – Doc. 4
English only
July 2024

SUMMARY REPORT

OF THE EXPLORATORY WORKSHOP
(27 - 28 May 2024)

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1. This document summarises the discussions of the Exploratory Workshop on Corporate Sustainability Due Diligence in Global Value Chains that was held at the seat of the Institute on 27 and 28 May 2024. The Workshop brought together a limited number of invited experts from academia and the private sector as well as representatives of international organisations and members of the UNIDROIT Secretariat (list of participants available in Annex I). The discussions are not reflected in a strictly chronological order in this Report.

Item 1: Opening of the Workshop

2. *The Secretary-General* opened the Workshop and welcomed the participants.

Item 2: Introduction to UNIDROIT and the new legislative project on corporate sustainability due diligence in global value chains

3. *The Secretary-General* briefly introduced UNIDROIT and its work. He noted that the project on Corporate Sustainability Due Diligence (CSDD) in Global Value Chains (GVCs) was part of the current Work Programme and had been initiated at the request of several organisations, namely the European Bank for Reconstruction and Development (EBRD) and the International Development Law Organisation (IDLO), to which a proposal of the European Law Institute (ELI) was subsequently added. All such organisations were represented at the Workshop. The project was linked to and provided considerable potential for synergies with ongoing projects at the Institute, including the UNIDROIT/FAO/IFAD project on Collaborative Legal Structures of Agricultural Enterprises as well as the UNIDROIT/ICC project on International Investment Contracts and the UNIDROIT Principles of International Commercial Contracts (the UPICC).

Item 3: Purpose of the Exploratory Workshop and consideration of matters identified in the Discussion Paper (Study 87 – E.W. – Doc. 3)

4. Turning to the purpose of the Workshop, *the Secretary-General* explained that it was intended as a brainstorming exercise based on the Discussion Paper that had been shared with the participants prior to the Workshop. If the participants confirmed that there was a need for a global normative instrument on the topic, the Secretariat would ask the UNIDROIT Governing Council to upgrade the project to high priority and establish a Working Group to develop the instrument. To that end, the scope of the project ought to be well defined. Underlining that UNIDROIT was a global intergovernmental organisation, he noted that the fact that regional instruments on the topic already existed did not mean that there was no need for the proposed new instrument. On the contrary, a new instrument might help avoid fragmentation and take account of the fact that the regional instruments might not necessarily work in other parts of the world.

5. *The Deputy-Secretary General* joined in welcoming the participants. She highlighted that in addition to the ongoing projects that had been mentioned, the UPICC would be a useful point of departure for this project.

6. Joining in welcoming the participants, *Ms Philine Wehling (Legal Officer)* thanked all the participants, both in person and online, for attending the Workshop. With regard to further related contract law instruments developed by UNIDROIT, she highlighted that the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming and the UNIDROIT/IFAD Legal Guide on Agricultural Land Investment Contracts had also used the UPICC as a point of departure. Concerning the organisation of the Workshop, she proposed following the order of topics as addressed in the Discussion Paper (Study 87 – E.W. – Doc. 3), which also included questions for consideration. Accordingly, she drew the participants' attention to Section II of the Discussion Paper, "Scope of the project and issues for discussion".

(a) Corporate sustainability issues related to global value chains: key concepts

7. Starting with Section II.A of the Discussion Paper, "Corporate sustainability issues related to global value chains: key concepts", *the Secretariat* referenced key concepts described therein and raised the question of whether any ought to be defined and used as working definitions – as opposed to definitions to be included in the future instrument – for the purpose of the project.

8. Several participants highlighted the relevance and implications of definitions for the sake of determining the scope of the project. It was also noted that defining certain key notions was important for terminological clarity during the discussions, as some notions were only vaguely defined or had no generally accepted definition. Accordingly, most participants expressed the view that the meaning of key notions ought to be clarified for the purpose of the project. The following notions were suggested for future consideration (depending on the form and scope of the future instrument): due diligence, CSDD, value chain, global value chain, supply chain, upstream, downstream, supply chain contract, sustainability, adverse impact, responsible contracting, and responsible purchasing practices. It was also noted that Corporate Social Responsibility (CSR) ought to be clearly distinguished from CSDD. Some participants raised doubts about the feasibility of defining certain of the above-mentioned terms.

9. With regard to the content, all participants supported the idea of drawing definitions to the largest extent possible from international law and relevant international instruments – first and foremost the United Nations Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (the OECD Guidelines) – in order to ensure consistency in use and, ultimately, policy coherence. It was therefore suggested to consider adopting the reference approach to the UNGPs and the OECD Guidelines in an annex to the document, as had been adopted in the European Union Corporate Sustainability Due Diligence Directive (EU CSDDD). Some participants cautioned against developing new definitions that would deviate from existing ones.

10. Several participants pointed to the issue that the notions included in international instruments were not always aligned with domestic legislation, for example "causation" and "good faith".

11. Finally, some participants encouraged considering lessons learnt from the work on definitions for related instruments, including the EU CSDDD and the OECD Guidelines. While it had proven difficult to reach a consensus on agreeable definitions for certain notions, such as "value chain", the approach to problematic notions that had been taken by the EU CSDDD – for example with regard to the definition of "causation" – might be helpful for this project.

12. *The participants agreed that key concepts ought to be clarified for the purpose of the project to the largest extent possible by drawing on the definitions set out in existing international instruments. Which terms ought to be defined as working definitions would remain to be decided as the work progressed, as this would depend on the form and scope of the future instrument.*

(b) Overview of corporate due diligence legal instruments and initiatives

13. *The Secretariat* introduced the overview of corporate due diligence legal instruments and initiatives set out in Section II.B of the Discussion Paper. The aim of the discussion was to ensure that the overview included all relevant instruments and initiatives in order to identify the remaining gaps in the international framework that a future UNIDROIT instrument could address.

(i) International and supranational instruments

14. *The Secretariat* asked whether any important instruments ought to be added to the overview of international and supranational instruments set out in Section II.B.1 of the Discussion Paper, and whether any of the international instruments constituted reference documents with which the future instrument ought to be aligned.

15. Participants suggested to add all other OECD guidance documents on due diligence. Furthermore, it was recommended to add certain instruments developed under the auspices of the International Labour Organization (ILO), namely the Minimum Age Convention (1973), the Worst Forms of Child Labour Convention (1999), and the ILO-IOE Child Labour Guidance Tool for Businesses (2015).

16. Participants suggested addressing the EU CSDDD separately under a dedicated section on regional instruments, and at the European Union (EU) level to add the Regulation on Deforestation Free Products (EUDR) coming fully into force in December 2024, the Directive on Corporate Sustainability Reporting (CSRD) in effect since 2023, the new Batteries Regulation coming into force in 2025, and the draft Regulation enabling the EU to prohibit products made using forced labour (adopted by the European Parliament in April 2024, with approval by the Council pending). Participants were not aware of any similar instruments related to CSDD from other regions.

17. More broadly, participants highlighted in particular the UNGPs and the OECD Guidelines as reference documents for the future instrument.

18. *The participants agreed that with the addition of the further instruments referred to above, the overview would cover all international and regional instruments relevant to the project. They recommended that the future instrument be aligned with the UNGPs and the OECD Guidelines.*

(ii) Domestic legislation

19. *The Secretariat* invited participants to consider the review of domestic CSDD legislation contained in Section II.B.2 and asked about the challenges faced in the implementation of these laws.

20. Participants suggested several additions to this section. Firstly, one participant reported that national legislative initiatives were ongoing in Latin America, referring to a currently pending draft law on CSDD in Brazil, and proposed to include such.

21. Secondly, participants proposed to add trade bans to the review of domestic legislation, in particular the United States (US) Tariff Act Section 307 prohibiting the importation of merchandise wholly or partially mined, produced, or manufactured in any foreign country by forced labour. This trade ban had significant implications for due diligence and contracts, for instance for the way in which companies addressed that particular risk in their contracts.

22. Thirdly, beyond national legislation, it was suggested to also consider National Action Plans (NAPs) on business and human rights. Across the globe, a growing number of countries had adopted NAPs on business and human rights, and some of those included relevant legislative elements.

23. Finally, it was suggested to also consider how public supervision was being shaped at the domestic level. For example, regarding the German Supply Chain Act, the supervisory authority in Germany had issued comprehensive guidance for the Act's effective implementation.

24. With regard to the challenges faced in the implementation of these laws, participants reported that the norms were often framed in an open manner and required adaption for their

implementation in different sectors. Other challenges included limited supervisory budgets, as well a lack of exchange in implementation with the Global South, including on the part of supervisory authorities.

25. *The participants agreed with the proposed additions to the review of domestic legislation.*

(iii) Model clause collections and sustainability contractual clauses

26. *The Secretariat* invited participants to discuss the model clause collections described in Section II.B.3 of the document and asked whether the Section included all relevant model clause collections for the project to consider.

27. Regarding the American Bar Association (ABA) Model Contract Clauses (MCCs), participants reported that the ABA Business Law Section had established a Working Group, primarily composed of commercial lawyers, to develop model contract clauses to integrate human rights into supply chain contracts, chiefly for the manufacturing and sale of goods. The MCCs 1.0 had been published in 2018 and followed the traditional contracting approach where expectations of perfect social compliance were placed on the supplier, and if there was any issue, then the buyer had an immediate right to terminate the contract, along with a right of indemnification against the supplier in case of a third-party lawsuit.

28. Subsequently, a second version of the MCCs had been prepared by a more diverse group, including commercial as well as business and human rights lawyers, and published in 2021: the MCCs 2.0. This version's approach had changed, taking the UNGPs and the OECD Guidelines (instead of the UCC) as a starting point and translating them into contractual obligations. Instead of the one-sided commitment by the supplier included in the MCCs 1.0, the MCCs 2.0 provided for the following key features: a shared commitment by both buyer and supplier to establish human rights and environmental due diligence processes and to maintain them in cooperation; a buyer's commitment to engage in responsible purchasing practices; a prioritisation of remediation ahead of traditional contract remedies; and responsible exit.

29. The Responsible Contracting Project (RCP) has also developed and disseminated model contractual clauses. Moreover, the RCP was tasked with the facilitation and promotion of the implementation and uptake of the MCCs 2.0.

30. The European Model Clauses (EMCs) had been developed by European lawyers, including lawyers from the United Kingdom (UK). The EMCs had originally aimed to translate the ABA MCCs 2.0 into the European context, connecting the model clauses to contract law in different European countries. However, the project had gradually developed and departed from the ABA MCCs and instead mainly built on the EU CSDDD. The EMCs were accompanied by commentary which explained the clauses and contained a section of best practices. Moreover, they included a part with country-specific explanations on the issues to consider regarding the model clauses when contracting in a given country. A limited consultation on the draft EMCs had been launched in early 2024, and wider consultation was currently underway to gather feedback in terms of how the clauses would work in practice.

31. In addition, participants recalled that Article 18 EU CSDDD required the European Commission to develop guidance about voluntary model contractual clauses within 30 months of the entry into force of the Directive.

32. *The Secretariat* asked whether broader data collection of in-house sustainability contractual clauses might be useful in informing the work on the future instrument. In general, participants held the view that such a broader collection of clauses would be useful for the project, yet they cautioned that many such clauses would not necessarily be examples of good contracting practices. Such an

exercise would deserve particular attention given that the provision of model clauses did not in and of itself testify to their actual use in practice, and there was almost no empirical evidence on point. It was suggested to be cautious and not to use model clauses which might be rarely used in practice.

33. Participants proposed to consider public procurement as well because governments often required an analogous type of due diligence. Some participants had been involved in formulating model clauses for public procurement guided by human rights due diligence.

34. Furthermore, participants proposed to consider contracts of development finance institutions (DFIs) and international financial institutions (IFIs) to gain insights as to how they incorporated human rights and environmental standards into their financing agreements.

35. Moreover, it was suggested to consider supply chain contracts between investors and suppliers, which could potentially fall within the scope of the project.

36. *The participants agreed that the overview presented in the Discussion Paper covered all important model clause collections. Furthermore, they agreed that broader data collection of sustainability contractual clauses would be useful for the work on the future instrument.*

(c) Gaps in the current international framework and added value of a future UNIDROIT instrument

37. Based on the foregoing review of international instruments, domestic legislation, and model clause collections, the participants turned towards identifying the gaps and weaknesses in the current international framework in addressing the pressing problems in practice, and the potential added value of a future UNIDROIT instrument.

38. First, participants highlighted that the most pressing issue in contractual practice – which had not been comprehensively addressed in existing instruments – was the use of contracts as one of the main tools for the "de-verticalisation" of supply chains over recent decades, which largely failed to promote human rights and environmental protection objectives. "De-verticalisation" referred to the process of reducing or eliminating vertical integration – i.e., a company's ownership of various stages of its production process – within a supply chain: companies separated functions and services such as farming, manufacturing, transportation or distribution from their own business activity, relying on partners to perform those functions instead. Contracts were most often used to shift responsibility from the buyer to the suppliers, who would guarantee that there were no human rights issues in its activity and supply. In addition, contracts typically did not take into consideration how the buyer's own purchasing practices might aggravate the human rights situation, for example by imposing a timeline or price pushing the supplier to make its labourers work excessive overtime or not cover the minimum wage. Moreover, in case of breach of contract because of human rights or environmental issues, contracts commonly foresaw the right to terminate, following a zero-tolerance approach, instead of human rights and environmental remediation (as promoted, for instance, by the OECD Guidelines and the EU CSDDD).

39. Participants argued that the future UNIDROIT instrument could add significant value by identifying and explaining the aforementioned problems in current contractual practice, and proposing alternative good practices for contracting, including model clauses. This would offer an alternative to the traditional contracting practices in value chain contracts. Such guidance would be useful for large companies in drafting contracts, and also for smallholders and small- and medium-sized enterprises (SMEs) to improve their negotiation position vis-à-vis larger companies, for example to show that certain practices were no longer viable. The guidance would also be useful for Global South countries, as it would develop an alternative standard, reflecting current good contractual practices. Moreover, such a guidance document would also help practitioners to advise client companies.

40. Second, participants noted that the existing international instruments, including the OECD Guidelines, do not address contracts and the role they could play to promote adequate CSDD. Contracts are merely one component of due diligence, and one which has been overlooked so far. Yet participants highlighted that contracts were the only means to transpose and give effectiveness to due diligence requirements in the supply chain, especially in countries without supply chain regulatory instruments. The OECD Guidelines lay out all the steps of the due diligence process, yet they do not address the role of contracts in those different steps. There is no comprehensive guidance on how the OECD Guidelines translate into contracts, not even in the existing model clause collections. The future instrument could fill this gap by providing guidance on due diligence-aligned contracting, transposing the process of due diligence into contracts. It might explain what role a contract could play for each step of the due diligence process set out in the OECD Guidelines. Guidance for contracting, and on contracting models, would be extremely useful for companies; company codes of conduct often indeed reflect international standards, but the way in which those same company contracts operationalise their codes of conduct often does not implement those very standards.

41. Third, none of the existing model clause collections has fully implemented the UNGPs. The future instrument could operationalise them through private law guidance.

42. Fourth, none of the existing model clause collections has a global reach – the ABA MCCs and the European model clauses are aimed at specific markets and were notably not conceived for emerging market countries. The future instrument developed by UNIDROIT would add important value if it incorporated a global approach, developing clauses that would also work on the ground in Global South countries and involving the Global South in the development of the instrument. This global approach would set this project apart from all other existing initiatives – including the ABA MCCs, the EMCs, and the future EU model clauses.

43. Fifth, none of the existing model clause collections has the legitimacy of being developed by a global intergovernmental institution. The future UNIDROIT instrument would fill this gap too, based on its global constituency and its legitimacy as a Member State organisation with a built-in public-interest mission.

44. Sixth, the lack of sector-specific guidance on contracting is another important gap in the current instruments. The ABA MCCs and the EMCs are pan-industrial. While this project might initially focus on cross-sectoral guidance, in line with the UNGPs and OECD Guidelines, it might acknowledge many sectoral issues and subsequently consider developing sector-specific clauses, adapting to different circumstances for different industries and risk-based obligations.

45. Seventh, both the ABA MCCs and the EMCs have focused on supply chain contracts for the manufacturing and sale of goods, and could be extended to services, but other contracts have not been covered. The UNIDROIT project would adopt a more comprehensive approach, not limited to specific types of contracts, following the UPICC as a model, another aspect where the future project might add value.

46. Lastly, one participant reported that there was currently no useful guidance for IFIs and other institutions to design a system streamlining the same contractual framework for both environmental and human rights due diligence, to avoid creating two different frameworks. It was proposed that this project could provide such a streamlined framework.

47. *The participants agreed that there are currently several significant gaps in the international framework that could be filled by a future UNIDROIT instrument. These include providing guidance on due diligence-aligned contracting, including model clauses, which would (i) offer an alternative to traditional contracting practices that often failed to promote human rights and environmental protection objectives, (ii) lay out how to operationalise the requirements set out in the relevant*

existing instruments through contracts, (iii) fully implement the UNGPs, (iv) have global application and legitimacy, (v) be developed with the involvement of the Global South, (vi) acknowledge sector-specific issues, and (vii) not be limited to specific contract types.

(d) Form of the future instrument

48. The above consideration of the gaps where the future instrument would have a significant added value informed the discussion on the possible form of a future instrument, for which different options had been presented in Section II.E of the Discussion Paper.

49. Most participants spoke in favour of a legal guide for due diligence-aligned contracting, including model clauses, that would primarily be aimed at private parties – rather than legislative guidance addressed to legislators – because the former could better fill the gaps identified above. Again, the need for guidance for contractual parties had not been comprehensively addressed by the existing international framework. It was highlighted that it would also be helpful to design the instrument in a way that allowed parties to refer to the future UNIDROIT instrument in their contracts.

50. Participants underlined that the future instrument, while aimed at private parties, could also be useful for legislators and policy makers, like the UPICC, which were used by parties in contract drafting but had also informed legal reform in many jurisdictions. Moreover, while the guidance would primarily focus on contracting *qua* contracting, it could also make reference to the contract law of some countries which might pose particular problems and explain possible appropriate adaptations. Furthermore, one participant noted that the guidance should also be addressed to States insofar as not only legislation but also NAPs should incorporate elements of responsible contracting. For example, Japan had released guidelines aimed at the private sector, but they were also relevant for legislators because they had an educational element.

51. Another participant recommended to steer relatively clear from ongoing implementation of the EU CSDDD, which timewise coincided with the UNIDROIT project. It would be helpful to develop an instrument focusing on the contracting parties that found themselves between the EU CSDDD and potentially mandatory rules in other countries prohibiting certain actions from suppliers, for example regarding the transfer of information in the supply chain. Parties had to find a way to comply with the different and sometimes conflicting legal requirements – here was where guidance was particularly needed.

52. *The participants agreed that the future instrument should take the form of a legal guide, which would primarily be aimed at contracting parties and include guidance for contracting, illustrations and examples of good practices, plus model clauses. The guide could also be consulted by legislators and policy makers, while legislative guidance directly addressed to legislators, for instance in the form of a model law, would not be the preferred form at this point in time.*

53. As a general remark in relation to scope, it was noted that the future instrument should be rooted in the existing international framework and should lay out how to operationalise that framework through contracts. In other words, the instrument would contractualise the requirements already set out in the relevant instruments (UNGP, OECD) and extend no farther. *The participants agreed accordingly.*

54. As another overarching issue, *the Secretariat* observed that none of the participants had raised the issue of technology as a stand-alone aspect that could be considered separately during the analysis. Rather, the participants considered technology pervasive and argued that it should be addressed in the different parts of the project, as technology affected the supply chain and contracting in many ways, including how the clauses were proposed, agreed upon, and enforced. Moreover, participants noted that technology was key to understanding what clauses UNIDROIT could address. In particular blockchain was becoming one of the technologies pervading global value chains

for the purpose of, *inter alia*, data sharing and self-executing clauses, which was also related to the aspect of remediation. Other participants highlighted the importance of the instrument to consider the impact of artificial intelligence and address other issues related to technology, particularly given that SMEs would usually not have the resources to implement all due diligence requirements and largely needed to automate them through technological solutions. *The participants agreed that technology could not be addressed separately in relation to CSDD, but rather was pervasive and should be addressed in the different parts of the project.*

55. Next, participants debated whether the future instrument should provide cross-sectoral or sector-specific guidance. The majority of participants supported starting with a cross-sectoral approach and then envisage creating sector-specific guidance, as had been the OECD's approach. While the instrument would provide cross-sectoral guidance, for example the commentary in the instrument that explained collaboration could, *inter alia*, provide guidance and practical examples on how collaboration worked in practice and in different sectors, for instance if there were many smallholders versus two or three main suppliers in a particular value chain. Furthermore, the guide could explain that, depending on the contracting model and a party's position within that model, a particular kind of contract clause might be beneficial for the party to include in the contract.

56. In favour of providing sector-specific contractual guidance, a few participants argued that such guidance was desperately needed yet currently lacking. While the OECD also provided sector-specific guidance that was in fact extensively used by companies, it did not address contracting. The RCP had started to develop more sector-specific contractual clauses, which required thorough exchange with companies and a deep understanding of the different sectors and their structures. One participant proposed to consider the distribution of power within a chain rather than focus on specific industry sectors.

57. *The participants agreed that the project should generally start with cross-sectoral guidance and address different circumstances for different industries where appropriate. They agreed to then consider subsequently developing sector-specific sub-groups and/or guidance.*

58. The discussion on scope then turned to the size and type of companies and other legal entities, as well as the kind of contracts and other instruments that should be covered by the future instrument.

59. A participant raised the question of whether the future instrument should apply only to companies of a certain size, like the EU CSDDD and the German Supply Chain Act, or to every contracting party. Several participants argued against such a limitation, highlighting that the instrument should also provide guidance for smaller actors in the chain, not only large enterprises. Indeed, the explanatory part of such guidance would have an important educational function, which would be particularly useful for SMEs.

60. Furthermore, certain participants argued that it was important to also include DFIs and financial institutions more generally in the project's scope. DFIs especially had a public-interest mandate and a strong standard-setting influence. Those institutions played an important role and were therefore also covered by the UNGPs.

61. A participant noted that the discussion had considered financial institutions as lending institutions, and raised the question of whether they should also be considered in their role of chain leaders in financial services. Furthermore, it was recommended to distinguish between (i) participation of financial institutions in the supply chain and (ii) the use of financial instruments such as green bonds, for instance. It was suggested to include the latter in the consideration, as there were many correlations between bonds and contracts.

62. Participants noted that supply chain contracts between an investor and a supplier would potentially fall within the scope of this project, as opposed to investment contracts between an investor and a State party.

63. Finally, participants noted that the instrument's scope should not be limited to specific types of contracts, like the ABA MCCs and the EMCs, but rather adopt the comprehensive approach of the UPICC in this regard.

64. *The participants agreed that, at this point in time, the scope of the project should not be limited to companies of a certain size nor exclude financial institutions. Further, they agreed that the scope should not be limited to specific contract types.*

(e) Structure of the future instrument

65. As a starting point in relation to the structure of the future instrument, a participant questioned whether the clauses were to be the culmination of a process starting with other instruments (general terms and conditions, the supplier code of conduct, and principles of sustainability contained, for example, in a set of corporate principles separate from the code of conduct) that would influence the content of the clauses. Observing that the EMCs and the RCP had started with direct consideration of model clauses, participants suggested that perhaps another added value of this project might be to think the other way around, i.e., start from those more general instruments and then address model clauses.

66. Other participants argued that the main problem in practice was how contracts operationalised companies' codes of conduct, which in and of themselves were largely satisfactory but were often undermined by those same companies' contract practice. For instance, while a code of conduct might leave room for remediation, the contract would stipulate that the supplier represented and warranted that it was in perfect compliance with the buyer's code of conduct, and any deviation from the code of conduct was a material breach of contract that gave the buyer an immediate right of termination.

67. Another participant proposed that a future instrument should start in general terms, addressing how clauses in supply chains and different structures worked. It should not be based on or limited to one particular contracting model, as the model might be subject to change. Other participants agreed, noting that contractual models changed because the legislative backdrop and other circumstances changed. Therefore, the ABA MCCs, more than the EMCs, provided different bracketed options. The clauses were modular and could be added and adopted because of sector specificities and different power structures. Moreover, the ABA MCCs' footnotes provided guidance on what parties might want to consider in a particular sector or in a particular situation. It would also be useful for the future guidance to include examples of collaborative models in view of different contexts. Such calibrated guidance was much needed and would fulfil an important educational function for SMEs. By way of example, it was noted that the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming and the UNIDROIT/IFAD Legal Guide on Agricultural Land Investment Contracts both contained an explanatory part on the contractual models used in practice and on the parties, together with illustrations.

68. Some participants suggested that the future instrument adopt the descriptive, analytical approach of the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming, discussing problems that the contractor would need to take into account in drafting a contract.

69. Based on all of the above considerations, it was proposed that the table of contents for the future instrument would contain: (i) an explanatory part, which would elaborate, *inter alia*, on what it meant to carry out due diligence and address the above considerations regarding the linkages and influence of codes of conduct and other instruments on the one hand, and contracts on the other;

(ii) the "do's and don'ts" of contract drafting, including illustrations and examples of good practices as well as a discussion of essential and optional terms; and (iii) model clauses with different options.

70. *The participants agreed in general on the proposed table of contents as a starting point for the structure of the future instrument.*

(f) Content of the future instrument: issues for discussion

71. The participants considered the issues set out under Section C of the Discussion Paper, which might potentially form the content of a future instrument.

(i) Definitions

72. With regard to definitions, participants noted that the same considerations that were discussed with regard to "Corporate sustainability issues related to global value chains: Key concepts", summarised above in Subsection (a), would apply. In particular, they agreed that the instrument ought to include definitions, underlining that a lack of clarity about key terms would make the instrument less useful.

73. *The participants agreed that the future instrument should contain definitions, and that those should to the largest extent possible be drawn from existing instruments (foremost the UNGPs and the OECD Guidelines). The question of the definitions to include in the future instrument ought to be decided at a later stage of the project.*

(ii) The UPICC and CSDD

74. *The Secretariat* introduced paragraphs 62 through 69 of the Discussion Paper, which addressed articles of the UPICC that might potentially be relevant for global value chains: Articles 1.8 (inconsistent behaviour), 2.2.1 (agency), 4.3 (interpretation via relevant circumstances), 5.1.4 (duty to achieve a specific result, duty of best efforts), 5.1.5 (determination of kind of duty involved), 5.1.6 (reasonable quality of performance), and 7.3.1 (termination).

75. As a general comment, a participant noted that contracting in the context at hand was the outcome not only of the choices of the two contracting parties, but also of a complex set of instruments that were in place, and thus the content of the contract was not determined only by the will of the parties. More precisely, the buyer determined the content of the contract between the first-tier supplier and the sub-contractor, who defined the obligations and rights by referring to the buyer's code of conduct and other instruments of the buyer, such as principles of sustainability contained, for example, in a set of corporate principles separate from the general code of conduct that had not been defined by them. In view of this constellation of sources, the participant questioned whether the UPICC approach to private autonomy would suffice to take this wide array of instruments into account, given that they significantly affected the choices the parties made; or, rather, whether the future instrument should also include a framework to be able to reinterpret private autonomy when moving from a single transaction into supply chains. Another participant agreed that this issue would need to be addressed in the future instrument.

76. Still another participant raised the problem of purchasing practices through which the buyer contributed to the non-performance of the supplier. For example, if the buyer imposed a price or a timeline or made changes to the orders, thereby pushing the supplier to make its labourers work excessive overtime beyond what was allowed in the buyer's code of conduct, this would amount to non-performance. The terms stipulated by the buyers in their contracts with the suppliers usually provided that any non-performance of the buyer's code of conduct would give the buyer an immediate right to terminate the contract and sue the supplier for damages. Participants discussed whether and

how the UPICC would deal with the buyer's contribution to the supplier's non-performance and which remedies were available. First, it was noted that according to the default UPICC rule, termination was a last resort, and there were certain circumstances (for example, the other party's behaviour) that ought to be considered to decide whether there had been fundamental non-performance that would allow for termination. However, the UPICC generally left parties free to introduce contractual terms that departed from the default rules. Second, participants considered UPICC Article 7.1.2, "Interference by the other party", according to which "[a] party may not rely on the non-performance of the other party to the extent that such non-performance was caused by the first party's act or omission or by another event for which the first party bears the risk." This provision was not limited to damages but applied to any remedy. Another participant noted that the difficulty of applying Article 7.1.2 would be that it required the non-performance to be "caused" by the other party, while in most cases the other party did not cause it but rather contributed to or facilitated the non-performance.

77. Concerning the right to termination and, more generally, to exercise any remedy under the UPICC, in a scenario in which there was also a violation of supply chain due diligence, one participant highlighted that this project needed to consider to what extent the approaches to be developed would impede the remedies that a party exercised for purely commercial reasons. For example, if goods were manufactured using forced labour and therefore the buyer's customers turned them away, the question would be whether the future instrument should provide that the buyer could not terminate the contract or claim damages, because that would entail negative human rights interference with the supplier. In some situations, the commercial side and the human rights side would be very closely bound together, and therefore the future instrument would have to find an adequate way to let both approaches coexist in a contract.

78. Lastly, participants suggested adding UPICC Article 1.9 on usages and practices to the list of relevant UPICC provisions. There could be a point in the future where the inclusion of certain human rights and environmental standards would be so commonly present on the market that it would be read into the contract, as per the custom of a particular sector, and it would not need to be mentioned.

79. *The participants agreed that a granular analysis of all these issues, based on contract law, would be extremely useful as the type of guidance that could be provided to parties, and that it should be done in greater depth once the project started.*

(iii) Contractual clauses not covered by the UPICC

80. *The Secretariat* invited participants to consider the potential contractual clauses addressed in Section II.C.3 of the Discussion Paper and to discuss whether these and any further clauses should be considered for inclusion in the future instrument.

General CSDD obligation

81. Participants discussed the clauses and suggested several additions. First, it was suggested to add provisions on accompanying measures for suppliers, including providing assistance to SMEs, to the general CSDD obligation as set out in the Discussion Paper. For example, the EU CSDDD contemplated the provision of assistance, especially to SMEs, to ensure that they effectively had the capacity for implementation.

82. Second, it was proposed to add provisions on purchasing practices, i.e., clauses that would require the buyer to take into account how its own purchasing practices had an impact on violations.

83. Third, it was proposed to consider including a provision on minimising the administrative burden for suppliers that followed responsible purchasing practices. Participants reported that suppliers were already overwhelmed by due diligence questionnaires, score cards, information

requests, audits, etc., from companies that fell or would fall under the scope of mandatory supply chain laws, and that they were not able to keep up. This increased the cost of production. If suppliers were not obtaining a higher price or assistance to help meet these due diligence requirements, this could lead to even more commercial pressure on the suppliers which, in turn, could translate into more pressure on workers' human rights. Therefore, one of the clauses that was added to the EMCs addressed structuring requests for information in a reasonable way as to not overburden the supplier with informational requests, and to accept, for example, questionnaires that had been filled in for other buyers unless they clearly did not satisfy the buyer's requirements.

84. Fourth, participants suggested adding a commitment to carry out human rights and environmental due diligence, as distinct from asking the supplier to make a representation or a warranty of perfect compliance with the code of conduct. A corresponding clause could stipulate that the buyer and supplier agreed to establish and cooperate in maintaining a due diligence process that included identifying, mitigating and addressing all the steps of due diligence adverse impacts. A critical aspect of integrating due diligence was that it did not imply strict liability, whereas representations and warranties did. The EMCs, moreover, did not consider an adverse impact *as such* as default; rather, default occurred when a party refused to collaborate to address such impact. Due diligence should be integrated in a way that did not outlaw imperfection, as this resulted in violations being concealed as opposed to corrected.

85. Fifth, with regard to contractual cascading, participants proposed to analyse how one could contractually ensure shared responsibility. While the traditional approach was to pass the responsibility on to the supplier, who in turn passed it on to its supplier, the UNGPs and OECD Guidelines adopted a different approach, which was also codified in the EU CSDDD, encouraging not to use a contract to transfer responsibility to business partners; rather, the responsibility was shared and the ultimate responsibility stood with the chain leader. Accordingly, the cascading clauses in the EMCs did not allow responsibility shifting between buyer and supplier, nor further down the chain among suppliers.

86. Furthermore, participants suggested that the future instrument should contain a responsible exit clause stipulating that if, for whatever reason (e.g., a force majeure event, or a severe adverse impact that could not be remedied) the buyer decided to terminate the contract, it had to give reasonable notice, consider the adverse impact caused by the exit, and take measures to mitigate such impact. It was proposed to consider including a principle providing for a form of shared responsibility, or shared mitigation of the adverse effects, in such situations. It was reported that many traditional contracts foresaw an immediate right to terminate the contract in case of a human rights violation. The EU CSDDD instead leaned towards responsible exit, considering whether the adverse impact on human rights could be mitigated, and allowed for termination only in the situations where even the enhanced corrective action plan had failed.

References to codes of conduct and internal policies

87. A participant noted that the reference in contracts to codes of conduct and internal policies as laid out in the Discussion Paper was particularly important and should be considered in detail because it would be frequently used. This would raise the question of how these references could be designed. Could they be dynamic, i.e., allowing the value chain leader to freely modify the code of conduct, without any consultation, and the contracts that followed would automatically be modified accordingly? Would there be there any limitations? At first sight, this seemed to be a contractual incorporation by reference, but the way it was used in this context might deserve particular consideration.

Perpetual clauses

88. Similarly, some participants opined that the project should analyse perpetual clauses in more detail as the use of such clauses raised several questions. For instance, if the contract contained an obligation of the supplier to include these clauses into contracts with the sub-suppliers, and to require the sub-suppliers to do the same, what would the legal consequence be if the clause were not passed on to the sub-suppliers? Would there be a remedy for specific performance that would require the supplier to make an offer to modify the contract where it had not been included? After all, the chain leader could not legally oblige the entire chain to implement its standards.

Human rights and environmental remediation

89. Participants highlighted that, importantly, the future instrument should create a structure for human rights and environmental remediation, which was not included in regular commercial contracts. This followed from the undertaking to contractualise human rights and environmental due diligence: one of the key steps of due diligence was that in case of an actual adverse impact – a harm to human rights or the environment – then that impact would be remediated, which was different from a mere breach of contract for which damages were to be paid. The ABA MCCs and the EMCs contained clauses that addressed what happened in case of such an adverse impact: the first step ought to be remediation, which involved having the parties come together with the affected stakeholders to develop a remediation plan, or corrective action plan, that had to seek redress of the victims' grievances. The victims also had to be a part of the implementation process to ensure that remediation would indeed be provided. Only if the issue could not be solved might termination owing to the human rights impact be considered. It was suggested that, similarly to the ABA MCCs and the EMCs, the future instrument could contractualise an obligation to place human rights remediation ahead of termination and damages for breach.

Third-party rights

90. Next, participants discussed the question of who was entitled to recover damages for the harm caused to human rights or the environment, or to seek an injunction in case of an imminent violation.

91. A participant described the scenario in which the supplier committed to the buyer in the contract that neither the supplier nor its sub-contractors would engage in practices concerning environment or labour conditions that would violate international conventions. In that case, the buyer was the holder of the right that corresponded to the supplier's obligation. If there was a breach, who was entitled to recover damages for the harm caused to the workers and/or the environment? Three potential avenues were discussed. First, the buyer's liability could be expanded to recover for harm caused to third parties, and then the buyer would be obliged to transfer the sums received as damages to the workers based on unjust enrichment. Yet this solution was neither currently established nor desirable. Second, if the buyer was not considered entitled to recover for the harm caused to the workers and the environment, as these were not its own damages and the buyer was not considered their agent, consideration could be given to expanding the third-party beneficiary doctrine – to not only enable third parties that were intended by the parties to recover for the harm they suffered, but to also consider such workers and environmental organisations as beneficiaries intended by the law as entitled to damages. Third, if neither of the two approaches was adopted, then another possibility would be to apply extra-contractual liability that allowed for those harms to be compensated, which however had many limitations. In any case, compensation needed to be provided to those harmed by the violations if the buyer or relevant suppliers had caused or contributed to such violations.

92. A similar question would arise in case the supplier violated a prevention plan without a harm having yet occurred, but there was a risk that the environment would suffer harm. Should the potential injunction to do what the supplier committed to and failed to do come from the buyer, or

should it come from the third parties? Would it form part of the buyer's due diligence, or be included among the rights of the third parties?

93. Participants explained that the ABA MCCs and the EMCs had addressed this issue by placing remediation ahead of traditional contract remedies, as mentioned above. Unlike in the EU CSDDD, damages could be part of remediation under the clauses, and therefore the damages distribution route to compensation was not necessary. In the case an adverse impact on human rights took place somewhere in the supply chain, the clauses provided that the party that caused the harm, or both parties if they caused it jointly, had to develop a remediation plan in consultation with the adversely affected stakeholders. They also had to identify whether any remedy would be necessary vis-à-vis certain stakeholders who had been damaged. If there was disagreement about the remedy, then a dialogue would be established between the parties and the specific stakeholders identified in the remediation plan to try to reach an agreement. If this was not successful, the next step would be arbitration, which would include the stakeholders. Furthermore, the EMCs stated that neither buyer nor supplier should benefit from a potential or actual adverse impact occurring in relation to their agreement. If damages were owed that would result in a benefit to the buyer or the supplier, such amounts should support the remediation process. If there were insufficient funds to pay damages and complete the remediation process, then the remediation should take priority.

Private international law aspects of third-party rights

94. A participant noted that this discussion concerning contractual liability had an important private international law aspect, since at the outset it would be the local law that had to provide for the compensation of the workers or the neighbours that were harmed by the supplier's misconduct. Concerning tort liability, under most rules of private international law, the law where the damage occurred would be the law that applied, not the law where the supply chain ended. Accordingly, the laws of the seat of the buyer would usually not come into play, which was the reason behind the inclusion of a mandatory private international law rule in the EU CSDDD for the specific liability. Without such mandatory rule, the contract would most likely have to incorporate a choice-of-law clause in favour of applicable law that would lead to a claim for damages. However, a contract could only be construed as envisaging third-party beneficiaries if it expressly said so, or if that could be read into the contract. If a company were well advised, it would include a clause in the contract expressly stipulating that the contract was not in favour of third-party beneficiaries. Other participants confirmed that most contracts excluded third-party beneficiary rights, as companies considered it too unspecific to grant such rights in advance, without knowing who the third-party beneficiary would be.

Indemnification clauses

95. Participants discussed the effect of indemnification clauses. The EMCs contained a model indemnification clause, trying to narrow the traditionally broad coverage of such clauses. In regard to a model indemnification clause, and similar clauses more generally, participants highlighted the difficult balance that the future guidance would seek to strike: avoiding too-narrowly-framed model clauses (which would not be seriously considered by companies) and orienting these clauses in a way that centred on human rights.

Grievance mechanisms

96. It was suggested to add a clause establishing an obligation of having grievance mechanisms in place. In conjunction with the idea of remedies, grievance mechanisms were contemplated which might not necessarily be looking backwards (remedying an impact which had already taken place) but could rather be forward looking. Hence, the contract could contain a clause requiring the supplier and other entities in the chain to have grievance mechanisms in place. Furthermore, the future

instrument might discuss where the grievance mechanism should be provided for in the chain to avoid the duplication of such mechanisms at different levels.

97. Participants suggested that grievance mechanisms should generally also cater to the five types of human rights remedies under international human rights law: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. While a private actor could, for example, not provide all the guarantees of non-repetition that a State could give, these remedies were important to the extent that a business could provide them.

Dispute resolution

98. Participants considered whether the technique of perpetual clauses and references to codes of conduct could also be useful with regard to dispute resolution mechanisms. For example, the contract could stipulate that any dispute arising out of the supply chain should be submitted to arbitration before a particular institution. Other participants questioned whether this should be addressed in the guidance, and if so, whether such a clause in a code of conduct should be sufficient without any specific reference in the contract at all.

99. Participants recommended that the future instrument provide advice on dispute resolution in general terms rather than in detail, including how dispute resolution clauses could be worded to enforce value chain contracts.

100. *The participants agreed that the above issues should in principle be covered, and that a granular analysis of the various issues, based on contract law, would be extremely useful. This granularity would allow the clauses to adjust to different circumstances for different companies. As a starting point, the ABA MCCs and the EMCs would provide useful insight for consideration.*

(iv) Additional issues that could be included as legislative guidance

101. *The Secretariat* noted that Section II.D of the Discussion Paper contemplated the development of a legislative guidance document as the future form of the instrument, and therefore discussed issues that would typically be addressed in a supply chain due diligence law. However, in line with the participants' recommendation, some suggestions could be included in the future legal guide that might be useful for legislators, for example regarding liability. The relevant issues would need to be considered as the project progressed.

Item 4: Any other matters

102. With regard to the next steps, *the Secretariat* explained that a summary report and conclusions in light of the discussion would be shared with all participants of the Workshop for comments and input. Then, the summary report and conclusions would be submitted to the Governing Council to request an upgrade of the project to high priority, allowing for the establishment of a Working Group.

Item 5: Closing of the Workshop

103. In the absence of any other matters*, the Secretary-General* thanked all participants for coming to the Institute and participating in the Workshop's very interesting and instructive discussion. He expressed the Secretariat's gratitude to all participants and declared the Workshop closed.

ANNEX I

LIST OF PARTICIPANTS

EXPERTS

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Mr Fabrizio CAFAGGI	Professor, University of Trento and LUISS University (Italy) Judge at the Council of State of Italy
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International Development Law Organization (IDLO)	Ms Irmina PACHO Climate Justice Specialist
Organisation for Economic Co-operation and Development (OECD)	Ms Barbara BIJELIC Deputy Head of Due Diligence, Centre for Responsible Business Conduct

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Mr Hideki KANDA	Professor, Gakushuin University (Japan)
Mr Lauris RASNAČS	Professor, University of Latvia (Latvia)

UNIDROIT SECRETARIAT

Mr Ignacio TIRADO	Secretary-General
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Ms Priscila PEREIRA DE ANDRADE	Legal Officer

ANNEX II

AGENDA

1. Opening of the Workshop

2. Introduction to UNIDROIT and the new legislative project on corporate sustainability due diligence (CSDD) in global value chains

3. Purpose of the Exploratory Workshop and consideration of matters identified in the Discussion Paper (Study 87 – E.W. – Doc. 3):
   - (a) Corporate sustainability issues related to global value chains: Key concepts
   - (b) Overview of corporate due diligence legal instruments and initiatives
     - (i) International and supranational instruments
     - (ii) Domestic legislation
     - (iii) Model clause collections
   - (c) Content of the future instrument: issues for discussion
     - (i) Definitions
     - (ii) The UNIDROIT Principles of International Commercial Contracts (UPICC) and CSDD
     - (iii) Contractual clauses not covered by the UPICC
     - (iv) CSDD and enforcement
   - (d) Additional issues that could be included in a legislative guidance instrument
     - (i) Scope of control
     - (ii) Obligations
     - (iii) Extent of harm
     - (iv) Liability
     - (v) Enforcement
     - (vi) Choice of law
   - (e) Possible form of the future instrument
     - (i) Compliance guide, with model clauses and UPICC commentary
     - (ii) Legislative guidance
     - (iii) Guidance document, including both model clauses and legislative guidance

4. Any other matters

5. Closing of the Workshop

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

ANNEXE II

EN

UNIDROIT Exploratory Workshop on Corporate Sustainability Due Diligence in Global Value Chains
Rome, 27-28 May 2024

UNIDROIT 2024
Study 87 – E.W. – Doc. 3
English only
May 2024

DISCUSSION PAPER

1. This document provides background information relating to UNIDROIT's new legislative project on Corporate Sustainability Due Diligence (CSDD) in Global Value Chains, as well as a list of issues and questions that the participants of the Exploratory Workshop may wish to consider.

2. The paper attempts to present the broadest possible overview of the issues for discussion in order to provide the invited experts to the Exploratory Workshop with the potential questions to be addressed in the context of the project. Nevertheless, it should be noted that the paper does not provide an exhaustive list of issues for discussion, nor a full legal analysis of each issue. Rather, it aims to suggest a starting point and structure for the deliberations during the Workshop, and participants are invited to propose additional areas for discussion as appropriate.

3. Given that the precise scope and form of the prospective international instrument are to be defined by the future Working Group, participants in this Workshop are invited to contribute to a discussion on both the potential content and the form of the instrument. The Secretariat would also welcome additional input on what would differentiate the potential UNIDROIT guidance document from other existing initiatives to best fill in the remaining gaps and complement the existing instruments, relying on the UNIDROIT mandate and expertise.

4. Accordingly, the document is divided into two main parts: (I) Introduction, and (II) Scope of the project and issues for discussion. Section I introduces UNIDROIT and the background of the CSDD project. Section II first introduces corporate sustainability issues related to global value chains and its key concepts, to then provide an overview of the main corporate due diligence legal instruments and initiatives at the international, supranational and domestic levels. Next, it addresses the content of the future guidance document, proposing substantive issues for discussion. Lastly, the paper addresses the possible forms of the future UNIDROIT guidance document: a compliance guide with commentary on the application of the UNIDROIT Principles of International Commercial Contracts (UPICC) and model clauses, legislative guidance, or a combination of both.

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I. INTRODUCTION

A. Introduction to UNIDROIT and its working methods

5. The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental organisation established in 1926 as an auxiliary organ of the League of Nations. It is composed of 65 Member States, representing over 74% of the world's population and 90% of global GDP. Its primarily legislative function is to develop methods for modernising, harmonising and coordinating international private and commercial law by formulating uniform law instruments. In developing uniform law, UNIDROIT generally cooperates with other intergovernmental organisations and global and regional agencies, as well as other international bodies. UNIDROIT is a standard-setting organisation in the area of transnational law, working in close collaboration and coordination with its two "sister organisations", the United Nations Commission on International Trade Law (UNCITRAL) and the Hague Conference on Private International Law (HCCH).

6. Examples of instruments developed by UNIDROIT include (i) treaties (conventions and protocols);[1] (ii) model laws;[2] (iii) legal guides;[3] and (iv) principles representative of best practices.[4]

7. As consistent with UNIDROIT's established working method, each instrument is developed by a specific Working Group established pursuant to the authorisation of the Governing Council, composed of experts representing different legal and economic systems and geographical regions. All Working Groups are also integrated with observers that typically provide the views of the relevant public and private-sector stakeholders, including the industry, national public agencies, international organisations, and civil society.

8. The work is generally preceded by comparative law studies, impact assessments, and a careful examination of the feasibility and benefit of legal harmonisation in the relevant field, which may take the form of exploratory workshops.

B. Background of the CSDD project

9. In 2022, UNIDROIT was called upon by both the European Bank for Reconstruction and Development (EBRD) and the International Development Law Organization (IDLO) to consider work on corporate sustainability due diligence in global value chains in light of its expertise in contract law, seen as a key catalyst for the implementation of sustainability measures. The European Law Institute (ELI) later also proposed to explore the applications of digital technologies in this context.

10. Accordingly, the "Development of a guidance document on Corporate Sustainability Due Diligence in Global Value Chains" was included in the UNIDROIT Work Programme by the General Assembly at its 81st session in December 2022 (see document UNIDROIT 2022 A.G. (81) 9), upon recommendation by the 101st session of the Governing Council (see document UNIDROIT 2022 C.D. (101) 21, paras. 115-131). The project has been assigned medium priority pending the completion

[1] E.g., the Cape Town Convention on International Interests in Mobile Equipment (https://www.unidroit.org/instruments/security-interests/).

[2] E.g., the Model Law on Factoring (https://www.unidroit.org/instruments/factoring/model-law-on-factoring/) and most recently the UNCITRAL/UNIDROIT Model Law on Warehouse Receipts (https://www.unidroit.org/work-in-progress/model-law-on-warehouse-receipts/).

[3] E.g., the Legislative Guide on Intermediated Securities (https://www.unidroit.org/wp-content/uploads/2021/06/LEGISLATIVE-GUIDE-English.pdf).

[4] E.g., the UNIDROIT Principles on International Commercial Contracts (https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/).

of exploratory work to define the scope of the project, based on which it will be assessed for high priority status, allowing for the establishment of a Working Group dedicated to the project.

11. While the Institute's mandate is focussed on private law, it is noted that the project relates to issues often addressed by public international law, including environmental protection and compliance with human rights standards. Indeed, there are multiple international guidance documents developed by international organisations, including the United Nations Guiding Principles on Business and Human Rights,[5] the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct,[6] and the draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises.[7] However, for the purposes to be achieved, public law instruments could be supplemented by a guidance document to States and/or companies on private law, fostering harmonisation not only between national laws and contractual governance but also between public and private law regimes.[8]

C. UNIDROIT's expertise and the CSDD project's synergies with other projects on the current Work Programme

12. The project can draw on UNIDROIT's expertise in commercial law and legal harmonisation, and in particular its experience with the UNIDROIT Principles of International Commercial Contracts (UPICC), first adopted in 1994. Widely considered as one of the most successful international contract law instruments, several other international contract law-based instruments have been developed based on the UPICC, such as the 2015 UNIDROIT/FAO/IFAD Legal Guide on Contract Farming, the 2021 UNIDROIT/IFAD Legal Guide on Agricultural Land Investment Contracts, and the 2023 Principles of Reinsurance Contract Law.

13. The CSDD project also aligns with other ongoing projects of the Institute, in particular the joint project with the International Chamber of Commerce's Institute of World Business Law (ICC Institute) on International Investment Contracts (IICs) to develop guidance to promote the modernisation and standardisation of international investment contracts.[9] It explores the interaction between the UPICC and common provisions in international investment contracts, and seeks to address a number of recent developments in the area of international investment law, notably the increasing focus on corporate social responsibility and sustainability. Moreover, the CSDD project is in line with the ongoing work on the UNIDROIT/FAO/IFAD Legal Guide on Collaborative Legal Structures of Agricultural Enterprises, which similarly builds upon the UPICC.[10]

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[5] United Nations, Guiding Principles on Business and Human Rights, https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

[6] Organisation for Economic Co-operation and Development, Guidelines for Multinational Enterprises on Responsible Business Conduct, https://www.oecd-ilibrary.org/docserver/81f92357-en.pdf?expires=1698327109&id=id&accname=guest&checksum=5C8CF3BBB46AE289BE249FEBBCFC5315.

[7] United Nations, Updated Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session9/igwg-9th-updated-draft-lbi-clean.pdf.

[8] See, e.g., A. Beckers, L'image Juridique Evolutive des Chaînes de Valeur Mondiales: Introduction au Numéro Spécial, Revue internationale de droit economique, Issue 4, 2002, p. 6 : "*Il y a une fragmentation croissante au sein du débat juridique et un manque de dialogue entre les différents domaines juridiques qui sont concernés par les chaînes de valeur mondiales (CVM). Les discussions sur les CVM au sein du droit privé notamment, c'est-à-dire en droit des sociétés, des contrats, des délits, semblent largement détachées des analyses du droit public sur la question*".

[9] For information on the IIC project, see the dedicated project page at https://www.unidroit.org/work-in-progress/investment-contracts-upicc/.

[10] For information on the Guide, see https://www.unidroit.org/instruments/agriculture/alic/.

D. Status of the project

14. Following the inclusion of the CSDD project on the Work Programme by UNIDROIT's governing bodies, this Exploratory Workshop is the first initiative organised by the Secretariat to start developing the project. A small number of experts and institutions have been invited to the Workshop to further delineate the scope of the project. The results of the Workshop will lay the foundation to establish a Working Group that will develop the future document, as consistent with UNIDROIT's established working method.

II. SCOPE OF THE PROJECT AND ISSUES FOR DISCUSSION

A. Corporate sustainability issues related to global value chains: key concepts

15. Participants in global value chains (GVCs) have unequal negotiating power and capacity to conduct CSDD. Typically, there is a "chain leader", a downstream enterprise, that sells the finalised product to the end customer.[11] On the one hand, it is the "chain leader" that is ultimately responsible for compliance with relevant sustainability and human rights standards acting as the global regulator of the chain.[12] On the other hand, it is common for global companies to include "responsibility clauses" in their value chain contracts, requiring contractors and subcontractors to guarantee that the supplied products and materials adhere to relevant standards, thus, shifting responsibility up the chain. Value chain contracts in their sustainability aspect are multistakeholder, as their provisions may have implications not only for the parties, but also for other contractors down and up the chain, the final consumer, and the employees of the corporate entities throughout the chain. To keep the terminology consistent, throughout the text of this issues paper the "chain leader" is commonly addressed as the "Buyer", and its contractors as the "Seller" – this reflects the construction of GVCs, where the goods move downstream from Sellers to Buyers, and from producers to international markets.

16. Value chain contracts have unique characteristics. Typically, such contracts are long-term, inherently transnational, and are aimed at establishing a continuous and collaborative business relationship.[13] Accordingly, the modalities of cooperation by the parties to a contract on sustainability-related issues can be conveniently included into the contractual terms. Indeed, supply chain contracts are described to be the "key form of leverage, through which buyers can influence suppliers to improve their human rights performance".[14]

17. Currently, the regulation of sustainability in value chain relationships is twofold, manifested by corporate social responsibility (CSR), following internal rules voluntarily adopted by the companies, and mandatory due diligence laws. CSR is voluntary in nature,[15] and accordingly, ambitious corporate human rights policies typically declare adherence to recognised human rights and sustainability standards, but do not outline private law consequences of their breaches.[16]

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[11] See generally, G. Gereffi, J. Humphrey, T. Sturgeon, The Governance of Global Value Chains, Review of International Political Economy 12(1) 2005.

[12] A. Beckers, The Invisible Networks of Global Production: Re-imagining the Global Value Chain in Legal Research, European Contract Law Review 16(1) 2020.

[13] K. H. Eller, Is 'Global Value Chain' a Legal Concept? Situating Contract Law in Discourses Around Global Production. European Review of Contract Law 16(1) 2020, p. 6.

[14] John Sherman III. Integrating Human Rights Due Diligence into Model Supply Chain Contracts, https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/CRI_80_AWP_FINAL.pdf.

[15] For the discussion, see European Commission, Corporate sustainability and responsibility, https://single-market-economy.ec.europa.eu/industry/sustainability/corporate-sustainability-and-responsibility_en, and HEC Paris, What is CSR?, https://www.hec.edu/en/faculty-research/centers/society-organizations-institute/think/so-institute-executive-factsheets/what-corporate-social-responsability-csr.

[16] See, e.g., https://www.stellantis.com/content/dam/stellantis-corporate/sustainability/human-rights/Stellantis-Human-Rights-Policy-EN.pdf, § 7;

Mandatory due diligence, in turn, is the priority of the present analysis. Inspired by international 'soft law' instruments, at present, CSDD is gradually becoming required by law.

18. The voluntary nature of CSR commitment leads to a more liberal approach to definitions, including very vaguely defined notions of "sustainability", "corporate social responsibility", "environmental, social and governance (ESG)" and "value chain".[17] The future guidance document may potentially contribute to efforts towards codification,[18] offering (more) standardised definitions, which may also serve for contract interpretation purposes. Furthermore, lack of terminological clarity is not only relevant for contracts, but also for the determination of the scope of the project itself. There is a difference between a global value chain contract (which, by definition, is seen as a part of a global network of contracts), and any other commercial contract with sustainability provisions, however well-articulated.

19. As a separate note, there is also a difference between the concepts of the "value chain" and "supply chain". According to one definition, the difference is that the "supply chain includes all the raw materials and parts that are made into a product and distributed up the chain for manufacture and sale", whereas "a value chain encompasses all the individual steps that are taken to create a marketable product".[19] Academic endeavours have been made in management studies to clarify the differences further,[20] but even there, in a specialised field, the exact definition is debated.[21] Against this background, it does not seem advisable for this document to attempt a thorough definition of how a value chain differs from a supply chain. It may be deemed appropriate to concede that "global value chain" is an accepted term, commonly used across international organisations and agencies.[22]

20. When developing harmonised corporate due diligence, it is important to take the competition in attracting investments into account. A significant challenge to corporate sustainability due diligence is the so-called "race to the bottom" – an economic condition where States tend to lower their human rights and environmental standards to attract investment.[23] The future guidance document may serve to allow for a coordinated or common international approach to be designed, thus potentially allowing companies to adhere to the same set of high standards.

21. As illustrated under Section II.B on corporate due diligence legal instruments and initiatives below, most projects related to the impact of CSDD on private law address a strongly bimodal system, where a multinational Buyer sources its goods from a typically much smaller Supplier, located in a

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https://www.leonardo.com/documents/15646808/16737734/Group+Policy+Human+Rights_general+use_new.pdf?t=1581339111551, § 5; https://static.inditex.com/annual_report_2022/pdf/Human-Rights-2022-ENG.pdf, p. 14.

[17] Peasoup, ESG and Sustainability – What's the Difference?, https://peasoup.cloud/eco/esg-and-sustainability-whats-the-difference/; Becky Jacobs, Brad Finney, Defining Sustainable Business – Beyond Greenwashing. Virginia Environmental Law Journal 37(2) 2019, pp. 94 – 95.

[18] See, e.g., the EU taxonomy for sustainable activities https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32020R0852.

[19] McKinsey, What Is Supply Chain?, https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-supply-chain.

[20] A. Feller, D. Shunk, T. Callarman, Value Chains Versus Supply Chains, https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=b02e25922d7641a05dd239eb18130710ed332a69.

[21] R. Nkunda, Unclear Conceptual Boundaries Between Supply Chain, Value Chain and Logistics: A Review Of Concepts, Origins and Relationships, https://journals.mocu.ac.tz/index.php/eaj-sas/article/view/116.

[22] In a rather simplistic manner, the World Bank provides the following definition: "A global value chain breaks up the production process across countries. Firms specialise in a specific task and do not produce the whole product." Later in its 2020 report, the World Bank does not distinguish the two concepts, although every now and then "supply chains" are mentioned. See World Bank, World Development Report 2020: Trading for Development in the Age of Global Value Chains, https://openknowledge.worldbank.org/server/api/core/bitstreams/3df67ad2-367c-5718-ba97-edd213723bb3/content.

[23] R.B. Davies, K.C. Vadlamannati, A Race to the Bottom in Labor Standards? An Empirical Investigation, Journal of Development Economics 103, 2013, p.12.

third country, which is usually more likely to contribute to human rights violations. Thus, adverse impacts typically occur upstream. There are also calls for downstream due diligence,[24] that is, responsibility for post-sale adverse effects. At present, this part of the CSDD process merits further study.

22. It is noted that, from an organisational perspective, GVCs can vary greatly and be complex in structure. To properly tailor the legal guidance, whatever form that might take, it seems important for the final instrument to include an explanatory section, describing the issue also from the business point of view. The future instrument could, akin to Chapter III of the UNIDROIT/IFAD Legal Guide on Agricultural Land Investment Contracts, potentially elaborate on the organisational structure of GVCs, to facilitate further legal discussion. Another non-legal issue that might prove highly beneficial for better holistic understanding of the problem is the economic analysis of corporate sustainability.[25] The final guidance document might address the motivation of the companies (if any) to engage in the CSDD. In a recommendations paper by the Global Compact back in 2004, it was observed that

> ***Ultimately**, successful investment depends on a vibrant economy, which depends on a healthy civil society, which is ultimately dependent on a sustainable planet. In the **long-term**, therefore, investment markets have a clear self-interest in contributing to better management of environmental and social impacts in a way that contributes to the sustainable development of global society. A better inclusion of environmental, social and corporate governance (ESG) factors in investment decisions will **ultimately** contribute to more stable and predictable markets, which is in the interest of all market actors* (emphasis added).[26]

23. As this assessment underlines, corporate sustainability requires a justification not only in public reasoning, but in self-interest, too. However, the use of terminology such as "ultimately" and "long-term" three times in three sentences is rather revealing. The immediate self-interest in sustainability is not identified and the benefit to a commercial actor is seen only in global cooperation and in the long-term. Legal harmonisation is one of the ways to provide for that long-term effect. It cannot realistically be expected that the self-interest in the contract negotiation and conclusion practice includes sustainability considerations. This explains the attempts to shift responsibility up the supply chain, to appear formally in compliance with the CSDD requirements. However, the above scepticism regarding the rationales of companies to adhere to due diligence standards is mitigated by the study of sustainability drivers and incentives, such as the desire to source quality goods and achieve higher prices, reputational concerns, and the desire to prevent exposure to liability.[27]

Question for discussion:

- *Which key concepts would need to be defined for the purpose of this project, possibly in form of working definitions?*

[24] The Danish Institute for Human Rights, Due diligence in the downstream value chain: case studies of current company practice, https://www.humanrights.dk/publications/due-diligence-downstream-value-chain-case-studies-current-company-practice.

[25] See generally the concept of "Who Cares Wins", https://www.ifc.org/content/dam/ifc/doc/mgrt/whocareswins-2005conferencereport.pdf.

[26] The Global Compact, Who Cares Wins, https://www.unepfi.org/fileadmin/events/2004/stocks/who_cares_wins_global_compact_2004.pdf.

[27] For a comprehensive discussion of the CSR and its economic rationales and effects see, e.g., H. Christensen, L. Hail, C. Leuz, Mandatory CSR and sustainability reporting: economic analysis and literature review, Review of Accounting Studies (2021) 26.

B. Overview of corporate due diligence legal instruments and initiatives

24. Multinational companies have been encouraged to take responsibility for their value chains on a voluntary basis for decades. Since the promulgation of the Guiding Principles for Business and Human Rights in 2011, which were intended to address the power of multinational companies, stakeholders have been increasingly looking towards converting these soft law principles into binding law. One strategy includes bilateral trade agreements, which is an important consideration but one outside the scope of this paper.

25. In recent years, efforts have turned to national legislation requiring due diligence by companies headquartered and/or operating within their jurisdiction. The scope, requirements, and enforcement of due diligence laws have evolved considerably over the last decade. Questions remain around how courts will enforce these laws, since they include novel legal definitions of accountability and affect traditional concepts of civil liability. Governments, law firms, and bar associations have started to provide guidance and model clauses for contracts with suppliers of goods and services to support companies with the implementation. However, the legal landscape remains scattered. Most jurisdictions do not have supply chain due diligence legislation in place, while those that do present considerable divergence in scope and approach. Gaps and ambiguity make it unclear how companies may ensure adequate and effective due diligence. Moreover, the ongoing regulatory changes and proposals are likely to result in changed contractual and corporate governance.

26. Subsection 1 outlines the main international and supranational instruments that are relevant to the project, including existing soft law instruments and instruments that are currently being developed with the aim to become legally binding texts. Domestic legislation and model clause collections are addressed under Subsections 2 and 3, respectively.

1. International and supranational instruments

27. United Nations Guiding Principles on Business and Human Rights (UNGPs). The UNGPs[28] provide for a three-pillar approach, dividing each pillar into foundational and operational principles. For example, the Guiding Principles require States to "set out clearly the expectation that all business enterprises domiciled in their territory […] respect human rights throughout their operations". Regarding corporate diligence, the Guiding Principles elaborate on the procedures an enterprise has to employ to respect human rights and avoid breaches. "Unanimously welcomed" by the Human Rights Council, the Guiding Principles played a crucial role in the further development of the corporate due diligence regulatory field.[29]

28. OECD Guidelines for Multinational Enterprises on Responsible Business Conduct. First introduced in 1976, the OECD Guidelines are reviewed on a regular basis, with the most recent version released in 2023.[30] They offer a comprehensive framework, with separate chapters dedicated to human rights, anti-corruption and the environment. The Guidelines do not offer applicable legal provisions and are solely a collection of codified best practices for multinational enterprises. They recognise the GVC as a means of responsible business conduct.[31]

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[28] UN Guiding Principles on Business and Human Rights, 2011, https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

[29] K. Buhmann, The Development of the 'UN Framework': A Pragmatic Process Towards a Pragmatic Output in Mares, R. (ed.) The UN Guiding Principles on Business and Human Rights, Foundations and Implementation (2012), p. 85.

[30] OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, 2023, https://read.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en#page1.

[31] See, e.g., p. 13 of the 2023 edition.

29. ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration).[32] The MNE Declaration was first adopted in 1977 and amended several times thereafter, most recently in 2022. It provides direct guidance to enterprises (multinational and national) on social policy and inclusive, responsible and sustainable workplace practices.

30. OECD-FAO Guidance for Responsible Agricultural Supply Chains.[33] Published in 2016, the OECD-FAO Guidance was developed to help enterprises observe existing standards for responsible business conduct and to undertake due diligence along agricultural supply chains in order to ensure that their operations contributed to sustainable development. The Guidance presents a practical approach that companies can implement into their business models and processes.

31. Draft United Nations Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises. The work on the Instrument began in 2014, when the United Nations Human Rights Council mandated "an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights"[34] to "elaborate an international legally binding instrument to regulate […] the activities of transnational corporations".[35] Since then, nine sessions have been held, and currently, the third draft of the Legally Binding Instrument is under consideration. However, the prospects of the so-called BHR Treaty ever coming into force are unclear.

32. European Union Corporate Sustainability Due Diligence Directive (CSDDD). On 15 March 2024, the Permanent Representative Committee of the Council of the European Union (EU) endorsed the final compromise text with a view to agreement, which was adopted by the European Parliament's Committee on Legal Affairs on 19 March.[36] The text shall be voted on in parliamentary plenary in April. Once formally approved by the European Parliament and the Member States, the Directive will enter into force on the twentieth day following its publication in the EU Official Journal.

33. The CSDDD would require larger corporate entities to "take appropriate measures to identify and assess actual and potential adverse impacts arising from their own operations or those of their subsidiaries and, where related to their chains of activities, those of their business partners"[37] and prevent or mitigate such effects, when discovered. Importantly, the CSDDD provides that companies under its scope shall be required "as a last resort (…) to refrain from entering into new or extending existing relations with a business partner in connection with or in the chain of activities of which the impact has arisen"[38] and "terminate the business relationship with respect to the activities concerned if the potential adverse impact is severe".[39] Thus, the CSDDD directly regulates European contract law.

34. It is noted that the latest draft Directive no longer refers to the "value chain" (as opposed to supply chain) but instead to the "chain of activities", defined as "(i) activities of a company's

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[32] ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 2022, https://www.ilo.org/empent/areas/mne-declaration/lang--en/index.htm.

[33] OECD-FAO Guidance for Responsible Agricultural Supply Chains, 2016, https://www.oecd-ilibrary.org/agriculture-and-food/oecd-fao-guidance-for-responsible-agricultural-supply-chains_9789264251052-en.

[34] Human Rights Council, Elaboration of an International Legally Binding Instruments on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, § 1. https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9.

[35] Id.

[36] European Parliament, Press release, 19 March 2024, https://www.europarl.europa.eu/news/en/press-room/20240318IPR19415/first-green-light-to-new-bill-on-firms-impact-on-human-rights-and-environment.

[37] Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, https://data.consilium.europa.eu/doc/document/ST-6145-2024-INIT/en/pdf, Art. 6(1).

[38] Id., Art. 7(5).

[39] Id., Art. 7(5)(b).

upstream business partners related to the production of goods or the provision of services by the company, including the design, extraction, sourcing, manufacture, transport, storage and supply of raw materials, products or parts of the products and development of the product or the service, and (ii) activities of a company's downstream business partners related to the distribution, transport and storage of the product, where the business partners carry out those activities for the company or on behalf of the company, excluding the distribution, transport, storage of the product being subject to the export control under the Regulation (EU) 2021/821 of the European Parliament and of the Council or the export control relating to weapons, munition or war materials, after the export of the product is authorised".[40] It thus sets a broad definition for coverage as including those entities with a direct or indirect, upstream or downstream business relationship, who supply or purchase products or services that contribute to the company's own. As it stands, the Directive would impose strict, joint and several liability and apply EU Member State law regardless of the place of harm.[41]

35. The most recent draft (at the time of writing in March 2024) provides, in Article 12 on "Model contractual clauses", that in order "to provide support to companies to facilitate their compliance with Article 7(2), point (b), and Article 8(3), point (c), the Commission, in consultation with Member States and stakeholders, shall adopt guidance about voluntary model contractual clauses, no later than after 30 months from the entry into force of this Directive".

Questions for discussion:

- *Are there further (existing or draft) international, supranational or regional instruments relevant to the CSDD project?*
- *Are any of the above instruments particularly important for the project? Should any of the above instruments be considered as a reference for the future instrument to be substantially aligned with?*

2. Domestic legislation

36. Europe has been the site of most legislative activity on supply chain due diligence to date. Due diligence legislation has expanded its coverage, requirements, and extent of liability over the last decade, and national laws vary considerably. However, most laws have a core set of elements in common: size of covered companies, type of liability, extent of harm, scope of control, type of enforcement, and choice of law.[42]

37. This Section reviews selected existing and proposed domestic legislation, focussing on human rights due diligence legislation from California, the United Kingdom (UK), France, the Netherlands, and Germany. Additional countries with due diligence legislation, which are not covered here, include for example Austria, Belgium, Canada, Mexico, Norway and Switzerland. Exploration of proposed due diligence legislation outside of Europe would be particularly insightful because it would speak to political, social, and economic considerations. The end of this Section accordingly highlights initiatives in other regions.

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[40] Id., Art. 3(1)(g).

[41] Id., see Art. 22.

[42] The underlying framework reflects https://corporatejustice.org/wp-content/uploads/2021/07/Corporate-due-diligence-laws-and-legislative-proposals-in-Europe-June-2021.pdf.

38. California: One of the first laws in this area was the California Transparency in Supply Chains Act (CTSCA)[43], passed in 2010. Since California is the world's fifth largest economy, this Act covers a significant portion of global trade. It builds on United States (US) legislation concerning conflict minerals.[44] However, the CTSCA's intent was specifically "to help California consumers make better and more informed purchasing decisions" via mandatory disclosures in five recommended areas. As then-Attorney General Kamala Harris wrote, this law "does not mandate that businesses implement new measures to ensure that their product supply chains are free from human trafficking and slavery".[45] Critiques have since raised major questions over the impact of this law. At best, compliance has been minimal due to the lack of any penalty for non-compliance (via administrative penalty or private lawsuit) and the exclusion of companies with annual revenues under $100m. Companies have published statements on their websites, often with minimal specificity and little to no response from consumers.[46] At worst, advocates warn that the CTSCA may create a "safe harbour" for companies being sued, citing "compliance" with the law as evidence of reduced or eliminated liability.[47]

39. UK: The "Modern Slavery Act" (MSA), passed in 2015 (and adopted by Australia in 2018), is more comprehensive than the CTSCA.[48] The Act defines modern slavery as including any scenario where employees face the menace of a penalty during non-voluntary employment. The MSA did not require companies to leave problematic contracts. Rather, companies must seek – and disclose – information to consumers while addressing identified issues. The Act reacted to findings that typical contractual mechanisms, particularly "disclosure" requirements, audits, or worker hotlines, regularly failed to prevent major human rights violations. Mechanisms like these would still be used to "enable a meaningful dialogue" with suppliers, but greater oversight by UK regulators was seen as necessary to prompt more progress.[49]

40. Much like the CTSCA, however, compliance with the MSA has been mixed. The Business and Human Rights Resource Centre studied 16,000 corporate statements under the MSA from 2015 to 2020, relating the lack of any penalties against noncompliance rates of over 40%. Based on this assessment, the study recommended a reform to be carried out on § 54 MSA requiring mandatory reporting provisions and standards, also introducing legally binding obligations around failure to prevent harm, import bans on certain products, and penalties for public procurement. Each of these

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[43] Senate Bill No. 657, Chapter 556, California Transparency in Supply Chains Act, approved 30 September 2010, full text available at https://oag.ca.gov/sites/all/files/agweb/pdfs/cybersafety/sb_657_bill_ch556.pdf.

[44] See H.R. 4173, Dodd Frank Wall Street Reform and Consumer Protection Act, § 1502, 21 July 2010, see full text available at https://www.congress.gov/bill/111th-congress/house-bill/4173/text (requiring publicly traded companies to use tracing and auditing to ensure that raw minerals and materials are not associated with conflict in the Congo, further operationalised by the SEC's "Conflict Minerals Rule" in August 2012).

[45] See https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf, at (i).

[46] See Apple's 2020 report at https://www.apple.com/supplier-responsibility/pdf/Apple-Combat-Human-Trafficking-and-Slavery-in-Supply-Chain-2020.pdf (20 page document, citing compliance with the CTSCA and the UK Modern Slavery Act); Disney's 2020 report at https://thewaltdisneycompany.com/app/uploads/2019/09/Related-Policies-and-Statements.pdf (2 page document on the CTSCA, alongside 3 pages on the UK Modern Slavery Act, 1 on restricting Uzbekistan cotton due to child labour, a 2 page human rights policy statement, and 1 page conflict minerals policy); Walmart's broad disclosures at https://corporate.walmart.com/sourcing/promotingresponsibility (flagging that "primary responsibility for compliance with Walmart's Standards for Suppliers rests with the suppler" while briefly discussing issues in Bangladesh, Mexico, and Thailand).

[47] For a 2017 discussion of limitations with the CTSCA, see https://corpaccountabilitylab.org/calblog/2017/7/25/is-the-california-transparency-in-supply-chains-act-doing-more-harm-than-good.

[48] [U.K.] Modern Slavery Act 2015, https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted; see also [Australia] Modern Slavery Act 2018, https://www.legislation.gov.au/Details/C2018A00153.

[49] Anna Triponel, Demystifying the Modern Slavery Act 2015 for Corporate Lawyers, 21 May 2020, https://uk.practicallaw.thomsonreuters.com/w-025-6078?transitionType=Default&contextData=(sc.Default)&firstPage=true.

recommendations have, at least in part, been implemented in subsequent legislation in the European Union.[50]

41. France: The 2017 *Loi de Vigilance* in France covers all companies with more than 5,000 employees in France or 10,000 employees worldwide.[51] The law includes a civil duty of diligence via prevention, with redress and liability mechanisms via court order injunctions or civil suits. Companies are liable for indirectly controlled subsidiaries and for any other given commercial activity with an established business relationship.[52] The *Loi de Vigilance* includes five mandatory steps for companies: risk mapping; evaluation of supply chain; steps to mitigate risks; alert system for possible risks; and a monitoring scheme for effectiveness.

42. Commentators from the private sector lauded the *Loi de Vigilance* as pioneering because it adopted a non-static approach to identify, analyse, and map risks. It also covers more human rights abuses than the CTSCA and MSA and includes more provisions for enforcement. However, the law's structure may undermine its utility. For one, it is unclear what injunctive measures a judge would use. For another, French tort law has a high burden of proof to meet breach of obligation, damage, and causality, hence successful suits under the *Loi de Vigilance* would require proof that a due diligence plan would have prevented the harm.[53] Given this complexity, when the *Loi de Vigilance* came into effect in 2019, only 15 companies had a finalised plan, citing confusion over the legal requirements.[54] Moreover, two court cases involving Total under this law provided conflicting rulings on whether commercial or civil courts will hear these suits, adding to the lack of clarity over how the law will be enforced.[55]

43. Netherlands: In 2019, the *Wet Zorgplicht Kinderarbeid* (Child Labour Due Diligence Act) joined the growing body of legislation on human rights in Europe.[56] Like the UK's MSA, it focused on one specific area of human rights (child labour), but it adopted more coverage than the UK or French laws (encompassing any company selling to Dutch customers). The law similarly requires investigation on the presence of child labour in supply chains, public reporting, and regulatory supervision. In a development that remains unique among due diligence laws to date, the Act provides for *criminal* penalties against a responsible company director if child labour is not properly identified and corrected.[57] In addition, responding to delays in the European Union's more wide-

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[50] See UK Modern Slavery Act: Missed Opportunities and Urgent Lessons", Business and Human Rights Resource Centre (25 February 2021), https://www.business-humanrights.org/en/from-us/briefings/uk-modern-slavery-act-missed-opportunities-and-urgent-lessons/.

[51] Loi nº 2017-399, *Relative Au Devoir de Vigilance des Sociétés Mères et des Entreprises Donneuses d'Ordre* (*Loi de Vigilance*), 27 March 2017, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626.

[52] Daniel Sharma, "Human Rights Due Diligence Legislation in Europe: Implications for Supply Chains to India and South Asia", DLA Piper (26 March 2021), https://www.dlapiper.com/en/us/insights/publications/2021/03/human-rights-due-diligence-legislation-in-europe/.

[53] Canelle Lavite, The French Loi de Vigilance: Prospects and Limitations of a Pioneer Mandatory Corporate Due Diligence, *Verfassungsblog* (16 June 2020), https://verfassungsblog.de/the-french-loi-de-vigilance-prospects-and-limitations-of-a-pioneer-mandatory-corporate-due-diligence/.

[54] Thomas Lapierre et al., What if Future EU Mandatory Human Rights Due Diligence Legislation Comes to Rescue of French Corporate Duty of Vigilance Law?, International Bar Association, https://www.ibanet.org/article/0B9779EE-5105-4A43-B92E-EF4536E664F9 (citing *Application of the Vigilance Plans, Entreprises pour les Droits de l'Homme*, 14 June 2019).

[55] Cour d'Appel de Versailles, *Les Amis de La Terre France v. SA Total* (10 December 2020), https://www.amisdelaterre.org/wp-content/uploads/2020/12/decision-ca-versailles-total-ouganda.pdf (discussion at Total Uganda Case in France: the Court of Appeal of Versailles Remands the Case to the Commercial Court, *Les Amis de la Terre France* (10 Dec. 2020), https://www.amisdelaterre.org/communique-presse/total-uganda-case-in-france-the-court-of-appeal-of-versailles-refers-to-the-commercial-court/).

[56] *Wet Zorgplicht Kinderarbeid* (24 October 2019), available at https://zoek.officielebekendmakingen.nl/stb-2019-401.html.

[57] Sharma, Human Rights Due Diligence Legislation, DLA Piper.

reaching due diligence laws, the Dutch government is looking to pass national corporate due diligence legislation of its own.[58]

44. Germany: The *Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschrenrechtsverletzungen in Lieferketten – Lieferkettensorgfaltspflichtengesetz* (LkSG – Supply Chain Due Diligence Act), passed in June 2021, covers companies with at least 3,000 employees since 2023 and companies with at least 1,000 employees from 2024 onward [§ 1].[59] The Federal Government's 2016 "National Action Plan for Business and Human Rights" required a follow-up survey in 2020 on whether companies complied with non-mandatory due diligence obligations, pledging to pass binding legislation if less than 50% complied; a first round of the survey revealed compliance was at 22%, whereas a second, more highly scrutinised round, yielded a lower result of only 17%.[60] The Action Plan had been devised by the Federal Government to meet the goals of the 2011 UN Guiding Principles on Business and Human Rights,[61] in an effort to support the Principles as proposed by the UN in practice and to assign clear responsibilities for both the German State and businesses, especially when acting abroad.[62] Following the underwhelming results of the non-mandatory due diligence obligations, the Federal Government aimed at both defining a clear catalogue of obligations and instruments for reporting violations as well as penalising contraventions by way of a federal law.[63]

45. The LkSG, while clearly a compromise, nevertheless seems to be a systematic and comprehensive piece of legislation addressing many of the key issues of supply chain due diligence: at its core lies the combination of defining standardised reporting and documentation obligations businesses have to meet and a duty to act in the case of violations of certain international human rights and environmental standards.[64] The LkSG cites a lengthy catalogue of international human rights agreements, such as the ILO Worst Forms of Child Labour Convention (No. 182), as well as environmental agreements, such as the Basel Convention, predominantly as they relate back to human health [§ 2(1)-(3)], and assigns duties of care to companies falling under the scope of the law [§ 3; § 1]. The businesses' compliance is to be scrutinised and enforcement is to be conducted

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[58] Dutch minister announces national corporate due diligence legislation, Business and Human Rights (6 December 2021), https://www.business-humanrights.org/en/latest-news/dutch-minister-announces-national-corporate-due-diligence-legislation/.

[59] *Lieferkettensorgfaltspflichtengesetz* (22 July 2021), available at https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl121s2959.pdf#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl121s2959.pdf%27%5D__1634289566835; note that different sources present different estimates for how many companies will be covered, see, e.g., Karl Würz, Das Lieferkettengesetz ist verabschiedet – bereiten Sie sich vor!, available (only in German) at https://www.haufe.de/compliance/recht-politik/lieferkettengesetz-arbeitsbedingungen-in-der-lieferkette-pruefen_230132_506326.html, who estimates the first cohort to be around 600 companies, the second around 2,900 companies.

[60] National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights, 2016-2020, available in English at https://globalnaps.org/wp-content/uploads/2018/04/germany-national-action-plan-business-and-human-rights.pdf; German Parliament Passes Mandatory Human Rights Due Diligence Law, Business & Human Rights Resource Centre (16 June 2021), https://www.business-humanrights.org/en/latest-news/german-due-diligence-law/. On the positive returns in the two rounds, see Karl Würz, *Das Lieferkettengesetz ist verabschiedet – bereiten Sie sich vor!*, available (only in German) at https://www.haufe.de/compliance/recht-politik/lieferkettengesetz-arbeitsbedingungen-in-der-lieferkette-pruefen_230132_506326.html. Note that the German government when drafting the LkSG argued with an even lower compliance rate of 13 – 17% as its starting point, cf. BT-Drucks. 19/30505, p. 3, available at https://dserver.bundestag.de/btd/19/305/1930505.pdf).

[61] Available at https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

[62] National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights. 2016 – 2020, p. 4 – 6, available in English at https://www.auswaertiges-amt.de/blob/610714/fb740510e8c2fa83dc507afad0b2d7ad/nap-wirtschaft-menschenrechte-engl-data.pdf.

[63] Considerations of the German Bundestag, BT-Drucks. 19/30505, pp. 1 – 2, https://dserver.bundestag.de/btd/19/305/1930505.pdf.

[64] For commentary on the law, see https://lieferkettengesetz.de/wp-content/uploads/2021/06/Initiative-Lieferkettengesetz_Analysis_What-the-new-supply-chain-act-delivers.pdf; https://riskandcompliance.freshfields.com/post/102h27a/fast-forwarding-german-compliance-practice-the-effects-of-the-new-corporate-huma.

by the Federal Office for Economic Affairs and Export Control, which can fine companies on a sliding scale based on annual global sales [§ 19, §§ 23-24]. Those fines can be hefty, too: for very large companies (above € 400m in annual revenue), they can be 2% of the companies' average annual revenue over the past three years [§ 24(3)]. Furthermore, the government can also exclude non-compliant businesses from public procurement altogether [§ 22].

46. A major issue has, according to some commentators, not been fully clarified in the final bill:[65] While § 3(3) sentence 1 states that a violation of the duties under the law does not give rise to civil liability, § 3(3) sentence 2 maintains that civil liability independently of the LkSG remains unaffected. This might leave the door open to civil claims being brought under § 823 BGB, the Civil Code, using a violation of an obligation under the LkSG as the relevant tort/delict.[66] This view was supported by the fact that § 11, allowing individuals who deem themselves violated in one of their eminently important legal interests under the LkSG to designate domestic trade unions or NGOs to bring their claims before German civil courts, would appear to lack any practical relevance otherwise. It appears likely that ultimately the courts will have to clarify which reading of § 3(3) will prevail.

47. Initiatives in other regions: Although most legislation has been passed in the European Union, other countries have begun to enact National Action Plans with an eye to future legislation. It is important to note that regions have different priorities when it comes to major human rights abuses in the value chain. Environmental issues that impact health have assumed fairly universal importance, whereas significant variance remains with respect to issues such as the factory working conditions, child labour, and migrant worker status.

- Latin America: Latin American civil society is working on proposals for domestic legislation. Mexico, specifically, hosted the "Due Diligence and Reparation for Impacts of Business Activity" forum (2020), passed new legislation related to labour rights, and proposed a human rights due diligence law that would be the first such national law in the Americas.[67]

- Asia: The last few years have seen a rise in discussions around legislative human rights protections, but corporate compliance has focused on obligations arising from European operations as opposed to domestic legal requirements.[68] In reviewing Japan's National Action Plan (2020) and revised Corporate Governance Code (2021) and the Singapore Stock Exchange's new ESG disclosure provisions, it seems that some Asian countries may be poised to introduce similar legislation soon.[69] Legislators in the Special Administrative Region of

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[65] For a more detailed account of the following, see again Sonja Hoffmann et al., The New Corporate Due Diligence Act: Potential Liability under Civil Law and Administrative Law, White and Case (8 July 2021), https://www.whitecase.com/publications/alert/new-corporate-due-diligence-act-potential-liability-under-civil-law-and.

[66] This is also spelled out in the Green Party's comment on Amendment Request No. 2 (Liability) on 9 June 2021, the relevant provisions of which made it into the final law as drafted: "German courts could evaluate the due diligence obligations within the supply chain as safety and organisational duties pursuant to § 823 para. 1 […] and could establish tort liability for companies on this basis" (BT-Drucks. 19/30505, p. 29, available at https://dserver.bundestag.de/btd/19/305/1930505.pdf).

[67] On the *Ley General de Responsabilidad Empresarial y Debida Diligencia Corporativa*, proposed 6 October 2020 and pending in the Gaceta del Snado, see https://www.senado.gob.mx/64/gaceta_del_senado/documento/112449 with further analysis at https://ecija.com/en/sala-de-prensa/mexico-corporate-due-diligence-in-the-field-of-human-rights-the-new-challenge-for-companies/#_ftn7.

[68] See, e.g., the response of European car manufacturers to land grabs in Cambodia, https://www.business-humanrights.org/en/blog/human-rights-due-diligence-legislation-new-hope-for-victims-of-land-grabs-in-cambodia/.

[69] Discussion of business and human rights in Japan primarily by law firms and economic publishers with international clientele, see https://www.noandt.com/lp/featured/esg_01/en/ and https://asia.nikkei.com/Business/Business-trends/Japan-companies-scrutinize-human-rights-in-supply-chains.

Hong Kong have proposed human rights legislation for debate, however they recognised that a lack of domestic support would prevent ratification of this law.[70]

- Africa: Despite little legislation and fewer National Action Plans, a few countries (e.g. Kenya) have looked towards domestic solutions to human rights abuses in national and international supply chains. Laws that do exist focus more on diligence around environmental impacts and land rights (e.g. customary or indigenous rights).[71]

- Middle East: It appears that to date, no State in the region has adopted a National Action Plan, but Morocco and Jordan have discussed their intent to do so.[72]

Questions for discussion:

- *What is the global reach of due diligence laws introduced at the national level? How do the new legal obligations influence extra-territorial business activity?*
- *What are the challenges faced for the implementation of these laws?*
- *Are there commonalities in the current laws and legislative initiatives that might be considered (emerging) international standards to be considered in this project?*

3. Model clause collections

48. Whether companies are compelled to comply with mandatory obligations, or they voluntarily engage in corporate sustainability due diligence, contracting with suppliers is an integral part of the process of identification, prevention, mitigation and cessation of adverse impacts.

49. In recent years, several projects devoted to developing standard sustainability contract clauses (SCC)[73] have emerged, with the view to offer a collection of clear and enforceable contractual provisions.[74] Privately-developed SCCs often "take a catch-all or umbrella-style approach to compliance",[75] thus, more comprehensive guides serve the purpose of clarifying the scope of obligations of the parties to a contract as well as third-party rights. Overall, the projects discussed below tend to propose holistic systems of contract clauses, transposing CSDD procedures imposed by laws into the contracts.

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[70] See Part Two – Mandatory Corporate Human Rights Due Diligence: What Next? An International Perspective, Gibson Dunn (10 March 2021), https://www.gibsondunn.com/part-two-mandatory-corporate-human-rights-due-diligence-what-now-and-what-next-an-international-perspective/.

[71] See Joseph Kibugu, Is it Time for African Countries to Introduce Mandatory Corporate Due Diligence on Human Rights?, Business & Human Rights Resource Centre (29 July 2019), https://www.business-humanrights.org/en/blog/is-it-time-for-african-countries-to-introduce-mandatory-due-diligence-on-human-rights/.

[72] Noor Hamadeh, Businesses in the MENA region: What Role in Human Rights?, The Tahrir Institute for Middle East Policy (17 March 2021), https://timep.org/commentary/analysis/businesses-in-the-mena-region-what-role-in-human-rights/.

[73] K. Mitkidis. Sustainability Clauses in International Supply Chain Contracts: Regulation, Enforceability and Effects of Ethical Requirements, Nordic Journal of Commercial Law 1 (2014).

[74] V. Ulfbeck, O. Hansen, Sustainability Clauses in an Unsustainable Contract Law? CEPRI Studies on Private Governance 6 (2022).

[75] E. Hay, ESG Clauses and Disputes Risks. https://arbitrationblog.kluwerarbitration.com/2022/12/11/esg-clauses-and-dispute-risks.

50. American Bar Association (ABA) Model Contract Clauses 2.0. The ABA Working Group developed the first set of contract clauses (MCC 1.0) in 2018,[76] and released the most current version (MCC 2.0) in 2021.[77] The Model Clauses seek to incorporate the process of CSDD into contracts, including the obligations to establish a monitoring procedure, to disclose relevant information and to investigate suspicious cases, as well as a grievance and dispute resolution mechanism. Among the novelties of the MCC are the notions of "zero tolerance activity", "nonconforming goods" and "responsible exit". Revisions focused on shifting the paradigm from the assumption that only suppliers violate human rights to mutual party responsibilities, reflecting that buyer purchasing practices (timing, pricing, changes) can also exacerbate working conditions. Accordingly, the clauses in MCC 2.0 do not attribute responsibility to suppliers but create reciprocal obligations on the part of the buyer and the supplier. The Model Clauses have also shifted from "a regime of representations and warranties" towards "a regime of human rights due diligence", responding in part to evolving EU laws and in part to stakeholder needs. In making these changes, the Model Clauses have retained a "fully modular approach" to allow countries to "choose the commitments that best reflect their positions, their goals, and their sector of activity".

51. European Model Clauses (EMC). At European level, a recognised collection of model clauses does not exist yet. However, there is an ongoing project coordinated by the Erasmus University Rotterdam[78] to develop the European Model Clauses for Supply Chains.[79] The existing third draft recognises that currently developed contractual practices "have frequently proven ineffective" and need to be balanced to account for the difference in "bargaining power [resulting] in one-sided contractual clauses imposed by the most powerful party (generally the buyer) onto the weaker one (generally the supplier)".[80] The EMC project recognises the issue of responsibility shifting up the chain via the use of representations and warranties, as well as the use of contract termination as a tool to prevent CSDD liability, a practice which does not serve to advance sustainability interests. Building on the MCC 2.0, the EMC propose seven model articles with commentaries thereto, envisaged to be implemented in contracts governed by the law of EU Member States. As such, the project seeks to provide for compliance with all existing domestic laws on CSDD.

52. Privately developed SCCs. Other contract clauses include the variety of model clauses developed by The Chancery Lane Project,[81] as well as the Supplier Model Contract Clauses developed by the Responsible Contracting Project[82] in cooperation with Linklaters, the Sustainable Terms of Trade Initiative and the German GIZ. Both initiatives concentrate on the cooperative approach, preferring mitigation measures and remediation plans over responsibility-shifting to the supplier side. This echoes the comprehensive nature of a value chain contract and demonstrates that even occasional sustainability and human rights-related breaches are not by definition a ground for contract termination. Rather, the expectation from the buyer is to, where possible, assist and cooperate with the supplier in order to mitigate the adverse impact.[83]

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[76] D. Snyder, S. Maslow, Human Rights Protections in International Supply Chains—Protecting Workers and Managing Company Risk: 2018 Report and Model Contract Clauses from the Working Group to Draft Human Rights Protections in International Supply Contracts. Business Law (73) 2018.

[77] American Bar Association. Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0, https://www.americanbar.org/content/dam/aba/administrative/human_rights/contractual-clauses-project/mccs-full-report.pdf.

[78] Erasmus University Rotterdam, Consultation European Model Clauses for Supply Chains Project, https://www.eur.nl/en/esl/events/consultation-european-model-clauses-supply-chains-project-2023-10-23.

[79] European Model Clauses, third draft, https://www.eur.nl/en/esl/media/2023-10-european-model-clauses-supply-chains.

[80] Id., §1.

[81] The Chancery Lane Project, Toolkit, https://chancerylaneproject.org/toolkit/.

[82] Responsible Contracting. Supplier Model Contract Clauses 1.0, https://www.responsiblecontracting.org/_files/ugd/fcee10_b277e766daaf4e85bd7645f6b657009d.pdf.

[83] Illustrative in this regard is the title of the Model Contract Clause 2 of the SMCs: "Shared Responsibility to Carry Out Human Rights and Environmental Due Diligence".

53. Indeed, enterprises have developed their own sustainability contractual clauses in-house (often criticised for pushing responsibility upstream). Potentially, the future UNIDROIT Working Group might deem it necessary to conduct a data collection exercise, collecting examples of such clauses, to have a broad overview of the current practice.

Questions for discussion:

- *Are there further model clause collections or similar initiatives that should be taken into consideration for the CSDD project?*
- *Do the current MCC, EMC and SCC present common features?*
- *What is the current business practice for drafting sustainability due diligence clauses? What guidance and/or reference clauses are used by businesses for drafting sustainability due diligence clauses?*
- *Would a broader data collection of in-house sustainability contractual clauses be useful as a basis for the development of this project?*
- *What would be this project's added value to the existing model clause collections if it were to develop model clauses? What are the gaps and weaknesses of the existing model clause collections?*
- *How can supply contracts with business partners incorporate environmental and human rights concerns?*

C. Content of the future instrument: issues for discussion

54. As consistent with UNIDROIT's practice, the form of the future instrument to be developed shall be defined by the future Working Group following the result of the exploratory work. The UNIDROIT Governing Council has expressed an initial preference for the project to focus on the development of a compliance guide with model clauses.

55. On this basis, the proposed topics below aim to provide a non-exhaustive list of issues that are relevant for consideration and may potentially become the content of the guidance document. The list might evolve over time. Presently, the topics are as follows. First, the experts are invited to discuss key definitions (Section 1). Second, the experts may wish to consider the interrelation between the UPICC and CSDD (Section 2). In this respect, the approach taken in the UPICC commentary, with illustrations serving as examples of the application of the Principles, may be replicated in a future guidance document. Third, the guidance document may include a section on contractual clauses that are not addressed in the UPICC, thus specially tailored to CSDD in GVC contracts (Section 3). The difference between Sections b and c is that the latter concentrates on the CSDD contractual provisions, facilitating full realisation of goals of the legislative instruments, and the former concerns the implications of such clauses on general contract law. Lastly, the experts are invited to consider the issue of enforcement (Section 4), including the provisions on jurisdiction, damages and third-party rights.

1. Definitions

56. There is currently a terminological variety stemming from multiple sustainability-related projects. To begin with, there is a terminological confusion between "sustainability" and

"Environmental, Social and Governance" or "ESG". Often used by various businesses for promotional purposes and interchangeably, these terms need to be distinguished and clearly defined for the purposes of developing a legally-enforceable set of contract principles and clauses, to facilitate mutually transparent and reasonable expectations between the parties.

57. According to the United Nations definition, sustainability is "meeting the needs of the present without compromising the ability of future generations to meet their own needs".[84] "Sustainable" in international law is seen to "combine three principal chapters of international law: […] international environmental law, […] international economic law, especially as far as it relates to development and […] human rights law".[85]

58. In turn, ESG is a more recent concept and, according to one view, serves as a "popular substitute" to sustainability, called upon to reflect the widened character of the initially environmentally-leaning[86] term. Other authors hold that ESG is not a radically new concept, but has "largely replaced […] the idea of corporate social responsibility".[87]

59. Accordingly, the future guidance document might offer a separate section on definitions, in order to provide more clarity to the parties as to the precise scope of their sustainability-related obligations, specifically to avoid complications related to interpretation in case of dispute resolution. Given the variety of possible interpretations of "sustainability", "due diligence", "ESG" and the like, recourse, for example, to the standard of "reasonable persons"[88] may not yield the desired outcome.

60. The delimitation of the concept of a "value chain contract" in relation to the general concept of an international commercial contract might also be worth including in the definitions section, as it may help narrow down the categories of contracts the document would cover. In addition, it may be worth providing model definitions for the possible beneficiaries of value chain contracts, including "the Buyer", "the Supplier" and "the Third-Party Stakeholder".

61. Such definitions may be conveyed solely as UNIDROIT interpretative guidance, or a more prescriptive model provision on definitions, to be further implemented in contracts. It is noted that developing agreed definitions might turn out to be more demanding than it may seem, especially given the impact that the interpretation of the relevant terms has on contractual obligations, as illustrated in the definitions section of the EMCs. Although the EMC project strives to provide legal clarity in contracts and overcome the hurdles of potential debate due to vagueness in sustainability due diligence obligations, the definitions provided do not entirely reach this goal. "Severe adverse impact" is, for instance, defined as "having a big impact by its nature", and "living wage" is determined using a "reputable benchmark".[89] Barring further effort by the parties to a contract to clarify the definitions (e.g., by defining which "reputable benchmark" they intend to use),[90] a plethora of convincing interpretations can be provided by either side, eventually frustrating the initial goal of increasing clarity in GVC contracts. Accordingly, the UNIDROIT guidance document may not attempt to comprehensively define all terms related to GVCs, especially broad notions of "sustainability" or

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84 UN Academic Impact, https://www.un.org/en/academic-impact/sustainability.

85 N. Schrijver, The Rise of Sustainable Development in International Investment Law in P. Quayle (ed.) The Role of International Administrative Law at International Organizations. Brill (2020), p. 298.

86 Brundtland report, § 48: "The concept of sustainable development provides a framework for the integration of environment policies", https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf.

87 D. Lund, E. Pollman, The Corporate Governance Machine, Columbia Law Review 121(8) 2021, p. 2566.

88 UPICC 2016, Chapter 4.

89 EMC, Definitions.

90 As regards living wage in particular, there exist multiple methods of calculating it, and it is impossible to set a single number, as living wage is always country-specific. In publications of global labour NGOs, the preferred method is the "Anker methodology". See more at https://files.fairtrade.net/standards/GLWC_Anker_Methodology.pdf.

"ESG". Rather, the instrument may focus on providing concise and legally-oriented definitions of more particular concepts such as the "third-party stakeholder" or "adverse impact".

Questions for discussion:

- *Which terms should be defined in the future guidance document? Which terms merit specific attention?*
- *Should the definitions section be narrowly conceived as used in the document itself, or can it be a self-standing recommendation of definitions to be used by parties to GVC contracts?*

2. The UPICC and CSDD

62. The UPICC are one of the most recognised international instruments that provide guidance on the principles and rules applicable to international commercial contracts, and a reading of the Principles to advance the promotion of sustainability purposes should naturally be supported. Some of the Principles that may potentially be commented in light of their applicability in GVCs include Articles 1.8 (inconsistent behaviour), 2.2.1 (agency), 4.3 (interpretation via relevant circumstances) 5.1.4 (duty to achieve a specific result, duty of best efforts), 5.1.5 (determination of kind of duty involved), 5.1.6 (reasonable quality of performance), and 7.3.1 (termination).[91]

63. It is specifically noted that one of the strengths of the UPICC, often lauded by the practitioners, are the illustrations provided in the commentary. By providing hypothetical examples based on anonymised legal practice, the UPICC set a standard of clarity. It is seen as advisable that the guidance document, whatever its final form may be, adheres to this practice of supplying legal texts with examples of its commercial usage. These illustrations are even more relevant for the CSDD project, given the novelty of the issue and the complexity of value chains.

64. *Article 1.8 – Inconsistent behaviour.* The interpretation of this principle allows for the introduction of the broad scope of pre-contractual issues. Potentially, whether adherence of one of the parties to a code of conduct already creates an expectation (expected behaviour), which can further be a ground for an estoppel claim, can be explored.

65. *Article 2.2.1 – Agency*. According to Chapter 2, Section 2 of the UPICC, an agent may create a legal relationship between the principal and a third party. Pursuant to its Article 2.2.2, the agency may be implied. In the context of GVCs, the agency may be construed as a link binding the Buyer, the Seller and the sub-supplier. It may be worth exploring whether there is any merit in studying the potential link between the sustainability obligations existing between the Buyer and the sub-supplier on the grounds of agency. The references to the agency in GVCs can be found, for example, in the 2018 Accord on Fire and Building Safety in Bangladesh (expired in 2021), which explicitly provided that "the agreement covers all suppliers producing for the signatory companies. In the event that agents or other intermediaries are part of the signatory's business model, the signatory is responsible to assure that these intermediaries support the signatory's efforts to fulfil the obligations of this Agreement, independent of whether the intermediaries have signed this Agreement or not".[92]

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[91] Ekaterina Pannebakker, Sustainable Development Clauses in International Contracts Through the Lens of the UNIDROIT Principles, https://www.unidroit.org/wp-content/uploads/2023/08/1st-position_E.S.-Pannebakker.pdf.

[92] 2018 Accord on Fire and Building Safety in Bangladesh, Scope, available at https://docs.pca-cpa.org/2016/02/2018-Accord-full-text.pdf.

66. *Article 4.3 – Relevant circumstances for interpretation*. *Nature and purpose of the contract.* Article 4.3 of the UPICC provides a non-exhaustive list of six circumstances that need to be considered when interpreting a commercial contract. Out of those, point (d), the nature and purpose of the contract, is of interest for the present project. The official UPICC Commentary is silent on point (d), allowing for a variety of understandings, which boil down to asking "what do the parties in transactions such as the one in question typically intend to achieve".[93] In GVC contracts, the nature and purpose may play a role more considerable than that in regular commercial contracts, as the nature of the contract is different. Moreover, it may be argued that by including CSDD or other sustainability-related provisions, the parties to a contract intend to achieve a different result from that of a regular commercial deal. Thus, UPICC Article 4.3 allows for discussion of a specific nature of GVC contracts.

67. *Article 5.1.4 – Duty to achieve a specific result. Duty of best efforts, combined with Article 5.1.5 – Determination of kind of duty involved.* It is often too prematurely concluded that, unless stated otherwise, ESG obligations are best efforts duties. A further study of CSDD provisions in real contracts may help understand the way parties to contracts shape their obligations. In the context of this item for discussion, a separate model clause providing for the duty to achieve a specific result may also be contemplated. For example, a model clause providing for the usage of a quantifiable benchmark may be developed.[94] Yet, terminological issues step in again. It might be argued that, by definition, CSDD is the duty of best efforts, and the duty to achieve a specific result is conceptually incompatible with the CSDD. Moreover, the soft law framework, such as the UN Guiding Principles or the OECD Guidelines, focus on respect for human rights, implying the duty of best efforts. Again, given the variety of ESG and CSDD clauses, it is not necessarily that they all belong strictly to "best efforts" or "specific result". Rather, there is a margin for interpretation, which might not be welcome and could be clarified in the guidance document. Another question that may potentially be addressed is the difference between a duty of best of efforts and a merely declarative statement, not intended to create legal consequences. It is common for CSR and CSDD provisions to employ language like "the Parties should strive". If the supply chain contract makes a reference to an external instrument, like a code of conduct, which, in turn, employs "soft" language, it can be well argued that no precise obligation, even of a "best efforts" nature, was created.

68. *Article 5.1.6 – Determination of the quality of performance.* Unless the expected quality of performance is stipulated in the contract, it is measured against the "average in the circumstances". Given the rise of sustainability, it is not inconceivable that the determination of quality may also include the average approach to CSDD. It is noted that the UPICC commentary to Article 5.1.6 is short, and does not include a determination of what exactly the "performance" is, thus, allowing for a broader interpretation. In the supply of goods, it may be argued that performance relates not only to the quality of a given good as such, but also to all other connected circumstances, including responsible sourcing and production. The application of this Article is also relevant to the issue of rejection of goods for failure to avoid adverse environment and human rights effects, though whether the contribution by the Seller (Supplier) is relevant in this respect is debatable. For example, the EMCs provide that nonconforming goods can be rejected only if the Supplier has contributed to the adverse effect.[95]

69. *Article 7.3.1 – Right to terminate the contract.* According to Article 7.3.1, the right to terminate the contract emerges in case of fundamental non-performance by a counterparty. All of the existing model clauses, as well as the EU CSDDD proposal, strongly advise against terminating in case of an ESG breach.[96] It is stated that GVC contracts are complex structures, and, if the

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93 S. Vogenauer, Commentary on the UNIDROIT Principles of International Commercial Contracts, 2nd ed., OUP 2015, p. 675.

94 Id., § 3.3.

95 EMCs, Art. 3.

96 See the overview in Section I(C), above.

promotion of sustainability interests were part of its rationale, terminating a contract (usually meaning that the Buyer refrains from further dealing with the Seller) would not contribute positively to the human rights situation. Under the UPICC lens, such reasoning means that due diligence is generally not a fundamental contract provision. Another consideration might be that it is indeed fundamental, but GVC contracts are different from purely commercial international contracts, thus, Article 7.3.1 UPICC is not fully applicable. In any event, this interrelation is likely to be the subject of discussion by the future Working Group and will likely be reflected in the guidance document as one of the key points.

Questions for discussion:

- *Could the aforementioned Articles of the UPICC be commented as proposed in light of their applicability in GVCs? Would they need additional commentary and elaboration to clarify the way they would apply in the context of CSDD?*
- *Are there further Articles of the UPICC than those addressed above that may potentially be commented in light of their applicability in GVCs? Participants are invited to elaborate.*

3. Contractual clauses not covered by the UPICC

70. Contractual clauses on CSDD with respect to the value chain are becoming increasingly widespread, mostly found in model contract clauses of transnational companies. Another significant corporate instrument is the code of conduct, which, via contractual reference, may be incorporated into the legal relationship of the value chain participants. There appears to be a general understanding that for all of the specific CSDD obligations, the size of the business plays a crucial role regarding the scope of obligation. The rationale behind this approach is that small and medium-sized enterprises (SMEs) do not have sufficient resources and negotiating power to fully control the value chain as downstream agents. Again, this illustrates that GVC contracts are not purely commercial, but have a strong private regulatory element.

71. Potential contractual clauses include the following: declarative standards; general CSDD obligations; disclosure requirements and the right to audit; references to codes of conduct and internal policies; an obligation to implement standards, benchmarks and environmental management systems; and a "perpetual clause". Each of these clauses is briefly explained below. A separate section is devoted to the possibility of developing sector-specific clauses.

72. *Declarative standards.* Often, a contract only makes a general reference to ESG or sustainability (e.g., "The Principal expects the Contractor to adhere to the ESG Standards"[97]). Such drafting exposes the parties to the risk of an interpretative dispute[98] whether there indeed was a negotiated legally binding commitment; if so, what was the expected "adherence" and what precisely is the scope of "ESG Standards". This item also covers representations and warranties made by the parties regarding their CSDD processes. This regime is denounced as a "checkbox" approach in both MCC 2.0 and the EMCs, and the common approach appears to establish a system of coherent and enforceable CSDD obligations.

73. *General CSDD obligation.* Given the rise in CSDD legislation, it seems inevitable that the obligation to conduct due diligence in respect of the environment and human rights will be transposed

[97] BASF Poland, General Conditions of Purchase, https://www.basf.com/global/documents/en/about-us/suppliers-and-partners/download-center/BASFGroupDenmark_GeneralConditionsofPurchase_EN.pdf.

[98] Loyens & Loyeff, Enforcing ESG Obligations in Supply Contracts, https://www.loyensloeff.com/insights/news--events/news/enforcing-esg-obligation-in-supply-contracts/.

into contracts. The key aspect of this provision is mutuality. By agreeing on the modalities of the general CSDD obligation, parties to a contract develop an equilibrium of duties, that may strike a balance between the Buyer's commitment to assist the Seller in conducting due diligence and shifting responsibility upstream. The general CSDD obligation may also include provisions on compliance cooperation, sustainable pricing, and responsible exit. Disinvestment and termination of the contract may have a sudden deteriorating impact on the human rights situation, especially on labour rights.[99] Thus, providing for an extended period of exit, notifications and consultations, and other sustainable measures is needed to respect human rights obligations. The extent to which the guidance document should propose a concrete and structured CSDD obligation will need to be considered carefully. In certain countries, such as France, the duty of due diligence is sophisticated, meaning that GVC contracts under French law will inevitably require local expertise and elaboration beyond the requirements of other domestic laws. In this light, the formulation of the general CSDD obligation in the future guidance document may be designed as a potential minimum standard for the parties to adhere to, subject to the requirements of domestic legislation.

74. *Disclosure requirements and the right to audit.* This duty may be seen either as a part of the general CSDD obligation, or a separate supplement to it. The parties to a GVC contract may elect to develop the disclosure and audit requirement as a self-standing clause with particular types of required data and enumerated timeframes, including the right to audit all records upon reasonable notice.

75. *References to codes of conduct and internal policies.* The notion of a "code of conduct" is twofold. Some enterprises refer to codes of conduct as voluntary statement of whether they commit to minimum corporate social responsibility.[100] Thus, this type of code of conduct is an internalised one, concentrating on the business itself. The second type is the supplier code of conduct, whereby a chain leader expresses the requirements that it expects its supplier to adhere to.[101] This type of code of conduct is thus externalised, aimed at companies other than the author of the code. Conceptually close to declarative standards, codes of conduct can be contractualised.[102] A standalone code of conduct may be seen as causing legal consequences similar to those described in the paragraph on declarative standards. A contractualised code of conduct, however, is legally enforceable. In a GVC, a code of conduct may either be expressly stipulated into a contract, included as a reference, signed as a separate side-document, or be implied without an explicit mention.[103] Potentially, all of these models entail different legal consequences, varying from direct applicability to lack of legal force.

76. *References to standards and environmental management systems.* In a similar legal technique as with codes of conduct described above, by including a contractual reference, the parties can elect a regulatory standard to be applicable to their supply chain relationship. However, while a reference to a code of conduct may be regarded as declarative and unenforceable, or entailing at

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[99] See generally ACT Responsible Exit Policy and Checklist, https://actonlivingwages.com/app/uploads/2022/06/ACT_Fact-Sheets_ACT-Responsible-Exit-Policy_FA.pdf and Global Impact Investing Network. Lasting Impact: The Need for Responsible Exits, https://thegiin.org/research/publication/responsible-exits/.

[100] For example, the codes of conduct of Guyson (https://www.guyson.co.uk/sustainability) or GS-Yuasa (https://www.gs-yuasa.com/en/csr/policy.php).

[101] For example, Terna (https://portaleacquisti.terna.it/esop/ter-host/public/web-en/attach/principles-of-conduct.pdf), Eni (https://www.eni.com/assets/documents/eng/just-transition/supplier-code-of-conduct-march-2020.pdf), McKinsey (https://www.mckinsey.com/~/media/mckinsey/about%20us/social%20responsibility/supplier%20standards/supplier-code-of-conduct-english-march-2023.pdf).

[102] A. Millington, Responsibility in the Supply Chain in A. Crane et al. (eds), The Oxford Handbook of Corporate Social Responsibility, OUP, 2008, p. 365.

[103] V. Ulbeck, O. Hansen, A. Andhov, Contractual Enforcement of CSR Clauses and the Protection of Weak Parties in V. Ulbeck, A. Andhov, K. Mitkidis, Supply Chain in Law and Responsible Supply Chain Management, Routledge, 2019, p. 49.

maximum the duty of best efforts,[104] standards, benchmarks and environmental management systems (EMS) may all be used to provide for a specific quantifiable and enforceable result. The future Working Group might consider whether it recommends particular standards, benchmarks and EMSs, or whether this should be left entirely for the parties to select.

77. *"Perpetual clause".* A "perpetual clause" would require any sub-suppliers of the Seller to adhere to the human rights standards that are applicable in the main relationship between the Buyer and the immediate seller.[105] Not a substantive provision itself, the perpetual clause transposes the Buyer's standards up the chain. It is noted that such a clause requires a significant amount of transparency in terms of applicable obligations for its adequate operation.

78. *Sector-specific clauses.* Given that sustainability concerns differ between sectors, the future Working Group might consider developing addendums only applicable to specific industries, including but not limited to agriculture, textiles, and mining.

Questions for discussion:

- *Do the experts agree that contractual clauses as addressed above should be considered for inclusion in the future guidance document?*
- *Are there further clauses that should be considered for inclusion?*
- *Do the experts see it appropriate to further research the taxonomy of sustainability contractual clauses used by enterprises, in order to develop guidance on their application and, potentially, a set of model clauses?*

4. CSDD and enforcement

79. Unlike Sections a – c above, which concentrated on substantive issues, this Section addresses procedure and enforcement. It is split into two subsections – third-party rights and obligations, and dispute resolution and grievance mechanisms. The former focusses on the rights of non-parties to a GVC contract; the latter addresses the choice of forum and applicable law, by both parties to a contract and third parties.

80. A stakeholder may claim damages either in contract or in tort.[106] While it is for the future Working Group to decide on the precise scope of the guidance document, it is noted that the possibility of covering tort liability is a complex, multi-faceted issue, highly dependent on the legislative frameworks and the rulings of domestic courts. Indeed, many sustainability-related issues may arise not only as a matter of contractual, but also of tort liability. Naturally, the UPICC only address the contract law aspects, whereas the Working Group may also decide to study tort liability in relation to the CSDD.

Third-party rights

81. As outlined in Section II(A) above, GVC contracts are seen to be different in their nature from other international commercial contracts. Traditional commercial contracts are usually not intended

[104] See Section 1, above.

[105] A.L. Vytopil, Contractual Control and Labour-Related CSR Norms in the Supply Chain: Dutch Best Practices, 8 Utrecht Law Review 122 (January 2012).

[106] See generally, T.C. Hartley, International Commercial Litigation: Text, Cases and Materials on Private International Law, CUP (2015), p. 303.

to create rights and obligations for third parties and, in the absence of a clear agreement to the contrary, to confer them with any rights: a doctrine known as the "privity of contract". However, as explained in the comment on UPICC Article 5.2.1, party autonomy allows the parties to expressly or implicitly agree to create rights for a third party. Value chain contracts that mention CSDD may be seen as containing clauses favouring third-party rights,[107] which are included to protect stakeholder interests instead of those party to the contract. Moreover, commentators noted that the seller-buyer "regulatory aspect of private law contracting is well known",[108] and it is precisely the issue of third-party rights that needs further specification.

82. The determination of third-party rights depends on the common intent of the parties to the contract. Regarding the CSDD, the contractual reference alone to due diligence obligations, ESG standards, and corporate sustainability compliance may potentially be interpreted as an agreement to grant enforceable rights to the beneficiaries of corporate due diligence.

83. It is customary for a GVC to have multiple sub-sellers and sub-sub-sellers, thus forming a cascade. Yet, the buyer-seller contract is only valid between these two parties, and is not binding upon potential sub-sellers, thus hindering the regulatory effect of the GVC contract. Hence, two different groups of third-parties can be identified: either intra-GVC contract or extra-GVC contract.[109] The first are parties to the same GVC, who potentially rely on the representations made by the parties downstream, seeking enforcement down to suppliers and sub-sellers. The second are other stakeholders, usually labourers or the local population in places of production, harmed by adverse impacts. It is the latter who are, effectively, the beneficiaries of the CSDD.[110]

84. According to Article 5.2.1 of the UPICC, "[t]he parties (the "promisor" and the "promisee") may confer a right on a third party (the "beneficiary") by express or implied agreement."[111] The recognition of the implied agreement is crucial in the context of GVC contracts, as scarcely any corporate instrument or contract expressly states that adherence to the CSR standards should amount to a right conferred to a third party.

85. The claim that a mention of standards in a contract gives any rights to extra-GVC contract stakeholders, however, remains problematic. First, there is a difference between a benefit and a conferred right: "the mere fact that a third party will benefit from the performance of the contract does not in itself give that third party any rights under the contract".[112] It can be argued, *a contrario*, that should the parties to a GVC contract have wanted to give an enforceable right to anyone, they could have mentioned it in the contract. Second, as Article 5.2.2 of the UPICC provides, "the beneficiary must be identifiable".[113] It may be argued that a mere reference to sustainability standards and guidelines is not sufficient to satisfy the identifiability requirement. Nevertheless, for instance, a GVC contract referring to the ILO standards or conventions, and including a commitment of the parties to adhere to them, may be seen as identifying the employees of the Supplier as the third party to the contract. It is noted that the third party can be identified as a "member of a

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107 For example, a contract providing for a labour protection standard may be seen as giving standing for a non-compliance claim by the workers.

108 P. Verbruggen, Regulatory Governance by Contract: The Rise of Regulatory Standards in Commercial Contracts, https://pure.uvt.nl/ws/files/17144423/Verbruggen_2014_Regulatory_governance_by_contract_the_rise_of_regulatory_standards_in_commercial_contracts.pdf.

109 K. McCall-Smith, A. Rühmkorf. From International Law to National Law: The Opportunities and Limits of Contractual CSR Supply Chain Governance in in V. Ulbeck, A. Andhov, K. Mitkidis. Supply Chain in Law and Responsible Supply Chain Management, Routledge, 2019, p. 34.

110 See, for example, recitals 5-10 to the EU CSDDD proposal, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0071.

111 UPICC Art. 5.2.1.

112 UPICC Official Commentary, Art. 5.2.1.

113 UPICC Art. 5.2.1.

class".[114] When Section 5.2 of the UPICC was drafted, it was mentioned specifically that "third parties cannot routinely enforce contracts".[115] Read in the context of an implied right, it does not favour equating a reference to a code of conduct or a sustainability standard to a conferred right. Indeed, this reading was upheld in the *Wal-Mart* case[116] in the United States, where the workers failed to establish the existence of a right conferred to them by a code of conduct. The court reasoned that the benefit provided to the workers was incidental,[117] and the direct beneficiaries were the parties to the contract only. However, even if the parties intended the code of conduct to create third-party benefit, the lack of consideration may be an impediment in the establishment of a right.

86. To conclude, there are two types of potential third-party right bearers: the ones who participate in the contractual chains, and the ones who do not. Legal issues pertaining to each group are different, and accordingly there is merit to studying them separately, if this issue is elected for inclusion in the guidance document.

Questions for discussion:

- *Do the experts agree that the extent to which a third party may have enforceable rights under a GVC contract should be investigated?*
- *If so, might it be that a contractual sustainability obligation demonstrates the intent of the parties to grant rights to third parties?*
- *Do the experts see it fit to further investigate the issue of the privity of contract in respect of contractual cascades?*
- *According to the experts, should the issue of GVC tort liability be studied in this project and covered in the guidance document?*
- *Are there any issues to be added to those analysed above for study in this project?*

Dispute resolution and grievance mechanisms

87. This sub-section addresses dispute resolution and grievance mechanisms, both relating to access to justice by the affected stakeholders. The former covers choice of law and forum, and the latter the potential grievance mechanisms embedded into GVC contracts. Dispute resolution differs from grievance mechanisms in that the latter are non-State-based, effectively underlining the governance role of the "chain leader", which is responsible not only for supervision and due diligence, but also for conflict resolution. However, the two mechanisms are not mutually exclusive. Indeed, grievance mechanisms as a means of pre-trial dispute mitigation come first, but may, if necessary, be complemented by arbitration or litigation.

88. As regards grievance mechanisms, the UNIDROIT/IFAD Legal Guide on Agricultural Land Investment Contracts (ALIC Guide) provides for a nuanced division. According to the Guide, grievance mechanisms can be State-linked, providing a less formal setting "[i]n situations where a

114 S. Vogenauer, Commentary on the UNIDROIT Principles of International Commercial Contracts, 2nd ed. OUP 2015, p. 675.

115 UNIDROIT Study L – WP.5. 2000, https://www.unidroit.org/english/documents/2000/study50/s-50-wp05-e.pdf, para. 99.1.

116 Doe v. Wal-Mart Stores, Inc., 572 F.3d 677 (9th Cir. 2009).

117 J. Philips, S.-J. Lim, Their Brothers' Keeper: Global Buyers and the Legal Duty to Protect Suppliers' Employees. Rutgers University Law Review 61(2), 2009.

judicial remedy may be excessive or culturally inappropriate";[118] investor-linked, administered by the company; stakeholder, providing for a more diverse participation and forum; or third-party monitored, ensuring even greater neutrality.

89. Principle 28 of the UN Guiding Principles provides that "States should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms", and the initiatives on model clauses seek to follow this approach. For example, the ABA MC 2.0 provide that "Supplier shall maintain an adequately funded and governed non-judicial Operational-Level Grievance Mechanism (OLGM) in order to effectively address, prevent, and remedy any adverse human rights impacts that may occur in connection with this Agreement. Supplier shall ensure that the OLGM is legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and based on engagement and dialogue with affected stakeholders, including workers. […] Supplier shall demonstrate that the OLGM is functioning by providing […] written reports to Buyer on the OLGM's activities, describing, at a minimum, the number of grievances received and processed over the reporting period, documentary evidence of consultations with affected stakeholders, and all actions taken to address such grievances".[119] The UNIDROIT/IFAD ALIC Guide provides an overview of such a grievance mechanism (paras. 7.17 – 7.19). The guidance document on CSDD could potentially contribute further to the discussion, providing more examples of grievance mechanism best practices. For example, the Supplier-centered approach of ABA's MC 2.0 may be criticised as shifting the responsibility to maintain a grievance mechanism onto the Supplier, instead of a typically stronger and more resourceful Buyer.

90. Unlike grievance mechanisms, dispute resolution clauses are not specifically tailored to the CSDD. Accordingly, the future guidance document could provide choice of law and choice of forum recommendations, as well as more general guidance on choosing between contentious (arbitration/litigation) and non-contentious (mediation/negotiation) means of dispute resolution.[120] Nevertheless, there are certain issues that pertain specifically to the CSDD. Indeed, it was noted that "[human rights disputes involving business] often occur in regions where official national courts are dysfunctional, corrupt, politically influenced or simply unqualified".[121]

91. Of particular relevance and importance are the 2019 Hague Rules on Business and Human Rights Arbitration,[122] which are based on the 2013 edition of the UNCITRAL Arbitration Rules. In particular, the Hague Rules provide solutions for third-party participation[123] and effective access to remedy.[124] Although the future guidance document may refer to the Hague Rules as the recommended procedural rules, the particularities of dispute resolution procedures seem to be beyond the mandate of the present project.

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118 UNIDROIT/IFAD Agricultural Land Investment Contracts Guide, Art. 7.12.

119 ABA MC 2.0, p. 22.

120 For reference, see Chapter 7(II) of the ALIC Guide.

121 C. Cronstedt, J. Eijsbouts, R. C. Thompson, International Business and Human Rights Arbitration, https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf.

122 2019 Hague Rules on Business and Human Rights Arbitration, https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf.

123 Art. 19(2): "The arbitral tribunal may allow one or more third persons to join in the arbitration as a party provided such person is a party to or a third party beneficiary of the underlying legal instrument that includes the relevant arbitration agreement, unless, after giving all parties and the person or persons to be joined the opportunity to be heard, the arbitral tribunal finds that joinder should not be permitted. Third persons so joined shall become parties to the arbitration agreement for the purposes of the arbitration. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration".

124 Art. 28(1): "After consultation with the parties, the arbitral tribunal may invite or allow a person or entity that is not a party ("third person(s)") to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute."

92. Nevertheless, the future Working Group may study the possibility of developing a hybrid dispute resolution clause, that gives the parties to a GVC contract different procedural options. For example, the Seller may be given a broader choice of possible dispute forums.

Questions for discussion:

- *In the opinion of the experts, and in light of the already existing projects, should the CSDD guidance document cover dispute resolution? If yes, to what extent?*
- *In addition to the issues addressed under this Section C, "Content of the future instrument: issues for discussion", what further issues should be considered for inclusion in the future compliance guidance document?*

D. Additional issues that could be included in a legislative guidance instrument

93. This Section sets out additional issues that could be included in a legislative guidance instrument. It outlines a non-exhaustive set of core elements that are relevant for consideration and may potentially become the content of a legislative guidance instrument should the future Working Group decide to provide (also) legislative guidance on CSDD. These core elements are extracted through a comparative review of national legislation on the topic and include the following: scope of control, obligations, extent of harm, liability, and choice of law.

1. Scope of control

94. Once a company is required to comply with the law on CSDD, the question of which subcontractors or supply chain partners fall within the parent company's sphere of influence arises. The scope of control impacts each aspect of the law, from required reporting and mitigation to liability for harms caused by subcontractors.[125] This definition of "control" invariably includes directly held sub-entities (e.g. subsidiaries). Key questions remain over the reach of responsibility for partners further down the supply chain and whether extent of responsibility is reduced with less direct control.[126]

2. Obligations

95. The CSDD laws typically establish reporting and documentation obligations businesses have to meet and a duty to act in case of violations of certain international human rights and environmental standards. With regard to the duties of care assigned to companies falling under their scope, laws may require, for instance, the installation of a risk management system, the assignment of internal compliance divisions, a regular risk assessment process, as well as remedial action in case of

[125] An early application of the German Act will likely involve accusations of human rights violations by five South African citrus farms that sold their products to German retailers. See https://www.business-humanrights.org/en/latest-news/report-exposes-human-rights-violations-in-south-african-citrus-supply-chains/ and https://www.freshplaza.com/article/9330241/citrus-sector-becomes-test-case-for-supply-chain-law/. Likewise, litigation against Shell in the UK has found that the scope of control extends to subsidiaries operating in Nigeria. See https://www.nytimes.com/2021/02/12/business/shell-oil-spills-nigeria-lawsuit-britain.html.

[126] The draft European Union Directive, as of February 2021, referred to the "value chain" as opposed to "supply chain" to set a particularly broad scope for coverage including direct or indirect, upstream or downstream business relationships. See Corporate Due Diligence and Corporate Accountability, 10 March 2021, https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html. The latest version, however, refers to "chain of activities" instead of "value chain".

violations. Obligations may extend to affiliated companies as well as "direct" and "indirect" suppliers too, with a varying degree of responsibility depending on whether there is a direct contractual relationship. The corporate risk management team must conduct oversight and guide necessary preventative action. The business is obliged to create an organisational human rights mission statement outlining its efforts and strategies to meet its regular and ad hoc obligations under the law.

3. Extent of harm

96. Early due diligence legislation did not actually hold companies responsible for human rights related harm, and only suggested that they report on progress. The next phase of legislation required reporting, and a lack of sufficient information disclosure could itself be cause for penalty. The most recent phase of legislation cites standards for human rights, and companies can be held responsible for violations of these rights within their scope of control.[127]

4. Liability

97. This may comprise strict liability, whereby companies are presumed responsible for a human rights violation unless they can prove diligence to absolve or reduce their responsibility, or fault liability, where the injured party must show that insufficient due diligence by a company with control caused the harm in question. The type of liability continues to vary considerably by country and is closely related to the expected standard a company must meet for its due diligence. Some provisions also specify whether joint and several liability would be applied in a civil suit.[128]

5. Enforcement

98. Each CSDD law has presented a distinct method of enforcement. At the minimalist end, some laws focus only on information disclosure without sanctions, looking to consumers to take this information and change purchasing decisions based on reputation. On reporting itself, laws punish companies for some combination of shortcomings in timeliness, publication, or quality of reporting via prescribed fines, exclusion from government contracting, or prescriptive injunctions. Enforcement could be through government agencies tasked with monitoring compliance. At the most far reaching, some countries provide a cause for private action by those harmed (or their designated representatives in the country of choice) against the company or specific board members.[129] Opening companies up to civil and/or criminal liability by private parties is the source of much controversy, leading to strong divergences in related provisions.[130]

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127 Compare the California Act, which had no penalties at all (from non-compliance with reporting to violation of human rights standards) with the German Act, which set minimum quality standards for reporting and assigned a duty to act given knowledge (or substantive knowledge) of violations and introduced hefty fines in the case of violations. See CTSCA, https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf; *Lieferkettensorgfaltspflichtengesetz* (22 July 2021), § 3, § 24 available at https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl121s2959.pdf#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl121s2959.pdf%27%5D__1634289566835.

128 The EU proposal is particularly specific on this issue, providing for strict, joint and several liability. See [European Union] "Corporate Due Diligence and Corporate Accountability", § 28.

129 There have been many perspectives on the divergent approaches to this issue. See, e.g., https://www.foodnavigator.com/Article/2021/04/26/Commission-urged-to-adopt-civil-liability-regime-in-due-diligence-law. It remains unclear how most of these laws will be enforced, as seen in the ongoing litigation against Total in France. See https://www.asso-sherpa.org/first-court-decision-in-the-climate-litigation-against-total-a-promising-interpretation-of-the-french-duty-of-vigilance-law.

130 The Dutch law, for instance, provides for criminal liability. See *Wet Zorgplicht Kinderarbeid*, Art. 9, (unofficial English translation) available at https://www.ropesgray.com/-/media/Files/alerts/2019/06/20190605_CSR_Alert_Appendix.pdf?la=en&hash=9CC818B6E223F53A01F9FF709209FB160DDA82CF. Dutch original available at https://zoek.officielebekendmakingen.nl/stb-2019-401.html.

6. Choice of law

99. For laws that provide for a cause of action, the choice of law is an important consideration for ensuing lawsuits. Some laws provide for the application of their own law regardless of the place of harm, whereas others assume application of domestic law but allow claimants to request otherwise, such as the law of the jurisdiction where the harms were committed. Where not specified, typically it would be assumed that Rome II applies – however Article 4(1) provides that the governing law is where damage occurred, and Article 4(3) provides an exception where "the tort is more manifestly connected with" the law of another jurisdiction.[131] The key question, then, seems to be how courts will interpret what is the "harm" committed under a given law – the lack of oversight by the company, or the actual injury committed against person(s) represented in the suit.

Questions for discussion:

- *Do the experts agree on the above core elements of domestic CSDD legislation? Are there additional elements to be added to the list of core elements?*
- *Would the experts potentially include all of the above elements in a future legislative guidance document?*

E. Possible form of the future instrument

100. As stated above, the form of the instrument to be developed shall be defined following the result of the exploratory work. This Section is meant to serve as a basis for a discussion of the advantages and disadvantages of different forms to inform the future decision on the type of guidance to be developed.

101. Potentially, the envisaged guidance document may take one or both of the two proposed forms: a corporate sustainability compliance guide, with contractual model clauses and possibly a commentary to the applicability of the UPICC (Section 1, below) and legislative guidance, possibly with model provisions (Section 2, below). It is noted that the resulting document will interrelate with previously elaborated instruments, be it model clauses or due diligence laws. Thus, participants are invited to determine the gaps that the UNIDROIT guidance document could fill among other legal initiatives.

1. Compliance guide, with model clauses and UPICC commentary

102. The UNIDROIT Principles were not tailored to specifically address contemporary sustainability challenges. A sustainability-oriented UPICC commentary may be an appropriate guidance document to adapt the use of the UNIDROIT Principles to the changing regulatory landscape. It has been argued that "'conventional' or 'classical' contract law was designed to handle an entirely different type of contract than the ones that contain sustainability clauses which today are the majority of all contracts".[132] The use of sustainability clauses in contracts introduces a fundamentally new approach from the traditional type of commercial contract, as they distribute the balance of power between contracting parties, expanding the scope of stakeholders beyond strictly the contracting parties. As

[131] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007, On the Law Applicable to Non-Contractual Obligations (Rome II), Art. 4(1-3), available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:0049:EN:PDF.

[132] V. Ulfbeck, O. Hansen, Sustainability Clauses in an Unsustainable Contract Law?, CEPRI Studies on Private Governance 6 (2022).

such, GVC contracts have been characterised as "regulatory contracts",[133] somewhat separate from purely commercial contracts, as they play a governance role in the value chain. These contracts are not merely transactional, but effectively create a form of constitutional structure for a GVC (whether arranged as a network, web, multi-party contract or chain of bilateral contracts). Under such arrangements, one party (the chain leader, platform operator, etc.) often has strong governance powers over the entire ecosystem established by such contracts. The potential guidance document may not only propose legal provisions with a commentary, but also elaborate on the distinct nature of GVC contracts.

103. UNIDROIT may contribute to harmonisation of this field through a guide to compliance and contractual model clauses. A global guide to compliance would address differences across national approaches and provide a harmonised solution for companies with global reach. Such a guide could also target supply partners in countries trading with parent companies covered by these laws. Ongoing variability across countries, as well as pending changes, means that most guides to date have been focused on compliance in one to two jurisdictions only.

104. By definition, this type of guidance document would be addressed to companies to help comply with the emerging supply chain due diligence laws, and does not intend to provide legislative guidance to States. Optionally, the potential compliance guide may or may not include a section on UPICC interpretation and implementation in the field of sustainable contracts, thus potentially broadening the scope of this proposal. Being a collection of best practices, the potential compliance guide with model clauses and UPICC commentary may serve as an internationally recognised blueprint, easily adaptable to the needs of business. Potentially, some clauses that are less agreed upon in practice (e.g., contract termination, responsible exit) could benefit from the flexibility of a commentary, and more well-established clauses (e.g., right to audit) may be codified in model clauses.

105. It is noted that there are several projects that have either already resulted in contractual guidance or are currently developing a framework. The experts might therefore be interested in discussing the way the potential guidance document relates to those other projects. Potentially, given UNIDROIT'S mandate and expertise, the resulting guidance document may be conceived of as a "gap-filling exercise", addressing issues not covered in previously developed instruments, or, alternatively, an "authoritative interpretation", only covering the least-debatable issues related to the CSDD and its impact on contracts, thus, codifying the already crystallised understandings of the law. Additionally, it is noted that the existing projects tend to concentrate on offering a contractual blueprint for implementing a full-circle CSDD process in a GVC. These projects draw from the due diligence laws and adapt their provisions to fill the contractual framework, thus basing the starting point for legal reasoning on public law. Potentially, in order not to duplicate work already done, UNIDROIT guidance could take the opposite approach, commencing with general principles of contract law and commenting on their reception of corporate sustainability and its legal consequences. In any event, it is noted that in view of the other existing CSDD-related initiatives, the future guidance document may be construed not as a "spearheading" or innovative one, but rather as "codifying" existing developments, authoritatively commenting on the CSDD and its relationship with private law, in particular, contract law and liability.

106. At the same time, it is recognised that the contracts are entered into with a view of benefit maximisation.[134] In commercial relationships, the envisaged benefit is the revenue made by an enterprise. Unlike legislation, which is called upon to balance the private and public interest, and

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[133] P. Verbruggen, Regulatory Governance by Contract: The Rise of Regulatory Standards in Commercial Contracts, https://pure.uvt.nl/ws/files/17144423/Verbruggen_2014_Regulatory_governance_by_contract_the_rise_of_regulatory_standards_in_commercial_contracts.pdf.

[134] See A. Kronman, R. Posner, Economics of Contract Law, Boston, 1979, p. 3, discussing the economic rationale for commercial actors to stipulate their arrangements in enforceable contracts.

corporate social responsibility, voluntary by definition, contractual clauses remain a private means of the parties with a view of furthering their economic interests. Thus, any model provision, or a system thereof, which in essence expects a stronger negotiating party to concede some of the benefit for taking more responsibility might face rather expected implementation issues. This is especially so in view of the risk-allocating function of contracts.[135] Moreover, sustainability and commercial interest are not synallagmatic, meaning that both parties can still entirely fulfil contractual purposes even if sustainability clauses are breached. This, again, evidences that there is an element to GVC contracts going beyond regular commercial contracts. Potentially, the guidance document can dwell on its legal nature. Indeed, this changing landscape of private law was labelled as "private law 2.0",[136] where private actors address governance gaps that are not covered or enforced by States.

107. To summarise, the proposal outlined in this section, in its present form, attempts to combine three common forms of UNIDROIT's work: a commentary on the application of the UPICC, a legal guide, and a collection of usable model clauses. This proposal might invite a modification of the project's title to be considered by the future Working Group, adding a specific reference to "contracts": "Corporate Sustainability Due Diligence in Global Value Chain Contracts".

2. Legislative guidance

108. As previously described, much of the legislative work regarding corporate sustainability and mandatory due diligence procedures has been developed by the EU. Domestic legislative efforts in Latin America and the Caribbean are in the early advocacy or drafting stages. Ultimately, UNIDROIT assistance through legislative guidance for due diligence legislation may be useful in preventing a scenario where European countries are seen as imposing human rights laws on their trading partners, as opposed to a shared effort toward common goals. Proposed core elements of the legislative guidance may include the following: purpose, scope of application and definitions; scope and forms of control; obligations; extent of harm; liability; enforcement; and choice of law and dispute resolution.

109. It is noted that the legislative guide may also be turned into an innovative document, not addressed to all States in the same manner, but specifically tailored to the host-States of Sellers, with a view of providing guidance on how to accommodate and develop the CSDD in "producer" countries.

110. Unlike the above proposal to develop a compliance guide, legislative guidance is addressed to States in order to facilitate further harmonisation of CSDD in global value chains. Subject to the course of the discussion, the outcome may either be a comprehensive Model Law, attempting to harmonise CSDD requirements globally, or softer legislative guidance, offering model provisions, with a view to harmonise only particular aspects of CSDD, such as, for example, jurisdiction and enforcement.

3. Guidance document, including both model clauses and legislative guidance

111. A third option would be to combine elements of the other two elaborated approaches. Such guidance document may serve as a commentary to the most pertaining legal issues related to the private law implications of CSDD, without necessarily being addressed to States or companies in particular, and without proposing to change their practices. It might combine model clauses with a

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135 H.G. Beale, W.D. Bishop, M.P. Furmston, Contract, Cases and Materials, Butterworths, 1990, p. 75.

136 J.M. Smits. Private Law 2.0: On the Role of Private Actors in a Post-National Society, Hague Institute for the Internationalisation of Law, Eleven International Publishing, 2011.

commentary and a discussion of the corresponding legal framework, possibly proposing model provisions.

Questions for discussion:

- *What are the advantages and disadvantages of the different potential forms of guidance to be developed?*
- *Which form of guidance would best fill the remaining gaps in the existing initiatives?*