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Essential elements of effective and equitable human rights and environmental due diligence legislation

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Executive Summary

By David R. Boyd and Stephanie Keene

Human rights and environmental due diligence

Overlapping human rights and environmental abuses by business actors are rampant, while effective remedies for rightsholders remain elusive

Corporations and other non-state actors are responsible for vast numbers of human rights abuses worldwide, including those propelling the global climate, biodiversity, and pollution crises.[1] Through activities such as rampant deforestation, chemical and plastic production, fossil fuel exploitation and other large-scale extractive activities, businesses operating in the global economy routinely jeopardize the human right to a clean, healthy and sustainable environment—a human right recognized by the United Nations Human Rights Council and embodying rights to clean air; a safe climate; access to safe water and adequate sanitation; healthy and sustainably produced food; non-toxic environments to live, work, study and play; and healthy biodiversity and ecosystems. By endangering this nature-dependent human right, irresponsible business actors threaten the life, health, livelihoods, sustainable development, and prospects of billions of people, ostensibly for "growth", "progress" or "development" but, in reality to serve private, short-term interests of shareholders and distant consumers. Environmentally destructive business activities disproportionately harm rightsholders who are already marginalized or vulnerable, and business enterprises commonly outsource these activities from high-income to low- and middle-income states where protections for human rights and the environment are generally weaker and rightsholders have fewer opportunities for redress.

Rightsholders impacted by environmentally irresponsible activities seldom obtain effective remedies. Those who do must navigate a host of legal, financial, and other obstacles, and commonly face threats, intimidation and reprisals to themselves, their families, and their communities due to powerful actors' efforts to block the pursuit of justice. The most vulnerable rightsholders affected by business activities— such as children, women, Indigenous Peoples, Afro-descendant Peoples, local communities, peasants, persons with disabilities and especially those whose identities extend across multiple vulnerable groups— commonly face the most formidable obstacles to justice and remedy. Effective remedies prove particularly elusive when victims reside in countries plagued by limited law enforcement and judicial capacity, corruption, and other weaknesses in the rule of law, and when justice must be pursued via transnational legal actions that are beyond the capacity of most victims of human rights abuses.

Voluntary due diligence measures and existing human rights and environmental due diligence laws are inadequate

Given these harrowing realities, there is now widespread agreement amongst rightsholders, governments, civil society and progressive members of the business community that mandatory human rights and environmental due diligence laws (HREDD laws) are needed to hold business actors accountable for the ways their actions may threaten people and the planet across national and transnational value chains. The United Nations Guiding Principles on Business and Human Rights (UNGPs) call for a "smart mix" of both voluntary and mandatory measures to ensure businesses' respect for human rights. Yet, over a decade after the UNGP's 2011 publication, only a small minority of corporations have adopted voluntary human rights and environmental standards, and few companies view existing laws as a compelling or sufficient incentive to respect human rights and environmental imperatives.

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1 For references, please see the full version of the policy brief, available at: https://www.ohchr.org/sites/default/files/documents/issues/environment/srenvironment/activities/2022-07-14/20220713-SR-Environment_Policy-BriefingNr3.pdf

A handful of due diligence laws targeting business actors' human rights and environmental responsibilities already exist, including in France, Germany, and Norway. Unfortunately, these laws are inadequate to mandate respect for the human right to a clean, healthy, and sustainable environment, which continues to be abused by business activities that also commonly violate international environmental law. Many fail to regulate the totality of diverse actors engaged in commercial activities or associated economic functions, including corporations; institutional investors, banks, and other financial institutions; non-profit organizations; and states acting in their economic capacities, including via state-owned enterprises. Existing HREDD laws are also fraught with inconsistencies, ambiguities, exemptions, and other weaknesses that prevent them from adequately responding to often-overlapping human rights and environmental abuses that are plaguing rightsholders and ecosystems worldwide. At the global level where large multinational enterprises operate, gross disparities in these laws' scope of application, due diligence duties, penalties and provisions facilitating judicial action create an atmosphere of incoherence, fragmentation, uncertainty, and impunity that runs counter to the legal predictability and clarity necessary to maximize corporate compliance and facilitate access to justice for victims of human rights and environmental harms.

The enactment of forthcoming human rights and environmental due diligence laws could mark a promising turning point for business actors, people, and the planet – but time is of the essence and the devil is in the details

Numerous HREDD laws are under development at the domestic, regional, and global levels, representing a vital opportunity to advance and standardize corporate accountability. As of June 2022, the governments of Austria, Belgium, Finland, the Netherlands, and Spain have signaled their intent to pass comprehensive HREDD legislation regulating business actors. Luxembourg and Sweden are considering the possibility of such legislation. Regionally, the European Commission released its Proposal for a Directive on Corporate Sustainability Due Diligence (the "Proposal" or "draft EU Directive") on February 23, 2022. The Proposal is significantly narrower in scope than the version suggested by the EU Parliament in 2021. However, the draft EU Directive's current trajectory remains pathbreaking, as it would make large regulated actors' access to the EU market contingent on the completion of due diligence covering a wide swath of internationally recognized human rights and environmental challenges and provide administrative penalties and civil remedies for breaches of HREDD obligations. Globally, the third draft of the United Nations "Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises" (the "draft UN Treaty") is expected to make progress towards completion in 2022. Despite imperfections, the draft UN Treaty would be the first binding global instrument to mandate due diligence covering all internationally recognized human rights—including the right to a clean, healthy and sustainable environment—across all business activities within a State Party's territory, jurisdiction or control, including transnational activities, and would require State Parties to impose administrative, civil and criminal penalties on enterprises that fail to satisfy their HREDD duties of care.

In response to these legislative opportunities and the imperative to dramatically increase businesses' respect for human rights and the environment, we articulate a set of overarching goals and essential legislative elements for HREDD laws. If adopted, these proposals would result in legislation better equipped to prevent human rights, environmental and good governance harms by business actors and more likely to effectively remedy those harms that occur. Specific recommendations aimed at implementing each element are annexed to the full version of the policy brief. Regarding these crucial tasks, neither rightsholders nor the planet can afford delays. Time is of the essence.

Recommendations

Overarching goals that should inform the development of HREDD laws

HREDD laws should:[2]

a. **Aim to identify, assess, prevent, cease, mitigate and effectively remedy potential and actual adverse impacts to all internationally recognized civil, political, economic, social, cultural and environmental human rights (including the human right to a clean, healthy and sustainable environment) and ecosystems across all business sectors, activities and relationships,** consistent with the United Nations Guiding Principles on Business and Human Rights, the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, the OECD Due Diligence Guidance for Responsible Business Conduct, and the International Labour Organization (ILO) Tri-partite Declaration of Principles Concerning Multinational Enterprises and Social Policy; and

b. **Be sufficiently harmonized to create a coherent transnational enforcement environment rooted in international human rights law, international environmental law and related standards:** Global and regional HREDD legislation should: i) oblige states and regulated entities to satisfy all elements of their human rights and environmental responsibilities; ii) explicitly require the alignment of business activities with major international environmental agreements, including the United Nations Framework Convention on Climate Change (UNFCCC), Paris Agreement, Convention on Biological Diversity, Convention to Combat Desertification, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); iii) be harmonized with existing legislation regulating corporate social and environmental responsibility, to the extent that such harmonization is compatible with overarching HREDD objectives; and iv) account for the diverse national jurisdictions where regional and international HREDD laws will be transposed; and

c. **Impose due diligence obligations aimed at safeguarding and strengthening states' good governance[3] practices, in addition to protecting human rights and the planet:** Because threats to good governance (such as corruption or rule of law failures) undermine states' abilities to protect human rights, increase rightsholders' vulnerability to human rights abuses, and amplify risks of environmental harm, HREDD laws should require regulated entities' due diligence efforts to cover risks to good governance alongside human rights and environmental risks. At present, neither the draft EU Directive nor the draft UN Treaty contain this critical feature; and

d. **Be sufficiently prescriptive to generate a regulatory climate of legal certainty, while avoiding overly prescriptive measures** that may unduly constrain regulated entities' abilities to employ a wide range of context-specific actions to effectively prevent human rights and environmental harms.

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2 For complete, detailed recommendations see the Annex to the policy brief, available at: https://www.ohchr.org/sites/default/files/documents/issues/environment/srenvironment/activities/2022-07-01/20220701-SR-Environment-Annex-HREDD-Recommendations.pdf

3 Because this Executive Summary and the associated policy brief focus on the human rights and environmental aspects of HREDD laws, good governance is discussed only occasionally. However, good governance is of central importance to achieving HREDD. Therefore, the authors urge that all HREDD recommendations articulated in the policy brief should be interpreted as also addressing risks to good governance practices.

Key elements to be included in all HREDD laws

HREDD laws should:

1. **Mandate comprehensive human rights and environmental due diligence that includes the human right to a clean, healthy and sustainable environment and applies to all business appraisal, implementation and exit processes:** Mandate due diligence duties of care for business enterprises to identify, assess, prevent, cease, mitigate and effectively remedy potential and actual adverse impacts to: all internationally recognized human rights, including the right to a clean, healthy and sustainable environment; the environment, including the climate and biodiversity; and good governance. Such duties of care should be ongoing, and should cover business activity appraisal, implementation and exit processes.

2. **Establish comprehensive duties of care, inclusive of environmental, climate and biodiversity assessments, plans and targets**: Establish duties of care that reflect all stages and components of the human rights and environmental due diligence process, thus requiring regulated entities to address actual and potential adverse impacts to human rights, the environment (inclusive of the climate and biodiversity) and good governance that regulated actors' activities may cause or contribute to, or that may be directly linked to their operations, products or services via their business relationships.

3. **Address all business actors:** Adopt a legislative scope reflective of and proportionate to all business actors' ongoing responsibility to respect human rights, the environment and good governance throughout their value chains and include measures to support compliance across regulated actors, with a focus on high-risk sectors, special support for small and medium enterprises, and particular duties articulated for business directors.

4. **Require dynamic, responsive and continually improved due diligence practices:** Require regulated enterprises to dynamically respond to fluctuating human rights, environmental and good governance risks to the full extent of their proportionate means; incentivize enterprises to continually improve the effectiveness of their HREDD processes; and safeguard HREDD, environmental and human rights laws from legislative rollbacks and other developments that may derail progress with respect to businesses' respect for human rights.

5. **Be rightsholder-centered:** Be rightsholder-centered such that they: i) are gender-responsive and inclusive of the most vulnerable rightsholders; and ii) position rightsholder identification, consultation and engagement as fundamental to each stage of the HREDD process.

6. **Ensure effective remedies for rightsholders:** Empower rightsholders' access to justice and effective judicial and non-judicial remedies.

7. **Protect rightsholders from threats, intimidation and reprisals:** Provide affected and potentially affected rightsholders, environment and human rights defenders, whistleblowers, witnesses and their families with protection from threats, intimidation and reprisals connected to human rights and environmental grievances.

8. **Address monitoring and enforcement:** Require states to enforce HREDD laws by monitoring and investigating compliance across regulated actors.

9. **Foster harmonization:** Within each jurisdiction, ensure harmonization between HREDD laws, bilateral and multilateral agreements, and other legislation impacting the realization of human rights and environmental protection.

10. **Facilitate international cooperation:** Mandate international cooperation in the enforcement of HREDD laws.

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