



Special Rapporteur on human rights and the environment

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

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I. Introduction

1. 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 a host of human rights abuses worldwide, including those propelling the global climate, biodiversity and pollution crises. 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.¹ This human right was recognized by the United Nations Human Rights Council in 2021² and embodies substantive 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.

For example, a staggering nine million people die prematurely every year because of exposure to pollution and toxic substances, and among the most egregious culprits are businesses operating coal-fired power plants, mines, smelters, oil and gas operations, chemical plants, petroleum refineries, steel plants, garbage dumps, hazardous waste incinerators, factory farms, industrial aquaculture operations and monoculture plantations. Clusters of these facilities tend to be located in close proximity to poor and marginalized communities. Health, quality of life and a wide range of human rights are compromised, ostensibly for “growth”, “progress” or “development”, but in reality to serve private interests. Shareholders in polluting companies benefit from higher profits, while distant consumers benefit through lower-cost energy and goods. Some of the most extreme overlapping environmental and human rights harms take place in “sacrifice zones” where residents suffer devastating physical and mental health consequences and other human rights abuses as a result of living in pollution hotspots, heavily contaminated areas and places that have become (or are becoming) uninhabitable because of extreme weather events or slow-onset disasters spurred by the climate crisis.³ Sacrifice zones exist in States rich and poor, North and South, as described in more than 60 recently documented examples.⁴ However, environmentally destructive business activities are often outsourced from high-income to low- and middle-income states where protections for human rights and the environment are generally weaker.⁵

Despite extensive environmental degradation and adverse human rights impacts, there is often limited or no remedy for the most vulnerable and adversely affected rightsholders.⁶ Those who attempt to attain remedies 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.⁷ 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

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whose identities extend across multiple vulnerable groups—commonly face the most formidable obstacles to effective remedies, including those related to money, language, access to information, social stigma associated with certain human rights abuses, lack of access to legal representation and corruption of law enforcement officials.⁸ 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.⁹

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

Given these harrowing realities, there is now widespread acknowledgement amongst rightsholders, governments, civil society and progressive members of the business community that mandatory, comprehensive measures are needed to hold business actors accountable for the ways their actions threaten people and the planet across national and transnational value chains.¹⁰ Such measures are central to the protection of human rights, the achievement of essential climate and biodiversity targets, and realization of the Sustainable Development Goals. These laws should 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. Yet a decade after the introduction of the voluntary United Nations Guiding Principles on Business and Human Rights (hereinafter, “UNGPs”), only a small number of corporations have adopted voluntary human rights and environmental standards,¹¹ and few companies view existing regulations as a compelling or sufficient incentive for their businesses to respect human rights and environmental imperatives.¹² The UNGPs call for a “smart mix” of both voluntary and mandatory measures to ensure businesses’ respect for human rights,¹³ and voluntary commitments alone have proven especially ineffective amidst the economic turmoil of the past two years. The COVID-19 crisis sabotaged already volatile supply chains and prompted economically strained governments to attract foreign investment by further reducing environmental, human rights and community land protections. In response, businesses unconcerned with voluntary standards have accelerated their contributions to the interrelated human rights, climate, biodiversity and pollution crises, particularly in the resource rich low- and middle-income countries (LMICs) where labor is cheap, poverty is pervasive, environmental protections are weak and rightsholders have few opportunities for redress.¹⁴

In their most comprehensive form, mandatory human rights and environmental due diligence laws (HREDD laws) require business actors to identify, assess, prevent, cease, mitigate and effectively remedy adverse impacts to human rights and the environment caused or contributed to by their operations or business relationships.¹⁵ A variety of due diligence laws targeting business actors’ human rights responsibilities already exists across jurisdictions, but the scope of these laws varies

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widely. Some jurisdictions, including Australia, California and the United Kingdom, mandate reporting and disclosure of regulated enterprises' identified risks related to particular human rights issues, such as child slavery and forced labor.¹⁶ Others, such as the Netherlands, go beyond reporting requirements to mandate comprehensive due diligence processes with respect to specific human rights abuses.¹⁷ A third and growing group of countries, including France, Germany and Norway, imposes more comprehensive due diligence processes on enterprises via human rights and environmental due diligence laws requiring enterprises to identify, assess appropriately address, and communicate risks to the public with respect to *a range* of internationally recognized human rights and environmental harms.¹⁸

While the aforementioned legislative efforts represent positive steps towards corporate accountability, 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. Existing human rights and environmental due diligence laws are fraught with inconsistencies, ambiguities, exemptions and other weaknesses that prevent them from adequately responding to the often-overlapping human rights and environmental abuses that are plaguing rightsholders and ecosystems worldwide. At the global level at which many 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 and uncertainty 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.

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

In response to the inadequacy of voluntary measures, the weaknesses characterizing existing HREDD laws and the urgent imperative to heighten business enterprises' respect for human rights and the environment, this policy brief articulates a set of essential elements that, if reflected in HREDD laws at all levels, would produce legislation better equipped to prevent human rights and environmental harms by business actors and to effectively remedy those harms that occur. Rapid adoption of the proposed elements is especially vital given the numerous HREDD laws currently under development at the domestic, regional and global levels. 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,¹⁹ and legislation with a narrower scope is being contemplated in Canada.²⁰

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In an effort to establish consistent HREDD requirements throughout the EU, the European Commission released its Proposal for a Directive on Corporate Sustainability Due Diligence (hereinafter the “Proposal” or “draft EU Directive”) on February 23, 2022.²¹ The Proposal is significantly narrower in scope than the version suggested by the EU Parliament in March 2021,²² which proposed that due diligence obligations related to human rights, the environment, and good governance be imposed on all business actors based or operating in the European Union, regardless of size. 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.

Also under consideration is the third draft²³ of the United Nations “Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises” (hereinafter, the “draft UN Treaty”), which was first proposed by Ecuador and South Africa in 2014²⁴ and is expected to make progress within the UN treaty process in 2022. The latest version of the draft UN Treaty was released in August 2021 and discussed during the Seventh Session of the open-ended intergovernmental working group on transnational corporations and other business enterprise with respect to human rights (OEIGWG) from October 25 - 29, 2021.²⁵ While imperfect, the draft UN Treaty as presently written would be the first binding global instrument to mandate corporate 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 actors that fail to satisfy their HREDD duties of care.²⁶

II. Overarching Goals that Should Inform the Development of HREDD Laws

Developing human rights and environmental due diligence legislation that effectively prevents, mitigates, ceases, and remedies adverse human rights and environmental (HRE) impacts across all sectors, geographies and non-state actors is a gargantuan but vital task in protecting people and the environment from severe and potentially irreversible harm. While no single law can capture the level of nuanced guidance necessary to address all contexts, all HREDD laws should share the following core qualities of comprehensiveness, balance and harmonization, which undergird the recommendations proposed in this policy brief.

Specifically, HREDD laws should:

- 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**

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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.

- b. Be sufficiently harmonized to create a coherent transnational enforcement environment rooted in international human rights, international environmental law and related standards:** Given the transnational nature of many business-related human rights abuses and the wave of forthcoming HREDD legislation, coherence across global, regional and domestic HREDD laws, and between HREDD laws and other legislation regulating transnational business activity, is crucial to ensure legal certainty and predictability at a global scale. 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, such as the United Nations Framework Convention on Climate Change (UNFCCC), Paris Agreement, Convention on Biological Diversity, Convention to Combat Desertification, and 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.
- c. Impose due diligence obligations aimed at protecting states' good governance practices, in addition to protecting human rights and the planet:** Elements of good governance such as the functioning of democratic institutions, the rule of law, anti-corruption efforts and the delivery of state services are all closely linked to human rights.²⁷ For example, corrupt business practices in the context of extractive concessions and land acquisition often result in the misappropriation of land and water, inadequate human rights impact assessments, and other failures that enable gross human rights abuses against Indigenous Peoples, including harms to their health and their forced displacement from ancestral territories.²⁸ Because threats to good governance 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'¹

¹ Throughout this paper, the phrases "regulated actor", "regulated entity" and "business enterprise" are used interchangeably to refer to the totality of diverse legal and physical persons engaged in commercial activities or

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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.²⁹

- d. **Strike a balance between overly restrictive and unduly flexible measures:** If HREDD legislation is to compel regulated actors to consistently prevent, address and remedy human rights, environmental and good governance abuses by business actors, HREDD legislation must be sufficiently prescriptive to generate a regulatory climate of legal certainty and predictability. At the same time, legislators should avoid overly prescriptive measures that may limit regulated entities' abilities to take a wide range of context-specific actions to effectively prevent human rights and environmental harms. Lawmakers should be particularly wary of inspiring a "check the box" approach to compliance focused more on avoiding corporate liability than preventing harm to people and the planet, or of incentivizing business actors to simply withdraw from developing markets where existing HREDD practices are particularly lax, rather than working to improve business activities and facilitate compliance.

To enable the achievement of these goals within the multiple legislative HREDD efforts currently underway, this policy brief presents ten elements that should be reflected in all global, regional and national-level HREDD laws. Specific recommendations aimed at implementing each element are presented in the Annex to this report, and build upon the efforts of the Working Group on the issue of human rights and transnational corporations and other business enterprises (hereinafter, the "Working Group on Transnational Corporations"), rightsholders, civil society, and other business and human rights experts. Unless otherwise specified, these recommendations are presented as they apply to domestic HREDD laws, with the implication that regional and global instruments should mandate States to pass domestic legislation implementing these recommendations. Finally, because this policy brief focuses on the human rights and environmental aspects of HREDD laws, good governance is discussed intermittently. However, good governance is of central importance to achieving HREDD objectives and therefore the implementation of all HREDD recommendations in this policy brief should be interpreted as also addressing risks to good governance practices.

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.

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III. Key Elements to be Included in all Human Rights and Environmental Due Diligence Laws

A. 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 appraisal, implementation and exit processes.

Mandate duties of care concerning human rights, the environment and good governance: Human rights abuses embody a range of overlapping harms to people, the environment and good governance practices that undermine sustainable outcomes, and that must be mitigated, stopped, prevented and remedied through HREDD processes. The indivisible, interdependent and interconnected nature of human rights is reflected by the right to a clean, healthy and sustainable environment—recognized in law by over 80 percent of UN Member states³⁰—through which a host of nature-dependent human rights converge that are directly threatened by acute and cumulative environmental harms.

Even when harms to human rights, the environment and good governance do not immediately overlap they are often interrelated; the most diffuse kinds of environmental harm by business actors that arguably lack immediate human “victims” still contribute to interconnected human rights abuses, widespread environmental degradation, and the deterioration of governance institutions and practices upon which sustainable development depends. For example, the scientific community is united in its conclusion that the climate crisis—propelled in large part by business emissions—is altering the planet faster than humans can adapt.³¹ Environmentally irresponsible business activities’ cumulative contributions to climate change thus fuel widespread adverse human rights consequences,³² impair governments’ good governance practices³³ and increase risks of war and conflict³⁴—circumstances under which some of the most severe human rights abuses, human rights violations, and sustainable development setbacks most commonly occur. In a similar way, the correlation between deforestation, biodiversity loss and the risk of future global pandemics like COVID-19 that threaten the realization of human rights, good governance and sustainable development is well established, as is business enterprises’ contribution to these forms of environmental destruction.³⁵ **Given these inextricable relationships, the effectiveness of HREDD laws rests in part on their ability to address all potential and actual risks to all internationally recognized human rights (including the right to a clean, healthy and sustainable environment),**

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the environment and good governance. Notably, none of the existing HREDD laws (France, Germany and Norway), the draft EU Directive or the draft UN Treaty address all three of these foundational elements. Of particular concern is the current draft EU Directive's lack of an explicit reference to the right to a clean, healthy and sustainable environment and its inclusion of an annex detailing a problematically narrow³⁶ set of international human rights and environmental agreements covered by the draft directive. The draft EU Directive's annex fails to include many core environmental conventions and seminal human rights instruments,³⁷ and should be replaced by a broad, open-ended provision targeting all actual and potential adverse impacts to: (1) all internationally recognized human rights (including the right to a clean, healthy and sustainable environment); (2) the environment, including climate and biodiversity; and (3) good governance.

Mandate HREDD duties covering business appraisal, implementation and exit processes: In order to be truly comprehensive, HREDD duties must be ongoing³⁸ and applicable to business activity appraisal, implementation and exit processes. Effectively regulating both planned and early termination processes is particularly vital where enterprises exit before remedying HRE harm that their activities caused or contributed to. Such exit should be responsibly guided by an HREDD process, as hasty or otherwise ill-considered exit processes risk exacerbating adverse HRE outcomes stemming from business activities and commonly drain business actors' leverage to the extent that affected communities are left without viable options for an effective remedy.³⁹ There is limited business and human rights guidance on exit and safeguards to prevent harm associated with exit are generally weak.⁴⁰ However, the UNGPs and OECD emphasize that business actors contemplating this measure of last resort have a responsibility to consider how their exit might create adverse human right impacts.⁴¹

Given the potential impacts of exit on HRE outcomes and the fact that the business responsibility to provide remedy extends beyond the lifecycle of any project or business relationship, HREDD laws should explicitly: (1) establish HREDD duties (and corresponding penalties for violations) for the development and implementation of responsible exit plans, and require all such plans to be developed in meaningful consultation with adversely affected rightsholders; (2) require regulated entities to identify, assess and, to the extent possible, mitigate adverse HREDD impacts until responsible exit plans are fully implemented; and (3) require regulated entities to include requirements for responsible exit within initial agreements underlying their business activity, including obligations to remedy human rights and environmental harms following any early exit. At present, neither the draft EU directive nor draft UN Treaty reflect these three requirements.

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B. Establish comprehensive duties of care, inclusive of environmental, climate and biodiversity assessments, plans and targets

Establish duties of care that reflect all stages and core 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.

To facilitate transparency, prevent environmental and human rights harm, and empower rightsholders and other stakeholders to track regulated actors' HREDD compliance, forthcoming HREDD laws should establish duties of care corresponding to each step of the human rights due diligence process established in the UNGPs and related OECD guidance. Based on this approach,⁴² legislation should deem human rights and environmental due diligence to be an ongoing process requiring regulated actors to:

1. **Identify and assess** actual and potential adverse impacts to human rights, the environment and good governance that regulated entities' activities may cause or contribute to, or that may be directly linked to their operations, products, or services via their business relationships;
2. **Integrate** assessment findings to develop HREDD strategies, commitments, policies, procedures, action plans, targets and risk management systems;
3. **Implement** HREDD commitments, policies and procedures by taking aligned actions to: 1) prevent, mitigate, cease and remedy actual and potential adverse impacts that regulated actors might cause or contribute to; and 2) seek to prevent or mitigate adverse impacts that may be directly linked to their operations, products, or services via their business relationship;
4. **Monitor and periodically evaluate** the effectiveness of these due diligence policies, procedures, processes and implemented responses; and
5. **Transparently and periodically communicate:** HREDD statements, policies, procedures, action plans, targets, risk assessments and methodologies; assigned HREDD responsibilities across all levels of the regulated entity; the outcomes of implemented actions; and evaluations of HREDD outcomes and effectiveness.

In summary, regulated actors exercising these five steps will: 1) identify, assess, prevent, cease, mitigate, and effectively remedy all actual or potential adverse HRE impacts that their activities may cause or contribute to; and 2) seek to prevent or mitigate adverse HRE impacts directly linked to their operations, goods or services via their business relationships.⁴³

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Effective risk identification, assessment and response will involve all corporate levels of a regulated entity. Because entities cannot remedy adverse impacts that they are not aware of, HREDD processes can greatly benefit from an effective, enterprise-established: 1) operational-level grievance mechanism tasked with responding to affected rightsholders' human rights and environmental (HRE) grievances and sharing these complaints with persons assigned to respond to such grievances throughout an entity; and 2) whistleblower mechanisms allowing workers operating at all levels of an entity, and other rightsholders, to anonymously and confidentially report possible HRE risks or harms to HREDD-responsible personnel, even where such risks do not affect them or otherwise qualify as a grievance. In addition to enterprises' monitoring responsibilities, regulated actors should reevaluate their HREDD frameworks, plans, targets, actions and associated outcomes annually, and whenever HRE risks associated with business activities or relationships materially change.⁴⁴

Environmental, Climate and Biodiversity Assessments, Plans and Targets: While the draft UN Treaty and draft EU Directive largely impose HREDD duties consistent with the five-step HREDD process outlined above, provisions specifically requiring actors to include environmental, climate and biodiversity-based assessments, plans and targets within mandated HREDD processes and published materials are either missing or inadequate across both draft instruments. The word "biodiversity" is not included in the articles of either draft instrument, and the failure to specify the need for biodiversity assessments, plans and targets where business activities may have such impacts ignores the tremendous risk that destructive business activities pose to the ecological diversity upon which all life on Earth depends.⁴⁵ Although the draft UN Treaty requires the undertaking and publication of regular "environmental and climate change impact assessments" throughout regulated actors' operations,⁴⁶ it does not explicitly require dedicated environmental and emissions plans or targets in response to these findings, despite the explicit inclusion of the right to a safe, clean, healthy and sustainable environment within the scope of human rights for which due diligence is mandated. The draft EU Directive calls upon the largest regulated companies to adopt a Paris Agreement-aligned climate transition plan and to establish emissions reduction targets where climate change is identified as a principal risk (Article 15). Unfortunately, the existential threat posed by climate change is downplayed by the fact that non-compliance with these "requirements" may not result in any penalty because Article 15 is excluded from the core HREDD duties specified in Articles 4 – 11.

To avoid these dangerous legislative ambiguities and the potential neglect of vital environmental, climate, and biodiversity imperatives that they could facilitate, both the draft EU Directive and draft UN Treaty should be revised to ensure that *all* companies have explicit HREDD obligations—and corresponding consequences for non-compliance—that ward against their business activities'

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causing or contributing to adverse impacts to the environment, the climate and biodiversity, inclusive of short-, medium- and long-term reduction plans and targets.

Rightsholder-centered HRE risk management systems: As specified in further detail under Elements 5 – 7, HREDD risk management systems must be rightsholder-centered. To achieve this central requirement, the environmental, climate and biodiversity due diligence activities referenced above must be linked to and integrated within a larger rights-holder-centered HRE risk management system. This system must feature dedicated sections of HREDD strategies, policies, commitments, and procedures to ensure the equitable and meaningful participation and consideration of particularly vulnerable rightsholders, including: women and girls, children, Indigenous Peoples, local communities, Afro-descendants, peasants, persons with disabilities, persecuted minority groups, disabled persons, poor people, internally displaced persons, migrants, refugees, lesbian, gay, bisexual, trans and gender-diverse (LGBT) persons, older persons, protected populations under occupation or in conflict-affected areas, and other vulnerable groups. In most if not all instances, stand-alone policies covering matters beyond due diligence and focused on topics such as gender equality, children, Indigenous Peoples, other particularly vulnerable rightsholders, corporate social and environmental responsibility, and sustainability will also be appropriate. In all circumstances, HREDD strategies, policies, procedures, action plans and targets must be gender-responsive, consider rightsholder intersectionality, require all HREDD data on risks and impacts to be collected and published in a gender-disaggregated manner, and require further data disaggregation across other rightsholder groups where applicable.

C. 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.

Business abuses of human rights and the environment often involve a confluence of failures by various kinds of actors operating across multiple sectors and jurisdictions within a single value chain. In parallel with the business and human rights responsibilities articulated by the UNGPs, HREDD laws should regulate *all business enterprises* irrespective of sector, geography, value chain position, business model, or size. Due diligence obligations under HREDD laws should be ongoing,⁴⁷ with particular obligations for business directors whose decisions have especially marked influence on enterprises' HRE performance.⁴⁸ Furthermore, and in response to the transnational nature of many business sectors, HREDD laws should impose duties of care on all enterprises who are domiciled in a regulated state or operating in a regulated market.

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Explicitly identifying the various kinds of enterprises regulated by HREDD law is of crucial importance to fostering legal certainty. In the interest of inclusivity, neither the UNGPs or the OECD Guidelines for Multinational Enterprises define “enterprise”⁴⁹, and HREDD laws should interpret this term broadly and explicitly regulate the business activities of both individuals and legal persons, states acting in their economic capacity (including the process by which states negotiate and enter into international trade and investment agreements), state-owned enterprises, corporate directors, non-profit organizations engaged in commercial activities within regulated markets, and institutional investors, banks and other financial institutions, all of whom have tremendous impacts on HRE compliance. In this regard, the significant exceptions granted to the financial sector by the draft EU Directive are a disappointing departure from the UNGPs, disregarding the demonstrated ability of well-executed HREDD within the financial sector to improve HRE outcomes.⁵⁰

Include non-profit entities: Including non-profit enterprises within the ambit of actors regulated by HREDD laws is important to combatting human rights and environmental abuses, including those by conservation organizations engaged in exclusionary conservation practices (i.e., “fortress conservation”).⁵¹ Some large non-profit entities and large transnational businesses are virtually indistinguishable in terms of the complex, multinational nature of their operational structure, the major roles they play within business sectors, the expansive scale of their activities, and the magnitude of their potential human rights and environmental harms.⁵² For these reasons, both the OECD and the architect of the UNGPs, Professor John Ruggie, have deemed the commercial activities of not-for-profit entities sufficient to bring them within the scope of “enterprises” bearing business and human rights responsibilities under the UNGPs.⁵³ With respect to the risk of overlapping human rights and environmental harms, many environmentally-oriented non-profit organizations offer goods and services on commercial markets, commercially exploit land and other resources or directly support entities thus engaged (including for tourism purposes commonly linked to conservation objectives) and sometimes receive payments for the conservation services and goods they provide.⁵⁴ Consequently, HREDD laws should include non-profit entities engaged in commercial activities within a regulated market as regulated enterprises.

Include small and medium enterprises (SMEs): The scale of environmental destruction and human rights abuses perpetuated by business activities necessitates HREDD across businesses of all sizes. The UNGPs clarify that a business’s human rights responsibilities are *not predicated on the business’s size or existing capacity to respect human rights*, but on the risk that an entity’s operations, products, services and relationships pose to human rights.⁵⁵ SMEs make up the majority of businesses worldwide,⁵⁶ yet many existing HREDD laws largely or entirely omit SMEs from the scope of regulated actors. For example, the draft EU Directive limits the scope of HREDD duties to large companies’ own operations, their subsidiaries, and entities (potentially including a small subset of SMEs) within the value chain “with whom the company has an established business

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relationship,”⁵⁷ thus potentially excluding over 99 percent⁵⁸ of all EU companies from regulation and thwarting the draft Directive’s ability to regulate the entire value chain. In the European Commission’s view, “the financial and administrative burden of setting up and implementing a due diligence process would be relatively high” and “for the most part, [SMEs]... do not have pre-existing due diligence in place... and the cost of carrying out due diligence would impact them disproportionately.”⁵⁹

The practical implications of legislative approaches that fail to impose HREDD duties for all SMEs and across the entire value chain, as required by the UNGP, are significant. An internationally applicable HREDD law that excluded SMEs from regulated actors would overlook more than half of all business actors worldwide (including the majority operating in LMICs⁶⁰) and fail to provide robust protection for the majority of global workers.⁶¹ More broadly, the misguided exclusion of SMEs from HREDD laws overlooks: (1) the proven capacity of some SMEs to implement sophisticated HREDD systems; (2) the potential advantages that some SMEs’ proximity to rightsholders and embeddedness within local communities and landscapes affords them when responding to adverse HRE risks; and (3) the pressing need to address the serious human rights and environmental abuses that many SMEs perpetuate.⁶² Moreover, the failure to regulate all SMEs perversely incentivizes large enterprises to limit their potential HREDD liability by: a) avoiding the kinds of consistent relationships with SMEs that would best facilitate SMEs’ HRE compliance; b) replacing independent and small suppliers (including farmers) with larger entities perceived to have greater HREDD capacities; and c) relocating purchasing activities to geographies perceived to pose lower HRE risk, only to be replaced by smaller, unregulated companies with lesser compliance capacity or commitment. These incentives, in turn, are likely to produce concentrations of “good actors” and “bad actors” across value chains, thus reinforcing SME capacity gaps, exposing rightsholders impacted by “bad actors” to heightened HRE risks, and preventing the HREDD laws from creating the uniform playing field across business enterprises that regulators, rightsholders, consumers and business actors all desire.

Include measures to support SMEs’ compliance capacity: By contrast, HREDD laws that regulate all enterprises including SMEs—a reported precondition to many large enterprises support for HREDD laws⁶³—are best positioned to rectify systemic factors contributing to SMEs’ limited HREDD capacity such as unfair corporate purchasing and contracting practices, address core supplier concerns surrounding living wages and living incomes, and mandate that large enterprises take reasonable measures to improve the HREDD capacity of SMEs with whom they work. As acknowledged by the UN Working Group on Transnational Corporations, large businesses under the UNGPs “are expected to help their smaller suppliers to respect human rights as an integral part of their own human rights due diligence in order to prevent adverse human rights impacts directly linked to their business operations through their supply chains or business relationships.”⁶⁴ It is widely understood that

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large enterprises' significant power and leverage over SME suppliers and producers, particularly in the global South, often spur unfair purchasing and contracting practices that push prices down and limit the ability of SMEs to viably operate, achieve a living income, pay employees living wages, and simultaneously abide by human rights and environment standards, thus increasing the likelihood of environmental and human rights abuses.⁶⁵ All too often, large enterprises utilize contractual cascading to shift HREDD compliance to smaller downstream supply chain entities without sufficiently supporting SMEs to satisfy these vital contractual commitments.⁶⁶ HREDD laws could help remedy such imbalances by employing a dual "carrot and stick" approach. Rather than providing SMEs with *de facto* absolution for any HRE harms, HREDD laws should level the playing field across business actors by simultaneously holding all entities to their business and human rights responsibilities while also requiring larger actors to address phenomena that systemically hinder SMEs' HRE compliance.

Importantly, such an approach would not prevent HREDD laws from reducing or even eliminating reporting or value chain mapping requirements that may pose particular challenges to SMEs with limited capacity, nor would it foreclose the deferral of due diligence duties beyond the timeline in which those duties apply to large enterprises, which would enable the provision of SME-specific guidance to take place before SMEs are tasked with compliance. While HREDD measures should be appropriately tailored to the SME context and ward against creating unintended consequences for smaller-sized suppliers, the long-term ability of HREDD law to actually prevent human rights and environmental harm rests on legislation's ability to regulate SME actions and relationships between SMEs and large enterprises.

Implement the proportionality principle and allow for prioritization of risk: In recognition of the varying HREDD capacity existing across business actors, the commentary to UNGP 17 acknowledges that where the number of entities in a value chain make it "unreasonably difficult" for a business enterprise to conduct due diligence across all adverse human rights impacts, the business enterprise "should identify general areas where the risk of adverse human rights impacts is most significant... and prioritize these for human rights due diligence."⁶⁷ Crucially, the UNGPs articulate business and human rights responsibilities that are to be exercised through means "proportional" to the severity of an enterprise's adverse impact (judged by the impact's scale, scope and irremediable character) as well as a host of context-specific factors including an enterprise's size, sector, operational context, ownership and structure.⁶⁸ Thus, HREDD law shaped by the UNGPs should require regulated enterprises, and by extension, any court tasked with interpreting the scope of an enterprise's HREDD duty, to consider the totality of circumstances shaping human rights or environmental risks while viewing the severity of the risks as the primary guiding factor. *Under this approach, Article 6.3 of the third draft UN Treaty should be revised. As written, States Parties are only required to mandate human rights due diligence "proportionate to [regulated enterprises']*

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size, risk of human rights abuse *or* the nature and context of the business activities and relationships,” yet a more multifaceted articulation of a proportionate HREDD response that always and primarily considers risks to people and the environment is required in order to effectuate the intent of the UNGPs.

By embedding the proportionality principle within HREDD provisions and allowing for risk prioritization where appropriate due to capacity constraints, the complexity, detail and ultimate HREDD burden on a regulated enterprise will reflect the specific circumstances of the operations and business relationships at issue, with duties varying principally according to the level of risk intrinsic to the particular activity and sector, in addition to contextual factors such as enterprise size, geographic location, the presence or absence of conflict, business model, ownership structure, and enterprise position within the value chain—all of which determine the actors’ leverage (i.e., capacity to address harm). Under this approach, SMEs, and particularly those that do not operate in high-risk sectors, can be expected to have much narrower and less burdensome duties of care than large entities. At the same time, regulated actors with limited HREDD capacity can prioritize identified HRE impacts and focus their HREDD efforts on the most severe risks, thus allowing SMEs with limited HREDD resources to nonetheless advance HRE aims.

Specify the HREDD duties of business directors: Given the outsized impact that corporate leaders have on the human rights and environmental performance of their organizations, HREDD laws should also establish specific and heightened duties of care (and corresponding consequences for non-compliance) for directors, requiring these especially influential business actors to: (a) establish and oversee all phases of the ongoing HREDD process; (b) approve HREDD strategies, policies, plans and targets (inclusive of those related to the environment, climate and biodiversity); (c) ensure that their duty to act in their company’s best interest is exercised in a manner that reflects long-term interests and is aligned with positive sustainability, human rights, environmental, and good governance outcomes; and (d) report to their entity’s board of directors in relation to their execution of these tasks. At present, neither the draft EU Directive or draft UN Treaty satisfies all of these requirements. Articles 25 (establishing directors’ duty of care) and 26 (establishing a director’s responsibility to set up and oversee due diligence) of the draft EU Directive are too vague to be impactful. Article 8.6 of the draft UN Treaty would require State Parties to hold directors liable for their failures to prevent legal or natural persons that they control, manage or supervise in the context of a business relationship from causing or contributing to human rights abuses, but the inclusion of a provision specifically addressing business directors, providing for their particular responsibilities, and requiring their involvement in the design and finalization of their companies’ HREDD materials and processes would be positive additions to the draft treaty.

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D. 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.

Require regulated enterprises to dynamically respond to fluctuating human rights, environmental and good governance risks to the full extent of their proportionate means: As operational-level business contexts constantly shift, HREDD legislation should require HREDD processes to be ongoing and dynamic,⁶⁹ and should incentivize continual improvement of HREDD effectiveness. HREDD should commence during the appraisal phase of business activities. Moreover, HREDD risk assessments, related assumptions and responses should be reevaluated before the commencement of new project elements, before business relationships decisions with HRE implications, and whenever significant new risks emerge or existing risks grow substantially.⁷⁰

The interrelated concepts of “control”, “influence” and “leverage” (which the UNGPs describes as the “ability to effect change [regarding] the wrongful practices of an entity that causes a harm”⁷¹) are central to determining an appropriate response to HRE risk assessment findings and in encouraging continual HREDD improvement. In order to effectively compel entities to take active ownership over the specific contexts in which they operate and to tailor their HREDD responses to those contexts, the scope of entities’ HREDD duty to take proportionate actions to identify, assess, prevent, cease, mitigate and remedy adverse human rights and environmental impacts should not be determined by their degree of contractual control, legal control (ownership interest), or decisive influence over another entity in the value chain, nor should it be determined based on the actual degree of interaction between two entities. Such rigid understandings of “control” have restricted the ability of human rights victims to hold companies liable for human rights abuses under UK jurisprudence, and a definition of “leverage” focused on decisive influence and the degree of interaction between two entities may also create perverse incentives for upstream enterprises to take hands-off approaches when dealing with supply chain actors.⁷² Moreover, this narrow approach would be especially inappropriate to apply to regulated SMEs, many of which do not have significant contractual, legal or decisive control over other enterprises but that may nonetheless possess other forms of “non-traditional” leverage that can prove influential in improving human rights and environmental outcomes. For example, SMEs may have greater “soft leverage” than larger entities because SMEs’ size commonly results in longer-term business relationships with fewer suppliers and customers (with a pronounced preference for like-minded business partnerships), alongside more frequent face-to-face interactions between supervisors and employees. These factors may facilitate better-quality relationships, which may in turn enable SME

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leaders to instill HRE-compatible values more easily amongst employees and to quickly mobilize employees and business partners to respond to emerging HRE risks.⁷³

To avoid the aforementioned pitfalls, the proportionate HREDD duty should be understood as extending until, given the specific circumstances at play, a regulated actor cannot reasonably be expected to take additional actions to prevent, cease or mitigate adverse impacts.⁷⁴ By extension, an HREDD duty of care should reflect an actor's actual and *reasonably attainable leverage*—which may fluctuate over time in a given context—and which may include opportunities to work with other business actors and exert leverage in unison in order to address acute and systemic adverse impacts.⁷⁵

With regard to the exercise of leverage and the scope of actions that regulated enterprises are expected to take under HREDD law, the draft European Directive appropriately acknowledges that:

An 'appropriate measure' [to identify, prevent and bring to an end adverse impacts] should mean a measure that is capable of achieving the objectives of due diligence, commensurate with the degree of severity and the likelihood of the adverse impact, and reasonably available to the company, taking into account the circumstances of the specific case, including characteristics of the economic sector and of the specific business relationship and the company's influence thereof, and the need to ensure prioritization of action. In this context, in line with international frameworks, the company's influence over a business relationship should include, on the one hand its ability to persuade the business relationship to take action to bring to an end or prevent adverse impacts ...and, on the other hand, the degree of influence or leverage that the company could reasonably exercise....⁷⁶

However, these sentiments are somewhat undercut by the draft directive's over-reliance on contractual cascading requirements mandating large regulated companies to seek contractual assurances from immediate business partners that they will comply with HREDD commitments and any preventative action plans, and that these business partners will seek similar contractual assurances from their own partners.⁷⁷ While regulated entities are also required to take appropriate measures to verify compliance through means such as independent audits, such verification measures have proven ineffective in ensuring voluntary HREDD commitments at scale.⁷⁸ Most problematically, the dual focus on contractual cascading and verification through third party audits risks allowing large companies to shift HREDD compliance burdens to other value chain actors without: 1) taking necessary financial and other capacity-building measures to invest in and improve downstream actors' HREDD compliance abilities to the extent necessary for contractual commitments to be feasible and consistently met; and 2) increasing and exercising their HREDD leverage in both traditional and non-traditional ways, including through collaborative efforts.

Incentivize regulated actors to continually enhance their HREDD practices: HREDD laws should incentivize regulated actors to continually enhance their HREDD processes and to exceed the standards of care mandated in HREDD laws. For example, legislation could include tax advantages

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or advantages in government procurement processes for regulated entities that demonstrate continual HREDD enhancement exceeding legal compliance duties. Evidence of continual HREDD improvement and efforts to exceed HREDD duties of care might also be considered as mitigating—but not exculpatory—factors by courts tasked with imposing penalties for enterprises' HREDD failures. However, governments should maintain access to remedies such as injunctive relief or forms of civil liability that provide direct relief to affected rightsholders. Finally, HREDD laws could also explicitly tether variable remuneration of corporate directors to their achievement of mandatory, pre-established and progressive sustainability, human rights, and environmental (inclusive of climate and biodiversity) targets, thus incentivizing those with the greatest influence over companies' HRE performance to prioritize continual HREDD improvements.

Safeguard against legislative rollbacks and other threats to progress regarding businesses' respect for human rights, including unethical business lobbying practices: In addition to including positive incentives to encourage HREDD enhancement, HREDD laws should safeguard against state and business actions that threaten to derail progress with respect to HREDD effectiveness and, more generally, businesses' respect for human rights and the environment. Legal reform processes that weaken an HREDD law's protections for nature and people are a major threat to such progress. Legislative rollbacks are the byproduct of states' primary failure to fulfill their obligation to refrain from retrogressive human rights measures, but this failure is commonly buttressed by extensive corporate lobbying activities that unduly influence policymakers and run counter to the commentary in the UNGP's foundational principle (UNGP 11), which states that "[b]usiness enterprises should not undermine States' abilities to meet their own human rights obligations."

The potential adverse impact of business lobbying activities on inter-related good governance, human rights and environmental outcomes should not be underestimated. As acknowledged by OECD guidance, recommendations, and principles related to transparency and integrity in lobbying, the influence of financially and politically powerful lobbyists representing business interests on a variety of public decision-making processes is often disproportionate; wealthy and powerful lobbyists often possess a high level of risk tolerance; and information disclosed about lobbying practices is generally insufficient to enable public scrutiny.⁷⁹ Extensive, non-transparent corporate lobbying efforts designed to thwart or weaken the forthcoming EU directive and other national HREDD laws are well-documented,⁸⁰ and there is no reason to believe that similar corporate efforts to weaken HREDD laws through reform processes will not endure after HREDD laws are enacted.

HREDD laws can ward against the central risk of legislative rollbacks by: 1) reiterating states' obligation to refrain from retrogressive measures and creating mechanisms for rightsholders to appeal retrogressive government actions related to HREDD law; 2) requiring states to protect their HREDD, environmental and human rights laws from disproportionate and otherwise undue influence by commercial and other vested interests, in accordance with national law; 3) requiring

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business actors' lobbying activities related to HREDD, environmental, and human rights laws to be conducted with full transparency, integrity and fairness; and 4) mandating that regulated actors generally refrain from actions that may undermine States' abilities to meet their human right obligations. In recognition of the substantial impact that business lobbying activities may have on the realization of human rights, Article 6.8 of the draft UN Treaty requires State Parties to transparently implement their HREDD laws and to "protect these policies from the influence of commercial and other vested interests of business enterprises, including those conducting business activities of transnational character." However, the draft EU Directive does not include analogous measures.

E. Be rightsholder-centered

HREDD laws should be rightsholder-centered such that they: a) are gender-responsive and inclusive of the most vulnerable rightsholders; and b) position rightsholder identification, consultation and engagement as fundamental to each stage of the HREDD process.

As emphasized by the UN Working Group on Transnational Business, "meaningful stakeholder engagement should be at the heart of State and business strategies to realize legitimate and effective responses in addressing human rights risks and impacts in a business context."⁸¹ The primary objective of HREDD laws is to prevent, cease, mitigate and remedy human rights and environmental harms, and this goal requires that HREDD laws be rightsholder-centric, gender-responsive, inclusive, and responsive to rightsholders' intersectional identities. Each stage of the mandatory HREDD process must be responsive to the differentiated rights, needs and priorities articulated by rightsholders, and especially the most vulnerable rightsholders, during ongoing rightsholder consultation and engagement. Of equal importance (as discussed in Element 6), laws must safeguard affected rightsholders' access to judicial and non-judicial forums and effective remedies.

Gender-responsiveness, rightsholder inclusivity, and effective rightsholder identification, engagement and consultation: Rightsholders harmed or potentially harmed by irresponsible business activities often possess key knowledge and insights that should inform and shape HREDD processes while enhancing the broader sustainability of a business endeavor. The failure to identify potentially and actually impacted rightsholders and to engage in good-faith, inclusive, meaningful, ongoing and targeted rightsholder consultation is a key driver behind many businesses' failure to respect human rights and nature. Rightsholders are often deprived of sufficient, timely and accessible information necessary to meaningfully influence business decisions or are otherwise excluded from decision-making processes that impact their human rights and the ecosystems they rely upon.⁸² Rightsholders impacted by dual human rights and environmental harms commonly fail

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to receive an equitable share of benefits from business activities reliant on their lands, water and resources.⁸³

Marginalized and vulnerable rightsholders—including but not limited to women and girls, children, Indigenous Peoples, local communities, Afro-descendants, peasants, persons with disabilities, persecuted minority groups, disabled persons, poor people, internally displaced persons, migrants, refugees, LGBT persons, older persons and protected populations under occupation or in conflict-affected areas—face particularly acute and well-documented challenges in participating in development projects and accessing judicial and non-judicial mechanisms when their rights are abused. Such groups and persons are often inadequately consulted and engaged by business actors, suffer the most significant human rights abuses, and have the most limited access to information about business activities that impact them, judicial and non-judicial forums, and available remedies. Business failures to respect Indigenous Peoples’ rights to free, prior, and informed consent (FPIC) and any applicable FPIC rights of other marginalized rural groups are common, as are failures to address power differentials between corporate negotiators and rightsholders who belong to marginalized groups and who may possess intersecting vulnerabilities.⁸⁴ Rural women, for example, may face gendered social pressures, linguistic, educational, or transportation-related challenges, disproportionate childcare responsibilities and other obstacles that prevent them from meaningfully contributing to consultations and decision-making processes with business actors.⁸⁵ At the same time, human rights harms perpetuated by business activities often impact women differently and disproportionately.⁸⁶

In response to these injustices, the OECD Due Diligence Guidance for Responsible Business and UNGPs emphasize the importance of good-faith, meaningful engagement and consultation with potentially or actually impacted persons throughout the HREDD process. Communications and engagements should be conducted in a manner that takes into account language and other barriers to effective engagement. Key elements of HREDD actions, such as the establishment of operational-level grievance mechanisms, should be based on the feedback, priorities and desires of affected and potentially affected rightsholders.⁸⁷

Unfortunately, provisions concerning rightsholder identification, consultation and engagement are amongst the weakest elements of both the draft EU Directive and the draft UN Treaty. Neither instrument articulates what effective, meaningful rightsholder identification and consultation should entail or adequately compels business actors to: 1) make ongoing, gender-responsive and culturally-appropriate consultation with potentially and actually affected rightsholders the bedrock of all HREDD activities; 2) provide rightsholders with timely information in a language and format accessible to them; or 3) make reasonable efforts to eliminate and mitigate obstacles to vulnerable rightsholders’ participation in stakeholder consultations and operational-level grievance mechanisms.

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The articles of the draft EU Directive are particularly disappointing in their failure to make explicit reference to Indigenous Peoples, Afro-descendants, local communities, peasants, children, women, or any of the other vulnerable persons or groups who may be impacted by irresponsible business practices. This flagrant legislative weakness is aggravated by the absence of measures requiring regulated actors to implement a gender-responsive approach throughout the exercise of HREDD duties and to respect applicable FPIC rights. The draft Directive also includes a perverse requirement that HRE risk identification, assessment, and corrective action plan development should involve consultation with potentially affected groups only “where relevant.”⁸⁸ This proposed provision could be interpreted to permit enterprises to decide against pursuing rightsholder consultation where they perceive such consultation to be irrelevant, without considering the perspective of potentially affected rightsholders whose protection purportedly animates HREDD law. Moreover, this requirement ignores the fact that the relevance of rightsholder consultation is often only apparent to companies in hindsight and that rightsholder consultation plays a foundational role within standards on businesses’ human rights due diligence responsibilities that is not subject to enterprises’ discretion.⁸⁹

F. Ensure effective remedies for rightsholders

Empower rightsholders’ access to justice and effective judicial and non-judicial remedies.

A central element of states’ human rights obligations is to provide human rights victims impacted by business activities with access to effective remedies. The UNGPs call upon states to do so through legislative, administrative, judicial and other means that consider “ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.”⁹⁰ Satisfying this imperative requires a bolstering of state capacity, legislation and legal support networks designed to overcome the enormous barriers facing many human rights victims seeking remedies. For example, rural communities suffering overlapping human rights and environmental harm in the context of corporate pollution must often fulfill immediate survival needs such as seeking medical treatment, uncontaminated food and safe water, while at the same time seeking compensation, environmental rehabilitation and restitution through judicial and non-judicial grievance mechanisms.⁹¹ These mechanisms are often hampered by capacity constraints, high costs, a host of technical legal hurdles, lengthy proceedings, language barriers, and opaque processes.⁹² As discussed in Element 7, human rights victims often face these challenges in addition to threats and reprisals from powerful actors who seek to prevent them from seeking redress.⁹³ Where, as is increasingly the case, a rightsholder residing in the jurisdiction where HRE harm was sustained seeks justice against a business in another jurisdiction, access to a judicial forum, much less an effective remedy, is likely to prove especially elusive.⁹⁴

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The UN Working Group on Transnational Business has articulated an appropriate response to the challenges facing affected rightsholders:

Rights holders should be central to the entire remedy process. Such centrality would, among other elements, mean that remedial mechanisms are responsive to the diverse experiences and expectations of rights holders; that remedies are accessible, affordable, adequate and timely from the perspective of those seeking them; that the affected rights holders are not victimized when seeking remedies; and that a bouquet of preventive, redressive and deterrent remedies is available for each business-related human rights abuse.⁹⁵

HREDD laws in keeping with this approach would reduce impediments to accessing judicial and non-judicial grievance mechanisms, provide a range of civil, administrative and criminal remedies for non-compliance that respond to rightsholder needs and priorities, and result in deterrent, proportionate and predictable legal consequences for regulated actors that fail to comply.

Establish a range of judicial and administrative remedies that benefit rightsholders: A rightsholder-centric approach to HREDD laws means that administrative, civil and criminal remedies must either directly or indirectly benefit victims. HREDD laws should thus explicitly reference victim-centered remedies such as injunctive relief, restitution orders, administrative orders that suspend companies' operating licenses or that compel compliance with HREDD obligations subject to a daily accruing fine⁹⁶, orders compelling enterprises to meaningfully consult with rightsholders and conduct proper HREDD,⁹⁷ civil and criminal compensation payments, reparations, environmental rehabilitation orders, guarantees of non-repetition and other culturally appropriate remedies.

In addition, HREDD laws should consider creative, collaborative means by which administrative and criminal penalties—which are often utilized to support state budgets—may be used to promote access to justice in the context of irresponsible business actions. For example, the draft UN Treaty currently envisions an “International Fund for Victims” to provide legal and financial aid to human rights victims seeking judicial remedy.⁹⁸ In the finalized treaty, the purpose of this Fund could be expanded to include efforts to protect human rights defenders, human rights victims, whistleblowers, witnesses, and their families from threats and reprisals (for reasons specified under Element 7), and could be supported in large part by the administrative and criminal fines collected under various countries' HREDD laws. To ensure that fines collected in LMICs benefit those countries' law enforcement capacities, any fines collected by an LMIC law enforcement body implementing an HREDD law could be directed to the access to justice and victim-and-witness protection needs of that country.

In the interest of legal certainty and the pursuit of a level playing field across businesses, HREDD laws should also be explicit about the circumstances under which individual, joint and several liability is possible. In order to fulfill the law's preventive purpose, actors should be held liable for

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HREDD failures even where such failures are not connected to potential or actual harm, such as when regulated actors fail to comply with reporting and transparency requirements. Finally, while the confluence of mitigating and aggravating factors considered in sentencing processes is beyond the scope of this policy brief, neither completion of HREDD processes or the general soundness of an actor's due diligence portfolio should automatically render a regulated actor immune from liability.

Eliminate obstacles to judicial grievance mechanisms: HREDD laws will best enable rightsholders to achieve effective remedies if they include proactive measures to eliminate financial and legal obstacles that prevent rightsholders from bringing claims before courts.⁹⁹ For example, to prevent the kinds of delays in legal proceedings that have precluded the first civil claims filed under the French Law of Vigilance (2017) from being promptly addressed by a competent court for over two years,¹⁰⁰ legislatures should specify the original jurisdiction of at least one competent non-commercial court to hear civil claims brought under HREDD laws. As presently written, both the draft EU Directive and draft UN Treaty require the provision of an “effective” remedy, request states provide access to a competent court, and allow transnational cases of HRE harm to be heard by courts with the appropriate jurisdiction. However, only the draft UN Treaty currently requires states to remove obstacles to courts and remedies, with a specific focus on women and other vulnerable and marginalized groups.¹⁰¹

Policymakers should also take special care to safeguard human rights and environmental claims of a transnational nature, which are common where multinational enterprise activities are involved. To account for unequal HRE protections and judicial capacities across the transnational landscapes in which many abuses occur, HREDD legislation should include broad choices of law and forums. This will empower victims to bring actions in forums that provide access to a fair judicial process, and to have their claims evaluated using a legal regime that is consistent with the HREDD law's provisions and objectives. In many cases, victims may require access to a judicial forum in a high-income country where the alleged harm did not occur, but where the enterprise in question is domiciled.¹⁰²

Other formidable obstacles to remedy within judicial forums include requirements that place a disproportionate burden of proof on human rights victims and those alleging environmental damage, rather than companies and other business actor defendants who commonly possess the evidence needed to substantiate human rights and environmental claims. Given the limited resources with which many HRE victims and defenders operate, once the plaintiff bringing suit under a HREDD law establishes prima facie evidence of harm, the burden of proof (i.e. proving satisfactory due diligence) should shift to the business defendants.

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Establish effective operational-level grievance mechanisms: Finally, and as alluded to in Element 2, effective, enterprise-established whistleblower mechanisms and operational-level grievance mechanisms (OLGMs) are desirable elements of HREDD portfolios because they can enable enterprises to quickly identify and respond to potential and actual HRE risks. In some cases, they also facilitate prompt mitigation of potential HRE impacts before those impacts materialize into HRE abuses, thus shielding rightsholders and nature from harm. Importantly, OLGMs' proximity to affected rightsholders may also allow business entities to build a degree of trust with rightsholders that eludes business actors based in headquarters—who are less likely to speak rightsholders' language, understand rightsholders' context, provide culturally appropriate approaches to mediation and remedy, and facilitate any rightsholder preferences for in-person engagement rather than written communication. OLGMs' proximity to local communities also allows them to be more accessible to rightsholders than judicial mechanisms based far away from rural development projects.¹⁰³

However, much of OLGMs' success rests on the implementation of the “effectiveness criteria” articulated in the UNGPs which, as fully articulated in the annexed recommendations to this policy brief, requires OLGMs to be based on engagement and dialogue with rightsholders and other stakeholders, while also being legitimate, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning.¹⁰⁴ The satisfaction of these criteria will often prove the difference between an OLGm capable of effectively addressing rightsholders' concerns before ecosystems have been irreversibly damaged and human rights abuses have occurred, and an OLGm that exacerbates rightsholder grievances and contributes to corrosive gaps in communication and rightsholder consultation.¹⁰⁵

Regrettably, both the draft EU Directive and the draft UN Treaty fail to mandate the establishment of whistleblower mechanisms through which workers can inform an enterprise of potential HRE harm related to its activities. The draft UN Treaty also overlooks non-state-based grievance mechanisms. While the draft EU Directive obliges regulated actors to provide a complaints procedure for rightsholders, civil society and trade unions, it does not require the procedure to exist at an operational-level, and fails to require companies to take reasonable efforts to ensure that such procedures reflect the UNGP effectiveness criteria for non-judicial grievance mechanisms.¹⁰⁶

G. 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.

Affected and potentially affected rightsholders, environment and human rights defenders, witnesses testifying about human rights and environmental abuses, whistleblowers, and their

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families often face threats, intimidation and reprisals in connection to human rights and environmental grievances. In the context of grievances against irresponsible business practices, threats and reprisals often have a chilling effect on HRE advocacy efforts, are not adequately investigated or consistently prosecuted, and deter individual victims from seeking remedy through either judicial or non-judicial mechanisms.¹⁰⁷ In 2021 alone, the Business & Human Rights Resource Centre tracked 615 attacks against human rights defenders engaged in business and human rights-related advocacy, including 370 incidents of judicial harassment (e.g., arbitrary detention, unfair trials, and strategic lawsuits brought to silence business critics), 76 killings, and 45 incidents involving beatings and violence. Seventy percent of the attacks in 2021 were against human rights defenders primarily engaged in defending land and environmental rights. The five most dangerous sectors to be a human rights defender in 2021 are all sectors where overlapping environmental and human rights claims are especially common—in descending order of danger, these sectors are: mining; agribusiness; oil, gas and coal; logging and lumber; and hydropower and dam projects. Moreover, the vast majority of these attacks took place in Latin America and Asia and the Pacific, regions predominantly comprised of LMICs that are generally less equipped with the legislation and law enforcement capacity necessary to effectively protect rightsholders and witnesses from threats, intimidations, and reprisals associated with the pursuit of justice and effective remedies.

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The endemic nature of threats and reprisals in the context of irresponsible business activities is inexcusable, and rectifying the proliferation of these abuses requires coordinated action across government and business. It is of the utmost importance that HREDD laws include dedicated provisions focused on mobilizing both state and business action to this vital end, and as emphasized by the UN Special Rapporteur on the situation of human rights defenders, stakeholder engagement at each stage of the HREDD process should explicitly include human rights defenders as a key stakeholder group.¹⁰⁹ At present, the draft EU Directive's silence with respect to human rights and environmental defenders and the threats and reprisals faced by rightsholders and defenders is deafening, as is the draft UN Treaty's failure to impose targeted obligations on business actors to prevent these reprehensible actions.¹¹⁰

H. Address monitoring and enforcement

Require states to enforce HREDD laws by monitoring and investigating compliance across regulated actors.

Given the importance of HREDD laws in preventing both human rights abuses and environmental degradation, effective state monitoring and enforcement is essential. To this end, each country should have at least one administrative or other supervisory body tasked with monitoring, tracking, investigating (on its own initiative and based on third party concerns) and enforcing HREDD

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compliance, including through compelling the provision of information necessary to execute this mandate. Wherever possible, a separate division within the same supervisory authority should be tasked with identifying and sharing good practices amongst regulated entities and other stakeholders, participating in the process through which future guidance is developed, and providing education and advisory services to regulated entities. In practice, the success of these institutions will likely depend, at least in part, on the clarity of their mandates, the degree to which civil society and business actors view them to be credible, the degree of transparency and adherence to ethical standards that they exhibit, their receipt of adequate funding and competent personnel, and their ability to function independently without political interference.¹¹¹

I. Foster harmonization

Within each jurisdiction, ensure harmonization between HREDD law, bilateral and multilateral agreements, and other legislation impacting the realization of human rights and environmental protection.

HREDD laws operate alongside a multitude of existing laws, international agreements and government mechanisms with direct impacts on regulated actors' human rights and environmental responsibilities. To promote legal certainty and predictability, minimize the cost of compliance, and maximize regulated actors' focus on harm prevention, legislators developing HREDD laws should strive for harmony across these instruments. In addition, HREDD laws should acknowledge states' duties to reform any existing legislation that may undercut or insufficiently reflect HREDD laws' objective (such as weak regulations governing integrity and transparency in corporate lobbying practices, as discussed in Element 4), and should require future laws, policies and international agreements to be compatible with HREDD laws. These tasks, in turn, will require states to ensure coherence between various government agencies – a matter that may be addressed by establishing a national action plan on business, human rights and the environment or a policy targeting HREDD in particular. Valuable lessons may be gleaned from laws already imposing due diligence obligations on business actors, such as anti-corruption laws.¹¹²

Harmonize international trade and investment agreements with HREDD objectives: The inclusion of measures addressing international trade and investment agreements is an important area of law requiring harmonization with HREDD legislation. These agreements often lack proportionate HREDD obligations on entities with wide-ranging HRE impacts and are developed without adequate HREDD due diligence (including human rights and environmental impact assessments). To make matters worse, trade and investment agreements are often interpreted by dispute resolution bodies in a manner that lacks an HRE lens, limits states' abilities to prevent and address human rights abuses, and otherwise facilitates irresponsible business practices, thereby endangering HRE outcomes on a number of fronts.¹¹³ Efforts to reform existing international trade and investment

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agreements should prioritize those that predate the UNGPs and other key advances in business and human rights standards, as these often lack investor obligations concerning human rights and the environment.¹¹⁴ By explicitly calling for such harmonization in HREDD law, and by including measures targeting unfair corporate purchasing and contracting practices as discussed in Element 3, HREDD laws can act as a catalyst to address underlying, systemic issues that undermine states' duties to protect human rights, including the right to a clean, healthy and sustainable environment.

J. Facilitate international cooperation

Mandate international cooperation in the enforcement of HREDD laws.

The cumulative, global impact of forthcoming HREDD laws will be greatly enhanced by coordination and cooperation across national supervisory authorities and judicial bodies overseeing HREDD law enforcement (see Element 8). Effective collaboration will increase legislative coherence and predictability at a global scale, and could help equalize variability in states' judicial and law enforcement capacities.

In this regard, the draft EU Directive and draft UN Treaty have particularly important roles. Their application across national jurisdictions positions them to establish regional and global coordination mechanisms, and to impose obligations upon state parties to cooperate in terms of the sharing of investigative information, the execution of joint HREDD investigations, and the pursuit of other joint enforcement measures. At present, both draft laws establish a coordinating body designed to work across states implementing HREDD laws, but the opportunity to strengthen these cooperative measures remains, particularly by specifying an obligation for coordinating bodies to engage with and seek feedback from rightsholders utilizing HREDD enforcement mechanisms.

IV. Conclusion

Given the severity of human rights and environmental harm being perpetuated by business enterprises around the world, it is imperative that legislators respond rapidly to the essential elements put forward by this policy brief as well as numerous other recommendations on the content of HREDD laws provided by rightsholders, civil society, and experts. Processes through which international, regional and domestic HREDD laws are negotiated must move forward expeditiously and rightsholders' feedback must be integrated into future drafts more consistently. Short-sighted fears about the ability of particular enterprises (especially SMEs) to respond to HREDD requirements must be overcome in favor of wide-reaching but reasonable HREDD provisions anchored by the proportionality principle and transitional periods allowing enterprises with limited capacity to face enforceable obligations at a later date than other regulated actors.



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While lawmakers move forward with the challenging process of developing legislation, enterprises of all sizes and from all sectors should act now to fulfill their responsibilities to respect human rights and the environment through robust and continual human rights and environmental due diligence. Doing so is essential to preventing human rights and environmental harm and to enjoying the many business benefits of respecting human rights and implementing sustainable practices.¹¹⁵ Early adopters will enjoy smoother and less expensive transitions under new HREDD laws than those who attempt to implement change only when they are legally compelled to do so. The reputational consequences involved in companies' failure to respond to the current movement towards mandatory HREDD are potentially significant.¹¹⁶

Faced with an unprecedented global environmental crisis with devastating consequences for the human rights of billions of people, it is clear that the voluntary approaches previously used to nudge business enterprises towards social and environmental responsibility are inadequate. To compel these influential actors to fulfill their responsibilities towards people and the planet, governments at all levels must expeditiously enact and enforce strong due diligence laws mandating respect for human rights, the environment and good governance. Time is of the essence.

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ENDNOTES

¹ United Nations Special Rapporteur on Human Rights and the Environment, with United Nations Special Rapporteur on Toxics and Human Rights, *The Right to a Clean, Healthy and Sustainable Environment: Non-Toxic Environment*, January 12, 2022, UN Doc. A/HRC/49/53; and United Nations Special Rapporteur on Human Rights and the Environment, *Additional Sacrifice Zones*, February 3, 2022, UN Doc. Annex 1 to A/HRC/49/53. See also Damien Gayle, *The Guardian*, “Millions Suffering in Deadly Pollution ‘Sacrifice Zones’, warns UN Expert”, March 10, 2022; and David R. Boyd, United Nations Special Rapporteur on Human Rights and Environment, and McKenna Hadley-Burke (2022), *Sacrifice Zones: 50 of the Most Polluted Places on Earth*. OHCHR.

² United Nations Human Rights Council, *UN Resolution 48/13: The Human Right to a Clean, Healthy and Sustainable Environment*, October 18, 2021, UN Doc. A/HRC/RES/48/13.

³ United Nations Special Rapporteur on Human Rights and the Environment, with United Nations Special Rapporteur on Toxics and Human Rights, *The Right to a Clean, Healthy and Sustainable Environment: Non-Toxic Environment*, January 12, 2022, UN Doc. A/HRC/49/53; United Nations Special Rapporteur on Human Rights and the Environment, *Additional Sacrifice Zones*, February 3, 2022, UN Doc. Annex 1 to A/HRC/49/53; and David R. Boyd, United Nations Special Rapporteur on Human Rights and Environment, and McKenna Hadley-Burke (2022), *Sacrifice Zones: 50 of the Most Polluted Places on Earth*. OHCHR.

⁴ *Ibid.* See also Damien Gayle, *The Guardian*, “Millions Suffering in Deadly Pollution ‘Sacrifice Zones’, warns UN Expert”, March 10, 2022.

⁵ United Nations Special Rapporteur on Human Rights and the Environment, *Human Rights Depend on a Healthy Biosphere*, July 15, 2020, UN Doc. A/75/161, at para. 75.

⁶ See for example, Francesco Martone (2019), *Enough! Pledging Zero Tolerance to Attacks Against Environmental and Human Rights Defenders*. Forest Peoples Programme; Gwynne Skinner, Robert McCorquodale, and Olivier De Schutter, with Andie Lambe (2013), *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*. The International Corporate Accountability Roundtable (ICAR), CORE, The European Coalition for Corporate Justice (ECCJ); Amnesty International (2014), *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy*. Amnesty International Ltd. London; United Nations High Commissioner for Human Rights, *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse*, May 10, 2016, UN Doc. A/HRC/32/19, at para. 24; and United Nations Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, July 18, 2017, UN Doc. A/72/162*, at paras. 62 - 64.

⁷ *Ibid.* See also Front Line Defenders (2021), *Front Line Defenders Global Analysis 2021*. Front Line Defenders. Dublin; and United Nations Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *The Guiding Principles on Business and Human Rights: Guidance on Ensuring Respect for Human Rights Defenders*, June 22, 2021, UN Doc. A/HRC/47/39/Add.2.

⁸ See for example, United Nations High Commissioner for Human Rights, *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse*, May 10, 2016, UN Doc. A/HRC/32/19, at paras. 1 - 7; Axel Marx, Claire Bright, Jan Wouters, with Nina Pineau (2019), *Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries*. A study requested by the European Parliament’s Sub-Committee on Human Rights. European Parliament; Nora Götzmann, Elin Wrzoncki, Linnea Kristiansson, and Evina Heydar, *The Danish Institute for Human Rights (2018), Women in Business and Human Rights: A Mapping of Topics for State Attention in United Nations Guiding Principles of Business and Human Rights Implementation Processes*. The

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⁹See for example, Gwynne Skinner, Robert McCorquodale, and Olivier De Schutter, with Andie Lambe (2013), *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*. The International Corporate Accountability Roundtable (ICAR), CORE, The European Coalition for Corporate Justice (ECCJ); Amnesty International (2014), *Injustice Incorporated: Corporate Abuses and the Human Right to Remedy*. Amnesty International Ltd. London; United Nations High Commissioner for Human Rights, *Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse*, May 10, 2016, UN Doc. A/HRC/32/19, at para. 24; and United Nations Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, July 18, 2017, UN Doc. A/72/162*, at paras. 62 - 64.

¹⁰ See for example, United Nations Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, July 16, 2018, UN Doc. A/73/163; Business & Human Rights Resource Centre (2020), *Towards EU Mandatory Due Diligence Legislation: Perspectives from Business, Public Sector, Academia and Civil Society*. Business & Human Rights Resource Centre; and Business & Human Rights Resources Centre, Gina Gambetta, Investors Call for Stronger Social Protections in Upcoming EU Due Diligence Rules, November 11, 2021, citing “Support for Meaningful and Safe Stakeholder Engagement as a Central Aspect of the EU Framework on Mandatory Human Rights and Environmental Due Diligence”, Letter signed by 43 institutions dated November 10, 2021, available at: https://media.business-humanrights.org/media/documents/Business_Statement_Engagement_MHREDD_finalv3_1011.pdf.

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¹² Lise Smit, Claire Bright, Robert McCorquodale, Matthias Bauer, Hanna Deringer, Daniela Baeza-Breinbauer, Francisca Torres-Cortés, Frank Alleweldt, Senda Kara, Camille Salinier and HéctorTejero Tobed (2020), *Study on Due Diligence Requirements Through the Supply Chain: Final Report*. A study requested by the European Commission, Directorate-General for Justice and Consumers. Publications Office of the European Union. Luxembourg.

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²³ Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (OEIGWG), Third Revised Draft of the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (August 17, 2021).

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Convention on Climate Change, the Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat, the International Convention for the Prevention of Pollution from Ships, the United Nations Convention on the Law of the Sea, the United Nations Convention to Combat Desertification, the International Labour Organization Convention 169 on Indigenous and Tribal Peoples, the United Nations Declaration on Human Rights Defenders, the International Convention for the Protection of All Persons from Enforced Disappearance, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, International Labour Organization Convention 190 on Violence and Harassment in the World of Work, and the United Nations Economic Commission for Europe Convention on Access to Information Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

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⁴⁹ OECD (2011), *OECD Guidelines for Multinational Enterprises*, 2011 Edition. OECD Publishing, at para. 4.

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⁵⁰ See for example, Office of the United Nations High Commissioner for Human Rights (2022), *Remedy in Development Finance: Guidance and Practice*. New York and Geneva. OHCHR.

⁵¹ For a more detailed discussion of the human rights impacts of exclusionary approaches to conservation, see: David R. Boyd, United Nations Special Rapporteur on Human Rights and the Environment, and Stephanie Keene (2021), *Human Rights-Based Approaches to Conserving Biodiversity: Equitable, Effective and Imperative*. UN Human Rights Special Procedures.

⁵² *Ibid.* While the present policy brief is particularly focused on human rights violations that overlap with environmental harm, the extent of non-profit organizations' business and human rights violations extends far beyond these parameters, as exemplified by accusations and admonitions by nonprofit entities such as FIFA, Oxfam, and the United Nations. See for example, John G. Ruggie (2016), *For the Game. For the World: FIFA & Human Rights*. Corporate Responsibility Initiative Report No. 68. Harvard Kennedy School. Cambridge, Massachusetts; Human Rights Watch, "UN Stop Sexual Abuse by Peacekeepers", March 4, 2016; and Avi Selk and Eli Rosenberg, The Washington Post, "Oxfam Prostitution Scandal Widens to at Least Three Countries", February 13, 2018.

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⁵⁸ Proposal for a Directive of the European Parliament of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937, (February 23, 2022), European Commission, Explanatory Memorandum at p.14.

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⁵⁹ *Ibid.* See also Eurostat, “Structural Business Statistics Overview”, available at:

https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Structural_business_statistics_overview (last visited, April 30, 2022).

⁶⁰ United Nations Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, April 24, 2017, UN Doc. A/HRC/35/32, at para. 6.

⁶¹ International Labour Organization, “Small and Medium Enterprises”, available at:

<https://ilo.org/global/topics/employment-promotion/small-enterprises/lang--en/index.htm> (last visited: April 30, 2022) (“there is broad agreement that small and medium-sized enterprises (SMEs) are vital to achieving decent and productive employment as they globally account for two-thirds of all jobs and also create the majority of new jobs.”). See also, International Trade Union Confederation (ITUC) (2016), *Scandal: Inside the Global Supply Chains of 50 Top Companies*. ITUC Frontlines Report 2016. ITUC. Brussels, Belgium (demonstrating that 50 of the largest transnational companies only directly employ 6 percent of workers worldwide; the other 94 percent are employed by subcontractors and suppliers).

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