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INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

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# Update on developments and proposal to upgrade the priority level of the project on Corporate Sustainability Due Diligence in Global Value Chains

(prepared by the Secretariat)

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| *Summary* | *Update on the results of the Exploratory Workshop on Corporate Sustainability Due Diligence in Global Value Chains held on 27-28 May 2024 and proposal to upgrade the project's priority level based on the results of the Workshop* |
| *Action to be taken* | *The Governing Council is invited to take note of the results of the Exploratory Workshop and to upgrade the project's priority level from medium to high priority, allowing the Secretariat to establish a Working Group. The Governing Council is invited to accept the possibility of cooperation or joint work with UNCITRAL should such a request be received.* |
| *Mandate* | *Work Programme 2023-2025* |
| *Priority level* | *Confirmation of high priority* |
| *Related documents* | *UNIDROIT 2022 C.D. (101) 4 rev.; UNIDROIT 2022 C.D. (101) 21; UNIDROIT 2022 A.G. (81) 9; UNIDROIT 2024 C.D. (103) 12; UNIDROIT 2024 C.D. (103) 30* |

## I. INTRODUCTION

1. At the 103rd session of the Governing Council in May 2024, the Secretariat informed the Council that it was organising an Exploratory Workshop on the project on Corporate Sustainability Due Diligence in Global Value Chains at the seat of the Institute on 27 and 28 May 2024. All Governing Council Members received an invitation to the Workshop. The Secretariat anticipated that the Council would be duly informed of the outcome of the Workshop and, should the Secretariat be convinced of the appropriateness to establish a Working Group, a proposal would be made to the Governing Council to upgrade the project's priority. In order to maximise efficiency and avoid having to postpone the setting up of a Working Group and the beginning of its activity until after the ordinary Governing Council session, the update on the results of the Workshop and the proposal to upgrade the priority level of the project would be submitted to the Council intersessionally by written procedure.

Accordingly, the purpose of this document is to inform the Members of the Governing Council of the results of the Exploratory Workshop, and to invite the Council to upgrade the project's priority level from medium to high priority in order to allow for the establishment of a Working Group.

## II. BACKGROUND OF THE PROJECT

2. In 2022, UNIDROIT was called upon by both the European Bank for Reconstruction and Development (EBRD) and the International Development Law Organization (IDLO) to consider undertaking work on Corporate Sustainability Due Diligence (CSDD) in Global Value Chains in light of its expertise in contract law, seen as a key potential catalyst for the implementation of sustainability measures through private law.

3. The project is to be contextualised in the growing concern for sustainability, including the protection of environmental standards and human rights along global value chains. Commercial contracts have become an essential vehicle to comply with CSDD in global value chains, and changes to contract law as a consequence of said trend have raised many legal questions which could benefit from UNIDROIT's expertise in the fields of contract and commercial law.

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

5. Subsequently, the European Law Institute (ELI) sent UNIDROIT a proposal to consider including an assessment of the impact of technology and the use of platforms in the context of global value chains. As in other areas of the law, technology has an important impact on CSDD, including on both the structure and functioning of global value chains. It also has a significant impact on the possibilities for monitoring sustainability performance.

6. At its 101st session in 2022, the Governing Council assigned the project medium priority and invited the Secretariat to conduct exploratory work to define the scope of the project. At that session, the Secretariat confirmed that the normative work would only be initiated once resources became available following the completion of another high-priority project. The Secretariat believes that the conditions to proceed with the upgrade of the project and begin normative work are now present.

7. First, as requested by the Governing Council, the Secretariat completed its exploratory work in preparation of the commencement of the project over the period 2022-2024. It undertook comprehensive research, mapping the main CSDD legal instruments and initiatives at the international, regional and domestic level. It also reviewed the existing model clause collections, which are devoted to developing standard sustainability contract clauses with the goal of clarity and enforceability. Based on this holistic review, the Secretariat analysed what might differentiate the potential UNIDROIT guidance document from the other existing instruments and initiatives, to best fill the remaining gaps, relying on UNIDROIT's mandate and expertise. The outcome of this research served as the basis for the discussions at the Exploratory Workshop held in May 2024, which provided a clear recommendation with regard to the scope of the future instrument. The outcome of the Workshop is summarised under Section III, below.

8. Second, with the conclusion in May 2024 of the joint UNCITRAL/UNIDROIT Model Law on Warehouse Receipts project – a high-priority project that had begun in December 2020 – resources have become available within the Institute that can be dedicated to implementing a new high-priority project under the 2023-2025 Work Programme.

9. Moreover, the Secretariat is convinced that now is the appropriate time to commence the normative work – not only because resources have become available, but also since the project would

develop strong synergies with other ongoing high-priority projects and significantly strengthen the Institute's new area of work on private law and sustainability. The Secretariat's main considerations and recommendations for the Governing Council are laid out under Section IV, below.

## III. OUTCOME OF THE EXPLORATORY WORKSHOP, 27-28 MAY 2024

10. The purpose of the Exploratory Workshop, held on 27 and 28 May 2024 at the seat of UNIDROIT in Rome, was to bring together a limited number of invited experts from different jurisdictions and with different professional backgrounds, to assess the existing international normative framework as well as the need for and added value of a future UNIDROIT instrument on the topic, and to provide recommendations as to such instrument's form, scope and content. The Agenda for the Workshop is included in Annexe I, as a part of the Report.

11. The Workshop involved some of the most globally renowned legal experts in the field of corporate sustainability due diligence. The legal systems represented included China, Italy, the Netherlands, Portugal, the United Kingdom, and the United States of America, in addition to Governing Council Members from Belgium, Japan and Latvia. Participants comprised legal and economic experts representing academia, the private sector, and intergovernmental organisations, including the Organisation for Economic Co-operation and Development (OECD), the EBRD, the IDLO, and the ELI. Notably, members of both the Working Group that developed the American Bar Association's Model Contract Clauses (the ABA MCCs) 2.0 and the Working Group that developed the draft European Model Clauses (the EMCs) participated in the Workshop. Given the medium-priority status of the project, the number of participants was limited. If the Governing Council should decide to upgrade the project to allow for the establishment of a Working Group, the group of experts would naturally be enlarged to cover a wider jurisdictional and professional representation. The List of Participants is included in Annexe I, as a part of the Report.

12. The participants' deliberations were based on a Discussion Paper that conveyed the comprehensive research undertaken by the Secretariat referred to above, circulated prior to the Workshop. The Discussion Paper aimed to suggest a starting point and structure for the Workshop, providing background information relating to the project, as well as a list of issues and questions that participants were invited to consider. Importantly, all considerations and recommendations shared by Governing Council Members in relation to this project during both sessions with this project on the agenda, namely the 101st session in June 2022 when the project was proposed for inclusion in the Work Programme and the 103rd session in May 2024 when the exploratory work was presented to the Council, were addressed. The Discussion Paper is available in Annex II.

13. Based on the Discussion Paper, the participants addressed the key concepts of global value chains and corporate sustainability due diligence. They carefully reviewed the main corporate due diligence legal instruments and initiatives at the international, regional and domestic level and identified the remaining gaps that a future UNIDROIT instrument could fill. Building upon this comprehensive assessment, the participants discussed in detail substantive matters they recommend for inclusion in the future UNIDROIT instrument, as well as the possible form of the instrument.

14. Overall, the Workshop resulted in the conclusion of the participants that there are significant gaps in the international framework in addressing pressing issues in practice, and that a future UNIDROIT instrument could indeed fill those gaps and constitute an important normative instrument to complement the existing international framework. The participants unanimously recommended that UNIDROIT develop such an instrument, also providing recommendations as to its potential scope, form and content. In summary, responding to the identified gaps in the international landscape, it was recommended that the future instrument provide guidance on due diligence-aligned contracting, including model contract clauses with commentary, which would: (i) offer to the parties an alternative to traditional contracting practices that often fail to promote sustainability objectives, (ii) lay out how

to operationalise the requirements set out in the relevant existing international instruments through contracts, (iii) fully implement the United Nations Guiding Principles on Business and Human Rights (the UNGPs), (iv) have global application and legitimacy, (v) be developed with the inclusion of the Global South, (vi) acknowledge sector-specific issues, and (vii) not be limited to specific contract types. The full text of the Summary Report of the Workshop reflecting the detailed considerations of the participants is enclosed in Annex I.

## IV. CONSIDERATIONS AND RECOMMENDATIONS BY THE SECRETARIAT

15. In view of the outcome of the exploratory work and in particular the results of the Exploratory Workshop, as well as the work planning and resource allocation within the Institute to implement the 2023-2025 Work Programme, the Secretariat is confident that now is the appropriate time to establish a Working Group. The main considerations for this recommendation are outlined below. Careful attention has been paid to addressing in a comprehensive manner the considerations and recommendations shared by Members of the Governing Council in relation to this project, particularly during its 103rd session in May 2024.

### A. Confirmation of the added value of a future UNIDROIT instrument to fill important gaps and weaknesses in the existing international framework

16. One concern voiced by Governing Council Members and taken into careful consideration by the Secretariat was to ensure that the future instrument would not duplicate any of the already-existing instruments on CSDD. This aspect was subject to thorough examination during the Exploratory Workshop. The unanimous view of the Workshop participants confirmed that the instrument as proposed would not duplicate any of the existing instruments but rather fill several important gaps and address various weaknesses, as elaborated below.

*Guidance on contracting at the global level, implementing existing international instruments*

17. To date, there is no instrument that provides contractual guidance to buyers and suppliers along value chains at the global level. Notably, the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct ("the OECD Guidelines") lay out all the different steps of the due diligence process, yet they do not address the role of contracts in those steps. None of the model clause collections that were considered by the participants – foremost the American Bar Association's Model Contract Clauses (ABA MCCs) 1.0 and 2.0, or the European Model Clauses (EMCs) – adopts a global approach. This is reflected in the fact that none of those model clause collections has fully implemented the international instruments, in particular the UNGPs and OECD Guidelines. The lack of implementation of a global approach can be explained by the model clauses' particular drafting history, as they were not conceived as global instruments but instead to help operationalise rules in certain jurisdictions only.

*Guidance on contracting that acknowledges sectoral issues*

18. The lack of sector-specific guidance on contracting is another important gap in the current instruments. While the OECD does provide sector-specific guidance that is extensively used by companies in practice, it notably does not address contracting. The future instrument might initially focus on cross-sectoral guidance, in line with the UNGPs and the OECD Guidelines, but it could then acknowledge many sectoral issues and subsequently consider developing sector-specific clauses, adapting to different circumstances for different industries. For example, the commentary in the instrument explaining collaboration between buyers and suppliers could, *inter alia*, provide guidance and practical examples on how collaboration works in practice and in different sectors, for instance if there are many smallholders versus two or three main suppliers in a particular value chain. Furthermore, the instrument could explain that, depending on the contracting model and a party's

position within that model, a particular kind of contract clause or another might be beneficial for the party to include in the contract.

*Guidance that adopts an inclusive approach: consolidating diverse perspectives, developed by a Working Group with wide geographical representation*

19. During the Governing Council session in May 2024, Council Members highlighted the need for a balanced instrument that takes into account different perspectives along the value chain as well as the fact that company policies and trade rules between different countries sometimes conflict. By way of aspirational analogy, Council Members referred to the UNIDROIT Principles of International Commercial Contracts (UPICC, or "the UNIDROIT Principles"), noting that they facilitate and promote transactions by harmonising contract law throughout different regions of the world, and they highlighted that the UPICC were recognised to be very balanced in protecting the rights and obligations of both parties to a contract. This was seen as the reason for the UPICC's wide acceptance and enduring success. Council Members underlined that, in a similar way, the discussion of due diligence should not only be considered from the perspective of the value chain upstream, but also from the perspective of the downstream companies and how their rights and obligations could equally be protected.

20. The Workshop participants agree that one element of the added value that a UNIDROIT instrument can bring is precisely that it would consider the various perspectives and circumstances to achieve a balanced outcome, following the model of the UPICC. Again, none of the existing model clause collections has been developed adopting such an approach. The ABA MCCs and the EMCs are aimed at specific markets and were notably not conceived for emerging market countries, the perspectives of which were not taken into account. The future UNIDROIT instrument could add an important value if it would consider all perspectives and develop clauses that would also work on the ground in Global South countries. The Secretariat supports this conclusion of the Workshop.

21. In order to ensure such a balanced outcome, it is crucial that the instrument be developed through an inclusive process which, following UNIDROIT's established working method, ensures the involvement of the Global South in the development of the instrument. Indeed, Governing Council Members highlighted the importance of establishing a Working Group with experts representing many different regions with diverse backgrounds in order to ensure a globally acceptable outcome. Generally, in light of UNIDROIT's diverse Member States, each project has to consider its experts' geographical provenance to ensure added value for various domestic legislative frameworks. This inclusive approach would set the UNIDROIT project apart from all other existing initiatives – including the ABA MCCs, the EMCs, and the future model clauses to be developed according to Art. 18 of the European Union Corporate Sustainability Due Diligence Directive (EU CSDDD).

22. This process would add yet another crucial advantage to the envisaged work, as none of the existing model clause collections enjoys the legitimacy of having been developed by a global intergovernmental institution. UNIDROIT guidance for contracting would fill this gap, based on its global constituency and its legitimacy as a Member State organisation with a built-in public-interest mission.

## B. Recommendations regarding the scope and content of the future instrument

23. The Secretariat was requested to provide recommendations for a more defined scope of the future instrument. The following recommendations are based on the assessment of existing instruments as well as UNIDROIT's expertise, and in line with the Workshop participants' insights.

*A technical instrument providing contractual guidance including model clauses*

24. At the 103rd session of the Governing Council in May 2024, some Council Members cautioned that the UNIDROIT project should not aim to define new sustainability standards, keeping away from politically controversial issues and concentrating on the contractual, which was indeed the project's

natural remit within UNIDROIT. Rather, Council Members suggested that the project could provide contract tools to help companies comply with emerging frameworks and regulations.

25. The outcome of the Exploratory Workshop aligns perfectly with this stance, as participants recommended that the future instrument be purely "technical", addressing private law aspects only and focusing on contractual guidance. They recommended that the future instrument be rooted in the already existing international framework and should lay out how to operationalise the requirements set out therein (e.g., the UNGPs, the OECD Guidelines) through contracts. The future instrument would not develop standards for due diligence but would instead provide the mechanisms for implementation of existing applicable standards into contracts in the global value chain. This approach is not only in line with UNIDROIT's mandate and expertise, but also responds to the important gap identified by the Workshop participants and the Secretariat in the existing international framework: the existing international instruments do not address the role that contracts in particular can play to promote CSDD. As mentioned above, the OECD Guidelines lay out all the steps of the due diligence process, yet they do not address the role of contracts in those different steps. It is recommended that the future instrument fill this gap by providing guidance on due diligence-aligned contracting, effectively transposing the process of due diligence into contracts. The instrument might explain what role a contract could play in each step of the due diligence process set out in the OECD Guidelines or other relevant international texts. For instance, the OECD Guidelines state that responsibility is shared by buyer and supplier and cannot be shifted entirely from the buyer to the supplier, as all businesses ultimately have responsibility for sustainability objectives. Hence, contracts should not be used to shift responsibility onto suppliers. The future instrument could propose clauses that establish a shared responsibility of buyer and supplier to prevent adverse sustainability impacts, as well as a mechanism to cooperate in mitigating such impacts should they arise.

26. Moreover, a future instrument providing contractual guidance would be useful to identify and explain problems in current contractual practice, as well as propose alternative good practices for contracting. Some of the problems of current contractual practice include that, in cases of breach of contract because of sustainability issues, contracts commonly foresee the right to immediate termination, rather than remediation. In addition, contracts typically do not take into consideration how the buyer's own purchasing practices might aggravate the situation, for example by imposing a timeline or price-pushing the supplier to make its labourers work excessive overtime. The future UNIDROIT instrument could propose clauses providing for a remediation mechanism and termination of contract only if remediation is not possible.

*Building on the UNIDROIT Principles, following the approach of previous contract law instruments*

27. Again, several Governing Council Members highlighted the UPICC as a successful contract law instrument that is broadly recognised and valued at the global level, and that could be taken as a model for the future instrument.

28. Indeed, the Secretariat and the Workshop participants recommend that the future Working Group take the UNIDROIT Principles as a starting point. The approach of taking the UPICC as a basis and reference for the development of a more specific instrument has proved successful for previous instruments on contracts developed by UNIDROIT with other organisations, notably the UNIDROIT/FAO/IFAD Legal Guide on Contract Farming (LGCF) and the UNIDROIT/IFAD Legal Guide on Agricultural Land Investment Contracts (ALIC). Moreover, the same approach is currently being followed by the joint project with the International Chamber of Commerce's Institute of World Business Law (ICC Institute) on International Investment Contracts, which features among its points of focus sustainability issues addressing similar considerations, but in the context of international investment contracts instead of value chain contracts.

29. The UPICC are one of the most recognised international instruments providing international commercial contract guidance. They can serve as a starting point for this project, as they contain

general principles and specific rules that could be used to address some of the issues connected to the implementation of sustainability concerns. On the other hand, they are necessarily general and were at least initially developed for application to more traditional commercial contracts. The use of sustainability clauses in contracts brings a fundamentally new approach to the traditional type of commercial contract, as they distribute the balance of power between contracting parties and expand the scope of stakeholders beyond just the contracting parties. As such, global value chain contracts are distinct from purely commercial contracts as they are not merely transactional but effectively create a form of constitutional structure for a global supply chain (whether arranged as a network, web, multi-party contract or chain of bilateral contracts). Accordingly, it is recommended that the future instrument elaborate on the distinct nature of global value chain contracts, both providing commentary on relevant UPICC provisions that may potentially apply in global value chains and proposing clauses not covered by the UPICC.

30. Specifically, several articles of the UPICC were identified during the Exploratory Workshop as a useful basis and reference for the future CSDD instrument. They include Articles 1.8 (inconsistent behaviour), 1.9 (usages and practices), 2.2.1 (agency), 4.3 (interpretation via relevant circumstances), 5.1.4 (duty to achieve a specific result, duty of best efforts), 5.1.5 (determination of kind of duty involved), 5.1.6 (reasonable quality of performance), 7.1.2 (interference by the other party), and 7.3.1 (termination). For example, the interpretation of Article 1.8 (inconsistent behaviour) allows for the introduction of the broad scope of pre-contractual issues. Potentially, whether adherence of one of the parties to a code of conduct already creates an expectation (expected behaviour), which can further be a ground for an estoppel claim, can be explored. Another Principle highlighted by the Workshop participants is Article 1.9 (usages and practices), as in the future the inclusion of certain sustainability standards might become so commonly present on the market that it would be read into the contract, as per the custom of a particular sector, and it would not need to be mentioned. Another example is Article 7.1.2 (interference by the other party), which may be commented on to address the problem of purchasing practices through which the buyer contributes to the non-performance of the supplier. For example, if the buyer imposes a price or a timeline or makes changes to the orders that push the supplier to make its labourers work excessive overtime beyond what is allowed in the buyer's code of conduct, this would amount to non-performance. The terms stipulated by the buyers in their contracts with the suppliers usually provide that any non-performance of the buyer's code of conduct gives the buyer an immediate right to terminate the contract and sue the supplier for damages.

31. Furthermore, the participants recommended considering a number of potential contractual clauses for inclusion in the future instrument that are *not* covered by the UPICC, including the general CSDD obligation, references to codes of conduct and internal policies, perpetual clauses, remediation, third-party rights, private international law aspects of third-party rights, indemnification clauses, grievance mechanisms, and dispute resolution. Contractual clauses on CSDD with respect to the value chain are becoming increasingly widespread and are mostly found in model contract clauses of transnational companies. The future instrument could provide an alternative model. For example, the general CSDD obligation could include accompanying measures for suppliers, including providing assistance to small- and medium-sized enterprises (SMEs), as for example provided in the EU CSDDD, which contemplates the provision of assistance, especially to SMEs, to ensure that they effectively have the capacity for implementation. It was also proposed to consider including a provision on minimising the administrative burden for suppliers that follow responsible purchasing practices. Participants reported that suppliers are already overwhelmed by due diligence questionnaires, score cards, information requests, audits, etc., from companies that fall or would fall within the scope of mandatory supply chain laws, and that these suppliers are not able to keep up. This increases the cost of production. One of the clauses that was added to the EMCs addresses structuring requests for information in a reasonable way so as to not overburden the supplier, and to accept, for example, questionnaires that have been filled in for other buyers unless they clearly do not satisfy the buyer's requirements. Furthermore, participants suggested that the future instrument should contain a responsible exit clause stipulating that if, for whatever reason (e.g., a force majeure event, or a severe adverse impact that could not be remedied) the buyer decided to terminate the contract, it had to give

reasonable notice, consider the adverse impact caused by the exit, and take measures to mitigate such impact. It was proposed to consider including a principle providing for a form of shared responsibility, or shared mitigation of the adverse effects, in such situations.

*Consideration of the role of technology in the due diligence process*

32. The Governing Council invited the Secretariat to consider the mechanisms through which technology impacts or interacts with the due diligence process, and to assess whether this could be subject to a separate analysis covered by another project proposed to the Council at its 103rd session in May 2024, namely the potential "ELI-UNIDROIT project in the area of technology and global value chains" (see UNIDROIT 2024 – C.D. (103) 12 bis). That project would cover technology in global value chains in general, not focusing on CSDD. After careful consideration, all Workshop participants agreed on the importance of addressing technology in the different parts of the CSDD project, considering it as pervasive in relation to CSDD, and therefore not conducive to be separated from the project.

33. Moreover, the Workshop highlighted that it would be an important, gap-filling added value of the future UNIDROIT instrument on CSDD to address the applications of digital technologies in the context and for the purpose of CSDD, and to assess the effect on value chain contracting.

34. Technology affects value chain contracting in many ways, including how the clauses are proposed, agreed upon, and enforced. Therefore, technology is key to understanding what clauses UNIDROIT could address. For example, blockchain is becoming one of the technologies pervading global value chains for the purpose of, *inter alia*, data sharing and self-executing clauses. Data transactions play a primary role in value chain contracting today. More importantly, data is a key input in a multitude of automated decision-making systems and processing. Therefore, legal and contractual solutions need to be revisited to ensure that they enable and promote data-driven global value chains.

35. Automation is one technological macro-category triggering a profound transformation of global value chains. Legion automated decision-making systems and processing are used along value chains in relation to CSDD. For example, SMEs – which usually do not have the resources to implement the increasing number of due diligence requirements – largely need to automate due diligence requirements through artificial intelligence and other technological solutions. The legal and contractual implications of this use of artificial intelligence and other technological solutions to implement CSDD requirements is another important aspect for the future instrument to take into consideration.

36. More generally, digital technology has generated new organisational and governance architectures that profoundly change global value chain models. Consequently, for instance, the concept of the "chain leader" needs to be adapted to these new structures, as under diverse governance models (networks, platforms, multi-party contracts, collaborative or associative schemes), one party (the operator of the platform, the leading supplier, the manager of the network) may be entrusted with certain supervisory and governance powers.

## C. Recommendations regarding the form of the future instrument

37. In view of the outcome of the research and of the Exploratory Workshop, which identified an important gap in existing international instruments regarding contractual guidance for the parties, it is recommended that the future instrument take the form of a legal guide primarily aimed at contracting parties – rather than legislative guidance addressed to legislators. This is in line with the views expressed by Governing Council Members during the June 2022 and May 2024 sessions. The provision of contractual guidance also falls squarely within UNIDROIT's core expertise, as exemplified not only by the UPICC but also the number of subsequent instruments and projects developed in their wake. The Workshop participants recommended that the legal guide include guidance for contracting, illustrations and examples of good practices, plus model clauses, and be designed in a way that allows parties to refer to the future UNIDROIT instrument in their contracts.

38. Moreover, it was noted that the future instrument, while aimed at private parties, could also be useful for legislators and policymakers – like the UNIDROIT Principles and the LGCF, which are directly used by parties in contract drafting but have also been used as models for legal reform in many jurisdictions.

## D. Recommendations for work planning and resource allocation within the UNIDROIT Secretariat

39. The Secretariat recommends commencing the normative work as soon as the availability of resources is confirmed. The project would develop strong synergies with other ongoing high-priority projects and, moreover, significantly strengthen UNIDROIT's new area of work on private law and sustainability.

40. As previously noted, with the completion of the joint UNCITRAL/UNIDROIT Model Law on Warehouse Receipts project – precisely the approval of the Model Law and its Guide to Enactment by the Governing Council at its 103rd session in May 2024 – resources within the Secretariat have become available that can be dedicated to carrying out a new high-priority project under the current Work Programme. This would in principle allow the Secretariat to create a Working Group and initiate the substantive work on this project. Whether this will effectively take place is however conditional of the final result of the discussion on the new Work Programme that will take place at the 105th session of the Governing Council (20-23 May 2025).

41. The project has strong synergies with other ongoing projects of the Institute, as it can not only draw on the discussions and ongoing work from those projects but would also feed into the discussion of specific aspects of the other projects. In particular, it aligns with the joint project with the ICC Institute on International Investment Contracts (IICs) to develop guidance to promote the modernisation and standardisation of international investment contracts. The project on IICs explores the interaction between the UPICC and common provisions in international investment contracts and seeks to address a number of recent developments in the area of international investment law, notably the increasing focus on corporate social responsibility and sustainability. Moreover, the CSDD project is in line with the ongoing work on developing a UNIDROIT/FAO/IFAD Legal Guide on Collaborative Legal Structures of Agricultural Enterprises, which also takes the UPICC as a point of departure and addresses, *inter alia,* sustainability concerns in relation to agricultural enterprises.

42. More broadly, the CSDD project is perfectly aligned with and would considerably strengthen the Institute's emerging area of work focusing specifically on the private law of sustainability, which so far features the ongoing high-priority project on Verified Carbon Credits. Sustainability as an overarching policy objective is linked with previous instruments developed by UNIDROIT in the field of private law and agriculture. UNIDROIT is in a prominent position to make a significant contribution towards the efforts of the international community to advance sustainability through the Institute's uniform private law instruments.

43. Finally, it is worth noting that UNCITRAL held a colloquium on 23rd and 24th October 2024, entitled "The Law of International Trade for a Greener Future ", where a discussion on "Greening the supply chain: a perspective from the CISG" took place [1]. The colloquium sought to discuss how existing UNCITRAL's instruments could help shape a "greener future". The conclusion on the CISG recorded by the UNCITRAL Secretariat states that "(a) drafting model clauses for parties under international sale of goods contract to accommodate the different obligation regimes under the CISG and applicable mandatory law for greening the supply chain; (b) developing a tripartite legal guide, in collaboration with HCCH and UNIDROIT, to uniform instruments in the area of international commercial contracts with a focus on climate-related obligations" would be proposed for consideration at the next Commission session. In light of this, considering the possible areas of overlap and in the spirit of cooperation

[1] The full report can be read here: https://documents.un.org/doc/undoc/gen/v24/075/69/pdf/v2407569.pdf.

between both organisations, the UNIDROIT Secretariat would propose to open the UNIDROIT CSDD project to cooperation and coordination with UNCITRAL, including the development of a joint instrument, should the abovementioned proposal of the UNCITRAL Secretariat for either cooperation or joint work be approved by the Commission and if UNIDROIT were to receive a proposal to that effect.

## V. ACTION TO BE TAKEN

44. *The Governing Council is invited to take note of the results of the Exploratory Workshop on the project to develop a guidance document on Corporate Sustainability Due Diligence in Global Value Chains held at the Institute on 27-28 May 2024. The Council is invited to upgrade the project's priority level from medium to high priority in order to allow for the establishment of a Working Group, when sufficient resources can be allocated. The Governing Council is invited to accept the possibility of cooperation or joint work with UNCITRAL should such a request be received.*

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

**ANNEXE I**

**EN**

**Exploratory Workshop on**
**Corporate Sustainability Due Diligence in**
**Global Value Chains**

**Rome, 27 - 28 May 2024**

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

**SUMMARY REPORT**

**OF THE EXPLORATORY WORKSHOP**
**(27 - 28 May 2024)**

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

**Item 1: Opening of the Workshop**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### (i) International and supranational instruments

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

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

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

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

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

### (ii) Domestic legislation

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

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

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

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

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

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

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

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

### (iii) Model clause collections and sustainability contractual clauses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**(d) Form of the future instrument**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**(e) Structure of the future instrument**

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

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

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

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

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

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

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

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

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

#### (i) Definitions

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

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

#### (ii) The UPICC and CSDD

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

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

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

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

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

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

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

### (iii) Contractual clauses not covered by the UPICC

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

*General CSDD obligation*

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

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

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

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

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

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

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

*References to codes of conduct and internal policies*

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

*Perpetual clauses*

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

*Human rights and environmental remediation*

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

*Third-party rights*

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

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

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

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

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

*Private international law aspects of third-party rights*

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

*Indemnification clauses*

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

*Grievance mechanisms*

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

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

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

*Dispute resolution*

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

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

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

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

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

### Item 4: Any other matters

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

### Item 5: Closing of the Workshop

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

**ANNEX I**

## LIST OF PARTICIPANTS

### EXPERTS

| | |
|---|---|
| Ms Claire BRIGHT | Associate Professor, NOVA Law School, Lisbon (Portugal)<br>Founder & Director of the NOVA Centre on Business, Human Rights and the Environment |
| Mr Fabrizio CAFAGGI | Professor, University of Trento and LUISS University (Italy)<br>Judge at the Council of State of Italy |
| Mr Damiano CANAPA | Professor, University of Lausanne (Switzerland)<br>Director of the Center for Business Law |
| Ms Sarah DADUSH | Professor, Rutgers Law School, Newark (United States)<br>Founding Director, Business & Human Rights Law Program and the Responsible Contracting Project |
| Mr Martijn SCHELTEMA | Professor, Erasmus University (the Netherlands)<br>Attorney-at-law & Partner, Pels Rijcken |
| Ms Suzanne SPEARS | Founder & Principal, PAXUS LLP, Lawyers for Business and Human Rights (United Kingdom) |
| Mr Ji WENHUA | Professor, University of International Business and Economics, Beijing (China) |

### INSTITUTIONAL REPRESENTATIVES

| | |
|---|---|
| European Bank for Reconstruction and Development (EBRD) | Ms Divya CHAWLA<br>Principal Counsel |
| European Law Institute (ELI) | Mr Ulrich SCHROETER<br>Professor, University of Basel |
| | Ms Teresa RODRIGUEZ DE LAS HERAS BALLELL<br>Professor, University of Madrid |
| International Development Law Organization (IDLO) | Ms Irmina PACHO<br>Climate Justice Specialist |
| Organisation for Economic Co-operation and Development (OECD) | Ms Barbara BIJELIC<br>Deputy Head of Due Diligence, Centre for Responsible Business Conduct |

**MEMBERS OF THE GOVERNING COUNCIL**

| | |
|---|---|
| Mr Jean-Christophe BOULET | Advisor, Federal Public Service Justice (Belgium) |
| Mr Hideki KANDA | Professor, Gakushuin University (Japan) |
| Mr Lauris RASNAČS | Professor, University of Latvia (Latvia) |

**UNIDROIT SECRETARIAT**

| | |
|---|---|
| Mr Ignacio TIRADO | Secretary-General |
| Ms Anna VENEZIANO | Deputy Secretary-General |
| Mr Rocco PALMA | Senior Legal Officer |
| Ms Philine WEHLING | Legal Officer |
| Ms Priscila PEREIRA DE ANDRADE | Legal Officer |

**ANNEX II**

**AGENDA**

1. Opening of the Workshop

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

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

4. Any other matters

5. Closing of the Workshop

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

**ANNEXE II**

**EN**

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

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

# DISCUSSION PAPER

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

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

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

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

**Table of Contents**

# I. INTRODUCTION

## A. Introduction to UNIDROIT and its working methods

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

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

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

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

## B. Background of the CSDD project

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### D. Status of the project

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

## II. SCOPE OF THE PROJECT AND ISSUES FOR DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Question for discussion:*

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

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

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

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

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

## B. Overview of corporate due diligence legal instruments and initiatives

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

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

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

### 1. International and supranational instruments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[35] Id.

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

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

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

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

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

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

*Questions for discussion:*

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

## 2. Domestic legislation

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

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

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

[41] Id., see Art. 22.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Questions for discussion:*

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

### 3. Model clause collections

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[80] Id., §1.

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

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

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

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

*Questions for discussion:*

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

## C. Content of the future instrument: issues for discussion

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

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

### 1. Definitions

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

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

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

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

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

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

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

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

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

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

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

88 UPICC 2016, Chapter 4.

89 EMC, Definitions.

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

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

*Questions for discussion:*

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

## 2. The UPICC and CSDD

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

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

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

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

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

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

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

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

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

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

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

94 Id., § 3.3.

95 EMCs, Art. 3.

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

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

*Questions for discussion:*

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

### 3. Contractual clauses not covered by the UPICC

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Questions for discussion:*

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

## 4. CSDD and enforcement

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

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

### *Third-party rights*

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

[104] See Section 1, above.

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

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

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

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

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

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

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

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

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

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

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

111 UPICC Art. 5.2.1.

112 UPICC Official Commentary, Art. 5.2.1.

113 UPICC Art. 5.2.1.

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

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

*Questions for discussion:*

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

***Dispute resolution and grievance mechanisms***

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

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

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

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

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

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

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

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

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

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

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

119 ABA MC 2.0, p. 22.

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

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

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

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

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

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

*Questions for discussion:*

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

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

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

### 1. Scope of control

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

### 2. Obligations

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

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

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

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

### 3. Extent of harm

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

### 4. Liability

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

### 5. Enforcement

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

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

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

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

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

### 6. Choice of law

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

*Questions for discussion:*

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

## E. Possible form of the future instrument

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

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

### 1. Compliance guide, with model clauses and UPICC commentary

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

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

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

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

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

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

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

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

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

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

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

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

### 2. Legislative guidance

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

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

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

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

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

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

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

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

*Questions for discussion:*

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