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Saving Humankind with Domestic Mandatory Human Rights Due Diligence Laws: A Third World Approach to International Law

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Abstract

The process of holding transnational corporations (TNCs) accountable for human rights abuses has witnessed longstanding struggles between the Global North and South. Mandatory human rights due diligence (mHRDD) laws are by far the latest legislative endeavors to regulate the human rights practices of TNCs through domestic laws. Currently, major mHRDD laws have emerged within Europe. Through networked global value chains, these laws have profound impacts on nations, populations, and suppliers in the Global South. However, we lack an adequate understanding of the consequences and implications of such laws from their perspectives. This article examines major mHRDD laws from a Third World Approach to International Law (TWAIL) perspective. It identifies three key features of mHRDD laws and explores how each feature may result in unintended oppression in the Global South. It finds that although the initial purpose of mHRDD legislation is to humanize global value chains, such legislation may entrench existing power imbalances between trade partners from Global North and South. Due to the affected stakeholders in the Third World being excluded from the legislative process of mHRDD laws, the protection of the existing laws is limited in that they can only be exercised in alignment with the legislative state's domestic political and economic interests. This article proposes that mHRDD laws must be reformed to engage with a broader range of stakeholders and suggests the necessity of a business and human rights treaty.

Keywords

Mandatory human right due diligence laws, Third World Approach to International Law, national interest, extraterritorial implication, global value chain

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Introduction

From the Bhopal disaster in India to the harrowing accounts of seafood slavery in Indonesia, people who are part of global value chains—notably those from the Global South—have endured protracted human rights abuses perpetrated by transnational corporations (TNCs). Against longstanding disagreements between Global North and South and numerous unsuccessful attempts to hold TNCs accountable, the United Nations Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGPs) in 2011.[1] For the first time, the UNGPs established a "global authoritative standard on business and human rights (BHR)" that clarifies state duties and corporate responsibilities for human

[1] UN Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, June 16, 2011, A/HRC/17/31, 2011 [hereinafter UNGPs].

rights.[2] At the core of the UNGPs is the concept of human rights due diligence (HRDD).[3] Essentially, HRDD is an ongoing process that requires business entities to respect and protect human rights throughout their operations and supply chains, and involves a comprehensive framework of risk assessment, abuse prevention, monitoring and accountability mechanisms.[4] The rise of HRDD has subsequently led to the adoption of mandatory human rights due diligence laws (mHRDD laws) within domestic and regional frameworks.

However, similar to the historical pattern of TNCs regulation, the adoption of mHRDD laws also witnessed a profound divide between Global North and South.[5] Currently, all mHRDD laws are exclusively originated from European countries.[6] These laws, while enacted at the domestic level, have profound extraterritorial implications that extend to Third World countries.[7] Naturally, mHRDD laws received immediate criticism once they were issued.[8] However, most studies primarily focus on existing legal provisions to evaluate the constructions of legal frameworks, standards, mechanisms and legal relationships in mHRDD laws, and seek improvements. This may lead to an overlooking of structural issues and root causes in the design and implementation of mHRDD laws.

As a critical approach to international law, the Third World Approach to International Law (TWAIL) seeks to understand the history, structure, and processes of international law from

[2] IBA Practical Guide on Business and Human Rights for Business Lawyers. pt. 13 (2016).

[3] John Gerard Ruggie & John F. Sherman, *The Concept of 'Due Diligence' in the Un Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert Mccorquodale*, 28 EUR. J. INT'L L., 921(2017).

[4] *See generally,* Principle 17 of the UNGPs.

[5] *See infra* Chapter I.

[6] *See infra* Chapter I, Section B.

[7] Domestic measures with extraterritorial implications are domestic norms adopted by a state to regulate domestic actors, but with the intention of shaping their conduct and that of their subsidiaries and contractors beyond borders, many of them are in the Third World. *See* FLORIAN WETTSTEIN, BUSINESS AND HUMAN RIGHTS: ETHICAL, LEGAL, AND MANAGERIAL PERSPECTIVES 229-33 (2022); *See also*, Galit Sarfaty, *Shining Light on Global Supply Chains*, 56 Harv. Int'l L.J., 420-21 (2015).

[8] These criticisms typically ask, "difficult questions of sovereignty, legitimacy, and participation." For instance, Okowa emphasizes the risks of unilateral legislation that benefit powerful states. *See* Phoebe Okowa, *The Pitfalls of Unilateral Legislation in International Law: Lessons from Conflict Minerals Legislation*, 69 INTERNATIONAL & COMPARATIVE LAW QUARTERLY, (2020); Dava points out mHRDD laws failed to address imbalance of power, information and resources between businesses and rightsholders. *See* Surya Deva, *Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?*, 36 LEIDEN JOURNAL OF INTERNATIONAL LAW, 389, 400 (2023)6, at 400; An empirical study concludes the effectiveness of mHRDD laws rely on the creation of equal playing fields for actors in GVCs. *See* Almut Schilling-Vacaflor, *Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?*, 22 Human Rights Review, 123 (2021); several researchers noted mHRDD laws' lack of meaningful involvement of rightsholders from host state undermined their legitimacy and effectiveness. *See e.g.*, WETTSTEIN, *supra* note 7, at 292-93; Michael Mason et al., *The Devil Is in the Detail—the Need for a Decolonizing Turn and Better Environmental Accountability in Global Supply Chain Regulations: A Comment*, REGULATION & GOVERNANCE, 2(2023); Seck Sara L. *Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance?* 46 (3) OSGOODE HALL LAW JOURNAL 565–603 (2008); *See also*, Markus Krajewski, *The State Duty to Protect against Human Rights Violations through Transnational Business Activities*, 23 DEAKIN LAW REVIEW, 13-14 (2018);Jaakko Salminen & Mikko Rajavuori, *Transnational Sustainability Laws and the Regulation of Global Value Chains: Comparison and a Framework for Analysis*, 26 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW, 602-27, 10 (2019); As a result, legislating mHRDD alone does not necessarily result in substantive changes.

the perspective of the Third World.[9] TWAIL does not prescribe a single research methodology but rather a research perspective that focuses on the status and rights of Third-world countries in international law.[10] It emerged as a response to the historical dominance of Western perspectives in international law, which often neglected the experiences and interests of the Global South.[11] This includes human rights.[12] mHRDD laws, while implemented by individual countries, intersect with broader international legal frameworks and power dynamics.[13] Considering the significant diversity and complexity in the historical, cultural, social and economic backgrounds of Third-world countries and communities, their knowledge, experiences and values should not be excluded from the academic discussion on the *good*, *bad* and *ugly* effects of mHRDD laws globally.[14]

Presently, only limited studies have adopted the TWAIL perspective to scrutinize mHRDD laws' exterritorial implications,[15] Eurocentric narratives,[16] and lack of stakeholder engagement.[17] Notably, these studies still focus on describing, analyzing, and interpreting specific regulations.[18] To date, no literature has offered an in-depth normative analysis of the motivations and underlying values of mHRDD legislation, and to evaluate whether these values align with the normative goals of ensuring fair and just protection of human rights within GVCs. This article fills this gap by critically examining major mHRDD laws from a normative TWAIL perspective. The aim is to understand how these laws are constructed and applied to reflect legislative countries' underlying values and purposes, thereby deviating from the core normative commitment HRDD aimed to fulfil.

This article is structured around a central critique, consisting of two progressive analyses. The central critique casts doubt on mHRDD laws being the most optimal device for protecting human rights in the Third World. The first layer analysis focuses on the key characteristics of major mHRDD laws to understand their structural features and operational logic. Importantly, grasping the common characteristics is a necessary prelude to evaluating the desired outcomes of mHRDD laws. The second layer analysis offers an in-depth exploration of the intentions, social interests, and public policy objectives of legislating HRDD. The underlying

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[9] *See* B. S. Chimni, *The Past, Present and Future of International Law: A Critical Third World Approach*, 8 MELBOURNE JOURNAL OF INTERNATIONAL LAW, 499, 499-515 (2007).

[10] Makau Mutua, *What Is Twail*, 94 PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW), 31, 36 (2000).

[11] *See e.g.*, John D. Haskell, *Trail-Ing Twail: Arguments and Blind Spots in Third World Approaches to International Law*, 27 CANADIAN JOURNAL OF LAW & JURISPRUDENCE, 383, 386 (2015).

[12] *See e.g.*, B.S. Chimni, *Third World Approaches to International Law: A Manifesto* 8INTERNATIONAL COMMUNITY LAW REVIEW, 3, 3 (2006).

[13] Fatimazahra Dehbi & Olga Martin-Ortega, *An Integrated Approach to Corporate Due Diligence from a Human Rights, Environmental, and Twail Perspective*, 17 REGULATION & GOVERNANCE, 3 (2023).

[14] Tobias Wuttke et al., *Human Rights and Environmental Due Diligence in Global Value Chains: Perspectives from the Global South* 5-7 (2022), *at* https://www.swp-berlin.org/publications/products/arbeitspapiere/WP02_HREDDinGlobalValueChains.pdf; *id.* at 5-7.

[15] Caroline Omari Lichuma, *(Laws) Made in the 'First World': A Twail Critique of the Use of Domestic Legislation to Extraterritorially Regulate Global Value Chains*, 81 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT / HEIDELBERG JOURNAL OF INTERNATIONAL LAW, 497(2021).

[16] Debadatta Bose, *Decentring Narratives around Business and Human Rights Instruments: An Example of the French Devoir De Vigilance Law*, 8 BUSINESS AND HUMAN RIGHTS JOURNAL, (2023).

[17] Dehbi & Martin-Ortega, *supra* note 13.

[18] For example, Bose's legislative storytelling examined only the narratives of Franch Law. *See* Bose, *supra* note 16.

values of mHRDD are important not only for unveiling the mask of such laws but also for influencing the effectiveness and fairness thereof.

This article is organized as follows: Chapter I provides a historical review of the Global North–South divide in regulating multinationals, which paves the way for subsequent discussions on the unintended exploitative features and competing motivations underlying mHRDD laws. Chapter II maps the landscape of major domestic mHRDD laws. Chapter III analyzes the key characteristics of such laws, with a focus on their extraterritorial reach. Where appropriate, the implications of these mHRDD laws on nations, populations, and suppliers in the Global South are discussed. Chapter IV discusses the structural limitations of mHRDD laws, which are enacted through a unilateral legislative process primarily driven by domestic stakeholders' conflicting interests and result in an inadequate integration of the Global South's perspectives. It concludes that lawmakers of mHRDD laws shall better engage with stakeholders in the Global South and suggests the necessity of an international BHR treaty.

1. The Enduring North–South Divide in BHR Regulation

The rise of mHRDD legislation is one of the most important developments in the realm of BHR. While international efforts to hold TNCs accountable for human rights abuses within global value chains have been inefficient and fraught with obstacles, developed countries have taken the initiative to adopt unilateral domestic legislative approaches. However, stakeholders across the globe are increasingly concerned about such laws, with a notable resonance found in the Global South. Nations of the Global South (which house most suppliers in the chains) and Global North (where powerful lead firms are predominantly located) have a distinctive stake in this discourse. To understand the distinction between contemporary developments mHRDD laws and to formulate relevant critiques, it is imperative to delve into the historical context.[19] Hence, this Section begins with a historical overview of the different efforts and initiatives in the Global South and North in regulating TNCs.

A. Regulating TNCs: A Hard History of the Global South

There is a long history of regulating human rights abuses committed by transnational businesses. Since the beginning of the last century, the international community has attempted to hold TNCs accountable for human rights through both hard law mechanisms—such as international labor law, international criminal law, and international economic law—and soft law initiatives, such as the UN Global Compact and the International Labor Organization's (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.[20] Although the efforts for regulating corporate human rights abuses through hard laws are now mainly led by developed countries, retrospectively, it was the Third World countries that first engaged in a proactive attempt to establish mandatory regulations on multinationals, yet denied by their developed counterparts.

The legalization of corporate human rights responsibility can be traced back to the 1970s, when a growing number of newly independent developing countries realized that political

[19] *See e.g., id.* at 19 (noted that "discrete national mHRDD laws must be understood in the context of its history.")

[20] For a detailed historical investigation in this regard, *see* NADIA BERNAZ, BUSINESS AND HUMAN RIGHTS: HISTORY, LAW AND POLICY - BRIDGING THE ACCOUNTABILITY GAP 43-208 (2017).

independence is not necessarily equal to economic independence. Global North multinationals still have perpetuated colonial exploitation and go unpunished for abusing power.[21] The failure of international law has led to a sense of insecurity in the Global South and called for more international efforts to reconcile powers of multinationals.[22] In this context, newly independent states capitalized on the UN to initiate the development of international law instruments aimed at regulating TNCs. The UN Code of Conduct on Transnational Corporations (UN Code of Conduct),[23] as well as the UN Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises (UN Draft Norms),[24] are two landmarks in this regard.[25] In particular, the UN Draft Norms required, among other things, multinationals to respect human rights and fundamental freedoms, disclose non-financial information, and adopt and report periodically the implementation of internal rules of operation.[26] These obligations closely resemble the current HRDD process. However, the two instruments were firmly rejected by the Western nations, which are today's major mHRDD lawmakers.

What resulted in the failure of the Global South-led initiatives is the inherent contradiction between regulating multinationals and the dominance of Western-championed neoliberal globalization. Hence, immediately following the drafting of the UN Code of Conduct, the Organization for Economic Cooperation and Development (OECD)—whose member states are home countries of most TNCs—adopted the Guidelines for Multinational Enterprises (OECD Guidelines) in 1976, thereby establishing voluntary self-regulation for TNCs. The adoption of the OECD Guidelines served as "pre-emptive strikes" aimed at thwarting the UN Code of Conduct, effectively "neutralizing the demand for its existence by adopting only non-binding loose standards at the international level."[27] From then on, the discourse on regulating TNCs has gradually shifted to non-binding modalities (then BHR laws) captured by the Global North.

B. The Rise of Global North-Led mHRDD Laws

The UNGPs have sparked a renewed global push to establish regulations on corporate human rights responsibility at the national and international levels. And the Global South remains the key actor in pursuing an international legally binding BHR instrument (BHR Treaty).[28] This time,

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[21] An early and insightful discussion on TNCs' colonial exploitation of the Global South nations, *see* KWAME NKRUMAH, NEO-COLONIALISM: THE LAST STAGE OF IMPERIALISM (1965); The global architecture built mainly by Western countries not only exempted multinational corporations from international legal liability but also provided them with excessive protection through institutional designs, such as international investment law and international financial law. *See* Ilias Bantekas, *Business and Human Rights: Foundations and Linkages*, *in* THE CAMBRIDGE COMPANION TO BUSINESS AND HUMAN RIGHTS LAW, 1-21 (Ilias Bantekas & Michael Ashley Stein eds., 2021).

[22] Salvador Allende Speech to the United Nations (excerpts), December 4, 1972, https://www.marxists.org/archive/allende/1972/december/04.htm.

[23] Code of Conduct on Transnational Corporations, May 28, 1987, E/RES/1987/57.

[24] *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*, August 26, 2003, E/CN.4/Sub.2/2003/12/Rev.2.

[25] *See* BERNAZ, *supra* note 20, at 164-76, 185-190.

[26] UN Draft Norms art. 15.

[27] *See* Bose, *supra* note 16, at 22.

[28] In 2014, the UN Human Rights Council mandated an Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with respect to Human Rights (IGWG) chaired by developing countries to elaborate on a BHR treaty. This resolution was co-sponsored mainly by the Global South, approved by 20 developing countries and rejected by 14 developed ones.

the Global North has not exhibited the same level of opposition to the Global South-led endeavor as they had previously. On the one hand, developed countries have shown a certain degree of "acceptance." For example, the United States expressed its openness to "a legally binding framework agreement." [29] The EU also cooperated with the IGWG to submit proposals for establishing principles and parameters of the treaty that confines with the EU values.[30] On the other hand, the Western camp also took proactive measures to hedge and eliminate the influence of the Global South in global value chain regulation by enacting domestic mHRDD laws with a global reach. Hence, mHRDD laws originated as a continuum of North–South divide in setting rules for TNCs.[31]

The enactment of mHRDD laws starts with some prior legislative attempts of mandatory disclosure laws, which require targeted companies to report on actions to combat certain human rights abuses along supply chains. However, reporting obligations in the absence of substantive due diligence requirements have only limited efficacy.[32] Subsequently, mHRDD laws were adopted to represent a tightened stand for regulating global value chains.[33] Such laws provide a comprehensive framework that mandates corporations to establish substantive HRDD processes for their operations and entities within their supply chains.[34] Noncompliance with these obligations may result in civil, administrative, and/or criminal sanctions.[35] Currently, there are 4 major mHRDD laws and one important EU Directive Proposal, all of which have emerged in Europe (see Table 1).[36] The bandwagon of legislating mHRDD laws is anticipated to continue.

As Bilchitz noted, "the voting patterns reflect a split between developed countries and developing countries". *See* David Bilchitz, *The Necessity for a Business and Human Rights Treaty*, 1 BUSINESS AND HUMAN RIGHTS JOURNAL, 204 (2016) 204.

[29] Annex to the report on the seventh session of the IGWG, December 29, 2021, A/HRC/49/65, 25.

[30] *See e.g.*, IGWG 8th Session Statement by the European Union, 24 October 2022, pp. 4 & 7, https://www.ohchr.org/sites/default/files/documents/issues/transcorporations/session8/submissions/2022-10-27/stm-IGWG-session8-igo-eu.pdf.

[31] Bose, *supra* note 16, at 21 (noting that mHRDD constitutes "a manifestation of the national-international dichotomy on regulation of TNCs.")

[32] *See* Marcia Narine, *Disclosing Disclosure's Defects: Addressing Corporate Irresponsibility for Human Rights Impacts*, 47 COLUM. HUM. RTS. L. REV., 84-150 (2015); WETTSTEIN, *supra* note at 241-247.

[33] *See* Deva, *supra* note 6, 413 (termed mHRDD as the "2.0 version" of BHR laws).

[34] *See* Gabriela Quijano & Carlos Lopez, *Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?*, 6 BUSINESS AND HUMAN RIGHTS JOURNAL, 241(2021).

[35] *See infra* Chapter III, Section A.

[36] Loi no. 2017–399 du 27 Mars 2017 relative au devoir de vigilance des soci´et´es m`eres et des entreprises donneuses d'ordre (the French Duty of Vigilance Act); Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen (Wet zorgplicht kinderarbei) (the Dutch Child Labor Due Diligence Act); A Gesetz über unternehmerische Sorgfaltspflichten in Lieferketten, Vom 16. Juli 2021 (German Act on Corporate Due Diligence in Supply Chains); Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (Norwegian Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions); Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final.

Table 1 Major mHRDD Laws

Year	mHRDD Law
2017	*French Duty of Vigilance of Parent and Instructing Companies Law* (French Law)
2019	*Dutch Child Labor Due Diligence Act* (Dutch Act)
2021	*German Act on Corporate Due Diligence Obligations for Prevention of Human Rights Violations in Supply Chains* (German Act)
2021	*Norwegian Act relating to Enterprises' Transparency and Work on Fundamental* Human Rights and Decent Working Conditions (Norwegian Act)
2022	*EU Proposal on Corporate Sustainability Due Diligence Directive* (EU Proposal)

Notably, one important feature of mHRDD laws is that the binding effect goes beyond domestic enterprises and "extends a state's control directly over production that takes place outside its traditional jurisdiction."[37] Such legislation "serves as an alternative to international law for shaping the behavior" of host states and will have profound impacts on global value chains.[38] In particular, the introduction of Global North-led mHRDD laws may effectively pre-empt the ecological niche of a Global South-led BHR treaty to regulate and humanize GVCs, thereby impeding its enactment. Hence, it appears that certain parts of the Global North are opposed not to the process *per se* of legislating corporate human rights responsibilities but rather to the legislation scheme proposed and led by the Global South.[39]

[37] Salminen & Rajavuori, *supra* note 8, at 608.

[38] Sarfaty, *supra* note 7, at 420.

[39] Bose, *supra* note 16, at 23 (noted that "the (treaty) negotiation process (as well as the domestic legislative reaction) was indeed looked like a flashback from the 1970s debate on the New Economic World Order.")

2. Domestic mHRDD Laws

The above historical review on BHR regulation characterizes an enduring Global North–South struggle for discourse power in global value chain regulation. Notably, there has been an irregular shift in the Global North perspective, departing from its previously strong position of international deregulation for globalized production network. Instead, there has been a rapid development of Global North-led domestic mHRDD laws with extraterritorial implications. This irregular shift suggests that the dynamics in this domain are becoming more complex and raises questions about the underlying motivations of these laws. The answer to this question requires a closer examination of major mHRDD laws.

Passed in 2017, the French Law is a pioneering legislation. Companies that fall under its purview must conduct, disclose, and implement due diligence. This plan is designed to ensure that their own operations, those of subsidiaries they control directly or indirectly, and the activities of their subcontractors and suppliers with whom they have an established commercial relationship do not pose threats to human rights and fundamental freedoms, risks and serious harms to health and safety and the environment.[40] Crucially, French Law introduces a civil liability regime, which allows victims to pursue legal actions before French courts to seek damages resulting from a company's failure to comply with its due diligence duties.[41]

Subsequently, the Dutch Act was enacted in 2019, which has not yet been enforced as of the time of writing this article. Although this Act primarily focuses on child labor, its personal scope extends to Dutch companies and companies abroad that sell goods and provide services to the Dutch market more than twice a year.[42] Targeted businesses of all sizes and origins must perform due diligence and submit declarations to designated authorities. Noncompliance may result in administrative fines and even criminal liabilities for responsible managers.[43]

The German Act was passed in 2021. This Act requires companies to perform human rights and environmental due diligence within their supply chains.[44] It adopts a holistic, albeit limited, approach to HRDD, combining human rights and environmental considerations within the due diligence requirements.[45] Noncompliant companies face administrative fines and exclusion from public procurement.[46] Importantly, the German Act explicitly states that its violations shall not lead to civil liability, while civil liability established independently of this Act remains unaffected.[47]

Then, the Norwegian Act was enacted to require human rights and decent work due diligence in the operations of enterprises, supply chains, and business partners.[48] While the Norwegian Act includes provisions for administrative fines and enforcement penalties for violations, it does not establish a civil liability regime.[49] However, it does grant individuals the right to request

[40] French Law, art. 1, para. 3.
[41] *Id*., art. 1, para. 7
[42] Dutch Act, arts. 1 & 4.
[43] *Id.*, art. 7 & 9.
[44] German Act, secs. 1 & 2
[45] In contrast, the French Law adopts a more isolated approach. *See* Dehbi & Martin-Ortega, *supra* note 13, at 4-5.
[46] German Act, secs. 22–24.
[47] *Id.*, sec. 3.
[48] Norwegian Act, sec. 4.
[49] *Id*., secs. 11-14.

information regarding how a company addresses actual and potential adverse impacts on human rights and decent working conditions.[50]

Lastly, the EU Proposal, initiated in February 2022, is advancing through EU legislative procedures. It sets out obligations for companies regarding adverse impacts on actual and potential human rights and the environment. These obligations extend to their own operations, the operations of their subsidiaries, and the value chain operations implemented by entities with which the company has a commercial relationship. Additionally, the EU Proposal goes several steps further by imposing climate due diligence obligations on certain large EU and non-EU enterprises, mandating these enterprises to adopt a plan to ensure their business model and strategy align with the climate target set by the Paris Agreement.[51] The EU Proposal also outlines civil and administrative liabilities for companies that violate their obligations.[52]

The key components of these five mHRDD laws are summarized in Table 2 and discussed in more detail in the next Chapter.

[50] *Id.*, sec. 6
[51] EU Proposal, art. 15
[52] *Id.*, arts. 18 & 22

Table 2 A Contextual Comparison of the Five Major mHRDD Laws

mHRDD Law	Material Scope	Personal Scope	Value Chain	Consequences of Breach	Remedies for Victims	Stakeholder Engagement
French Law (2017)	Risks and harm to human rights and the environment (art. L. 225-102-4).	French companies with above 5,000 or 10,000 employees in France or globally (art. L. 225-102-4).	Subsidiaries, subcontractors, and suppliers (art. L.225-102-4).	Injunctive relief; fines (art. L.225-102-4).	File a petition to require enforcement; file civil litigations to seek damages (art. L.225-102-4).	Company may consult with stakeholders when drafting a due diligence plan (art. L.225-102-4).
Dutch Act (2019)	Child Labor (art.2).	Companies registered in the Netherlands or doing business with Dutch customers (arts. 1 & 4).	Production chain covering companies earlier in the value chain (arts. 4 & 5).	Administrative fines; management criminal liability (arts.7 & 9).	Complaint to supervisory bodies (art.3).	Allow social organizations to prepare a joint action due diligence plan (art.5).
German Act (2021)	Human rights and (a limited scope of) environment (sec. 2).	Companies with over 3,000 employees with a registered office or branch in Germany (1,000 employees from 2024) (sec.1).	Entire life circle of a company and its direct suppliers' product or service (sec. 3&9).	Fines; exclusion from public procurement (sec. 22–24).	Firm-level grievance mechanism (sec. 8); Authorize trade union or NGO to bring proceedings (sec 11); report to a competent authority (sec. 14).	Company to consider interests of stakeholders in developing a risk management system (sec. 4).
Norwegian Act (2021)	Human rights and working conditions (sec. 3).	Large businesses doing business activities within Norway or in the Norwegian market (secs. 2 & 3).	Suppliers, subcontractors, and business partners (sec. 3).	Prohibitions and orders; enforcement and infringement penalties (secs. 11–14).	Remediation and compensation (sec. 4); right to information (sec. 6).	Communicate with affected stakeholders and rightsholders when doing due diligence (sec. 4).
EU Proposal (2022)	Human rights and environment (art. 1).	EU companies with 500 employees and EUR 150 million net global turnover (250 employees and 40 million if half of turnover was generated in a high-impact sector); non-EU companies with EUR 150 million net turnover in the EU (40 million if half of turnover was generated in a high-impact sector (art. 2).	Any activity related to the production of goods or provision of services by a company, including the use and disposal of the product (art. 3).	Remedial action and administrative fines (Art. 20); exclusion from public support (art. 24); Director liability (art. 25).	Complaint to firm-level authority (rt. 9); file concerns to a supervisory authority (art. 19); file civil litigations to seek damages (art. 22).	Companies shall consult with stakeholders in identifying risks and developing plans (arts. 6-8); collaboration with other entities shall be considered by the supervisory bodies in determining sanctions (art. 20).

3. Key Characteristics of mHRDD Laws

In this Chapter, key common features of current domestic mHRDD legislations are discussed to understand the potential impact of mHRDD laws on global value chains. We assess the extent to which specific groups of actors' interests and perspectives are represented by these laws, as well as which issues or adverse impacts are deliberately excluded from their scope. Such an assessment contributes to a broader inquiry of TWAIL scholarship: "How does a particular rule or legal regime empower or disempower people in the Third World?"[53]

A. Major mHRDD Laws are Established in the First World

As global value chains have become "[t]he face of the modern global economy,"[54] upholding human rights therein is generally considered a grand challenge that can only be appropriately addressed through global actions.[55] However, mHRDD laws are domestic laws with extraterritorial implications, aiming to shape global value chain regulations unilaterally. As illustrated in the "Personal Scope" part in Table 2, these laws are used to directly regulate domestic companies or companies operating within their jurisdictions that have business interests across supply chains.

These direct targets—which are typically lead firms and wield significant influence and control over their suppliers[56]—are obliged, to varying degrees, by mHRDD laws to ensure that their own operations and those of their suppliers at various tiers adhere to standards outlined by these laws.[57] In effect, the dual-tier regulatory framework of mHRDD laws transforms the directly-regulated companies into quasi-regulators over entire supply chain. Consequently, under mHRDD laws, "multinational companies are more than just regulated entities; they now also serve as regulators themselves, thereby imposing standards on their third-party suppliers in other countries."[58] Given the cascading effect of global value chain, domestic mHRDD laws made by the First World can now exert extraterritorial influence worldwide, thereby achieving their intended regulatory objectives.

At first glance, these ambitious domestic initiatives reflect a responsible image of developed countries in establishing foreign corporate accountability and providing enhanced access to remedy and human rights conditions for accountability holders, particularly those in the Global South.[59] For example, the German Act seeks to safeguard the rights of individuals involved in

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[53] Antony Anghie, *Twail: Past and Future*, 10 INTERNATIONAL COMMUNITY LAW REVIEW, 480 (2008).

[54] Lamy, P. (2014) "Global value chains and the new world of trade," Keynote Address, Duke GVC Global Summit, October 20, 2014, https://globalvaluechains.org/video/duke-global-summitkeynote-address.

[55] Florian Wettstein et al., *International Business and Human Rights: A Research Agenda*, 54 JOURNAL OF WORLD BUSINESS, 54, 54-65 (2019).

[56] *See* Donella Caspersz et al., *Modern Slavery in Global Value Chains: A Global Factory and Governance Perspective*, 64 JOURNAL OF INDUSTRIAL RELATIONS, 177(2022). For detailed exploration of this issue. *See* Section B.3 of this Chapter.

[57] *See* the "Value Chain" and "Material Scope" part in Table 2.

[58] Sarfaty, *supra* note 7, at 421.

[59] Foreign corporate accountability is a common objective of mHRDD laws, denoting the accountability of a company for negative impacts caused abroad by subsidiaries or suppliers. In this regard, accountability holders refer to individuals and communities who suffer harm because of violating human rights and environmental standards. *See generally,* Mason et al., *supra* note 8.

the production of goods for the German market.[60] Likewise, the Norwegian Act is expected to improve working conditions for individuals in global supply chains *within* and *outside* Norway.[61] Nevertheless, the good intentions do not change the nature of mHRDD laws, which are unilateral domestic legislation. As we will discuss in detail later, they may, wittingly or unwittingly, stifle the voices of the populations these laws aimed to safeguard.[62] In particular, when these domestic mHRDD laws are utilized to enforce "universal norms," they often fall short of being the optimal solution.

B. Using Domestic Laws to Codify "Universal" Norms in Global Value Chain

The second characteristic of mHRDD laws is associated with a clear objective of promoting Western-defined "universal" norms within global value chains. This is achieved by translating such norms into tangible and enforceable legal provisions that often reflect a Eurocentric viewpoint. These provisions include the inclusive definitions of "value chain", the selective adoption of human rights standards, and the delocalization of remedial mechanisms.

1. The Legal Notion of "Value Chain"

As Table 2 illustrates, mHRDD laws, notwithstanding their differences in many aspects, share comprehensive definitions of the term "value chain" within their provisions.[63] In essence, these laws encompass the entire production and distribution process within the supply chains of target companies, leaving almost no relevant actor outside their scope. For example, French Law extends its jurisdiction to cover all subsidiaries under the control of a direct target, as well as any subcontractors and suppliers with established commercial relationships.[64] The German Act includes the entire lifecycle of a product or service, and covers all entities involved in steps necessary to produce the product.[65] The Norwegian Act includes business partners that supply goods or services directly to a company but are not part of the supply chain.[66] On the one hand, the inclusive definition of the value chain in mHRDD laws should be necessary to address the governance gap across multiple tiers of supply chains. On the other hand, they characterize how "national legislators are vying to conceptualize global value chains through local hard law," demonstrating the Western legislators' taking for granted the extraterritoriality of mHRDD laws, as if they have the unquestionable authority to enforce these laws globally.[67]

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[60] Greater protection for people and the environment in the global economy, March 3, 2021, https://www.bundesregierung.de/breg-en/service/archive/supply-chain-act-1872076.

[61] Supply Chain Transparency—Proposal for an Act Regulating Enterprises' Transparency About Supply Chains, Duty to Know and Due Diligence, November 28, 2019, p. 4, https://www.regjeringen.no/contentassets/6b4a42400f3341958e0b62d40f484371/ethics-information-committee---part-i.pdf.

[62] *See* discussion, *infra* Chapter III, Section C.

[63] *See* the "Value Chain" part of Table 2.

[64] *See* French Law, art. L.225-102-4.

[65] *See* German Act, sec. 3 & 9.

[66] *See* Norwegian Act, sec. 3.

[67] Salminen & Rajavuori, *supra* note 8, at 603.

2. The Codification of Westernized "Universal" Values

It becomes evident that most existing mHRDD laws tend to prioritize selective national human rights and environmental standards yet label them as "internationally recognized standards of universal validity."[68] For instance, the German Act emphasizes its solid roots in internationally recognized standards and its genuine concern for people in the Global South, especially women and children. However, many internationally recognized human rights standards for the protection of women and children, such as the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child*,* are absent from the German Act's material scope.[69] Similarly, when defining "violations of internationally recognized objectives and prohibitions," the EU Proposal selectively refers to specific provisions of international treaties at its discretion rather than the treaties themselves.[70] Additionally, the EU Proposal falls short of incorporating the most recognized international environmental treaties, such as the UN Framework Convention on Climate Change and the Paris Agreement.[71] In the end, the mHRDD laws' claim to uphold universal values often appears to be more selective and often disconnected from local realities than truly universal.[72] One may argue that laws, by their nature, are seldom flawless. The incomplete coverage of all human rights and environmental standards does not *ipso facto* render the material scope of mHRDD laws devoid of universality. However, this argument overlooks a crucial reality: major domains of international law—including international human rights law—still bear indelible marks of their colonial origins.[73] Furthermore, there exists a long history of the Global North exploiting international law to advance its interests in the Third World.[74] Consequently, mHRDD laws that claim to be based on universal norms would inevitably "operate in the shadow of the legacy of the imperial project."[75] They risk perpetuating existing unequal power structures and continue to uphold Eurocentric values in the emerging regulatory sphere of global value chain. Therefore, the assertion that the material scope of mHRDD laws aligns with "internationally recognized standards of universal validity" warrants scrutiny [76].

3. The Western Jurisdiction of Human Rights Abuses

The Eurocentricity of mHRDD laws is also evident in their enforcement and remedy provisions. Civil liability serves as one of the most effective mechanisms for rightsholders to seek redress.[77] However, most mHRDD laws fail to establish robust civil liability regimes to provide

[68] *See* WETTSTEIN, *supra* note at 293; *See also* Dehbi & Martin-Ortega, *supra* note 13, at 6 (noted the mHRDD laws' Eurocentricity of standards).
[69] *See* arts.1-11 of Conventions in the Annex of the German Act.
[70] *See* Annex Part II of the EU Proposal.
[71] *Ibid.*
[72] Dehbi & Martin-Ortega, *supra* note 13, at 6.
[73] Antony Anghie, *Imperialism and International Legal Theory*, *in* THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW, 156-72 (Anne Orford & Florian Hoffmann eds., 2016).
[74] Penelope Simons, *International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights*, 3 JOURNAL OF HUMAN RIGHTS AND THE ENVIRONMENT, 19-29 (2012).
[75] Lichuma, *supra* note 15, at 500.
[76] WETTSTEIN, *supra* note 7, at 293.
[77] A general discussion on the roles and options of civil liability in terms of remedies, *see* GABRIELLE HOLLY & METHVEN O'BRIEN CLAIRE, HUMAN RIGHTS DUE DILIGENCE LAWS: KEY CONSIDERATIONS. BRIEFING ON CIVIL LIABILITY FOR DUE DILIGENCE FAILURES (2021).

meaningful relief for victims of human rights abuses. While each mHRDD law imposes administrative fines (and criminal liability under the Dutch Act), the fines ultimately flow into public coffers rather than directly remedying the victims.[78] Even in the case of the French Law and EU Proposal,[79] attempts to provide effective remedies for victims are still limited. On the one hand, civil liability under these laws is fault-based in that companies are held accountable only if they have been negligent or intentionally failed to fulfill their due diligence obligations.[80] Thus, companies are able to evade civil liabilities by undertaking minimal or superficial due diligence measures, even if actual harm has been caused.[81] On the other hand, both laws do not shift the burden of proof from victims to companies, nor do they offer proper assistance to rightsholders in overcoming the barriers to accessing civil remedies. This altogether may "result in a denial of justice."[82]

To make things worse, the discussed mHRDD laws may give rise to a pernicious phenomenon known as "delocalized justice."[83] This phenomenon refers to the transfer of the locus of justice away from the community in which harm was suffered (typically situated in the Global South) to judicial and non-judicial institutions of other countries (usually the Global North). Such transnational litigations aiming to hold businesses accountable have become a common practice in BHR.[84] Yet, delocalized justice also raises concerns regarding the judicial sovereignty of the Global South.[85] It hinders the advancement of local judiciaries and facilitates the extraterritorial application of human rights and other standards set by the Global North.[86] In addition, delocalized justice has the potential to consolidate and popularize a deleterious stereotype that portrays the regulation of global value chains "as problems where the most serious or common abuses are to be found in the Global South, and the effective remedies mostly need to be found in the Global North."[87] This narrative may further solidify a biased perception of the Global South as barbaric and the Global North as civilized, attributing the governance gap in BHR to regulatory and judicial failures in the Third World.[88] However, it is

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[78] Quijano & Lopez, *supra* note 34, at 244.

[79] Article L.225-102-5 of the French Commercial Code; art 22(1) of the EU Proposal.

[80] Nicolas Bueno & Claire Bright, *Implementing Human Rights Due Diligence through Corporate Civil Liability*, 69 INT'L & COMP. L.Q., 802-04 (2020).

[81] Quijano & Lopez, *supra* note 34, at 250-51.

[82] Dehbi & Martin-Ortega, *supra* note 13, at 11.

[83] DUVAL ANTOINE & PLAGIS MISHA, DELOCALIZED JUSTICE: THE DELOCALIZATION OF CORPORATE ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS ORIGINATING IN AFRICA (2021) https://www.afronomicslaw.org/index.php/category/analysis/delocalized-justice-delocalization-corporate-accountability-human-rights.

[84] Bose, *supra* note 16, at 32.

[85] *Id.* at 32-33.

[86] *See* V ROCK GRUNDMAN, THE NEW IMPERIALISM: THE EXTRATERRITORIAL APPLICATION OF UNITED STATES LAW 257-66 (1980);Robert McCorquodale, *Waving Not Drowning: Kiobel Outside the United States*, 107 AMERICAN JOURNAL OF INTERNATIONAL LAW, 847 (2013).

[87] James Fowkes, *Adjusting the North-South Balance: Southern Judicial Boldness and Its Implications for the Regulation of Global Supply Chains*, 23 DEAKIN LAW REVIEW, 119 (2018).

[88] *See* Makau wa Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J., 201(2001); However, there have been numerous examples that substantiate the merits of the Global South's regulatory regimes and judicial institutions in dealing with BHR issues. *See e.g.*, Fowkes, *supra* note 119-42 (concludes that some Southern countries are distinctive and more effective than their counterparts in the Global North in addressing corporate human rights responsibility); *See also,* Joana Setzer & Lisa Benjamin, *Climate Litigation in the Global South: Constraints and*

just that the root cause of such failures is a result of systematic undermining by developed countries for trade competitiveness.[89]

C. Third World Suppliers Are Disproportionately Burdened by mHRDD Laws

From a legal perspective, global value chain can be understood as a mixture of structurally separate entities constituted through equity ownership or contractual relationships but centrally controlled by lead firms, most of whom are TNCs from the Global North.[90] On the other hand, dispersed suppliers from Global South "are linked together by the variety of governance techniques that a lead firm has at its disposal."[91] The dominant position of lead firms allows them, in pursuit of profit maximization, to coordinate sourcing, establish commercial conditions, and enforce codes of conduct on suppliers.[92] Such a control typically results in a transfer of monetary and non-monetary costs incurred in the production process from lead firms to global suppliers.[93]

As shown in Figure 1 below, the enforcement regime of existing mHRDD laws is a hierarchical two-tier regulatory framework. In this framework, lead firms at the top of the supply chain typically implementing contractual controls, codes of conduct or other mechanisms to govern human rights practices within their value chains. These measures establish a framework that converts domestic HRDD legal requirements on lead firms into contractual obligations for actors at the end of the value chains, creating a regulatory effect on suppliers who are not directly subject to these laws.[94] For example, the German Act contains a contractual control clause that requires companies to adopt preventive measures on direct suppliers to outline human rights and environmental expectations and verify compliance.[95] The EU Proposal explicitly requires an independent third-party verification process.[96] In the case of suppliers failing to adhere to the outlined commitments set by lead firms in the contract, lead firms often have the legal option of "comply or cancel" to unilaterally terminate their business relationships without extra costs and risks.[97]

Innovations, 9 TRANSNATIONAL ENVIRONMENTAL LAW, 77-101 (2020) (discusses Global South's innovative approach to human rights-based climate litigation).

[89] Ilias Bantekas, *The Linkages between Business and Human Rights and Their Underlying Root Causes*, 43 HUM. RTS. Q., 117-37 (2021); Simons, *supra* note 74, at 19-29.

[90] Kevin B Sobel-Read, *Global Value Chains: A Framework for Analysis*, 5 TRANSNATIONAL LEGAL THEORY, 364 (2014).

[91] Jaakko Salminen & Mikko Rajavuori, *Private International Law, Global Value Chains and the Externalities of Transnational Production: Towards Alignment?*, 12 TRANSNATIONAL LEGAL THEORY, 233 (2021).

[92] Michael Rawling, *Legislative Regulation of Global Value Chains to Protect Workers: A Preliminary Assessment*, 26 THE ECONOMIC AND LABOUR RELATIONS REVIEW, 663-64 (2015); *id.* at 92, at 660-77.

[93] *See* Mia Mahmudur Rahim, *Humanising the Global Supply Chain: Building a Decent Work Environment in the Ready-Made Garments Supply Industry in Bangladesh*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS, 130-50 (Surya Deva; & David Birchall eds., 2020).

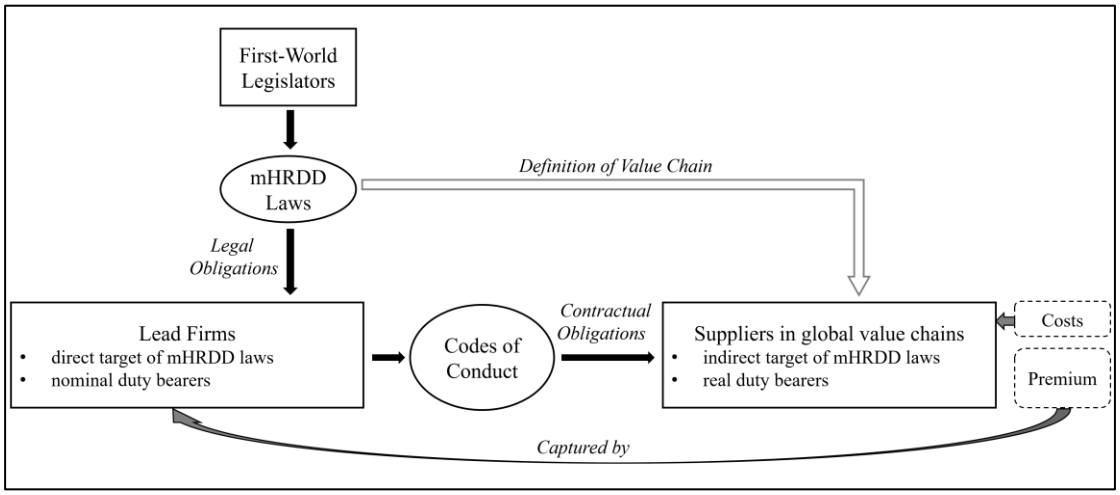
[94] Sarfaty, *supra* note 7, at 434-37.

[95] *See* German Act, sec. 6.4.

[96] *See* EU Proposal, art.7 & 8.

[97] Anke Hassel, *The Evolution of a Global Labor Governance Regime*, 21 GOVERNANCE, 231-51 (2008). Fair Trade Advocacy Office, *Making Human Rights Due Diligence Frameworks for Small Farmers and Workers*(2020), at https://fairtrade-advocacy.org/ftao-publications/publications-statements/making-

Figure 1 The Two-Tier Regulatory Framework of mHRDD Laws



Even worse, lead firms dictate the favorable terms that align with their expectations without substantially increasing purchasing prices or offering material assistance.[98] In fact, lead firms have a tendency to prioritize profit-related factors over substantial improvements in human rights when balancing commercial interests with social concerns.[99] Under the mHRDD laws, there are no substantive obligations on the part of lead firms to share the financial burdens or make necessary investments to ensure suppliers' fulfillment of HRDD.[100] Instead, suppliers are often compelled to incur additional costs to enhance their human rights and environmental performance and bear the expenses of social audits.[101] Yet, the additional gains derived from improved social performance are appropriated by lead firms.[102] In this complicated context,

human-rights-due-diligence-frameworks-work-for-small-farmers-and-workers/?preview=true,%20pp.i-v.

[98] *See* Rahim, *supra* note 93, at 132-33.

[99] Peter Pawlicki, *The Electronics Industry: Governance of Business and Human Rights against a Background of Complexity*, *in* RESEARCH HANDBOOK ON GLOBAL GOVERNANCE, BUSINESS AND HUMAN RIGHTS, 326 2022); Sven Helin & Maira Babri, *Travelling with a Code of Ethics: A Contextual Study of a Swedish Mnc Auditing a Chinese Supplier*, 107 JOURNAL OF CLEANER PRODUCTION, 41, 41-53 (2015).

[100] The EU Proposal seemingly recognizes the undue compliance burden on Third World businesses, urging buyers to bear verification costs. Yet, without a reciprocal obligation for buyers to equitably share the expenses and advantages linked to enhancing human rights, particularly through incentivizing compliance in purchasing practices, the risk persists of lead firms exploiting their suppliers.

[101] Social audits and other third-party auditing mechanisms, typically provided by Western companies, have evolved into a sophisticated profit-driven industry. The structural flaws embedded in this industry, *e.g.*, conflicts of interest, monitoring incapability, and lack of accountability, make it function as tools for corporate whitewashing or greenwashing, rather than driving substantial human rights improvements. *See* José Carlos Marques, *Private Regulatory Capture Via Harmonization: An Analysis of Global Retailer Regulatory Intermediaries*, 13 REGULATION & GOVERNANCE, 157(2019); Joseph Wilde-Ramsing & Gabriele Quijano, *A Piece, Not a Proxy*, SOMO the Centre for Research on Multinationals(2022), at https://www.somo.nl/a-piece-not-a-proxy/; CLAUDIA MÜLLER-HOFF, HUMAN RIGHTS FITNESS OF THE AUDITING AND CERTIFICATION INDUSTRY? 11-19 (2021).

[102] Alain De Janvry et al., *Fair Trade and Free Entry: Can a Disequilibrium Market Serve as a Development Tool?*, 97 REVIEW OF ECONOMICS AND STATISTICS, 567(2015); Caspersz et al., *supra* note 56, 184-86; WORLD BANK, TRADING FOR DEVELOPMENT IN THE AGE OF GLOBAL VALUE CHAINS 86 (2020).

suppliers on the ground bear a substantial burden in complying with human rights requirements, incurring disproportionate costs and becoming the "real duty bearer" for implementing human rights standards within the supply chain. Meanwhile, lead firms act as "nominal duty bearers" by superficially complying with these standards but transferring the burden of costs to suppliers. This cost-shifting from lead firms to suppliers ultimately results in reduced profit margins and workers' wages in the Third World, undermining the protection of human rights within their communities.[103]

Hence, the two-tier structure of mHRDD laws has risks cementing and legitimizing the exploitative supply chain governance model dominated by lead firms and further exaggerating their competitive advantage.[104] In fact, the OHCHR recently urged EU legislators to reevaluate their excessive reliance on contractual controls, calling for reconfiguring the prevailing business practices.[105] Consequently, it should come as no surprise that Global South nations perceive the First World-made domestic mHRDD laws as a form of legal imperialism and hidden protectionism that aims to retain Western dominance in global trade.[106]

4. Unveiling the Disguise: mHRDD as a Unilateral Legislative Process

Chapter III analyzes contemporary mHRDD legislations, with a focus on how the features of these laws, entail oppression and exploitation against the Third World. These critiques have theoretical implications for the debate surrounding the substantive nature of mHRDD laws. Through domestic legislative process, which is typically referred to as "a contested, multilevel process,"[107] mHRDD laws provide a platform for competing economic and political motivations of domestic stakeholders with vested self-interests. Ultimately, the legal instruments aimed at implementing human rights values, despite their good intentions, are at risk of being alienated into tools that reinforce power imbalances and exacerbate human rights crises in global trade.[108]

A. The Business Case of mHRDD Laws

Despite the legislative process of mHRDD laws being driven by various motives and values, economic considerations stand as one of the most important factors in shaping them. The last decade has witnessed how corporate investors' economic demands for long-term value-creation have spurred the accelerated development of regulation and legislation in the field of BHR. Particularly, mHRDD laws have been successively established in many European states. Here, the 2008 global financial crisis (GFC) was an important watershed moment for

[103] Rahim, *supra* note ;Caspersz et al., *supra* note 56.

[104] Mason et al., *supra* note 8, at 6.

[105] UN OHCHR, Final Call for Alignment of the EU Corporate Sustainability Due Diligence Directive with the UN Guiding Principles on Business and Human Rights, October 27, 2023, https://www.ohchr.org/sites/default/files/documents/issues/business/final-call-for-alignment-cs3d-ungps.pdf.

[106] Mason et al., *supra* note 8, at 7.

[107] Marc Schneiberg & Sarah A. Soule, *Institutionalization as a Contested, Multilevel Process: The Case of Rate Regulation in American Fire Insuranc*, *in* SOCIAL MOVEMENTS AND ORGANIZATION THEORY, 122 (Doug McAdamet al. eds., 2005).

[108] International solidarity and the extraterritorial application of human rights: prospects and challenges, Report of the Independent Expert on human rights and international solidarity, Obiora Chinedu Okafor, April 19, 2022, A/HRC/50/37, paras. 37–42.

corporations to consider the interests of other stakeholders beyond shareholder value in their business practices.[109] At that time, the risk-taking behavior of firms and their management, which aims to maximize the welfare of shareholders, resulted in systemic risks for the global economy.[110]

Following the GFC, corporate leaders united in calling for action to require firms to invest in long-term sustainable value and serve the benefit of all stakeholders.[111] Investors now pay increasing attention to companies' performance in environmental, social, and corporate governance (ESG) aspects to reduce risks and improve long-term investment returns. This includes requiring the protection of human rights to be discussed at the firm level.[112] Global responsible investment grew from $13.6 trillion in 2012 to $30.7 trillion in 2018, marking a growth of over 125%.[113] The adoption of the UN Principles for Responsible Investment (UNPRI) has also expanded significantly, with signatory institutions increasing from 100 in 2006 to over 3,826 in 2021.[114]

Corporate human rights, as one of the core elements of ESG investment, then became a topic *du jour*.[115] Enthusiasm for social investing has prompted investors to demand that firms adopt mHRDD measures to ensure their portfolios align with human rights standards. Subsequently, governments also adopted legislative and regulatory measures to encourage corporate social responsibility actions.[116] Since the 2008 GFC, the introduction of UNGPs and the adoption of mHRDD laws in many countries suggest a trend for BHR norms to transform from soft law to hard law.[117] In other words, HRDD could be perceived as a concept that originated from the investment needs for sustainable development. And over time, it evolved into hard law obligations that are now enforced at the production and consumption ends.

By nature, due diligence is a disclosure-based approach aimed at protecting the interests of corporate investors.[118] As existing mHRDD legislation originates primarily from Western

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[109] *See* COLIN MAYER, PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD (First edition. ed. 2018).

[110] Luca Enriques & Alessandro Romano, *Rewiring Corporate Law for an Interconnected World*, 64 ARIZONA LAW REVIEW, 51(2022) (noted that due to market changes in the era of globalization, such as the rise of common ownership and GVCs that connect the economies of many countries, risks originating from individual companies or regions have the potential to harm the entire economic system).

[111] Business Roundtable, Business Roundtable, *Statement on the Purpose of a Corporation*(2019), at https://opportunity.businessroundtable.org/ourcommitment/.

[112] Michal Barzuza et al., *ESG and Private Ordering*, 1 THE UNIVERSITY OF CHICAGO BUSINESS LAW REVIEW, 1(2022) (mentioned millennial investors' ESG preferences promote asset owners to value ESG agendas).

[113] GSIA, *2018 Global Sustainable Investment Reveiw*, Global Sustainable Investment Alliance(2019), at http://www.gsi-alliance.org/wp-content/uploads/2019/03/GSIR_Review2018.3.28.pdf.

[114] UNPRI, *About the PRI*, United Nations Prinicples for Responsible Investment(2023), at https://www.unpri.org/about-us/about-the-pri.

[115] John Gerard Ruggie et al., *Ten Years After: From UN Guiding Principles to Multi-Fiduciary Obligations*, 6 BUSINESS AND HUMAN RIGHTS JOURNAL, 179, 196-97 (2021) (note that "the S elements in ESG are either outright human rights issues or close cousins.")

[116] Jean-Pascal Gond et al., *The Government of Self-Regulation: On the Comparative Dynamics of Corporate Social Responsibility*, 40 ECONOMY AND SOCIETY, 640(2011).

[117] M. Tina Dacin et al., *Business Versus Ethics? Thoughts on the Future of Business Ethics*, 180 JOURNAL OF BUSINESS ETHICS, 863(2022).

[118] The concept of due diligence refers to a process of collecting information regarding the investment target. The emergence of mHRDD following the GFC is just a continuation of corporates' due diligence responsibilities to protect investors. *See* Ruggie & Sherman, *supra* note 3; *See also* George J. Benston, *Required Disclosure and the Stock Market: An Evaluation of the Securities Exchange Act of 1934*, 63 THE AMERICAN ECONOMIC REVIEW, 132(1973).

countries located at the investment and consumption ends of global value chains, mHRDD laws also tend to primarily protect the property and economic interests of corporations and their investors, rather than genuinely safeguard against human rights abuses. For example, French Law mandates companies establish, implement, and disclose a vigilance plan for human rights protection in their annual reports.[119] On the one hand, the French Law essentially provides a tool for socially responsible investors to understand the human rights risks and sustainability performance of their investee companies.[120] On the other hand, the enforcement and sanctions of French Law are deliberately weak.[121] The primary purpose of French Law is by no means facilitating judicial proceedings that redress the victims of human rights abuses.[122] Rather, it protects rightsholders only to the extent that it encourages lead companies to engage with them, thereby avoiding risks of litigation.[123] Differently put, mHRDD laws protect victims of human rights abuses to the extent of evading investor-concerned risks, at the margin of the costs for mHRDD exceed the generated returns.[124] Consequently, they become less effective as regulatory instruments.

Further, the EU Proposal faced strong pressure from France and Germany to protect domestic multinationals, resulting in the dilution of provisions regarding obligations and the scopes.[125] For example, France refused to include financial services within the personal scope of the EU Proposal.[126] Germany met with significant resistance from its domestic lobbying groups representing small and medium-sized enterprises and removed companies with fewer than 1,000 employees from the scope of the law.[127] These examples showcase how lawmakers invited economic considerations to influence the codification of human rights in mHRDD laws.

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[119] Rachel Chambers & Anil Yilmaz Vastardis, *Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability*, 21 CHI. J. INT'L L., 323(2021). The filing and disclosure of the annual report, which largely aims to protection the interests of corporate shareholder and promote sustainable development of capital market, has the same origin with corporate due diligence. *See Id.* at 133.

[120] A discussion on the role of mandatory disclosure for investors, *see* Frank H. Easterbrook & Daniel R. Fischel, Mandatory Disclosure and the Protection of Investors, 70 Va. L. Rev., 669(1984); the limitations of investor-oriented disclosure, *see generally*, Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REG., 499(2020).

[121] *See* discussion *supra* Chapter III, Section B. 2 & 3.

[122] Jacob Douds et al., *Business and Human Rights: First French Case-Law on the Duty of Vigilance – Judges Adopt a Cautious Approach to Avoid Judicial Interference in Corporate Management*, Mayer Brown(2023), at https://www.mayerbrown.com/en/perspectives-events/blogs/2023/03/business-and-human-rights-first-french-caselaw-on-the-duty-of-vigilance--judges-adopt-a-cautious-approach-to-avoid-judicialinterference-in-corporate-management.

[123] *Id.*

[124] Wesley Cragg, *Ethics, Enlightened Self-Interest, and the Corporate Responsibility to Respect Human Rights: A Critical Look at the Justificatory Foundations of the Un Framework*, 22 BUSINESS ETHICS QUARTERLY, 9(2012); Helin & Babri, *supra* note 99.

[125] III John F. Sherman, *Human Rights Due Diligence: Is It Too Risky?*, HARVARD KENNEDY SCHOOL CORPORATE SOCIAL RESPONSIBILITY INITIATIVE WORKING PAPER NO. 55, (2010); Gwamaka Kifukwe, *Law and Global Order: Eu Legislation on Human Rights Due Diligence*, European Council on Foreigh Relations(2022), at https://ecfr.eu/article/law-and-global-order-eu-legislation-on-human-rights-due-diligence/.

[126] Silvia Ellena, *Eu Countries Still Divided over Proposed Corporate Accountability Rules*, EURACTIV.com(2023), at https://www.euractiv.com/section/economy-jobs/news/eu-countries-still-divided-over-proposed-corporate-accountability-rules/.

[127] *Id.*

Thus, the criticisms raised by TWAIL scholars are not unfounded that mHRDD legislation, through its packaging of human rights values, conceals and rationalizes the pursuit of economic objectives.[128]

B. The Politics of mHRDD Laws

Another implication of the competition among countries for their economic interests is the political motivation that the drafting, implementation, and enforcement of mHRDD laws entail a highly politicized process, where various actors and the competing interests embedded within each jurisdiction's institutional environment shape the current legal framework.[129]

First, one important reason for the emergence of mHRDD instruments, primarily and predominantly from the European countries, is the EU's political aspirations to become a global leader in setting global environmental and human rights standards. As the world's largest trade bloc for goods and services, the EU has a longstanding tradition of leveraging its economic and political advantages to establish provisions and standards in trade relationships that promote EU values. This approach, known as value-based trade, has long been an integral part of the EU's trade policy.[130] Through comprehensive frameworks and policies, such as the EU Green Deal and Global Gateway, the EU promotes its core values and principles—such as human rights, environmental sustainability, political ideology, national security, *etc*.—among its trade partners.[131] Similarly, the EU Proposal serves as a political tool to enhance EU influence in global trade and shape its image as a global leader. Through binding mHRDD legislation, European countries exert strong pressure on Third World nations situated downstream in their supply chains to comply with the prescribed standards in these mHRDD laws.[132] Ultimately, this caused Western-defined standards to dominate and suppress alternative views in the Global South.

Second, the legislative process of mHRDD laws is primarily a political process that takes place within the border of the issuing state through which the interests and demands of domestic interest groups are translated into policy implementation. The EU Proposal was weakened in its substance due to member states' national interests. Similarly, the legislative process of national mHRDD laws has also witnessed significant lobbying activities by various domestic political and economic interest groups. Due to apparent divergences in interests among different interest groups and the varying compositions of interest groups in each state, there are evident differences in the specific provisions of the currently mHRDD laws.

The legislative process of the German Act provides a vivid example of political compromises among domestic interest groups. During the process, despite the support from the pro-social parties for robust legislation and strict civil liability, the German Act had to dilute the scope and

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[128] *See* discussion, *supra* Chapter III, Section C.

[129] Maria-Therese Gustafsson et al., *The Politics of Supply Chain Regulations: Towards Foreign Corporate Accountability in the Area of Human Rights and the Environment?*, 17 REGULATION & GOVERNANCE, 853(2023)

[130] Peter Draper; et al., *The Political Economy of Due Diligence Legislation*, UNIVERSITY OF ADELAIDE INSTITUTE FOR INTERNATIONAL TRADE POLICY BRIEF 21, (2023).

[131] European Commission, *Global Gateway*, Europen Union(2023), at https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/stronger-europe-world/global-gateway_en.

[132] *See* discussion, *supra* Chapter II, Section B.2.

obligations under the influence of powerful business lobbying.[133] The liability regimes proposed in the French law draft were watered down and succumbed to corporate lobbying.[134] Ultimately, legislative proposals aimed at maximizing the protection of human rights are often labeled as radical and replaced by compromised actionable legislation in which the interests of domestic stakeholders are reflected based on their varying degrees of involvement and lobbying capacity.[135]

However, the impact of such laws is not limited to the domestic stakeholders involved in the legislative process. On the contrary, mHRDD laws have universal extraterritoriality, rendering human rights practices in the Third World a direct normative target. Consequently, when mHRDD laws are enforced in global supply chains, the complex political demands of domestic interest groups embedded in these laws are imposed on Third World countries. This is precisely the source of inequality of mHRDD laws: the unilaterally defined human rights standards being universalized and imposed on entities operating in exterritorial jurisdictions.[136] Such an approach reflects deep-rooted ideological biases within Western culture, as it portrays the legislating countries as superior saviors who shape the world at their will and come to rescue the savage cultures and victims in the Third World.[137] This narrative in mHRDD laws justifies their extraterritorial reach by insinuating that norms and standards in the Global South are naturally unjust, thereby implying that they must adhere to the standards of the "civilized" Global North.[138]

C. The Need to Give the Third World a Voice

By examining the economic and political motivations underlying mHRDD legislations through the TWAIL lens, it shows that the current version of mHRDD laws exemplifies a typical home state regulation, placing Eurocentric economic, legal, and sociocultural standards above the social and cultural realities of the Global South.[139]

Thus, mHRDD laws are nationalist and neo-colonialist in nature, packaged under the guise of "universal" values that have clear boundaries of interests. Phrase it differently, when lawmakers decide to adopt unilateral legislative actions, they inevitably invite national interest claims that conflict with universal values into the mHRDD laws. Given the inherent domestic interests in mHRDD legislation, the values and norms it advocates cannot be universally applicable. Instead, it represents a revival of the neoliberal end-of-history ideology in corporate regulation, holding that regulatory rules generated from the Global North will be universally

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[133] Markus Krajewski et al., *Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?*, 6 BUSINESS AND HUMAN RIGHTS JOURNAL, 550(2021)

[134] Sandra Cossart et al., *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All*, 2 BUSINESS AND HUMAN RIGHTS JOURNAL, 317, 317 (2017).

[135] Nicolas Bueno & Christine Kaufmann, *The Swiss Human Rights Due Diligence Legislation: Between Law and Politics*, 6 BUSINESS AND HUMAN RIGHTS JOURNAL, 542, 542 (2021).

[136] *See* discussion, *supra* Chapter III, Section B.

[137] *See* Mutua, *supra* note 88.

[138] *Id.*

[139] Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 THIRD WORLD QUARTERLY, 739(2006); James Thuo Gathii, *Twail: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV., 26(2011); Obiora Chinedu Okafor, *Newness, Imperialism, and International Legal Reform in Our Time: A Twail Perspective*, 43 OSGOODE HALL LAW JOURNAL, 171(2005).

applicable.[140] Ultimately, the legislation that was supposed to correct unequal relationships and mitigate the governance gap in BHR potentially consolidated power asymmetry. However, mHRDD laws, as they aim to protect human rights—a shared value of all humanity, should be both domestic and international in nature. Here, a major concern for mHRDD laws is that the Global South has been excluded from the formulation and implementation processes of these laws.[141] Even in the case of the EU Proposal, where intensive public consultations have been conducted, the absence of stakeholders from the Global South is glaring.[142] This absence highlights an ironic paradox of mHRDD laws—that the laws created for the benefit of Third World populations were crafted without their input. The marginalization of the voices of the Global South may weaken both the legitimacy and effectiveness of mHRDD laws because accountability holders on the ground, who bear the true brunt of corporate human rights transgressions, typically exhibit a more profound grasp of the substantive issues and intricacies necessitating redress.

The second concern is more profound—that mHRDD laws potentially mainstreamed the Western discourse in norm-making, academic debates, and practical aspects of BHR. Similar to the traditional concern within TWAIL about "who speaks international law," the question of "who speaks Business and Human Rights" has become a burning issue that warrants the attention of *twailian* scholarship.[143] In this context, without substantial inputs from the Global South, it is not surprising that the unilaterally created domestic mHRDD laws, which are applied globally, could profoundly "re-center Europe as the axis of knowledge production on business and human rights norms."[144] Eventually, the Global South will be further marginalized, and other promising solutions—such as the negotiated BHR treaty—risk being concealed and silenced.

However, the effectiveness of human rights and business ethics norms relies heavily on the recognition of and respect for cultural relativism.[145] The complex dynamics of the *global* nature of global value chains require us to consider legal pluralism.[146] Thus, mHRDD laws must break free from the grip of Eurocentricity and Western domination to unleash their untapped potential. This should preferably be done if the law is adopted through negotiations among equals in the Global South and North. Regulation for more equitable protection of human rights by TNCs ultimately requires international multilateral cooperation within the UN framework. These efforts should not be replaced by the existing unilateral mHRDD laws.

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[140] Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 THE GEORGETOWN LAW JOURNAL, 439(2001).

[141] Lichuma, *supra* note 15, at 518-24; Dehbi & Martin-Ortega, *supra* note 13, at 6 -11.

[142] CAROLINE OMARI LICHUMA, CENTERING EUROPE AND OTHERING THE REST: CORPORATE DUE DILIGENCE LAWS AND THEIR IMPACTS ON THE GLOBAL SOUTH, *Völkerrechtsblog* (2023), at https://voelkerrechtsblog.org/centering-europe-and-othering-the-rest/.

[143] *Id*.

[144] Bose, *supra* note 16.

[145] Tom L. Beauchamp, *Relativism, Multiculturalism, and Universal Norms: Their Role in Business Ethics*, *in* THE OXFORD HANDBOOK OF BUSINESS ETHICS, 235-66 (George G. Brenkert ed. 2009).

[146] Bertram Turner, *Supply-Chain Legal Pluralism: Normativity as Constitutive of Chain Infrastructure in the Moroccan Argan Oil Supply Chain*, 48 THE JOURNAL OF LEGAL PLURALISM AND UNOFFICIAL LAW, 378-414 (2016).

Conclusion

This article critically analyzed the mHRDD laws that emerged from the Global North, the latest developments in global BHR regulations, from a TWAIL perspective. mHRDD legislation exemplifies an innovative legislative endeavor that imposes hard law obligations to domestic multinationals to enhance their corporate human rights accountability and reflects developed countries' commitment to safeguard people affected by corporate human rights abuses. However, mHRDD laws are domestic laws, but with extraterritorial implications. This article examined three key features of current mHRDD laws that (1) major mHRRD laws are unilaterally created in the First World but applied globally; (2) they are domestic laws that codify primarily Eurocentric human right standards universally; and (3) third-world suppliers are disproportionately burdened by these laws. From a TWAIL perspective, each feature entails inevitable oppression and exploitation in the nations, populations, and suppliers in the Global South. The existing domestic mHRDD laws do not appear capable of accomplishing the claimed objectives of leveling the playing field, holding irresponsible corporations accountable, and providing adequate remedies for suffering. It is then of great importance to identify what accounts for the limitations of the mHRDD laws and how Western lawmakers shall respond to the *twailers*' criticism—"reconsider the assumptions, arguments and narratives that are often taken for granted in the Western circle."[147] This article reveals that the limitations in the current version of mHRDD laws are structural, as they failed to integrate the perspectives of the Third World. Instead, mHRDD laws are enacted by a unilateral legislative process through which national economic and political interests that are at odds with universal human rights values are incorporated. Consequently, the current version of mHRDD laws reinforces an unequal powered global value chain order rather than correcting it. Lawmakers in the First World should develop a plan to better engage with stakeholders in the Third World. This article concluded that the enactment of domestic mHRDD laws should not replace the efforts for a legally binding international BHR treaty. More proactive work must be undertaken to support the negotiation of such a legal instrument rooted in international solidarity.

[147] ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? 254 (2017).