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Multinational Enterprises and Labour Rights: Concepts and Implementation

Nicolas Bueno

1 Introduction

The responsibility of multinational enterprises to respect labour rights in global operations has been widely discussed in the corporate social responsibility and business ethics literature. In recent years, legal scholars have tried to formalize this discussion around the legal concepts of corporate due diligence and corporate liability. This contribution outlines these legal trends. It presents the relevant transnational case law and provides some ideas for interdisciplinary research on multinational enterprises and labour rights.

Section 2 presents the concept of corporate human rights due diligence, as defined by the United Nations Guiding Principles on Business and Human Rights (UNGP) and the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises. It then outlines the due diligence that multinational enterprises should apply with respect to labour rights in particular by introducing the concept of ‘corporate labour rights due diligence’. Section 3 discusses how to implement corporate labour rights due diligence at the domestic level. It discusses emerging case law addressing liability of multinational enterprises for labour rights violations occurring at foreign subsidiaries or in their supply chain. It also outlines very recent domestic legislative initiatives that cover labour rights due diligence, such as the 2017 French *loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre*¹ or the Swiss Constitutional Initiative on Responsible Business,² which is currently in discussion.

Section 4 raises some research questions on multinational enterprises and labour rights. First, what is the scope of “labour rights” for due diligence? Regarding implementation of labour rights

¹ Loi no 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre <<http://www.senat.fr/dossier-legislatif/pp114-376.html>> accessed 15 November 2018.

² Initiative populaire fédérale 'Entreprises responsables – pour protéger l’être humain et l’environnement' <www.bk.admin.ch/ch/f/pore/vi/vis462t.html> accessed 15 November 2018.

due diligence through liability, what can be learnt from business ethics and labour law scholars with regard to supply chains and new business models, such as platform work? Is it justified to design different conditions of liability depending on whether a multinational enterprise operates abroad through a subsidiary, a supplier or uses a platform to provide services? Finally, this contribution brings about some thoughts about the practical challenges and inherent limits of an approach aiming at ensuring that multinational enterprises respect labour rights in the current competitive global economy.

2 The concept of corporate labour rights due diligence

The UNGP and the OECD Guidelines are soft-law instruments and do not impose binding legal obligations upon states or companies. However, they provide a relatively clear standard of conduct for business enterprises in order for them to respect human rights including several labour rights.³ This section presents the due diligence that multinational enterprises should apply when operating abroad, first with regard to human rights generally (2.1) and then with respect to labour rights in particular (2.2).

2.1 Corporate human rights due diligence

The UNGP and the OECD Guidelines for Multinational Enterprises define the due diligence that companies should apply within their responsibility to respect human rights throughout their global operations.⁴ Due diligence is defined as the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse human rights impacts.⁵ The UNGP specify what is expected from business enterprises for each step of this process. The goal of human rights due diligence under the UNGP is to prevent or mitigate ‘human rights risks’.⁶ They use a risk assessment language and approach.⁷

³ See infra section 2.2.1 The scope of labour rights for due diligence.

⁴ See also the recently published OECD Due Diligence Guidance for Responsible Business Conduct, which provides a higher level of detail. See also generally, Nadia Bernaz, *Business and Human Rights: History, Law and Policy – Bridging the Accountability Gap* (Routledge 2017) 193-9; Justine Nolan, ‘The Corporate Responsibility to Respect Human Rights: Soft Law or not Law?’, in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013) 156-7.

⁵ UNGP princ 17; OECD Guidelines for Multinational Enterprises, ch II, commentary para 14 and ch IV, commentary para 15.

⁶ Björn Fasterling, ‘Human Rights Due Diligence as Risk Management: Social Risk Versus Human Rights Risk’ <https://doi.org/10.1017/bhj.2016.26> (2017) 2 *Business and Human Rights Journal* 225, 226.

First, business enterprises should identify and assess actual and potential adverse human rights impacts. Corporations are thus expected to obtain knowledge about the effects of the business corporations' activities on rights-holders.⁸ Second, corporations should take appropriate action to prevent potential adverse human rights impacts or cease actual ones. In this regard, the UNGP clarify that appropriate action varies according to whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship. Examples of these three scenarios in relation to labour issues are presented below.⁹ Third, they should account for how they address their actual and potential adverse impacts. Finally, where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for their remediation.¹⁰

2.2 Corporate labour rights due diligence

2.2.1 The scope of labour rights for due diligence

There is no such concept as “corporate labour rights due diligence” in the legal literature. Nevertheless, the responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work (ILO Declaration).¹¹ As a result, corporate human rights due diligence applies to several labour rights entailed in international human rights treaties and in the ILO Declaration.

⁷ Kendyl Salcito and Mark Wielga, ‘What does Human Rights Due Diligence for Business Relationships Really Look Like on the Ground?’ <https://doi.org/10.1017/bhj.2017.31> (2018) 2 Business and Human Rights Journal 113,114.

⁸ Fasterling (n 6) 236.

⁹ See infra section 2.2.2 General corporate labour rights due diligence.

¹⁰ UNGP princ 17–21, for the steps. OECD Guidelines for Multinational Enterprises, ch II, commentary para 14-22. On these steps, Olga Martin-Ortega, ‘Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?’ (2014) 32 Netherlands Quarterly of Human Rights 44, 55–7; Nicolas Bueno, ‘Corporate Liability for Violations of the Human Right to Just Conditions of Work in Extraterritorial Operations’ <https://doi.org/10.1080/13642987.2017.1298092> (2017) 21 The International Journal of Human Rights 565, 571–3.

¹¹ UNGP Princ 12.

From a human rights law perspective, corporate human rights due diligence applies thus at least to the prohibition of slavery and child labour, the human rights to work and to just conditions of work as well as trade union rights. At the universal level, these rights are guaranteed *inter alia* by Articles 4, 23 and 24 of the Universal Declaration of Human Rights and by Articles 6, 7 and 8 of the International Covenant on Economic, Social and Cultural Rights. Each right entails its own specific elements. For example, the right to work entails the rights to the opportunity to gain a living by work and to freely accept work, which prohibits forced labour.¹² The right to just and favorable conditions of work guarantees fair, equal and sufficient remuneration; healthy and safe working conditions; equal opportunity for promotion; and reasonable limitation of working hours as well as holidays with pay.¹³

There has been much discussion regarding the extent to which these labour-related human rights are reflected in the ILO Declaration.¹⁴ The ILO Declaration also encompasses trade union rights, the elimination of forced or compulsory labour, the abolition of child labour, and the elimination of discrimination in employment.¹⁵ These core labour rights thus do not encompass, for example, the right to the opportunity to gain a living by work within the human right to work or most elements of the right to just conditions of work, such as sufficient remuneration; healthy and safe working conditions, reasonable limitation of working hours or holidays with pay. Although the lack of correspondence has been criticized,¹⁶ while also justified on practical and strategic grounds,¹⁷ Alston notes that ‘the list should include the right to a safe and healthy workplace, the right to some limits on working hours, the right to reasonable rest periods, and protection against

¹² U.N. Committee on Economic Social and Cultural Rights (CESCR), General Comment 18: The Right to Work, U.N. Doc. E/C.12/GC/18 (Nov. 24, 2005); see Nicolas Bueno, ‘From the Right to Work to Freedom from Work: Introduction to the Human Economy’ (2017) 33 *The International Journal of Comparative Labour Law and Industrial Relations* 463, 466-9; Ben Saul et al., ‘Article 6: The Right to Work’, in Ben Saul et al. (eds), *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014) 271-391; Jeremy Sarkin-Hughes and Mark Koenig, ‘Developing the Right to Work: Intersection and Dialoguing Human Rights and Economic Policy’ (2011) 33 *Human Rights Quarterly* 1.

¹³ CESCR, General Comment 23: The Right to Just and Favourable Conditions of Work, U.N. Doc. E/C.12/GC/23 (8 Mar. 8, 2016); see Bueno (n 10) 568-70; Ben Saul et al. ‘Article 7: Just and Favourable Conditions of Work’, in Ben Saul et al. (eds), *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials* (Oxford University Press 2014) 392-484.

¹⁴ See Philip Alston, “‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime’ (2004) 15 *EJIL* 457 and Brian Langille ‘Core Labour Rights – The True Story (Reply to Alston), (2005) 16 *EJIL* 409.

¹⁵ ILO, Declaration on Fundamental Principles and Rights at Work, 18 June 1998, par. 3.

¹⁶ Alston (n 14), 485.

¹⁷ Langille (n 14) 409.

abusive treatment in the workplace.¹⁸ Beyond this doctrinal debate, there is no doubt that these labour rights are human rights and thus are subject to corporate due diligence in the meaning of the UNGP.

2.2.2 General corporate labour rights due diligence

Multinational enterprises have the responsibility to respect both labour-related human rights as well as core labour rights. They are expected to carry out due diligence with respect to all these rights and should thus identify, take appropriate action and account for how they address adverse impacts on them. This contribution focuses on the appropriate action that should be taken once a risk has been identified. As stated above, appropriate action varies according to whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship.

First, where a business enterprise “causes or may cause” an adverse impact on labour-related human rights or core labour rights, it should take the necessary steps to cease or prevent the impact.¹⁹ This applies, for example, in the case of a business enterprise employing itself child labour. Second, where a business enterprise “contributes or may contribute” to an adverse impact on these rights, it should take the necessary steps to cease or prevent its contribution. Contributing should be interpreted as a substantial contribution, meaning an activity that causes, facilitates, or incentivizes another entity, such as a subsidiary or a supplier, to cause an adverse impact.²⁰ The United Nations Office of the High Commissioner for Human Rights gives the example of an enterprise changing product requirements for suppliers without adjusting production deadlines and prices, thus pushing suppliers to breach labour standards in order to deliver.²¹ In this case, the enterprise should use its leverage to mitigate impacts, in addition to ceasing or preventing its contribution.²² Leverage is considered to exist where the enterprise has

¹⁸ Alston (n 14) 486.

¹⁹ UNGP princ 19, commentary.

²⁰ OECD Guidelines for Multinational Enterprises, ch II, commentary para 14.

²¹ United Nations Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide* (United Nations 2012) 19 [OHCHR, *Interpretative Guide*].

²² UNGP princ 19, commentary.

the ability to effect change in the wrongful practices of the entity that is causing an adverse impact, the supplier in the example.²³

In the two first scenarios, the business enterprise causes or contributes to adverse impacts through its own activities, including its own activities in the supply chain.²⁴ Finally, the business enterprise can be involved solely because the impact is directly linked to its operations, products or services by a business relationship.²⁵ This is the case, for example, when a supplier acts contrary to the terms of its contract and uses child or bonded labour to manufacture a product for the contracting enterprise, without any intended or unintended pressure (contribution) from this enterprise to do so.²⁶ The legal literature provides examples in which the notions of “contribution” and “directly linked” are sometimes understood in different ways.²⁷ In this third scenario, the appropriate measure to be taken depends on the leverage the enterprise has on the entity causing or contributing to the adverse impact. If the business enterprise has leverage to mitigate the adverse impact it should exercise this, as in the contribution scenario. If it lacks leverage, it should try to increase its leverage. Finally, when increasing leverage is impossible, it should consider terminating the relationship.²⁸ In the two last scenarios, another entity is always involved. Therefore, in both situations the appropriate actions to be taken vary according to the extent of an enterprise’s leverage over another entity in addressing the impact.²⁹

2.2.3 Specific corporate labour rights due diligence

In addition to general due diligence that corporations should apply to the above-mentioned labour-related human rights and core labour rights, the ILO Tripartite Declaration and Chapter V

²³ *ibid*; OECD Guidelines for Multinational Enterprises, ch II, commentary para 19.

²⁴ OECD Guidelines for Multinational Enterprises, ch II, commentary para 17.

²⁵ UNGP princ 19, commentary; OECD Guidelines for Multinational Enterprises, ch II, A 12.

²⁶ OHCHR, *Interpretative Guide* (n 21) 56. See also Christine Kaufmann, ‘Konzernverantwortungsinitiative: Grenzenlose Verantwortlichkeit?’ (2016) *Swiss Review of Business and Financial Market Law* 45, 51; Nicolas Bueno, ‘La responsabilité des entreprises de respecter les droits de l’Homme: État de la pratique suisse’ (2017) *Pratique Juridique Actuelle* 1015, 1016, for other examples.

²⁷ Compare Olivier De Schutter ‘Corporations and Economic, Social, and Cultural Rights’, in Eibe Riedel, Gilles Giacca and Christophe Golay (eds), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press 2014) 212-16; Olga Martin-Ortega (n 6) 56; Christine Kaufmann et al., *Extraterritorialität im Bereich Wirtschaft und Menschenrechte* (Swiss Center of Expertise in Human Rights 2016) 16-17.

²⁸ UNGP princ 19, commentary; OECD Guidelines for Multinational Enterprises, ch II, commentary para 22, for the steps to be taken before termination.

²⁹ UNGP princ 19(b)(ii).

of the OECD Guidelines for Multinational Enterprises on employment and industrial relations entail specific recommendations for multinational enterprises with regard to labour issues. Both refer to the UNGP and use the same concept of due diligence. Other international guidelines focus on specific labour issues, such as the ILO Child Labour Guidance Tool for Business or on labour issues within specific sectors, such as the OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector. The following paragraphs outline some recommendations of the ILO Tripartite Declaration and Chapter V of the OECD Guidelines for Multinational Enterprises with respect to working conditions, employment, forced labour and trade union rights.

With respect to working conditions, both the ILO Tripartite Declaration and the OECD Guidelines for Multinational Enterprises recommend, for example, that wages offered by multinational enterprises be not less favorable to the workers than those offered by comparable employers in the country concerned. Where comparable employers may not exist, they should provide the best possible wages, benefit and conditions of work.³⁰ They should at least be adequate to satisfy the basic needs of the workers and their families.³¹ Multinational enterprises should also maintain the highest standards of safety and health within the enterprise bearing in mind their relevant experience within the enterprise as a whole, including any knowledge of special hazards.³²

Regarding employment, multinational enterprises should give priority to the employment, occupational development, promotion and advancement of nationals of the host country at all levels³³ and be guided throughout their operations by the principle of equality of opportunity and treatment in employment.³⁴ They also should contribute to the elimination of all forms of forced or compulsory labour and take adequate steps to ensure that forced or compulsory labour does not exist in their global operations.³⁵ Finally, with regard to trade union rights, multinational

³⁰ ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 5th ed, 2017, para 41; OECD Guidelines for Multinational Enterprises, ch V, para 4(a).

³¹ OECD Guidelines for Multinational Enterprises, ch V, para. 4(b).

³² ILO Tripartite Declaration, para 44. See also OECD Guidelines for Multinational Enterprises, ch V, para. 4(c).

³³ ILO Tripartite Declaration, para 18.

³⁴ OECD Guidelines for Multinational Enterprises, ch V, para 1(e).

³⁵ *Ibid.*, ch V, para 1(d); ILO Tripartite Declaration, para 25.

enterprises should provide workers' representatives with facilities as may be necessary to assist in the development of effective collective agreements. In addition, they should enable representatives of the workers to conduct negotiations with representatives of management and not threaten to utilize a capacity to transfer the whole or part of an operating unit from the country concerned in order to influence unfairly those negotiation.³⁶

This section has given a non-exhaustive overview of the general and specific due diligence that can be expected from a multinational enterprise with regard to labour rights throughout its international operations. However, providing an international standard of conduct does not say much about how to implement it in practice at the domestic level, which is the subject of the following section.

3 Legal implementation of corporate labour rights due diligence

Whilst the OECD Guidelines are addressed only to private corporate actors and among them only to multinational enterprises, the UNGP recommend that states implement and enforce laws that are aimed at, or have the effect of requiring, all business enterprises to respect human rights.³⁷ However, the UNGP do not entail specific recommendations about legal sanctions, such as corporate criminal or civil liability, to ensure that a business enterprise carries out human rights due diligence throughout its operations. According to Fasterling, due diligence is, at least primarily, not to be understood as a liability standard that exerts a certain standard of care, against which a business enterprise's action as judged in order to attribute ex-post responsibility.³⁸ This gap between due diligence and liability is sometimes referred by business and human rights scholars as to the accountability gap.³⁹

That being said, pillar III of the UNGP on access to remedy recommends that States take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and

³⁶ *ibid*, para 57-9; OECD Guidelines for Multinational Enterprises, ch V, para 2(a) and 7.

³⁷ UNGP princ 3(a).

³⁸ Fasterling (n 6) 228.

³⁹ Bernaz (n 4) 8; Anita Ramasastry, 'Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability', (2015) 14 *Journal of Human Rights*, 24.

other relevant barriers that could lead to a denial of access to remedy.⁴⁰ Among other legal barriers that could lead to a denial of access to remedy, the UNGP mention the way in which legal responsibility is attributed among members of a corporate group under domestic laws. This should not facilitate the avoidance of appropriate accountability.⁴¹

Despite the lack of international recommendations as to how states should ensure that multinational enterprises carry out human rights and labour rights due diligence in their global operations, several states are currently taking steps to implement the concept of corporate human rights due diligence at the domestic level. The following section first discusses emerging case-law on liability of multinational enterprises for the harm caused to foreign subsidiaries and suppliers' employees (3.1). It shows the uncertainty regarding the outcome of such transnational litigation in the absence of domestic legislation on labour rights due diligence. It then presents domestic laws already in force or currently in discussion aiming at implementing corporate labour rights due diligence (3.2). This section discusses only case-law and legislation that cover labour-related human rights or core labour rights.⁴²

3.1 Emerging “labour rights due diligence” case-law

3.1.1 Parent company liability cases

The case decision in *Chandler v. Cape* is certainly the most discussed decision in the business and human rights literature.⁴³ Mr. Chandler worked in Cape's subsidiary, a factory producing asbestos. In 2007, he contracted asbestosis as a result of exposure to asbestos dust during his

⁴⁰ UNGP princ 26, commentary.

⁴¹ *ibid*; see Gwynne Skinner, Robert McCorquodale and Olivier De Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (International Corporate Accountability Roundtable, Core and European Coalition for Corporate Justice 2013) 61, for comments.

⁴² For other domestic due diligence laws beyond labour issues, Nicolas Bueno, 'The Swiss Popular Initiative on Responsible Business: From Responsibility to Liability' in Liesbeth Enneking et al. (eds.), *Corporate Responsibility, Human Rights and the Law*, London (Routledge 2020).

⁴³ Among others, Christine Kaufman and Lukas Heckendorn, *Access to Remedy* (Swiss Center of Expertise in Human Rights 2018) 68, Robert McCorquodale, Lise Smit, Stuart Neely and Robin Brooks, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' <https://doi.org/10.1017/bhj.2017.2> (2017) 2 *Business and Human Rights Journal* 195, 203; Doug Cassel, 'Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence,' <https://doi.org/10.1017/bhj.2016.15> (2016) 1 *Business and Human Rights Journal* 179, 196; Bueno (n 10) 575-6; Christine Kaufmann, 'Holding Multinational Corporations accountable for Human Rights Violations: Litigation Outside the United States' in Dorothee Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016) 253, 260.

period of employment. The Court of Appeal developed the following four criteria to establish when law may impose on a parent company responsibility for the health and safety of its subsidiary's employees.

- (1) [T]he businesses of the parent and subsidiary are in a relevant respect the same;
- (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry;
- (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and
- (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.

In this specific case, the Court of Appeal found the parent company Cape liable for asbestos-related injuries caused to an employee of a subsidiary. As Cassel notes, *Chandler* is only a beginning of the common law on parent company duties of care and these criteria were tailored to the particular facts of the case.⁴⁴ Two years later in *Thompson v. Renwick*, those criteria were applied to Renwick, the parent company of a subsidiary for which Mr. Thompson worked. Mr. Thompson was also exposed to asbestos dust in his work, and as a result, had been seriously incapacitated by diffuse pleural thickening. Reversing the trial court's decision establishing Renwick's duty of care, the appellate court found that there was no evidence that Renwick 'at any time carried on any business at all apart from that of holding shares in other companies'.⁴⁵ The first criteria of the Chandler test was thus not met.⁴⁶

Similar questions of parent liability for the harm caused to employees of a subsidiary were addressed in France in the cases of *Areva* and *Comilog*.⁴⁷ In *Venel v. Areva*, the court established the circumstances under which a parent company can be, next to the subsidiary, a co-employer and accordingly have a duty to ensure that employees are protected against work-related

⁴⁴ Cassel (n 43) 196.

⁴⁵ *Thompson v. The Renwick Group Plc* [2014] EWCA Civ 635, para. 37.

⁴⁶ Bueno (n 10) 576, for further comments.

⁴⁷ Cour d'Appel de Paris, Arrêt du 24 octobre 2013, no. 12/05650 (*Areva*); Cour d'Appel de Paris, Arrêt du 10 septembre 2015, nos 11/05955 and 11/0596 (*Comilog*). For more details on the case of *Comilog*, see Liesbeth Enneking, 'Paying the Price for Socially Irresponsible Business Practices?' (2017) *Pratique Juridique Actuelle* 988, 991; Bueno (n 10) 576–7, on the case of *Areva*.

illnesses. Mr. Venel worked for the Cominak uranium-processing factory in Niger. He contracted lung cancer and asked the parent company, Areva, for compensation, claiming Areva held a duty to ensure protective health measures as a co-employer. The tribunal came to the conclusion that Areva was effectively a co-employer on the grounds that it held shares in Cominak and was the concession holder of the mine exploited by Cominak; that Cominak had a postal address in France at the headquarters of Areva; that both Areva and Cominak conducted identical activities and exploited the same mining site; that Areva, as an expert in the nuclear industry, could not ignore the risks for employees; and finally that Areva had established a local observatory for the health of workers in uranium mines.⁴⁸

However, the court found on appeal that to be co-employer there must be an intermingling of activities, interest, and management with the contractual employer. This was not the case as Cominak was not technically a controlled subsidiary of Areva, which held only 34% of its shares. Areva did not hold the majority of seats on the board of directors of Cominak, which remained autonomous in its management. The fact that both shared a common postal address and that Areva held the concession to exploit the mine was insufficient. Finally, the fact that Areva agreed to implement local observatories could not provide evidence that Areva recognized its status as employer. The Court concluded that Areva was not a co-employer and thus had no duty to safeguard Mr. Venel's health while working at Cominak.⁴⁹

3.1.2 Liability of contracting companies in supply chains

Another complex question is that of the conditions of liability of contracting companies for the harm caused to employees of contracted suppliers. The matter of *Doe v. Wal-Mart* shows the criteria developed by a U.S. court in 2009 in order to establish the liability of a contracting company for the harm suffered by employees of foreign suppliers. The plaintiffs were employees of companies located in China, Bangladesh, Indonesia, Swaziland, and Nicaragua that sold goods to Wal-Mart. They relied on a code of conduct included in Wal-Mart's supply contracts, specifying basic labour standards that suppliers must meet. They alleged that short deadlines and

⁴⁸ Tribunal des Affaires de Sécurité Sociale de Melun, Décision du 11 mai 2012, n° 10/00924, 6 and 7. See also Ronin, 'Faute inexcusable dans les groupes de sociétés: la responsabilité de la société mère retenue en cas de co-emploi' (2012) 76 *Revue Lamy Droit des affaires* 88, 89.

⁴⁹ Cour d'Appel de Paris, 24 Oct. 2013, no. 12/05650.

low prices in Wal-Mart's supply contracts forced suppliers to violate standards in order to satisfy the terms of the contracts.⁵⁰ The Court of Appeals for the Ninth Circuit found that the supply contracts did not intend to protect the workers.⁵¹ Furthermore, it found, as in the case of *Areva*, that Wal-Mart was not the plaintiffs' joint employer. A joint employer must have 'the right to control and direct the activities of the person rendering service, or the manner and method in which the work is performed.' The Court added that 'the right to control employment requires ... a comprehensive and immediate level of "day-to-day" authority over employment decisions.'⁵² In practice, no such right of control was exercised by Wal-Mart.

Finally, the ongoing German proceeding *Jabir et al v. KiK* might shed light on the liability of contracting companies to ensure safe working conditions at foreign suppliers. In September 2012, over 250 workers died in a fire at a factory in Pakistan that supplied the German textile corporation KiK. In March 2015, four plaintiffs filed a compensation claim against KiK. They alleged that KiK, which was buying 70% of the textiles produced by the factory, shared a responsibility for the fire-safety deficiencies in the Pakistani factory.⁵³

The emerging case-law raises interesting questions of liability of multinational enterprises for labour rights adverse impacts at foreign subsidiaries or suppliers. Except for the case of *Jabir et al v. KiK*, the facts of these cases occurred before the adoption of the UNGP and its international corporate human rights due diligence standard. It shows the uncertainty regarding the criteria to be applied to determine corporate liability for the damage caused to employees of a subsidiary or a controlled supplier in the absence of a legal standard of due diligence for multinational enterprises with respect to labour rights. This may explain why states are currently taking legal steps to close this gap by implementing corporate human rights due diligence in their domestic legislation as presented in the next section. These are the so-called "due-diligence laws".

3.2 Emerging due diligence laws

⁵⁰ *Doe v. Wal-Mart Stores Inc.*, 572 F.3d 677, 680 (9th Cir. 2009), 680.

⁵¹ See Haley Revak, 'Corporate Codes of Conduct: Binding Contract or Ideal Publicity?', (2012) 63 HASTINGS L.J. 1645, 1654 (2012).

⁵² *Doe v. Wal-Mart Stores Inc.*, 572 F.3d 677, 680 (9th Cir. 2009), 682.

⁵³ ECCHR, 'Pakistan: Cheap Clothes, Perilous Conditions', Case Report, April 2016, at 1.

Three categories of “human rights due diligence laws” can be distinguished. First, mandatory disclosure laws only require that companies disclose information regarding human rights (3.2.1). Mandatory due diligence laws contain in addition the standard of conduct that companies must adopt to ensure respect for human rights (3.2.2). Finally, due diligence provisions may be coupled with explicit liability provisions that clarify the legal consequences of failing to comply with due diligence duties (3.2.3). Only due diligence laws covering labour issues will be presented.

3.2.1 Mandatory disclosure laws

An increasing number of laws require that companies disclose information regarding labour issues. For example, the California Transparency in Supply Chains Act 2010 requires large retail seller and manufacturer doing business in California to disclose their efforts to eradicate slavery and human trafficking from their supply chains.⁵⁴ The Modern Slavery Act 2015 in the United Kingdom has a similar scope. It requires that large commercial organizations prepare a slavery and human trafficking statement. Among other information, the statement must include information about parts of the organization’s business and supply chains where a risk of slavery and human trafficking exists, and the steps it has taken to address that risk.⁵⁵ A comparable Modern Slavery Bill is discussion in Australia.

The EU Directive 2014/95 on Disclosure of Non-Financial Information also enters into the category of mandatory disclosure laws. Large enterprises must include a non-financial statement containing information about the development, performance, position, and impact of their activity relating to employee matters, among several other elements.⁵⁶ The enterprise has to report the risks of adverse impact stemming not only from its own activities, but also from those linked to its operations, products, services and business relationships, including its supply and

⁵⁴ California Transparency in Supply Chains Act 2010 (US), s 1714.43(a)(1). See Benjamin T Greer and Jeffrey Purvis, ‘Corporate Supply Chain Transparency: California’s Seminal Attempt to Discourage Forced Labour’ (2016) 20 *The International Journal of Human Rights*, 55–77, for an overview.

⁵⁵ Modern Slavery Act 2015 (UK), s 54(4)(a).

⁵⁶ Parliament and Council Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L.330/1, art 19a(1) (Non-Financial Disclosure Directive).

subcontracting chains,⁵⁷ thus in line with the UNGP. However, the company is not required to pursue policies in relation to those matters; in that case, it must only provide a clear and reasoned explanation for not doing so.⁵⁸

The California Act, the Modern Slavery Act, and the EU Directive 2014/95 do not introduce a due diligence standard. They also do not clarify the conditions of liability for parent or contracting companies. Some suggest that even if information that companies must disclose does not lead to any legal sanctions, companies may still seek to change their behavior if they believe that such information would lead to non-legal sanctions, such as reputational harm.⁵⁹ These regulations may be a step towards more accountability. However, as McCorquodale and al. note, this legislation and regulation generally requires reporting by companies of their activities without expressly requiring companies to address and remediate their human rights impacts.⁶⁰ In the end, since they do not clarify any due diligence standard and conditions of liability, they do not significantly reduce the uncertainty related to outcomes of transnational litigation for corporate labour rights.

3.2.2 Mandatory due diligence laws

In specific sectors, such as conflict minerals, some laws have introduced mandatory standards of conduct beyond disclosure requirements. For example, the Dodd–Frank Act on conflict minerals⁶¹ requires to adopt a due diligence standard that must be exercised once a company has determined that it uses conflict minerals.⁶² The EU has recently taken a similar approach by defining the due diligence that importers of specific minerals originating from conflict-affected

⁵⁷ *ibid* art 19a(1)(d) and preamble, para 8.

⁵⁸ *ibid* art 19a(1).

⁵⁹ Stephen Park, ‘Human Rights Reporting as Self-Interest: The Integrative and Expressive Dimensions of Corporate Disclosure’, in Robert C Bird, Daniel R Cahoy and Jamie D. Prekert (eds), *Law, Business and Human Rights: Bridging the Gap* (Edward Elgar 2014) 53.

⁶⁰ McCorquodale et al. (n 43) 202. See also Karin Buhmann, ‘Neglecting the Proactive Aspect of Human Rights Due Diligence? A Critical Appraisal of the EU’s Non-Financial Reporting Directive as a Pillar One Avenue for Promoting Pillar Two Action’, <https://doi.org/10.1017/bhj.2017.24> (2017) 3 *Business and Human Rights Journal* 23, for other critics.

⁶¹ Dodd–Frank Wall Street Reform and Consumer Protection Act 2010 (US), s 1502(b)(p)(1)(a). See also Park (n 59) 63, for reporting requirements.

⁶² Martin-Ortega (n 10) 66.

and high-risk areas must adopt beyond disclosure requirements.⁶³ Both documents use the OECD's Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas as standard of conduct.⁶⁴ Regarding labour issues, and in addition to conducting general and specific labour rights due diligence as presented above, companies extracting, trading, handling and exporting minerals from conflict-affected and high-risk areas must commit to adopt, disseminate and incorporate in contracts with suppliers a policy stating that they do not tolerate the commission of any forms of forced or compulsory labour or the worst forms of child labour.⁶⁵ According to the OECD Guidance, companies should also know the conditions of extraction, mineral transport, handling and trade in order to identify the existence of any forms of forced labour or the worst forms of child labour.⁶⁶

Another example of a mandatory due diligence law covering labour issues is the Dutch Child Labour Due Diligence Law, which is currently in discussion. The proposal entails a mandatory due diligence provision. Companies based in the Netherlands should act in accordance with the International Labour Organization Child Labour Guidance Tool for Business.⁶⁷ In addition, the proposal entails administrative and criminal fines for companies that do not submit a declaration that they have conducted due diligence, or that fail to conduct due diligence when required.⁶⁸ The legislative proposal is currently pending before the Dutch Senate.⁶⁹

In mandatory due diligence laws, sanctions are sometimes in place, as in the Dutch proposal, to require a company to carry out due diligence. Similarly, EU member states are required to carry out ex-post checks in order to ensure that importers of conflict minerals comply with their due diligence obligations.⁷⁰ However, like mandatory disclosure laws, none of these mandatory due

⁶³ Parliament and Council Regulation (EU) 2017/821 of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum, and tungsten; their ores; and gold originating from conflict-affected and high-risk areas [2017] OJ L.130/1 (Supply Chain Due Diligence Regulation).

⁶⁴ *ibid* 206. Martin Ortega (n 10) 66.

⁶⁵ OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, 3rd ed., 20-21.

⁶⁶ *ibid* 59-60.

⁶⁷ *ibid* art 7(1).

⁶⁸ *ibid* art 7(2). See also Christine Kaufmann, 'Menschen- und umweltrechtliche Sorgfaltsprüfung im internationalen Vergleich', (2017) *Pratique Juridique Actuelle* 974.

⁶⁹ See <www.eerstekamer.nl/wetsvoorstel/34506_initiatiefvoorstel_kuiken> accessed 18 November 2018 and <www.eerstekamer.nl/nieuws/20171219/debat_wet_zorgplicht_kinderarbeid> accessed 18 November 2018.

⁷⁰ Supply Chain Due Diligence Regulation (n 63) art 11.

diligence laws mention or elaborate on corporate liability for the harm once it has occurred, which brings us to the last category of due diligence laws. They do not provide for access to remedies for the affected employees.

3.2.3 Mandatory due diligence and liability provisions

The third category of due diligence laws includes those defining the standard of corporate due diligence and, in addition, specifying the legal consequences in the event of harm. Legal consequences can take the form of criminal liability or civil liability depending on who must enforce the due diligence standard – the public prosecutor or the victim. There are at least two current examples regarding civil liability: the French *loi relative au devoir de diligence* and the currently discussed Swiss Constitutional Initiative on Responsible Business.

The French *loi relative au devoir de vigilance* establishes a link between due diligence and civil corporate liability.⁷¹ It first requires that large companies based in France establish and implement a vigilance plan. This plan shall include measures to allow for risk identification and for the prevention of *inter alia* severe violations of human rights, serious bodily injury and health risks.⁷² It has a broad scope and covers most labour-related human rights and core labour rights. However, a question remains as to the definition of “severe” violations. Based on the international UNGP due diligence framework, the scope of due diligence covers risks resulting from the operations of the company and of the companies it controls as well as from the operations of the subcontractors or suppliers with whom it maintains an established commercial relationship.⁷³ Finally, the law expressly establishes a fault liability for the company’s own actions and omissions on the basis of the general tort of negligence.⁷⁴ It states that the author of any failure to comply with its due diligence duties shall be liable and obliged to compensate for the harm that due diligence would have permitted to avoid.⁷⁵ The French law thus expressly

⁷¹ Loi no 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre (Loi relative au devoir de diligence). Non-official translation provided by the European Coalition for Corporate Justice available at <<https://business-humanrights.org/en/french-duty-of-vigilance-bill-english-translation>> accessed 18 November 2018.

⁷² Loi relative au devoir de diligence, art. L. 225-102-4.

⁷³ Ibid.

⁷⁴ Sandra Cossart, Jérôme Chaplier and Tiphaine Beau de Lomenie, ‘The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All’ (2017) 2 Business and Human Rights Journal 317, 321.

⁷⁵ Loi relative au devoir de diligence, art. L. 225-102-5.

translates due diligence into an enforceable duty of care. As a result, employees of a subsidiary and of some suppliers can base their claim on a legal provision to challenge the conduct of the parent or contracting company.

The second example is the Swiss Constitutional Initiative on Responsible Business.⁷⁶ The Responsible Business Initiative aims at adding article 101a, ‘Responsibility of Business’, to the Swiss Constitution. The initiative collected the requisite threshold of 100,000 signatures. The Parliament is currently discussing whether to adopt a specific due diligence law in order to avoid a popular vote.⁷⁷ If both chambers of the Parliament cannot agree on a text or if the proponents of the initiative consider an agreed text unsatisfactory, the Swiss citizens will decide over the Responsible Business Initiative by 2020 at the latest.

According to the text of the constitutional initiative, companies are required to carry out appropriate due diligence. They must identify impacts on internationally recognized human rights, take appropriate measures to prevent their violation, cease existing ones, and account for the actions taken.⁷⁸ Internationally recognized human rights encompass explicitly labour-related human rights as well as core labour rights.⁷⁹ As in France, risks cover also those associated from the activities of subsidiaries and more generally of business relationships. Regarding liability, the constitutional initiative brings about a specific liability for the harm caused by controlled companies.⁸⁰ Accordingly, when a controlled company, such as a subsidiary, causes harm, the parent company is liable unless it can prove that it took all due care to avoid the loss or damage, or that the damage would have occurred even if all due care had been taken. This specific liability for controlled companies addresses the difficulty that plaintiffs may face in bringing evidence

⁷⁶ Initiative populaire fédérale ‘Entreprises responsables – pour protéger l’être humain et l’environnement’ <www.bk.admin.ch/ch/f/pore/vi/vis462t.html> accessed 15 November 2018. Unofficial English translation available at Swiss Coalition for Corporate Justice, ‘The Initiative Text with Explanations’ <<http://konzern-initiative.ch/initiativtext/?lang=en>> accessed 18 November 2018.

⁷⁷ See Swiss National Council, Rapport du comité des affaires juridiques sur la révision du droit de la société anonyme (18 May 2018), <https://www.parlament.ch/centers/kb/Documents/2016/Rapport_de_la_commission_CAJ-N_16.077_2018-05-18.pdf> accessed 15 November 2018.

⁷⁸ Swiss Constitution, Proposed art 101a(2)(a).

⁷⁹ Swiss Coalition for Corporate Justice, ‘The Initiative Text with Explanations’ <<http://konzern-initiative.ch/initiativtext/?lang=en>> accessed 18 April 2018

⁸⁰ Swiss Constitution, Proposed art 101a(2)(c). See Bueno (n 42); Gregor Geisser, ‘Die Konzernverantwortungsinitiative: Darstellung, rechtliche Würdigung und mögliche Umsetzung’ (2017) *Pratique Juridique Actuelle* 943, 948–949.

about the conduct of controlling companies located abroad. For the rest, it remains the plaintiff’s responsibility to prove the harm, the causality, and the control relationship between the business entities.⁸¹ Table I compares domestic labour rights due diligence laws adopted and currently in discussion as presented so far.

Title (chronological order)	Disclosure provision	Due diligence provision	Liability provision
California Transparency in Supply Chains Act 2010 (US)	X		
Dodd–Frank Act, sec 1502, 2010 (US)	X	X	
Directive 2014/95 on Disclosure of Non-Financial Information 2014 (EU)	X		
Modern Slavery Act 2015 (UK)	X		
Loi relative au devoir de vigilance 2017 (FR)	X	X	X
Regulation 2017/821 on Supply Chain Due Diligence Obligations for Importers of [Minerals] from Conflict-Affected and High-Risk Areas 2017 (EU)	X	X	
Child Labour Due Diligence Proposal, currently in discussion (NL)	X	X	
Popular Initiative on Responsible Business, currently in discussion (CH)	X	X	X
Modern Slavery Bill, in discussion (AU)	X		
Parliamentary Counter-Proposal to the Popular Initiative on Responsible Business, in discussion (CH)	X	X	X

Table I: Domestic “labour rights due diligence laws” presented in chronological order⁸²

4 Research agenda on multinational enterprises and labour rights

4.1 The material scope of “labour rights” for due diligence.

A first challenge regarding labour rights due diligence concerns its material scope. What are labour rights risks for due diligence and how can they be measured? As Fasterling notes for general human rights due diligence, the UNGP have adopted a risk management approach towards human rights, implying that “adverse human rights impacts” as human rights risks can be measured. He adds that this premise is alone challenging because convincing methodologies for measuring adverse human rights impact have yet to be developed or disclosed.⁸³ In the same line, Baumann-Pauly and al. envision a future business and human rights agenda that strategically focuses on the development of measurable industry-specific standard and the adoption of credible

⁸¹ Table based on Bueno (n 42) and updated.

⁸² Original source, Bueno (n 42)

⁸³ Fasterling (n 6) 237.

metrics that make transparent the extent of corporate compliance with human rights.⁸⁴ This is also true for labour rights due diligence.

To answer this challenge for labour rights, there is an evident need to combine interdisciplinary research in human rights law and business ethics. Regarding labour rights due diligence, the UNGP, ILO Tripartite Declaration and Chapter V of the OECD Guidelines for Multinational Enterprises do not sufficiently define “labour rights adverse impacts”. Human rights and labour lawyers should continue to define them in order for business ethics scholars to be able to create effective and implementable labour rights risk management tools. Concretely, there is a need to define more clearly the elements of the human right to just conditions of work. For example, what is the scope of corporate due diligence with respect to trade unions rights for companies operating in countries, such as China, that have not ratified the fundamental ILO Fundamental Convention on Freedom of Association and Protection of the Right to Organize? Are two weeks of holidays with pay per year instead of the recommended minimum three weeks a negative human rights impact to be addressed by multinational enterprises in the same way as child labour? What constitutes a “severe” and thus a “non-severe” (labour) human right violation in the French *loi de vigilance*?

4.2 Labour rights due diligence, enforceable duty of care and the scope of corporate liability

A second challenge is translating the concept of labour rights due diligence into an enforceable duty of care. Legal research should continue clarifying the vertical scope of labour rights due diligence for both parent companies and contracting companies along the value chain. In this regard, it seems to be acknowledged that multinational enterprises should conduct due diligence along the entire value or supply chain. Corporate liability for labour rights adverse impacts in global operations only starts to be discussed in courts and by legal scholars and mostly for parent companies.⁸⁵ Corporate liability for labour rights adverse impacts remains widely undeveloped for contracting companies’ liability in supply chains. Legal research would greatly benefit from economic research on supply chains in order to clarify labour rights due diligence and the scope

⁸⁴ Dorothee Baumann-Pauly, Justine Nolan and Michael Posner, ‘The Future of Business and Human Rights: Challenges and Opportunities’ in Dorothee Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016) 316, 317.

⁸⁵ See Cassel (n 43), for example.

of corporate liability in this regard. There has been an interesting attempt to combine law and business ethics showing how mandatory due diligence looks like in practice.⁸⁶ Why does a clothing retail-company traditionally buy its production from foreign suppliers instead of producing through foreign subsidiaries? Should this corporate structure justify different rules of corporate liability?

Additionally, and very interestingly, labour law scholars working are also enlightening the debate about new business strategies regarding non-standard form of employment, such as platform work in the on-demand economy.⁸⁷ Most of these actors are multinational enterprises operating abroad without subsidiaries or foreign suppliers. How does the UNGP and OECD concept of human rights due diligence apply to these business models? This question was raised by Natour.⁸⁸ What does this mean for liability? This question relates to identifying who should be defined as an employer in complex corporate groups, supply chains or business models for the purpose of establishing a duty of care towards affected workers.

4.3 Labour human rights due diligence in a global competitive economy?

More generally, there is also room for more self-critic of the business and (labour) human rights approach in a global competitive economy. A practical difficulty of implementing labour rights due diligence in a globalized economy lies in the state-centeredness of the global economy, which falls short of global cooperation.⁸⁹ Where states are competing against each other for individual economic interests, it is unlikely that they will place enforceable responsibilities through liability provisions for multinational enterprises to respect labour rights abroad.⁹⁰ It is true that there are ongoing discussions about a binding treaty on human rights that may level the playing field.⁹¹ However, in the absence of such cooperation, more research is needed on economic impacts, positive and negative, for workers worldwide of requiring multinational

⁸⁶ McCorqudale and al (n 43).

⁸⁷ In this book, Valerio de Stefano and Antonio Aloisi, 'Fundamental Labour Rights, Platform Work and Human-Rights Protection of Non-Standard Workers', ch 19.

⁸⁸ Faris Natour, 'Respecting Human Rights in the On-Demand Economy: Closing the New Governance Gap' <https://doi.org/10.1017/bhj.2016.7> (2016) 1 Business and Human Rights Journal 315, 315-20.

⁸⁹ *Id.* at 117.

⁹⁰ Although the French *loi relative au devoir de vigilance* proves the contrary.

⁹¹ Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' <https://doi.org/10.1017/bhj.2015.5> (2016) 1 Business and Human Rights Journal 41, 41-67.

enterprises to conduct labour rights due diligence. Would labour rights due diligence benefit low-skill workers at the bottom of the supply chain or workers in industrialized countries avoiding delocalization? To which extent and how?

Finally, one must acknowledge the inherent limits of the “business and labour rights approach”, which is before all defensive and reactionary. For example, there is no discussion about multinational enterprises not only respecting, but also *fulfilling* labour rights. What about requiring multinational enterprises to hire more or hire disadvantaged individuals that do not meet the needs of the labour markets as a way to fulfil the human right to work?⁹² What about incentivizing positive impacts on labour of companies truly committed to positive change? The business and labour rights approach is not potentialist or proactive. It does not work in the global economy.⁹³ The business and labour rights approach only thinks of ways to ensure minimum standards of workers’ protection by ensuring that enterprises meet their responsibilities.

5 Conclusion

In recent years, legal scholars have clarified the concept of “corporate human rights due diligence” as defined at the international level by the United Nations Guiding Principles on Business and Human Rights. They are also discussing how to translate such concept into an enforceable duty of care for corporate liability. This contribution has applied these developments by presenting the due diligence that multinational enterprises should apply to labour-related human rights and core labour rights under the concept of “corporate labour rights due diligence”.

Providing an international standard of conduct for multinational enterprises with respect to labour rights does not say much about how to implement it in practice at the domestic level. As discussed in the contribution, there is emerging case-law on parent company liability for the harm caused to workers at foreign subsidiaries. There are also ongoing cases of contracting companies’ liability for the harm caused to workers employed by foreign suppliers. However, in the absence of clear conditions of liability at the domestic level, the outcome of such transnational litigation proves to be very uncertain for both workers and multinational enterprises. This may explain why

⁹² See Olivier De Schutter, ‘Welfare State Reform and Social Rights’ (2015) 33 Neth. Q. Hum. Rts 123, 156.

⁹³ Nicolas Bueno, ‘From the Right to Work to Freedom from Work: Introduction to the Human Economy’ 33 The International Journal of Comparative Labour Law and Industrial Relations 463.

some states are currently taking steps to implement the concept of corporate human rights due diligence in their domestic legislation, such as the 2017 French *loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*.

Despite some trends towards domestic implementation of labour rights due diligence, many questions remain. First, what is the exact scope of “labour rights” for due diligence? Regarding liability, the business and human rights literature would also greatly benefit from business ethics and labour law scholars working on new form of non-standard employment, such as platform work. Should corporate liability for labour rights abuses be different based on whether the multinational enterprise operates through subsidiaries, suppliers or use platforms to provide services? Finally, there is room for self-critic on the inherent limits of the “business and labour rights approach” being before all defensive and reactional and difficult to implement in the competitive and state-centered global economy. There is room for complementary focusing on positive change.

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