

30 August 2016



**SUBMISSION TO UN OPEN ENDED INTER-GOVERNMENTAL
WORKING GROUP ON TRANSNATIONAL CORPORATIONS &
OTHER BUSINESS ENTERPRISES WITH RESPECT TO HUMAN
RIGHTS**

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Regulating Supply Chains in a Business and Human Rights Treaty

1. In considering the development of a business and human rights treaty, the inclusion of provisions aimed at regulating corporate human rights responsibilities in supply chains, seems essential given not only the preponderance and reliance on supply chains in bringing goods to market but also because of their potential as a repository of corporate human rights violations. At the annual conference of the International Labour Organization (ILO) in June 2016, the question of whether global supply chains need new rules and regulations figured prominently on the agenda. The final ILO conference conclusions highlight the need for a more formal examination of governance gaps within global supply chain and consideration of whether new international standards are required to protect workers in supply chains. Specifically, the ILO conference noted that governments have a responsibility to:

[c]reate an enabling environment to help enterprises strengthen their contribution to sustainability and decent work throughout their business operations, help them to identify sector-specific risks and implement due diligence procedures in their management systems. Governments should also clearly communicate on what they expect from enterprises with respect to responsible business conduct and could consider whether further measures, including regulation, are needed if these expectations are not met.¹

2. Preceding the ILO's 2016 supply chains discussions was the development of a number of different legislative initiatives focused on increasing corporate reporting of human rights impacts in supply chains. In 2015, the United

¹ International Labour Conference, Provisional Record, 105th Session, Geneva, 'Fourth Item on the Agenda: Decent work in Global Supply Chains Reports of the Committee on Decent Work in Global Supply Chains: Resolution and conclusions submitted for adoption by the Conference' (May–June 2016) para. 16(e), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_489115.pdf.

Kingdom passed the Modern Slavery Act, which mandates transparency in supply chains.² The UK legislation was modelled on, but is potentially broader than, the California Transparency in Supply Chains Act passed a few years earlier.³ Another example of transparency legislation is s.1502 of the US Dodd-Frank Act, which requires all listed companies to report on the sources of minerals used in their products that originate from the Democratic Republic of Congo or adjoining countries.⁴ While these American and British legislative developments mandate disclosure, they do not directly impose civil or criminal liability on lead firms for the downstream acts of other companies in their supply chain. However, transparency legislation can also be crafted to expressly attach legal liability up and down a supply chain for particular wrongdoings occurring anywhere in that chain. An example of this approach can be found in Australian legislation⁵ which establishes a regulatory framework for improving the rights of homeworkers in the Australian apparel industry and requires the insertion of contractual tracking mechanisms in supplier contracts to follow production and mandate disclosure up and down the supply chain. Liability for contraventions of the laws is imposed on lead companies in order to shift the overarching legal responsibility to the top of the supply chain. Another model of transnational supply chain regulation which combines due diligence requirements with civil and criminal liability is exemplified by the Illegal Logging Prohibition Act recently established in Australia.⁶ This Act incorporates due diligence requirements which obligate the importers and processors of timber to initiate verification and certification processes in order to ensure the imported timber was not illegally logged.⁷ If an

² *Modern Slavery Act 2015* (c.30) (UK), s.54.

³ *California Transparency in Supply Chains Act*, Ca. Civ. Code § 1714.43..

⁴ *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, 124 Stat. 1376 (2010). In addition, s. 1504 of the Act addresses financial transparency by requiring all listed oil and mining companies to disclose the revenues they pay to governments worldwide.

⁵ The FairWear campaign (<http://fairwear.org.au/>) was a significant force that led to the introduction of successive legislative amendments including: *Industrial Relations (Ethical Clothing Trade) Act 2001* (NSW) and s 175B *Workers Compensation Act 1987* (NSW); *Industrial Relations (Fair Work) Act 2005* (SA); *Outworkers (Improved Protection) Act 2003* (Vic); and *Industrial Relations and Other Acts Amendment Act 2005* (Qld). Also see generally, I. Nossar, R. Johnstone and M. Quinlan, 'Regulating Supply Chains to Address the Occupational Health and Safety Problems Associated with Precarious Employment: The Case of Home-Based Clothing Workers in Australia' (2004) 17 *Australian Journal of Labour Law* 137.

⁶ *Illegal Logging Prohibition Act 2012* (Cth).

⁷ The *Illegal Logging Prohibition Amendment Regulation 2013* requires that importers and processors undertake due diligence from 30 November 2014. There is an 18 month transition period during which the Australian government will seek to assist and educate companies about the due diligence requirements. Section 7 sets out the four step due diligence process. Step 1 is information gathering (the importer must obtain as much of the prescribed information as is reasonably practicable); Step 2 is an option process that involves assessing and identifying risk against a prescribed timber legality framework (section 11) or a country specific guideline (once they are prescribed); Step 3 is risk assessment (section 13); and Step 4 is risk mitigation (section 14) which should be adequate and proportionate to the identified risk. Illegally logged timber is defined broadly in the *Illegal Logging Prohibition Act 2012* (Cth) as timber "harvested in

importer or processor intentionally, knowingly or recklessly imports or processes illegally logged timber they could face significant penalties, including up to five years imprisonment and/or heavy fines. This hybrid legislation deliberately targets the firm at the top end of the supply chain (and utilizes civil and criminal liability) as a means of deterring illegal activities downstream. It is a potentially useful model for overcoming regulatory challenges that may arise in host states including an unwillingness or inability to enforce their own labour, human rights and environmental laws.

3. A number of key questions arise when considering the development of regulatory provisions aimed at protecting the rights of workers in supply chains: how broadly should a supply chain be described; how prescriptively should due diligence be defined; should due diligence processes vary from sector to sector or be narrowly focused on specific issues such as forced labor; and if due diligence applies separately to all entities within a supply chain, should lead firms in the chain be subject to specific requirements holding them accountable for both reporting on downstream activities and potentially liable for wrongdoings in that chain?
4. **Defining a supply chain.** In defining a supply chain, treaty drafters should look to soft and hard law guidelines that are already in place and include a comprehensive definition of a supply chain, not limited to the first tier suppliers. For example, the OECD Due Diligence Guidance⁸ adopts a deep approach and includes all suppliers from the sourcing of raw material to the final product in its supply chain definition; the US Foreign Corrupt Practices Act⁹ attaches liability to a company through its supply chain vendors.¹⁰ The broad and inclusive approach of defining a supply chain as set out in the OECD Due Diligence Guidance is an approach to be recommended.
5. **Defining due diligence.** The Guiding Principles provide a broad framework that sets out the general parameters of what companies should take into account in conducting human rights due diligence assessments.¹¹ They state that the

contravention of laws in force in the place (whether or not in Australia) where the timber was harvested” (Section 7).

⁸ OECD (2013), *Due Diligence Guidance*, n. **Error! Bookmark not defined.** Also see, OECD (2015), *Due Diligence Guidance for the Responsible Supply Chains in the Garment and Footwear Sector, Draft for Consultation*, <https://www.oecd.org/daf/inv/mne/Due-Diligence-Guidance-Responsible-Supply-Chains-Textiles-Footwear.pdf>.

⁹ *Foreign Corrupt Practices Act 1977*, as amended, 15 U.S.C. §§ 78dd-1.

¹⁰ The US Department of Justice has stated that one of the best practices of a FCPA compliance program includes the right to conduct audits of the books and records of the agents, business partners and supplier or contractors to ensure compliance. See: *USA v Panalpina World Transport (Holdings)* Docket Number 10-CR-769, a Deferred Prosecution Agreement.

¹¹ Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework: Report of the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises’, A/HRC/17/31 (21 March 2011), Principles 17-20.

“process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.”¹² However, the term “impacts” – the crucial element to which due diligence is addressed – is not defined and it may be clearer to refer to violations of international human rights in future legislation.¹³ The Guiding Principles also note that human rights due diligence may “vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations.”¹⁴ Some of the legislative approaches to mandating due diligence are narrowly targeted towards a particular issue. For example, the Dodd-Frank Act requires companies to conduct due diligence on the source and chain of custody of conflict minerals emanating from the DRC. The Illegal Logging Prohibition Act is prescriptive in its approach to mandating due diligence as related specifically to the source of certain imported timber into Australia. Supply chain arrangements are not static¹⁵ and will vary from sector to sector and amongst firms. Treaties by nature tend to be broad and somewhat abstract and the supply chain provisions would necessarily reflect this broadness but will differ in one clear respect from the Guiding Principles due diligence guidance because such treaty provisions would not be optional but rather be cast as a legal obligation. In order to capture sector specificities, one option may be to attach sector specific guidelines or ‘regulations’ to a treaty (to be drafted a later date), setting out a narrower set of investigative issues to consider when conducting due diligence.

6. **Accountability for human rights violations in a supply chain.** The various legislative models discussed above use different techniques to connect due diligence requirements with legal liability. Some aim to make corporate practices transparent and allow legal sanctions to be attributed indirectly via other legal principles, such as consumer law. Others directly incorporate civil or criminal penalties in the legislation. Due diligence provisions that directly incorporate penalties are more likely to be an effective deterrent against corporations operating in a manner that violates international human rights. Contractual risk-allocation may be effective in certain circumstances in shielding or indemnifying a firm for the wrongdoings of its suppliers, but such risk allocation would not protect the company or its officers from criminal liability. Moreover, contractual indemnification does not remove responsibility in the terms set out in the Guiding Principles where a firm has the leverage to effect change, and also does not prevent reputational risk. In the face of a human

¹² Human Rights Council, ‘Guiding Principles’, n. 11, Principle 17.

¹³ S. Deva, ‘Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles’ in S. Deva and D. Bilchitz, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013), 78-104.

¹⁴ Human Rights Council, ‘Guiding Principles’, n.11, Principle 17.

¹⁵ G. Gereffi, J. Humphrey and T. Sturgeon, ‘The Governance of Global Value Chains’ (2005) 12(1) *Review of International Political Economy* 78–104, 96.

rights scandal, investors and consumers are unlikely to be appeased by corporate recourse to a legal indemnification clause. A treaty might also provide that demonstrated good faith due diligence could be raised as a defence to, or at least a proportional mitigation of, criminal or civil liability.¹⁶ Guidance in this respect could be obtained from various anti-bribery and corruption laws that have been implemented both nationally and internationally. The UK Bribery Act 2010, for example, takes into account the fact that companies implemented “adequate procedures” to prevent bribery in their operations as a defence to a charge of a company’s failure to prevent bribery.¹⁷ Provisions incorporating both penalties for, and defences to, alleged misconduct could give business a strong incentive to exercise due diligence, without depriving them of the ability to defend themselves, or depriving victims of a remedy for serious violations of human rights.¹⁸

7. In summary, inclusion of supply chain accountability provisions in a future business and human rights treaty should take account of the following factors:

- a. the definition of a supply chain should extend beyond the first tier of suppliers;
- b. the requirements of due diligence could borrow from the framework set out in the Guiding Principles but the provision should also encourage the development of sector specific guidelines which to provide more specificity around due diligence requirements (see the Illegal Logging Prohibition Act);
- c. the provision should include penalties for non-compliance – options may include civil penalties (fines) for non-compliant reporting or inadequate due diligence and civil and criminal liability for violations such as non-payment of wages, trafficking and slavery (along the lines of the legislative models set out in the European chain liability regimes or the Illegal Logging Prohibition Act);
- d. the provision could provide a defense for companies that could demonstrate they had robust due diligence programs in place; and

¹⁶ S. Michalowski, ‘Due Diligence and Complicity: A Relationship in Need of Clarification’ in S. Deva and D. Bilchitz, *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013), 218-242.

¹⁷ D. Cassel and A. Ramasastry, ‘White Paper: Options For A Treaty On Business And Human Rights’ March 2015, 99. Also, courts and the US Department of Justice take certain factors into consideration when assessing criminal fines for companies prosecuted under the U.S. Foreign Corrupt Practices Act including: whether high-level personnel were involved in or condoned the conduct, whether the organization had a pre-existing compliance and ethics program, voluntary disclosure, cooperation, and acceptance of responsibility.

¹⁸ *Ibid.*

- e. innovative provisions that mandate disclosure requirements that operate up and down the supply chain; reversal of the onus of proof and deeming all workers to be ‘employed’ in the supply chain and a mix of public and private monitoring schemes (as per the Australian homeworkers legislation) should be considered.

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