doi:10.1017/aju.2024.49

INTRODUCTION TO THE SYMPOSIUM ON NEW PATHWAYS TOWARD SUPPLY CHAIN ACCOUNTABILITY

*León Castellanos-Jankiewicz,** *Tibisay Morgandi,*** *and Sergio Puig****

The continued rise of due diligence seems inexorable. The deluge of supply chain laws adopted in recent years has created unprecedented opportunities to align corporate behavior with the protection of global public goods. But these new forms of public-private governance may yet come under stress. The latest legislative proposals are facing an increased backlash, with large companies complaining of over-regulation and, in the case of smaller businesses, existential threats. At the same time, national courts enthusiastically invoke due diligence standards, yet ascribe to them varying degrees of substantive and procedural significance. Adding to the complexity, a wide array of grievance mechanisms and remedies, including civil and administrative procedures, are open to victims of abuse resulting from irresponsible business conduct, but their effectiveness remains to be fully tested. To provide clarity on these shifting dynamics at a crucial juncture, this symposium addresses current developments in supply chain accountability relating to human rights, labor standards, climate change, and the environment. The six essays that follow are written by scholars and practitioners working in different branches of law, with each paying particular attention to the application of private law in the public interest—an important theme as corporate entities continue to have a major impact on global public goods.

New Supply Chain Laws and Their Challenges

With hindsight, it has now become clear that John Ruggie's 2011 UN Guiding Principles on Business and Human Rights ushered in a new generation of hard and soft law.[1] The European Union's Corporate Sustainability Due Diligence Directive (CSDDD) is the latest instrument to mandate large corporations with preventing adverse human rights, labor, climate, and environmental impacts across production and distribution value chains.[2] The Directive stands out for its comprehensive requirements for companies to report on sustainability processes, conduct risk assessments, provide remediation for adverse impacts, and establish complaints procedures. Moreover, the CSDDD is meant to interact with other sector-specific regulations adopted by the EU in recent years on conflict minerals, batteries, deforestation, and forced labor.[3]

* *Senior Researcher, Asser Institute for International and European Law, The Hague, and University of Amsterdam Faculty of Law, The Netherlands. Email address: l.castellanos@asser.nl.*

** *Associate Professor of International Energy Law at Queen Mary University of London, School of Law, UK. Email address: t.morgandi@qmul.ac.uk.*

*** *Professor of International Economic Law, European University Institute, Florence, Italy. Evo DeConcini Professor of Law, University of Arizona, Tucson, United States. Email address: spuig@arizona.edu.*

[1] UN Guiding Principles on Business and Human Rights, UN Doc. HRC/17/4 (June 16, 2011); *see also* OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (2023).

[2] EU Corporate Sustainability Due Diligence Directive, 2024/1760/EU (June 13, 2024).

[3] EU Conflict Minerals Regulation, 2017/821/EU (May 17, 2017); EU Batteries Regulation, 2023/1542/EU (July 12, 2023); EU Deforestation Regulation, 2023/1115/EU (May 31, 2023); EU Forced Labour Regulation, COM/2022/453 final.

© The Author(s) 2024. Published by Cambridge University Press for The American Society of International Law. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (http://creativecommons.org/licenses/by/4.0/), which permits unrestricted re-use, distribution, and reproduction in any medium, provided the original work is properly cited.

https://doi.org/10.1017/aju.2024.49 Published online by Cambridge University Press

In several countries, a suite of national laws aimed at supply chain accountability are also in force. Prominent examples include due diligence and transparency legislative acts in France, Germany, Hungary, the Netherlands, Norway, and Switzerland, whereas proposals are currently being discussed in Austria, Belgium, and Luxembourg.[4] Beyond Europe, Australia, Canada, the UK, and the United States all have laws that focus on the prevention of forced labor and modern slavery.[5]

Supply chain liability aims at creating accountability mechanisms for the behavior of enterprises and their subsidiaries, including remedies in civil, administrative, and criminal law, for failure to prevent abuses of human rights and labor standards, as well as climate and environmental damage. It requires companies to monitor and engage with subsidiaries and business partners toward preventing, addressing, and mitigating adverse impacts, nudging them toward internalizing the costs of potential damage resulting from their activities.

In practice, however, these provisions also create unprecedented compliance challenges for multinational and small companies alike. In Europe, enterprises have argued that the proliferation of new measures hampers competitiveness, and have recently called for an action plan "to eliminate regulatory incoherence, conflicting objectives, unnecessary complexity in legislation and over-reporting."[6] Moreover, the exposure to liability resulting from due diligence requirements might prompt larger companies to exit emerging markets. This exposure might also shunt smaller suppliers perceived as high-risk without appropriate stakeholder engagement, ultimately worsening conditions for less-empowered actors.

More broadly, the surfeit in due diligence legislation raises important conceptual questions for the relationship between the public and private dimensions of international law. Professor Anne Peters has already noted that global markets and multinational corporations are shaping the substance and structure of international law.[7] Indeed, private actors are increasingly engaging in lawmaking, law application, and law enforcement.[8] And corporations often exercise governmental authority on behalf of states to deliver global public goods.[9] Based on these premises, the contributions to this symposium ask how the shifting boundaries between public and private law are creating new accountability avenues for corporate harm. Ultimately, can private law become a vehicle for global governance?

Overview of the Symposium

The symposium opens with an essay by Carsten Koenig from the University of Cologne on the relationship between civil remedies and human rights in the CSDDD.[10] The inclusion of civil liability in European supply chain legislation for damages resulting from human rights abuses has been hailed as a major breakthrough. However, international human rights and labor conventions are not designed to capture corporate behavior

[4] French Duty of Vigilance Law 2017; German Supply Chain Due Diligence Act 2021; Hungarian Act on the Rules of Corporate Social Responsibility 2023; Norwegian Transparency Act 2022; Netherlands Child Labour Due Diligence Act 2019; Swiss Ordinance on Due Diligence and Transparency in Relation to Minerals and Metals from Conflict-Related Areas and Child Labour 2021.

[5] UK Modern Slavery Act 2015; Canada Forced Labour Act 2015; U.S. Uyghur Forced Labour Prevention Act 2021; Australian Modern Slavery Act 2018.

[6] Antwerp Declaration for a European Industrial Deal 2024.

[7] As reported in León Castellanos-Jankiewicz, *The Lauterpacht Lectures 2017: Towards a Global Private Law?*, Camb. Int'l L.J. Blog (Aug. 29, 2017).

[8] Sergio Puig, *International Regime Complexity and Economic Law Enforcement*,17 J. Int'l Econ. L. 3, 491 (2014).

[9] Lorand Bartels & Tibisay Morgandi, *International Investment Law and State Human Rights Obligations*, *in* A Research Agenda for International Investment Law (Andrew Mitchell & Chen Yu eds., forthcoming 2025).

[10] Carsten Koenig, *Human Rights or Private Rights? – Effective Protection of Victims in Global Supply Chains*, 118 AJIL Unbound 269 (2024).

https://doi.org/10.1017/aju.2024.49 Published online by Cambridge University Press

and are difficult to apply in these particular cases. Because of this, Koenig argues that it is better to link supply chain liability to violations of private rights under tort law, such as personal injury and property damage.

Tibisay Morgandi from Queen Mary University of London School of Law discusses liability for greenwashing in company sustainability reports, a widespread practice whereby companies over-promise or make outright false statements regarding their human rights, labor, climate, and environmental policies, processes, and impacts.[11] Morgandi shows how, as a result of the landmark UK Supreme Court *Vedanta* case, English tort law now ascribes legal significance to these statements in regard to UK companies' operations and those of their subsidiaries, as well as those of entities in their supply chains. Her piece illustrates how, under the doctrine of "assumption of responsibility," a UK company's undertaking in a sustainability report to perform a specific task to prevent harm caused by a separate entity may incur that company's tortious liability for any related harm it fails to prevent. Morgandi outlines the implications of the *Vedanta* ruling for the legal position of UK companies regarding entities in their supply chains, unveiling a closer alignment than often suggested with the position of EU competitors subject to the CSDDD.

In his contribution, Humberto Cantú Rivera from Universidad de Monterrey, Mexico, discusses the UN Business and Human Rights Treaty negotiations and its implications for transnational corporations.[12] In particular, Cantú Rivera asks how transnational corporate groups can be held accountable for human rights harms and environmental degradation. Within the treaty negotiations, the question has been addressed by three distinct camps. A first group advocates for direct regulation of transnational corporations under international law. A second argues that all businesses should be covered by the instrument. Finally, a smaller faction recognizes that all businesses must be covered but with a specific focus on transnational business activities. This contribution highlights the challenges of building consensus among coalitions and stakeholders to achieve common goals.

Turning to the environment, Jason Rudall from Leiden University takes stock of recent case law relating to supply chain accountability for greenhouse gas emissions.[13] Beyond specific legislation that incentivizes corporations to mitigate the impact they have on the environment, Rudall argues that judicial actors are increasingly playing a role. This is mainly because courts have issued decisions expanding the responsibility of corporations for harms caused by their operations to people and the environment, including throughout their supply chains. The cases discussed show that domestic courts and litigants have drawn on soft law to construe and often extend domestic law. The argumentative value of persuasive as opposed to binding authority is a signal feature of these decisions, according to Rudall.

Jowita Mieszkowska from Global Rights Compliance brings a practical perspective to evaluate the unintended consequences of the CSDDD, particularly as regards the chilling effect that actual and perceived over-regulation can have on the activities of smaller companies.[14] In particular, the trickle-down provisions of the Directive may result in a rushed termination of relationships with business partners in states with emerging economies. This is because emerging markets tend to be perceived as high-risk, especially in areas subject to armed conflicts and regional instability. Therefore, compliance costs associated with reporting obligations and other due diligence requirements may lead to smaller businesses ceasing operations, significantly impacting workers and their rights. Finally, the adopted text of the Directive, being the result of a political compromise, which sidelined more

[11] Tibisay Morgandi, *Liability for Greenwashing in Company Sustainability Reports: A Novel Application of the English Tort Law Doctrine of Assumption of Responsibility*, 118 AJIL UNBOUND 274 (2024).

[12] Humberto Cantú Rivera, *The UN Supply Chain Treaty Negotiations: Between Transnational Civil Litigation and Public Law Beyond Borders*, 118 AJIL UNBOUND 279 (2024).

[13] Jason Rudall, *Emission Impossible? Corporations, Supply Chains, Courts, and Climate Change*, 118 AJIL UNBOUND 284 (2024).

[14] Jowita Mieszkowska, *The Unintended Consequences of the EU Corporate Sustainability Due Diligence Directive*, 118 AJIL UNBOUND 291 (2024).

https://doi.org/10.1017/aju.2024.49 Published online by Cambridge University Press

ambitious proposals, might have the effect of inhibiting or delaying more progressive efforts to protect human rights in EU member states' national jurisdictions.

Finally, Sarah Vandenbroucke, Ph.D. candidate at Leiden University, takes aim at the role of codes of conduct to ensure labor rights.[15] Vandenbroucke observes that the CSDDD takes major steps in the evolution of corporate governance, moving away from the voluntary nature of corporate social responsibility toward a binding regulatory framework. A key feature of this move toward compulsory compliance includes the introduction of mandatory requirements for companies to adopt codes of conduct on labor standards and other rights. Vandenbroucke emphasizes, however, that without a shift in multinationals' perception that human rights are equally central to their economic objectives, codes of conduct may not effectively address existing shortcomings. These deficiencies include the lack of stakeholder engagement with codes of conduct and the potential shifting of compliance burdens onto suppliers.

Overall, this symposium highlights the complexity and significance of recent developments in supply chain accountability, and the marked shift toward binding regulatory frameworks. As illustrated throughout the essays, new laws like the CSDDD aim to curb corporate abuses by establishing robust mechanisms for transparency, accountability, and liability. In parallel, domestic courts have also developed existing standards to the same end. However, these frameworks also face practical and conceptual challenges, from compliance burdens to potential conflicts or overlap between public and private law. Addressing these tests requires a nuanced approach, one that considers both the impact of multinationals on global public goods and the unintended consequences of new regulations for smaller enterprises and developing economies. Moving forward, it is essential to monitor and weigh these legal developments, in order to ensure that they achieve a healthy balance between practical feasibility and meaningful accountability. Ultimately, this will help transform corporate responsibility from the aspirational goal that it was until recently into an integral part of global governance.

[15] Sarah Vandenbroucke, *The Evolution of Codes of Conduct to Ensure Labor Rights in Global Supply Chains*, 118 AJIL Unbound 297 (2024).

https://doi.org/10.1017/aju.2024.49 Published online by Cambridge University Press