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PAPERS OF THE INTERNATIONAL ASSOCIATION OF THE LAW OF THE SEA

APPROCCI E STRUMENTI INNOVATIVI PER LA PESCA SOSTENIBILE NEL MAR MEDITERRANEO

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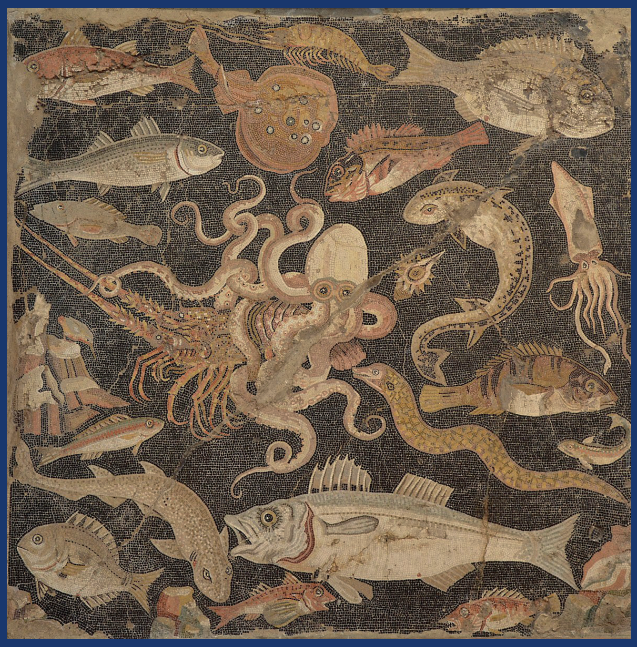

a cura di

GIUSEPPE CATALDI
VALENTINA ROSSI

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EDITORIALE SCIENTIFICA

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TOWARDS A MANDATORY HUMAN RIGHTS DUE DILIGENCE IN FISHERIES AND AQUACULTURE. REMARKS IN THE LIGHT OF RECENT NORMATIVE DEVELOPMENTS

Marco Fasciglione[*]

1. Introduction

Fisheries and seafood represent a massive industry with unique challenges compared to other major food and agriculture industries. With million metric tons of fish and seafood extracted annually from oceans, this industry represents one of the largest sources of food for global markets. In addition, with an estimated 60 million people employed in aquaculture and fisheries worldwide, this industry holds great importance to the economic and nutritional wellbeing of people around the world[1], representing also a relevant actor of the global economy. More than 10 percent of the world's annual seafood production is controlled by few companies, with the majority of them that are based in Asian Countries, such as Japan and Thailand. In addition, the European Union, China, Norway, Vietnam, and Chile have been the world's leading exporting countries of fish and fishery products worldwide in 2020 while the European Union, United States, China, and Japan dominated the market for seafood importing countries[2]. On the other side, the rapid and unregulated development of fisheries and seafood industry poses increasing risks to human rights and the environment. This industry, indeed, largely operate through individual vessels and fleets fishing on open oceans, often for months at a time without making landfall. Seafarers recruited for these jobs often face unsafe working conditions, lack of access to medical care, the impossibility to freely leave the vessel, and limited access to communication tools for contacting people on the land. These conditions may easily turn into

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[1] FAO, *The State of World Fisheries and Aquaculture*, Rome, 2020.

[2] *Leading exporting countries of fish and fishery products worldwide in 2020. Statista (2021)*, <https://www.statista.com/statistics/268269/top-10-exporting-countries-of-fish-and-fishery-products/> (August 2023); *Leading Importers of Fish and Fishery Products Worldwide in 2020. Statista (2021)*, <https://www.statista.com/statistics/268266/top-importers-of-fish-and-fishery-products/> (August 2023).

labor exploitation where crew members are forced to work for long in unsafe conditions, face sexual violence, hunger, or death for failing to comply with the skipper's orders, coercion to conduct illegal, unreported, and unregulated (IUU) fishing, and wage withholding. While forced labor and human trafficking in fisheries and aquaculture is not a new phenomenon[3], the problem has been exacerbated by the fact that this industry strongly relies on the supply chains model of production, which allows upstream companies to taking advantage of the opportunity to escape normative regulations by subcontracting the supplying of seafood and fish products to downstream companies operating in Countries with low human rights records, and practicing forced labour or other gross violations of human rights[4]. Violations of some fishers and seafood industry employees – occurring both during the recruiting processes and at the level of working conditions – are so egregious that these abuses have been referred to as constituting 'modern slavery'[5].

In the light of this backdrop, the path towards the 'humanization' of fisheries and seafood industry has mainly focused its attention on the role of States, and on the measures they are urged to adopt in order cope with these challenges and to discharge their duty to protect human rights of individuals falling within their jurisdiction[6]. Accordingly, widespread analyses have been performed on the obligation to protect, respect and fulfill human rights pending on State, as well as on the role that State actor play in this area. Lesser attention, however, has been devoted to the no less important role played by the private sector. The 2011 UN Guiding Principles on Business and Human Rights (hereinafter, UNGPs) remind us, indeed, that while States have the (positive) obligation to regulate the activities of private sector's actors so that they do not violate human rights[7], the corporate responsibility to respect (CRtoR) enshrined in the second Pillar of the UNGPs, urges the very same business enterprises – included fisheries and aquaculture industry – to respect human rights in the course of their operations and throughout the entire value chain and to take the necessary measures to prevent their activities from having a negative impact on human rights

[3] ILO, *Caught at sea. Forced labour and trafficking in fisheries*, Geneva, 2013.

[4] In 2015, an investigation of the Associated Press ('Seafood from Slaves') unveiled the conditions of several employees in the South-East Asia forced to catch or process seafood that through the supply chains of the major food retailers arrived on worldwide markets. For an analysis see A. BONFANTI, M. BORDIGNON, "'Seafood from Slaves': The Pulitzer Prize in the Light of the UN Guiding Principles on Business and Human Rights", *Global Policy*, 2017, pp. 498-504.

[5] ILO, *Caught at sea: Forced labor and trafficking in fisheries*, cit. as to the literature see: R. SURTEES, "Trapped at Sea. Using the Legal and Regulatory Framework to Prevent and Combat the Trafficking of Seafarers and Fishers", *Groningen Journal of International Law*, Vol. 1, No. 2, 2013, pp 96-97.

[6] G. CATALDI, "Sulla tutela del lavoro in mare con particolare riferimento alle imprese di pesca", in this *Volume*.

[7] M. FASCIGLIONE, "Enforcing the State Duty to Protect Under the UN Guiding Principles on Business and Human Rights: Strasbourg Views", in A. BONFANTI (ed.), *Business and Human Rights in Europe International Law Challenge*, 2019, pp. 37-47. As far as in general the theory of positive obligations, see R. PISILLO MAZZESCHI, "Responsabilité de l'état pour violation des obligations positives relatives aux droits de l'homme", in 333 *Recueil des Cours de l'Académie de Droit International*, 2009, pp. 179-506.

and, if an impact is originated, to mitigate and remedy it[8]. A basic tenet of this framework resides on the request to the companies to perform human rights due diligence (HRDD) with the aim to prevent any negative impact on human rights originated from their activities. Well, to the extent that corporate operations are involved, this framework also applies in relation to the human rights risks associated to the business activities in the fisheries and aquaculture. The objective of these pages is to review, in the light of the Guiding Principles, the scope of the CRtoR in relation to the activities of the companies operating in this industry, and to review the potentials of the recent surge of a regulatory wave on human rights due diligence, aimed at imposing on companies a due diligence obligation in respect to their impact on human rights.

2. The United Nation Guiding Principles on Business and Human Rights, the Corporate Responsibility to Respect and the Fisheries Industry

The United Nation Guiding Principles on Business and Human Rights (UNGPs), unanimously adopted by the UN Human Rights Council in 2011[9], are not a legally binding instrument. Nevertheless, they may be regarded as a common global platform for action to secure human rights in the global economy based on three Pillars: *a*) the duty of States to protect against human rights by abuses by third parties, including business enterprises; *b*) the corporate responsibility to respect human rights; and *c*) the need for greater access by victims to effective judicial and non-judicial remedies.[10] Conceptually, the UNGPs are expression of an approach to regulation in the form of a principles-based exercise in polycentric governance. With the term 'polycentric governance' Ruggie meant the way forward to systemically advance the cause of human rights in the global economy based on three concurring regulatory systems: public governance encompassing law and policy; corporate governance reflecting risk management; and civil governance reflecting social expectations of stakeholders. This approach stems directly from the acknowledgment that today human rights violations often occur in a context characterized by joint and coordinated, rather than independent, actions from different duty-bearers, and that accordingly, in order to

[8] As to the notion of 'impact' in the UNGPs, a notion broader than the one of 'violation', see the analysis of D. BIRCHALL, "Any Act, Any Harm, To Anyone: The Transformative Potential of "Human Rights Impacts" Under the UN Guiding Principles on Business and Human Rights", in *University of Oxford Human Rights Hub Journal*, Vol. 1, 2019, pp. 120-147.

[9] Human Rights Council, *Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/HRC/RES/17/4 of 7 July 2011. The UNGPs rely on the work performed from 2005 - 2011 by John Ruggie, the then special representative of the Secretary-General on human rights and transnational corporations and other business "enterprises".

[10] Despite their non-binding character, UNGPs constitute the first authoritative global standard on business and human rights. They have been internationally acknowledged and recognized by several States and the major international organizations and institutions, including the European Union and the Council of Europe, as a basis for the development of their own B&HR policies and standards. Bodies charged with policy-setting functions in human rights regional systems in Europe as well as in the Americas and in Africa have endorsed the Guiding Principles in the process of developing regional policy frameworks dealing with the negative effects on human rights of private sector activities.

achieve better protection for individuals and communities against corporate-related human rights harm, each of these governance systems needs to be mobilized and put in compatible directions.

In other terms, on the one hand, States owe a duty to protect human rights from violations occurring in the framework of business activities and they play a crucial role in controlling and supervising corporate activities. As far as fisheries and aquaculture are concerned, this duty means that States have to ensure that business operations in these sectors be not detrimental to human rights. On the other hand, business enterprises of these industries are urged to respect human rights during their operations and throughout the entire value chain, and have to do so, in particular, by performing human rights due diligence. This means taking steps in order to prevent their business activities from having a negative impact on human rights and, if an impact is originated, to prevent, mitigate and remedy it. While companies do not bear direct human rights obligations under traditional international law, the challenges posed by their activities as well as the obstacles encompassing State regulation, are increasingly leading to alternative approaches to hard regulation, traditionally based on legal norms, by emphasizing the role of private sector in the regulatory process.

The solution proposed by the UNGPs' second Pillar relies on the corporate responsibility to respect. Corporate responsibility to respect is a global standard of expected conduct for all business enterprises, including for the companies of fisheries and aquaculture industry. In principle, this responsibility does not entail binding legal obligations for companies and exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and furthermore does not diminish those State obligations. Corporate responsibility to respect is crystallized in the UNGPs statement that companies "should respect human rights".[11] The commitment to respect[12] implies that companies should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. The concept of 'human rights impacts', is one of the core features of the corporate responsibility to respect. Businesses, indeed, bear different degrees of responsibility for those adverse impacts they cause, contribute to, or which are "directly linked to their operations, product or services, by their business relationships"[13]. In

[11] UNGPs Principle 11.

[12] UNGPs Principle 16 requires that companies express this commitment in a formal "statement of policy", approved by senior levels, which is publicly available and reflected in policies and procedures of the company. Unilateral voluntary commitments from companies are an example of such statement of policy. This is the case, as for instance, of the Bolton Group, an Italian MNE which is the second largest player in the world in the tuna industry, who has adopted a human rights policy committing itself to uphold "the internationally recognized human rights, as laid out in the Universal Bill of Human Rights and the conventions which it has inspired, such as the ILO Declaration on Fundamental Principles and Rights at Work, the UN Guiding Principles on Business and Human Rights and the United Nations Conventions on the Rights of the Child (UNCRC)" and to perform "due diligence by establishing verification and compliance analysis mechanisms both internally and throughout our supply chain" (*Human Rights Policy, Bolton Group* (2022) <https://www.boltongroup.net/wp-content/uploads/2022/11/Human-Rights-Policy_ENG.pdf> (August 2023), at p. 3)

[13] UNGPs Principle 13.

particular, the UNGPs requires enterprises to *a*) avoid *causing* adverse human rights impacts through their own activities (both acts and omissions); *b*) avoid *contributing to* adverse human rights impacts through their own activities; and *c*) seek to prevent or mitigate adverse human rights impacts that are *directly linked to* their operations, products or services by their business relationships, even if they have not caused neither contributed to those impacts. According to the UNGPs, a company may cause an adverse impact where its activities (actions or omissions) on their own 'remove or reduce a person's (or group of persons') ability to enjoy a human right, *i.e.* where the company's activities are sufficient to result in harm. For example, a company who catches or processes seafood – for export through the supply chain to US or EU Countries – subjecting its employees to slavery practices, 'causes' an adverse human rights impact. Companies can 'contribute to' an adverse impact when their activities (actions or omissions) are combined with those of other actors in ways that cause harm. Contribution may occur where a food retailer of the fisheries supply chain, in order to ensure the quick delivery of some orders placed, encourages one of its suppliers to engage in anti-union behavior in order to face labor relations issues at one of its plants. Finally, 'linkage' refers to situations where a company has not caused, nor contributed to, an adverse human rights impact, but there is nevertheless a link between the operations, products or services of the company and that impact *via* company's business relationships. A situation of linkage may occur, as for instance, where a retailer sells fish or seafood which is caught by one of its supplier along the supply chain by using ships involved in human rights trafficking and labour abuse.

Well, the corporate duty to address negative impact on human rights has direct relevance for companies operating in the fisheries and aquaculture.[14] UNGPs in describing the *ratione personae* scope of application of the corporate responsibility to respect clearly state that this duty applies to all enterprises "regardless of their size, sector, operational context, ownership and structure". This means that *every company* in *every industry* has to respect human rights within their business activities and that no sector and no company shall be excluded: this responsibility applies fully and equally to all of them[15]. In the same vein, in respect to the *ratione materiae* scope of the corporate responsibility to respect, the UNGPs clarify that it potentially applies to all internationally recognized human rights. Indeed, since business enterprises can have with their operations an impact on virtually the entire spectrum of internationally recognized human rights, then their responsibility to respect applies to all such rights. The content of the category of internationally recognized human rights has to be "understood, at a minimum", as those included in the International Bill of Human Rights as well as those included in the fundamental labour rights set out in the 1998 ILO Declaration on Fundamental Principles and Rights at Work.[16] In addition, and particularly relevant for the present analysis, is the circumstance that according to

[14] For an analysis concerning, *mutatis mutandis*, the banking sector see J. RUGGIE, *Comments on Thun Group of Banks: Discussion Paper on the Implications of UN Guiding Principles 13 & 17 in a In a Corporate and Investment Banking Context*, 21 February 2017.

[15] UNGP Principle 14 and its Commentary.

[16] UNGPs Principle 12.

UNGPs some human rights may be at greater risk than others in particular *industries* or *contexts*: therefore, in presence of these settings companies have to pay "heightened attention".[17] Business operations of the fishing industry may originate situations deserving *exactly* such a heightened attention: the risk of involvement in gross human rights violations pertaining to the range of *jus cogens* norms – such as slavery, child labour, etc. –, the circumstance that companies operating in this industry may perform their operations in weak governance, or high-risk, Countries[18], or the fact that they may have business relationships with suppliers and other companies operating therein, impose on corporate actors an increased level of attention, and therefore an increased due diligence duty, as far as the respect of human rights. How to practically realize this objective?

Under the international framework on business and human rights companies have to carry out human rights due diligence (HRDD) in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts.[19] Therefore, in order to prevent human rights violations that may be associated to the fishery and aquaculture supply chain, companies of this industry should proactively investigate their own impacts, included those occurring along their supply chains, through a process of human rights due diligence.[20] This "consists in an on-going management process that a reasonable and prudent corporation has to undertake in order to meet its responsibility to respect human rights",[21] that has to be used to identify, prevent, mitigate and account for how they address their adverse human rights impacts.[22] It should include the following four core components: *a*) identifying and assessing actual or potential adverse human rights impacts; *b*) integrating and acting upon the findings; *c*) tracking responses; *d*) communicating how impacts are addressed. Corporate haman rights due diligence operates as a risk assessment tool and therefore can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the company itself to include risks to rights-holders.[23]

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[17] See the Commentary to UNGPs Principle 12.

[18] Cfr. *Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones. OECD, 2006*, <www.oecd.org/daf/inv/corporateresponsibility/36885821.pdf > (August 2023)

[19] See Principle 17 of the UNGPs.

[20] Of course, where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. In this case, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence.

[21] See UN Human Rights Office of the High Commissioner, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, 6 (2012).

[22] As far as the nature of the corporate human rights due diligence under the UNGPs, merging the due diligence notion as applied in corporate business practice with the same concept as applied within international human rights law, see M. FASCIGLIONE, "The Enforcement of Corporate Human Rights Due Diligence: From the UN Guiding Principles on Business and Human Rights to the Legal Systems of the EU Countries", in *Human Rights and International Legal Discourse*, 2016, vol. 1, pp. 94-116.

[23] Operatively, human rights due diligence should be initiated as early as possible in the development

The relevance of such a process for companies operating in the fisheries supply chain is self-evident. First, companies should identify, assess, and mitigate the actual and potential adverse human rights impacts of their products and services, as well as factories, farms, and corporate offices, and this in respect to their entire supply chain. Second, different actors across the value chain of a given product – such as suppliers, subcontractors, manufacturers, brands, licensees, franchises, retailers, traders, and customers – have a responsibility to address adverse impacts. Yet, corporate due diligence shall apply to all these companies irrespectively, of their dimension, size and the industrial sector of their business. Due diligence processes, in sum, shall cover situations concerning purchasing or the supply of fish and aquaculture products; through these processes companies must demonstrate that they have taken all the appropriate measures to ensure protection of human rights which may be potentially impaired activities of their suppliers. In addition, and an extremely relevant point, a core element of a corporate HRDD practice resides in having in place policies and processes through which companies can 'know and show' that they respect human rights in practice. 'Showing' involves communication to the public, and providing a measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders, including investors. By failing in implementing a correct due diligence process, all the enterprises – both contractors and subcontractors – could be held responsible for: improving supply chain transparency; preventing labour contracting abuses; meeting the legal requirements in supplier contracts; establishing a complaint/remediation process and/or a monitoring mechanism; reducing the risk of labour rights violations in all the steps of the seafood supply chain.

3. The 'Normative Hardening' of the Corporate Responsibility to Respect and the Human Rights Due Diligence Duty

3.1. Soft Law Initiatives

Despite their original nature of soft law standards, nothing prevents corporate responsibility to respect and corporate human rights due diligence from promoting multistakeholder and other kind of initiatives encompassing private sector, States and actors from the civil society. They may even be the object of "normative hardening" processes *via* national, or supranational, legislation.[24] Some interesting recent developments deserve to be mentioned in this respect.

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of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements, and may be inherited through mergers or acquisitions.

[24] C. BRIGHT, C. MACCHI, *Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation*, M. BUSCEMI, N. LAZZERINI, L. MAGI, D. RUSSO (eds), in *Legal Sources in Business and Human Rights*, 2020, pp. 218–247.

UNGPs have inspired the 2022 Geneva Declaration on Human Rights at Sea,[25] an NGOs-led declaration opened to the endorsement of State actors and private sector, urging States and private companies to take measures to promote respect for human rights, ensure accountability and provide effective remedies with regard any kind of activity at sea. Importantly, the Declaration invites private companies, masters of vessels, security personnel onboard vessels to "recognise and act upon their own roles in the protecting of human rights at sea"[26]. Promising instruments are under adoption, also, in the framework of FAO, such as, in particular, the Guidance on Social Responsibility in Seafood Value Chains, that will be destined to promote social sustainability in the fisheries and aquaculture value chains, including the recognition and protection of human and labour rights[27].

3.2. The Domestic Law Level

In addition, noteworthy normative developments occurred worldwide in several jurisdictions with the introduction of legislations either encouraging or mandating human rights due diligence and reporting. Such national laws, which may apply, of course, also to companies of fisheries and aquaculture industry, are meant, at first, to oblige companies to disclose information in respect to labour issues – or other kind of human rights impact – in the supply chains. These laws have also started to develop some relevant ad interesting case law. The 2010 California Transparency in Supply Chains Act[28], for instance, has spawned a series of civil litigation suits, with consumers or workers using the legislation for bringing legal actions against companies with the accusation of making misleading public statements on their anti-slavery efforts. The provisions of this Act are at the heart of the *Barber v. Nestlé USA* case in which the American company – along with its local Thai partner (the Thai Union Frozen Products PCL) – were accused of violating consumers' protection statutes by failing to disclose information on the use of forced labour for catching some ingredients of their pet food products. While the US California District Court deemed that the respondent had complied with the California Transparency Supply Chain Act that required a minimal disclosure on supply chain operations[29], in November 2015 Nestlé

[25] Human Rights at Sea, Geneva Declaration on Human Rights at Sea, 2022 (https://www.humanrightsatsea.org/GDHRAS, August 2023).

[26] *Ibid*. p. 4.

[27] In 2018, at the 33rd Session of the FAO Committee on Fisheries (COFI), Member Countries decided to develop a guidance on social sustainability in cooperation with relevant stakeholders, including industry and fish workers' associations, and building on the experience of the OECD-FAO Guidance for Responsible Agricultural Supply Chains. The issue of social conditions and decent work was discussed for the first time at the 16th Session of the FAO COFI Sub-Committee on Fish Trade with full consensus among Member Countries about the importance and relevance of human and labour rights. On this issue, see: M. TOUSSAINT, A. LEM, "Guidance on social issues relative to human and labour rights in fisheries and aquaculture value chains", in *FAO Aquaculture Newsletter*, August, 2019, p. 56.

[28] *California Transparency in Supply Chains Act* 2010 (US), s 1714.43(a)(1). As to the literature, 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*, p. 55-77.

[29] See *Barber v. Nestle USA*, Inc. 154 F. Supp. 3d 954 (C.D. Cal. 2015), judgment of 9 December

released a public statement admitting they had found forced labour in their supply chains in Thailand, involving their local subcontractor Fancy Feast Pet Food[30].

On the other side, the 2015 UK Modern Slavery Act – inspired by the California Act – focuses both on the prevention and prosecution of modern slavery and the protection of workers. The UK Act provides for corporate accountability for slavery and labour abuses in all the supply chains. All the businesses with a turnover of £36 million or more – including their good and service suppliers in the UK – are requested to publish online an annual report or a statement on slavery and trafficking, including all the steps taken by the company for ensuring labour safety in their operations. If the company fails in the information disclosure, it may be fined or required to comply with by a Court injunction. The new legislation applies also to foreign companies and subsidiaries that 'carry on a business' in the UK[31].

Turning to the European regional level several States have adopted legislations establishing overarching mandatory human rights due diligence. Some of these legislations only apply to specific sectors such as conflict minerals, or child labour issues, while others have a larger scope and apply horizontally across human rights issues and across sectors. Noteworthy examples include the laws enacted in France, the Netherlands, Switzerland, Norway and Germany. To the extent that companies of fisheries and aquaculture industry meet the conditions established by these laws as far as their personal scope of application, human rights due diligence obligations fixed therein apply also to such companies.

The French law on the *devoir de vigilance* of Parent Companies was adopted on 21 February 2017, and enacted on 27 March 2017[32]. It imposes an obligation of vigilance – an obligation of means, and not of results[33] – on companies incorporated or registered in France for two consecutive fiscal years that either employ at least 5,000 people themselves and through their French subsidiaries or employ at least 10,000 people themselves and through their subsidiaries located in France and abroad. Corporations covered are limited to large corporations and their business partners. Under the law corporations have to elaborate, disclose and implement a vigilance plan that should cover risks and serious harms linked to a corporation, its controlled subsidiaries, and suppliers with which the corporation maintains an established commercial relationship. The plan shall include 'reasonable vigilance measures to adequately

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2015.

[30] See *The Guardian*, (2016), <https://www.theguardian.com/sustainable-business/2016/feb/01/nestle-slavery-thailand-fighting-child-labour-lawsuit-ivory-coast> (August 2023).

[31] See *Modern Slavery Act* 2015, <https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted (August 2023).

[32] *Loi* No. 2017-399 du 27 mars 2017 *relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*. As to the contents, the civil liability regime and the other enforcement measures fixed by the law, see S. BRABANT, E. SAVOUREY, "French Law on the Corporate Duty of Vigilance. A Practical and Multidimensional Perspective", in *Revue internationale de la compliance et de l'éthique des affaires – Dossier thématique, supplément à la semaine juridique entreprise et affaires*, n° 50, 14 december 2017.

[33] See S. DEVA, "Mandatory human rights due diligence laws in Europe: A mirage for rightsholders?", in *Leiden Journal of International Law*, 2023, pp. 389-414, at 407.

identify risks and prevent serious violations of human rights and fundamental freedoms, risks and serious harms to health and safety and the environment'. In other words, while the reach of the French law is narrow its ambit is quite wide, covering risks not only to human rights but also to occupational health and safety, as well as the environment. Companies are committed to adopt a vigilance plan whose measures are broadly comparable to the four-step due diligence process under the UNGPs. As far as enforcement and access to remedy are concerned, the French law provides for a two-tyred mechanism: any interested party can seek an injunction from the court to order the corporation to comply with the law; and may seek for damages for the corporation's failure to comply with its vigilance obligation causing a preventable harm.

The Dutch Child Labour Due Diligence Law, adopted in 2019, is meant to address child labour in supply chains of those companies selling or supplying goods or services to the end users in the Netherlands[34]. The law, which only focuses on child labour, has a very extensive reach as it applies to all business enterprises – fisheries and aquaculture companies included – selling or supplying goods or services to the end-users in the Netherlands. The law requires all covered enterprises to adopt and implement a due diligence plan if there is a 'reasonable suspicion' that the supplied goods or services have been produced using child labour. Companies are also required to prepare a statement concerning the investigations carried out and the measures adopted under the plan. The supervisory mechanism established by the law provides both a monitoring system entrusted to a supervisory authority and a sanctioning mechanism designed to ensure compliance with the due diligence duty. The supervisory authority has the power to impose sanctions on companies for non-compliance and to receive claims from the victims seeking for damage compensation. However, this legislation is still not into force, and in 2021 the Dutch Parliament announced the inception of the process towards a comprehensive due diligence Act (the Responsible and Sustainable International Business Conduct Act) that, once adopted, will repeal the 2019 legislation.

Turning to Switzerland, the Swiss Human Rights Due Diligence Legislation, entered into force in 2023 as a consequence of the former Responsible Business Initiative's rejection, takes the form of a modification of the Swiss Code of Obligations and of the Swiss Criminal Code. Rather than imposing a general due diligence obligation across all sectors and issues, the new law introduces general reporting obligations and specific conflict minerals and child labour due diligence obligations. In addition, it does not introduce new provisions on the legal liability of companies for the harm caused by a subsidiary or a supplier. Accordingly, selected large Swiss corporations (those with at least 500 employees and a minimum turnover of CHF20 million, or a minimum turnover of CHF40 million) are required to report on 'environmental, social and labour-related issues as well as on human rights and measures against corruption'. Corporations with their registered office, central administration or principal place of business in Switzerland are required to conduct due diligence in

[34] See, *Netherlands Kamerstukken* I, 2016/17, 34 506, A ("Dutch Child Labour Due Diligence Law").

two situations: if they import or process above a certain threshold 'minerals or metals in Switzerland, containing tin, tantalum, tungsten or gold originating from conflict affected and high-risk areas'; and if they sell goods or services in Switzerland with 'reasonable grounds to suspect that they were produced with child labour'. In this second case, and provided they fall within the subjective scope of the law, also business enterprises of the fisheries and aquaculture fall within the reach of the Swiss legislation[35].

Germany and Norway are the last two European states to having adopted, both in 2021, legislations establishing human rights due diligence obligations for the private sector. The German Act on Corporate Due Diligence Obligations in Supply Chains[36] applies to all companies which have their central administration, principal place of business, administrative headquarters or statutory seat in Germany provided they have at least 3,000 employees. It also applies to foreign corporations with a domestic branch if they have 3,000 employees. Concerned enterprises are required to conduct due diligence in relation to human rights risks concerning all listed international human rights and environmental rights. The due diligence obligations extend to enterprises' own activities as well as the activities of their direct and indirect suppliers necessary to product or provide services. The covered enterprises are expected to conduct due diligence in an 'appropriate manner' which is determined based on the nature and extent of their activities, their ability to influence the conduct of their business partners, the severity of the violation, and the nature of the causal contribution of the enterprise. As far as access to remedy, the German law requires the interested companies to put in place an 'appropriate internal complaints procedure' to enable affected rightsholders to report risks and violations linked to their business activities as well as of their direct suppliers. The law provides only for financial penalty and administrative fines being imposed by the Federal Office for Economic Affairs and Export Control, while any liability under civil law is foreseen by the law. Provided that they meet the subjective scope of the German legislation, also business enterprises of fisheries and aquaculture industry fall within its ambit of application.

The Norwegian law[37] seeks to 'promote enterprises' respect for fundamental human rights concerning the production of goods and the offering of services with specific emphasis on the protection of decent working conditions – meant as those jobs that safeguards fundamental human rights as well as health, safety and environment in the workplace and provides a living wage. The legislation also aims to ensure the

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[35] See N. BUENO, C. KAUFMANN, "The Swiss Human Rights Due Diligence Legislation: Between Law and Politics", 2021, in *Business and Human Rights Journal*, pp. 542-549.

[36] See *Act on Corporate Due Diligence Obligations in Supply Chains* (*Lieferkettengesetz*), BGBl I 2021, 2959, <www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf> (August 2023).

[37] Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions, LOV-2021-06-18-99, <www.lovdata.no/dokument/NLE/lov/2021-06-18-99#:~:text=%20The%20Act%20shall%20promote%20enterprises,fundamental%20human%20rights%20and%20decent> (August 2023).

general public access to information regarding how companies address adverse impacts on fundamental human rights and decent working conditions. It fixes for companies a due diligence duty in accordance with the OECD Guidelines for Multinational Enterprises that extends to all the business operations of the enterprise, its supply chains and business partner as well. In respect to access to remedy and corporate accountability, the Consumer Authority may issue prohibitions and orders to ensure compliance with various provisions related to due diligence. The law, also, provides for enforcement penalties in case of non-compliance with such orders. Beyond these administrative enforcement tools, the Norwegian law contains no express provisions for civil or criminal liability of enterprises for not conducting HRDD at all or conducting it inadequately. The law applies to larger business enterprises that are resident in Norway and offer goods and services in or outside Norway, as well as to larger foreign enterprises that offer goods and services in Norway and are liable to pay tax to Norway. Section 3 of the law provides that the terminology 'larger enterprises' means "enterprises that are covered by Section 1-5 of the Accounting Act or which satisfies two of the following three conditions: sales revenues of NOK70 million, balance sheet total of NOK35 million, and average number of employees in the financial year is 50 full-time equivalent". Accordingly, business enterprises of fisheries and aquaculture meeting this dimensional requirement fall within the provisions of the Norwegian law.

3.3. The European Union Law level: the Proposal of Corporate Sustainability Due Diligence

The European Union has started to play a vanguard role in respect to the legal harmonization of member States law with the objective of 'humanizing' the business activities of the EU corporate sector both *via* corporate reporting and transparency and through mandatory corporate human rights due diligence[38]. The EU Directive 2014/95 on Disclosure of Non-Financial Information also falls 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.[39] Notably, enterprises have to report the risks of adverse impact stemming not only from its own

[38] The EU has also started the legislative path for establishing a general EU ban on goods made using forced labour. On 14 September 2022, indeed, the Commission presented a proposal for a regulation to prohibit products made using forced labour, including child labour, on the internal market of European Union (EU). The draft legislation, which fits into the EU efforts to promote decent work worldwide, covers all products made available within the EU market, meaning both products made in the EU for domestic consumption and for export, and imported goods. The provisions of the proposal would apply to products of any type, including their components, regardless of the sector or industry. Fisheries and aquaculture products should be covered by the ban. See N. Perrone, "Il ruolo dei privati per una pesca più sostenibile: lo strumento della due diligence nel quadro della regolamentazione UE", in this Volume.

[39] 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).

activities, but also from those linked to its operations, products, services and business relationships, including its supply and subcontracting chains,[40] thus in line with the requirements fixed by the UNGP. However, companies falling within the scope of the Directive are not required to implement policies in relation to those matters: they must only provide a clear and reasoned explanation for not doing so.[41] The narrow subjective scope of application of the directive and the growing demand, especially from investors and civil society organizations, for greater and more meaningful information on the social and environmental performance and impacts of companies' operations, has prompted the European Commission to explore avenues for reinforcing the European legal framework. This activity has led to the adoption of a new piece of legislation, the Directive on Corporate Sustainability Reporting, which modernizes and strengthens the European rules on social and environmental information – human rights impact included – that have to be disclosed by companies, applying them to a broader group of large companies, as well as listed SMEs. In light of the new directive, which entered in force in 2023, about 50,000 European companies, included companies from fisheries and aquaculture industry, will be required to report on sustainability.

Turning to the establishment of human rights due diligence obligations for corporate actors, on 29 April 2020 the European Justice Commissioner, Didier Reynders, announced the intention of the European Commission to fix new rules on mandatory corporate human rights and environmental due diligence.[42] Two years later, on 23 February 2022, the Commission released its proposal for a corporate sustainability due diligence directive (CSDDD)[43]. The proposal sets out obligations for companies regarding adverse impacts on 'actual and potential' human rights and the environment, with respect to their own operations, the operations of their subsidiaries, and the value chain operations carried out by entities with which the company has a business relationship. The proposal would introduce mandatory human rights and environmental due diligence (mHREDD); this obligation would be applied to a wide range of business enterprises – with the exception of SMEs, which would be excluded by the scope of application – doing business in the EU market, to their own

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[40] *Ibid* Art. 19a(1)(d) and preamble, para 8.

[41] *Ibid* Art. 19a(1).

[42] In March 2021 the European Parliament adopted the resolution with recommendations to the Commission on corporate due diligence and corporate accountability containing the proposal for a draft text of an European directive on corporate due diligence and corporate accountability (European Parliament, *Corporate due diligence and corporate accountability European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability*, (2020/2129(INL), 10 March 2021).

[43] See 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, 23 February 2022. As to the literature, see R. GRECO, "Corporate Human Rights Due Diligence and Civil Liability: Steps Forward Towards Effective Protection?", in *Diritti umani e diritto internazionale*, 2023, p. 5-34; S. BRABANT, C. BRIGHT, N. NEITZEL D. SCHÖNFELDER, *Due Diligence Around the World: The Draft Directive on Corporate Sustainability Due Diligence (Part 1)*, in *VerfBlog*, 15 marzo 2022; Id., *Due Diligence Around the World: The Draft Directive on Corporate Sustainability Due Diligence (Part 2)*, *VerfBlog*, 16 marzo 2022.

operations, to their subsidiaries and to their value chains, as well. The text of the draft directive as it stands now is the result of the proposal originally filed by the Commission and of the amendments tabled by the European Council in 2022 in its 'general approach' and by the European Parliament in 2023[44].

The proposal released by the Commission restricted the personal scope of the new rules to: a) EU limited liability companies with more than 500 employees and more than 150 million in net turnover worldwide; b) other limited liability companies operating in defined high-impact sectors[45], with at least than 250 employees and at least 40 million in net turnover worldwide; c) Non-EU companies performing business activities in the EU, with a threshold for turnover generated in the EU aligned with points under a) and b). The amendments proposed by the European Parliament in 2023 would significantly enlarge this scope by lowering the relevant employee and turnover thresholds, and abandoning the concept of high-impact sectors[46]. Ultimately, under the amendments of the Parliament the new legislation would apply to: a) companies formed under EU legislation with 250 employees or more, and a turnover of €40 million or over; and companies that are the ultimate parent company of a group with at least 500 employees, generating over than €150 million in net worldwide turnover; b) for companies formed under legislation of a third country, the rules would apply to companies with a turnover higher than € 150 million if at least €40 million was generated in the EU, including turnover generated by third party companies with whom the company and/or its subsidiaries has entered into vertical agreement in the Union in return for royalties; and companies that are the ultimate parent company of a group with at least 500 employees, and with a group turnover as defined in the previous point.

In order to comply with the corporate due diligence duty, companies would need to implement due diligence processes which are substantially in line with international standards and namely the UNGPs and the OECD Guidelines[47]. Companies

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[44] See: Council of the European Union, *Proposal for a Directive of The European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 - General Approach*, 30 November 2022; European Parliament, *Amendments adopted by the European Parliament on 1 June 2023 on the 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)0071 – C9-0050/2022 – 2022/0051(COD), 1 June 2023

[45] Art. 2.1(b) identifies the following sectors as having a high-impact: i) the manufacture of textiles, leather and related products (including footwear), and the wholesale trade of textiles, clothing and footwear; ii) agriculture, forestry, *fisheries* (including *aquaculture*), the manufacture of food products, and the wholesale trade of agricultural raw materials, live animals, wood, food, and beverages; iii) the extraction of mineral resources regardless from where they are extracted (including crude petroleum, natural gas, coal, lignite, metals and metal ores, as well as all other, nonmetallic minerals and quarry products), the manufacture of basic metal products, other non-metallic mineral products and fabricated metal products (except machinery and equipment), and the wholesale trade of mineral resources, basic and intermediate mineral products (including metals and metal ores, construction materials, fuels, chemicals and other intermediate products).

[46] See Amendments adopted by the European Parliament on 1 June 2023 on the proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, cit.

[47] OECD, *Guidelines for Multinational Enterprises on Responsible Business Conduct*, adopted on

would be asked to carry out a due diligence policy that should be proportionate and commensurate to the likelihood and severity of their potential adverse impact, as well as their specific circumstances and risk factors, particularly their sector and location of activity, the size and length of their value chain, the size of the company, its capacity, resources and leverage. In identifying and assessing actual and potential adverse impacts, companies would be asked to identify individual higher risk business relationships. In addition, the new rules would impose companies to take appropriate measures, by using or increasing the company's leverage with responsible parties to seek to prevent or mitigate the potential adverse impact and to influence the entity causing the impact. The concepts of prioritisation (prioritising potential and actual adverse impacts) according to the severity and likelihood of impacts, and of remediation (remedying actual adverse impacts) would be added to the due diligence actions, and to the actions to bring actual adverse impacts to an end. Under articles 17-21 Member states would be required to designate one or more bodies to supervise national compliance with the obligations laid down in the proposed directive. These supervisory authorities should have adequate powers and resources to carry out the tasks assigned to them under the new directive, including the power to request information and carry out investigations related to compliance with the obligations. They would be able to initiate an investigation on their own motion or on the grounds of substantiated concerns submitted by any natural or legal person. Administrative sanctions would be determined by each Member State and enforced by the supervisory authorities. A European network of supervisory authorities would be established to facilitate cooperation, coordination and alignment. Under articles 22, 23, 27, companies would be held liable for damage if they fail to comply with obligations to prevent, mitigate, minimise or put an end to potential adverse impacts, or if this failure gives rise to an adverse impact that could otherwise have been avoided.

As far as fisheries and aquaculture industry, they are fully concerned by the draft directive. In the first place, it is worth reminding that the Commission considered this industry among the high-risk sectors for which lower employee and turnover thresholds had to be applied. The abandonment by the European Parliament of the high-risk sector approach would not affect the relevance of the proposed new rules for this industry, due to the substantial enlargement of the thresholds concerning the personal scope. In the second place, even where they would not fall within the employee and turnover thresholds, and even where they would be excluded by the scope of the new rules due to their status of SMEs, companies of the fisheries and aquaculture might be affected by its provisions in their capacity as contractors or subcontractors to companies that fall within its scope. The draft directive, indeed, has been structured by the Commission around a cascading accountability mechanism activated through the use of contractual clauses. Under this mechanism, the due diligence duty incumbent on the lead company may explain effectiveness throughout the entire value chain thanks to the faculty recognised to the lead company to require, through the stipula-

1976 and lastly amended on 2023.

tion of specific contractual clauses with business partners, suitable guarantees regarding compliance with its code of conduct and due diligence prevention plan[48].

3.4. From Law to Practice: Recent Case Law Concerning Fisheries and Maritime Sector

Summing up, fisheries and aquaculture business enterprises have to be prepared to performing human rights due diligence and to find ways to prevent, mitigate and redress the adverse human rights impacts of their operations worldwide. Absolving human rights – or environmental – due diligence duty will help companies of this industry in satisfying, in the first place, mandatory legislations that have been adopted, or are under adoption, both at national level and at supranational level. In the second place, absolving due diligence duty will be increasingly necessary for avoiding incurring in civil litigations brought before courts by individuals or communities who have been adversely affected by negligent conducts of companies during their business activities. Various cases illustrate this point.

The protection of subsistence rights of fishermen communities is at the heart of the lawsuit against Anglo-Dutch company Shell for the negative impact of its activities in Nigeria. Members of the Bodo community, indeed, brought a civil action against Shell before London High Court seeking compensation for two oil spills, which occurred in 2008 and 2009 in the Niger Delta. The 15,000 plaintiffs asked for compensation for losses suffered to their health, livelihoods and land, and they asked for clean-up of the oil pollution. In 2014, four months before the case was due to be heard it court, and following the preliminary decision in which the court had established that Shell could have been held responsible for spills from their pipelines if it had been ascertained the company's failure to take reasonable measures to protect them from malfunction or from oil theft, the case was settled out of court[49].

In the same vein, the UK based company Vedanta Resources Plc and its Zambian subsidiary Konkola Copper Mines (KCM), have been brought before UK courts by 1826 plaintiffs for the damages caused to their lands and water resources from copper mining effluent. The applicants claimed, in particular, that KCM's Nichanga Copper Mine activities had polluted the water, they utilized for drinking, washing, bathing and irrigating, and that this had affected their health causing illnesses and permanent injuries. Villagers who ate polluted fish from the river fell ill and had suffered permanent

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[48] See Art. 7(2). The Parliament amendments have tried to circumscribe the automatic shifting of responsibility from the lead company to business partners entailed by this mechanism, which seems to be inconsistent with international standards. As far as this contractual cascading mechanism, see L. VALLE, M.C. MARULLO, "Contract as an Instrument Achieving Sustainability and Corporate Social Responsibility Goals", in *International Community Law Review*, 2022, pp. 100-123.; V. ULFBECK, O. HANSEN, A. ANDHOV, "Contractual enforcement of CSR clauses and the protection of weak parties in the supply chain", in V. ULFBECK, A. ANDHOV, K. MITKIDIS (eds.), *Law and Responsible Supply Chain Management: Contract and tort Interplay and Overlap*, New York-London, 2019, p. 47 ss.

[49] Leigh Day "Shell – Bodo", https://www.leighday.co.uk/news/cases-and-testimonials/cases/shell-bodo (August 2023).

internal injuries. In addition, since fishing was the main economic activities of the villagers, the pollution also affected people's earnings. In April 2019, four years after the case was brought to court, the Supreme Court, reversed the Court of Appeals' decision and by rejecting corporate defendants' contrary exceptions, ruled that the case against KMC and its parent company Vedanta could be heard by the English courts[50].

In an another interesting case, finally, the UK Courts have explicitly recognised that the lack of diligence may entail the direct liability of a company for the damages in the value chain arising from the activities of an enterprise linked to the former by a contractual relationship. In *Maran*, indeed, UK courts had been seized for ascertaining the liability of a UK based shipping company for the death of a worker at a Bangladeshi shipyard run by a Bangladeshi operator who had been contracted by the defendant company to dismantle a ship, but whose work safety standards were notoriously poor. The shipping company, therefore, had been sued for failing to check and monitor the contractor's working conditions, for example, by requiring specific guarantees on safety conditions. In acknowledging the lack of diligence on the part of the shipping company, the UK Courts have affirmed the principle that enterprises conducting their business activities in situations where it is foreseeable that environmental or human rights violations might occur, owe a duty of care to individuals who are under the risk of violations, even where these violations occur within business relationships with third parties[51].

4. Conclusions

Twelve years have passed since the adoption of UN Guiding Principles on business and human rights and corporate due diligence jargon has become a common language in the business and human rights realm. Due diligence has become, also, an important instrument in the hand of states to discharge their duty to protect human rights under the first Pillar. Of course, while this is a significant achievement to fill in the gaps of protection generated by the globalization forces, human rights due diligence however, "should not be seen as a panacea to either prevent human rights abuses or hold businesses accountable"[52]. The risk there is, indeed, to generate "false perceptions of change, without making any substantial positive impact on the situation of rightsholders on the ground"[53], which is the main goal of any legal system aimed to protect human rights.

Such risk, however, does not lessen the need for more effective binding domestic and international mandatory human rights and environmental due diligence laws. Voluntary measures have revealed their inability in addressing the adverse impact of

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[50] *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20. Ultimately, the case was settled out of Court with an agreement among the parties.

[51] *England and Wales Court of Appeal (Civil Division)*, *Hamida Begum (on behalf of Md Khalilmollah) v. Maran (Uk) Limited*, 10 March 2021, [2021] EWCA Civ 326.

[52] S. DEVA, "Mandatory human rights due diligence laws in Europe: A mirage for rightsholders?", cit., at 413.

[53] *Ibid*.

businesses on human rights, labour exploitation, the climate and biodiversity crisis, and the increasing levels of inequality. Twelve years after the adoption of the UNGPs by the UN Human Rights Council, only a rather low percentage of companies have taken adequate measures to undertake human rights due diligence processes in line with international responsible business conduct standards. The regulatory space must therefore be reinforced and must focus on comprehensive mandatory measures to foster sustainable and responsible corporate behaviour that leads to the protection of the most vulnerable and adversely affected rights holders. What is needed, therefore, is more regulatory tools, more precise, more inclusive and more apt to taking into account the different socioeconomic realities stemming from different areas of the world. It should be avoided, in sum, human rights and environmental due diligence laws contradicting or overlapping each other, displaying inconsistencies and ambiguities and undermining their own effectiveness. In addition, and second element of such strengthened regulatory framework, it is necessary an adequate and effective regulation of supply chains. Their rise and consolidation, which are the result of the States' competition to attract foreign investments and of the structure and functioning of international economic law, is at the origin of the adverse corporate impact on the protection of human rights and the environment, and of the neglection of avenues for redress and accountability for those affected. The recent normative trend in supply chain regulation we have assisted to during last years is an important, but not sufficient, step in the right direction. Home states regulation alone does not suffice *per se*, and the time has come that the efforts be headed towards regulatory measures involving also Host states. Mandatory regulation adopted from states of Global South might be of course, a positive element, but still only "a second best"[54] option to a robust multilateral substantive treaty on business and human rights, the only path apt to assuring "homogeneity in regulatory approaches to transnational business activities regardless of where they are from"[55] and to inducing real and effective behavioural change in business enterprises, particularly in the lower tiers of supply chains.

[54] D. BOSE, "Decentring Narratives around Business and Human Rights Instruments: An Example of the French Devoir de Vigilance Law", in *Business and Human Rights Journal*, 2023, pp. 18-42, at 42.

[55] H. CANTÙ RIVERA, C. PÉDAMON., *Business and human rights | White Paper*, n. 8, Paris, 2023, p. 69.

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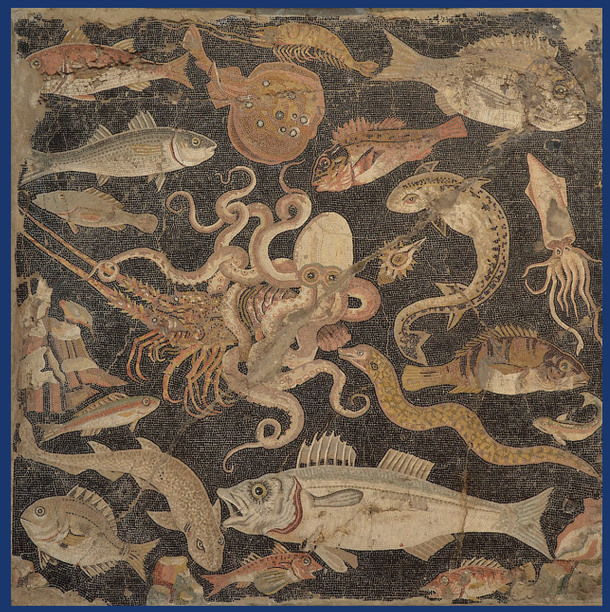

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