



THE UNIVERSITY  
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**Study of the Legal Framework on Human Rights and the  
Environment Applicable to European Enterprises Operating  
Outside the European Union.**

Submitted by The University of Edinburgh

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**Disclaimer:**

This study was prepared for the European Commission by the University of Edinburgh. The views expressed are those of the authors and do not necessarily represent the views of the European Commission.

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**FOREWORD BY ANTONIO TAJANI,  
VICE-PRESIDENT OF THE EUROPEAN COMMISSION**

Publication of this study is the first occasion on which the European Commission's Directorate-General for Enterprise and Industry has addressed the issue of business and human rights. It is a timely and important step. Human rights are increasingly relevant to enterprises, and enterprises can have a strong influence on human rights, both positively and negatively. Most enterprises have a positive impact on human rights, through the way they work and through the products, services and wealth that they create.

The idea of this study emerged during a meeting of the European Multistakeholder Forum on Corporate Social Responsibility in February 2009. A number of stakeholder groups, including employers' associations, trade unions and non-governmental organisations, provided input for the terms of reference. A multistakeholder steering committee helped to guide the study team. Comments from members of the steering committee are included as an annex to the report.

The study aims to clarify the current legal framework for human rights and the environment applicable to EU-based companies when they operate outside the European Union. A better common understanding of existing legal requirements will facilitate an effective implementation of the UN business and human rights framework put forward by Professor John Ruggie, the Special Representative of the UN Secretary-General for Business and Human Rights. This is a key example of how the development of internal EU policies can benefit from the global debate on the advancement of human rights led by the United Nations.

The practical implementation of the United Nations framework by the European Union will, however, have a wider scope than the issues addressed in this report.

Firstly, while the study is confined to an analysis of existing legal requirements, the United Nations framework implies recourse to a combination of non-legislative as well as legislative policy instruments. Professor Ruggie has spoken of the need for a "smart mix" of voluntary and legislative approaches. Recent papers from CSR Europe and the Institute for Human Rights and Business illustrate some aspects of current business practice in the field of human rights, much of it not imposed by legislation.<sup>1</sup>

Secondly, business and human rights is a live issue both inside and outside the European Union. The study alludes to the fact that research in some EU Member States found concern regarding human rights issues within the country as well as abroad.

Increasingly, in political dialogue with other countries and regions in the world, there is a need to discuss the nexus of business activities and human rights. And we have to pay tribute to the role of pro-active business representatives, civil society, and human rights defenders that are contributing to this issue.

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<sup>1</sup> See [http://www.csreurope.org/data/files/csreurope\\_hria\\_paper\\_reviewed2.0.pdf](http://www.csreurope.org/data/files/csreurope_hria_paper_reviewed2.0.pdf) and [http://www.institutehrb.org/pdf/The\\_State\\_of\\_Play\\_of\\_Human\\_Rights\\_Due\\_Diligence.pdf](http://www.institutehrb.org/pdf/The_State_of_Play_of_Human_Rights_Due_Diligence.pdf)

Armed with the knowledge and insights that this study provides, we hope that we in the European Commission, together the European Parliament, EU Member States, relevant stakeholders and international partners, can engage in constructive discussions about how best to further implement the UN framework on business and human rights.

A handwritten signature in blue ink, reading "Antonio Tajani". The signature is fluid and cursive, with the first name "Antonio" and the last name "Tajani" clearly distinguishable.

***Antonio Tajani***

***Vice-President of the European Commission  
Industry and Entrepreneurship***

## EXECUTIVE SUMMARY

### The scope of this study in the context of the UN Framework on Business and Human Rights

Economic globalisation has significantly altered the institutional and regulatory environment in which corporations operate. The internationalisation of business has created increasing gaps between the operational capacities of multinational corporations (MNCs) and the regulatory capacities of States. At the same time, privatisation of state functions has shifted powers and responsibilities from governments to the market. These developments have significant impacts on the international and domestic legal frameworks through which States, corporations, civil society organisations and citizens interact in relation to human rights and the environment. While States are under clear legal obligations to protect individuals against human rights and environmental harms, there are also increasing demands on corporations to respect human rights and the environment in their global operations. At the same time, the perceived dichotomy of business and human rights is increasingly displaced by a growing recognition of their interdependency.

In 2005, Professor John Ruggie was appointed as Special Representative of the UN Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG). In a series of reports over the following years, the SRSG developed the 'Protect, Respect, and Remedy' Framework for better managing business and human rights challenges (UN Framework) that builds on three pillars: the State duty to protect human rights against abuses by third parties, including corporations, through appropriate policies, regulation, adjudication and enforcement measures; the corporate responsibility to respect human rights, meaning to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective remedies, both judicial and non-judicial, for corporate-related human rights abuses. In 2008, the UN Human Rights Council unanimously welcomed the UN Framework, and extended the SRSG's mandate for another three years with the task of 'operationalising' the Framework.

The UN Framework was welcomed by the European Union and the EU Member States. In its 2009 Conclusions on Human Rights and Democratisation in third countries, the Council of the European Union expressed its full support for the UN Framework. The then Swedish Presidency and the incoming Spanish Presidency of the European Union considered the UN Framework a 'key element for the global development of CSR practices' with a 'significant input to the CSR work of the European Union'. The Commission's recent proposals for a Europe 2020 Strategy include a commitment to put forward a renewed European CSR policy, which is expected to include a stronger emphasis on business and human rights.

The purpose of this study is to 'analyse the legal framework on human rights and the environment applicable to European enterprises operating outside the European Union'. The study aims at complementing the UN Framework by providing an overview of European and EU Member State law relevant to human rights and environmental protection in relation to European corporations operating outside the European Union, including pertinent international agreements and general international law. The study's focus on the European *legal* framework implies that it is predominantly concerned with the 1<sup>st</sup> and the 3<sup>rd</sup> pillar of the UN Framework. The focus on European corporations operating *outside* the European Union requires that particular attention is paid to extraterritorial dimensions of European and EU Member State law. Within these parameters, the study analyses the European legal framework in the areas of human rights law, environmental law, trade law, investment law, criminal law, corporate

law, and private international law. Where relevant, the study also makes reference to labour law and general private law. The study is not intended to, and deliberately avoids, drawing political and policy conclusions in relation to the feasibility of the legal options it identifies.

### **Three discernible patterns related to alleged extraterritorial corporate human rights and environmental abuses**

Corporations can make important positive contributions to creating a global environment in which everyone can enjoy their universal human rights. They have an enormous capacity to create wealth, jobs and income, to finance public goods, and to generate innovation and development in many areas relevant to human rights and environmental protection. Moreover, many corporations take their responsibility to respect human rights and the environment seriously, and already do more than what is legally required. A number of European businesses are leaders in terms of their recognition of labour rights, and rights relating to privacy and security of the person, as well as their inclusion of human rights standards in supply chain management.

However, it holds equally true that corporations can have significant negative impacts on human rights and the environment in their global operations. Corporate conduct can impact on the full range of human rights, including civil and political rights, economic, social and cultural rights, and labour rights. A very considerable part of alleged violations of human rights and environmental law by European corporations take place outside the European Union. Moreover, research illustrates the connections between alleged corporate involvements in corruption, environmental harm, and human rights violations. European NGOs have reported numerous human rights violations allegedly committed by European corporations outside the European Union over the past decade. A number of criminal and civil proceedings have been brought in European courts, and a considerable number of complaints have been considered by EU Member State National Contact Points (NCPs) established under the OECD Guidelines for Multinational Enterprises.

Three patterns of human rights and environmental abuses allegedly committed by European corporations operating outside the European Union can be discerned.

First, the vast majority of alleged corporate human rights and environmental abuses examined were committed by subsidiaries or contractors of European corporations that are domiciled or resident in the country where the violation occurred, and are governed by the domestic regulatory and enforcement regime of that country. One consequence is that some European corporations may benefit from the operations of their third-country subsidiaries and contractors, while not being held directly responsible for human rights and environmental abuses committed in the course of these operations. This is particularly problematic when subsidiaries and contractors operate in countries with legal regimes that provide lower levels of human rights and environmental protection than the 'home' State of the European corporation.

Secondly, where subsidiaries or contractors of European corporations violate human rights and environmental law outside the European Union, third-country victims can encounter significant obstacles in obtaining effective redress both in the third country and in the European Union. Weak judicial and enforcement capacities, in some cases combined with apparent corporate pressure exercised over decision-makers and local communities, can impede effective access to justice in the State where the violation occurs. At the same time, the current legal framework can make it difficult for third-country victims to hold European



corporations accountable in EU Member State courts for abuses committed by their subsidiaries and contractors abroad.

Thirdly, the States in which subsidiaries and contractors of European corporations operate and/or EU Member States from which European corporations operate are often at least indirectly involved in corporate abuses of human rights and the environment. Some forms of indirect involvement by EU Member States, including failures to prevent and control extraterritorial effects of corporate activities harmful to human rights and the environment, can amount to breaches of domestic, European, or international law by the European Union and/or the EU Member States. Other forms of indirect involvement, including the financing or otherwise facilitating of business activities outside the European Union without due regard to potential negative impacts on human rights and the environment, will not necessarily amount to a breach of law. Yet they arguably involve failures on the part of the European Union and the EU Member States to protect human rights and the environment through law in relation to extraterritorial activities of European corporations.

### **Two challenges to legal reform**

These three patterns relating to human rights and environmental abuses by European corporations operating outside the European Union can be contrasted with two challenges to reform inbuilt in the current legal framework.

The first challenge is that international human rights law and international environmental law generally do not directly impose obligations on MNCs to protect human rights and the environment. While they often require States to regulate corporate activities harmful to human rights and the environment, and to enforce these regulations in case of corporate violations, they do not directly bind corporate actors. At the same time, those areas of law that are most relevant to the activities of corporations, including trade and investment law, corporate law, and private international law, primarily pursue different and at times conflicting objectives to the protection of human rights and the environment – which can lead to what the SRSB has termed ‘horizontal policy incoherence’. As a consequence, targeted or detailed human rights and environmental protection through these areas of law constitutes the exception rather than the norm.

The second challenge is that under an international legal regime that attributes jurisdiction primarily on the basis of territory, the exercise of extraterritorial jurisdiction to protect human rights and the environment often encounters legal and political obstacles. The SRSB has distinguished between the exercise of ‘direct’ extraterritorial jurisdiction, that is, the assertion of State authority via various legal, regulatory and judicial institutions over actors and activities located in the territory of other States, and ‘domestic measures with extraterritorial implications’ that, while having extraterritorial effects on human rights and environmental protection, can rely on the territory of the regulating State as the basis for jurisdiction. While both types of measures may be contested, the latter are often seen as less problematic.

### **European human rights and environmental law**

European human rights and environmental law imposes significant duties on the European Union and the EU Member States to protect human rights and the environment in relation to European corporations operating outside the European Union. These duties encompass procedural measures to ensure inclusive, informed and transparent decision-making, substantive measures to regulate and control corporate activities relevant to human rights and environmental

protection outside the European Union, and enforcement measures to investigate, punish and redress violations when they occur. Under some legal regimes, such as the European Convention on Human Rights (ECHR), failure to comply with these duties can make States directly liable for corporate violations of human rights and environmental law.

European human rights law imposes positive duties on States to protect human rights against corporate abuses, as well as negative duties on corporations acting as State agents not to violate human rights. While the tests for directly attributing corporate behaviour to States vary across the European Union, they coalesce around two basic propositions: first, States cannot evade their duty to protect by outsourcing public functions to the private sector; secondly, corporations that are owned or controlled by the State and/or exercise State functions can be directly subject to the State duty to protect.

There is a growing body of case-law under the ECHR on State duties to protect human rights against corporate abuse in the environmental sphere. States are required to regulate and control corporate activities harmful to human rights in a way that strikes a fair balance between the rights of those affected by the regulation, and the interests of the community as a whole. Moreover, State decisions in relation to corporations that may impact on Convention rights (e.g. licensing and supervision of dangerous activities) must be taken in a transparent and inclusive way that enables States to evaluate in advance the risks involved in the corporate activity. States are also duty-bound to provide for effective redress mechanisms, both civil and criminal, in case of corporate human rights abuses.

While an extraterritorial application of the ECHR constitutes the exception rather than the norm, the European Court of Human Rights (ECtHR) has given the duty of States to protect human rights 'within their jurisdiction' (Article 1) a broad interpretation that encompasses both instances of direct extraterritorial jurisdiction and domestic measures with extraterritorial implications.

While the ECHR is a comparatively advanced system of human rights protection against extraterritorial corporate abuse, it is still far from providing clear and unequivocal guidance for States in relation to their human rights obligations. Yet the procedural and substantive standards of protection developed in the jurisprudence of the ECtHR could serve as a basis for the European Union and its Member States to further clarify and develop normative standards on business and human rights. Such normative standards could feed into, for example, the new Commission's CSR policy and the EU Member State business and human rights strategies. They could provide guidance to different EU and EU Member State public authorities and agencies that directly interact with business, thus contributing to reducing existing legal and policy incoherence. Furthermore, they could clarify what States expect from corporations as regards their responsibility to respect human rights.

Environmental law imposes duties on the European Union and its Member States to protect the global environment and the environment of other States from harmful activities of European corporations, and to provide for enforcement mechanisms in relation to corporate violations of environmental law, either through criminal or civil liability regimes. State measures under EU and EU Member State environmental law include regulation and enforcement measures in relation to transboundary environmental pollution, and regulation and enforcement measures pertaining to access to environmental information, environmental decision-making including environmental impact assessments, and access to justice in environmental matters.

To prevent and redress transboundary environmental pollution, the European Union and the EU Member States mainly rely on domestic measures with extraterritorial implications. However, some European and EU Member State legislation implementing international environmental

treaties also permits or requires assertions of direct extraterritorial jurisdiction. Provisions on access to environmental information, participation in environmental decision-making and access to justice in environmental matters have extraterritorial implications in that they empower individuals and NGOs inside, and in more limited circumstances outside, the European Union to scrutinise decisions of EU institutions and EU Member State public authorities relevant to extraterritorial environmental protection against corporate abuse. European regulation on environmental impact assessments is relevant for environmental protection in relation to European corporations operating outside the European Union to the extent that it provides for the assessment of environmental impacts in third countries.

The European Union and the EU Member States do not always make full use of existing legal opportunities to protect human rights and the environment in relation to European corporations operating outside the European Union. Moreover, and from a legal perspective, there is nothing to prevent States, through multilateral agreements, from extending such protection to corporate human rights and environmental abuses not yet covered by international legal regimes.

Given the demonstrated linkages between human rights and environmental harms noted above, effective protection of the environment against corporate abuse can contribute to reducing the risk of serious corporate human rights violations. At the same time, a number of human rights encompass an environmental dimension, and have been employed to protect individuals against environmental pollution and damages by corporations. To give effect to the jurisprudence of the ECtHR and to enhance synergies between environmental and human rights protection in relation to European corporations operating outside the European Union, the EU and the EU Member States could explore possibilities to integrate human rights protection more systematically into existing legal tools and regulation protecting the environment. This could, for example, consist of strengthening procedural safeguards to protect local communities in third countries, including consultation, public participation, and environmental and sustainability impact assessments. European regulation of environmental impact assessments already allows for the protection of certain human rights. The potential for including human rights considerations in European environmental legislation could be further considered. The use of environmental legal tools to protect human rights could also be explored with third countries that have concluded with the EU Association or other agreements containing environmental cooperation clauses, based on a transparent and participatory process with third country governments and other affected stakeholders.

### **Trade law, investment rules, and related regulatory regimes**

The European Union and its Member States have the legal ability to promote human rights and environmental protection through trade law, investment rules, and related regulatory regimes by either defining the regulatory environment in which corporations operate outside the European Union (provided they meet the international law requirements in relation to the exercise of direct extraterritorial jurisdiction), or by regulating corporate conduct within the European Union with extraterritorial implications. Such measures can be taken either unilaterally through domestic regulation, or pursuant to international agreements. Moreover, the EU and the EU Member States can employ more indirect forms of State regulation, including through public procurement and export credit guarantees, that makes the conveyance of State investments, contracts and benefits contingent in some way on a corporation's human rights and environmental performance outside the European Union.

Understanding how regulation of trade and investment affects the human rights and environmental impacts of European corporations operating outside the European Union is crucial for States to implement their duty to protect. However, because State measures in these areas are primarily geared towards liberalising trade and promoting investment, States often do not (fully) realise or utilise their potential to protect human rights and the environment through trade law, investment rules, and related legal measures. This can lead to substantial legal and policy incoherence and gaps in protecting human rights and the environment, which often entails significant negative consequences for victims, corporations and States themselves.

There are two main ways in which the European Union and the EU Member States can protect human rights and the environment against extraterritorial corporate through trade law: first, trade restrictions that prevent corporations from exporting or importing goods harmful to human rights and the environment; and second, free trade agreements and conditions imposed upon preferential trade under preference regimes that aim at ensuring human rights and environmental protection in third countries in which European corporations operate.

Examples of existing practices to promote human rights and environmental protection through trade include the EU's Generalised System of Preferences (GSP) and GSP+ systems, its Forest Law Enforcement, Governance and Trade scheme (FLEGT), and its 'human rights clauses' in free trade agreements, in particular the EU-Cariforum and the EU-Korea agreements. The EU has recently reaffirmed its commitment to protect, in particular, the rights of children through measures in the trade and investment area.

Explicit reference to human rights considerations could be included into the EU's Sustainable Impact Assessments (SIAs) conducted prior to the conclusion of trade agreements to avoid negative human rights impacts of new trade commitments in third countries. The EU could also consider instituting a practice of 'implementation SIAs', supported in the case of free trade agreements by review clauses modelled after the EU-Cariforum Agreement.

Certain trade and trade-related measures are subject to, and require justification under, the WTO. Generally speaking, agreements with affected third States are more likely to comply with WTO rules than unilateral measures. It should be ensured that import and export bans fall within a relevant WTO exception. To ensure WTO compatibility, GSP preferences should only be used as a positive response to a trade, development or financial need of a beneficiary developing country.

EU and EU Member State measures to promote human rights and environmental protection through domestic investment rules applying to European corporations operating outside the European Union include promotion services, financial and fiscal incentives, and insurance mechanisms. The SRSB has highlighted the need to consider strengthening the role of Export Credit Guarantee Agencies in promoting and protecting human rights.

Socially responsible investment inside the European Union can contribute to encouraging better corporate human rights and environmental performance abroad. Some EU Member States already require their national pension and saving funds to disclose whether and to what extent social, environmental and ethical impacts of investments are taken into account. In the case of publicly owned banks, States could consider how they can use their influence as directors or shareholders to scrutinise the human rights and environmental impact of investments in corporations operating outside the European Union.

Bilateral investment treaties (BITs) between the EU and third States can oblige those third States to protect human rights and the environment against corporate abuses within their territory. To enhance human rights and environmental protection, the EU could ensure that BITs contain clear definitions of relevant protection guarantees and general exception clauses that allow host States to take non-discriminatory measures to protect against corporate human rights and environmental abuse. BITs could also include an obligation on the contracting State parties to adopt all necessary measures to ensure that investors comply with international human rights and environmental standards.

Labelling schemes, such as the EU voluntary ecolabel award scheme, can encourage European corporations to control and prevent negative human rights and environmental impacts of their third-country subsidiaries and suppliers. One way to sanction corporate non-compliance with requirements of labelling schemes in which they participate, and more broadly with provisions on consumer protection within the EU relating to corporate abuses of human rights and the environment outside the EU, is through the medium of existing rules dealing with commercial practices and misleading advertising. The European Union could further develop requirements for the EU and the EU Member States to systematically use environmental management and audit systems and eco-labelling as conditions for (privileged) access to public funding and other public benefits.

Public procurement provides another opportunity for the European Union and its Member States to protect human rights and the environment in relation to European corporations operating outside the European Union. In particular, public procurement can set standards that apply also to third country subsidiaries and suppliers, thus penetrating the whole production chain. An example would be taking into consideration whether or not corporations have a FLEGT licence in the decision-making processes of EU Member States that have adopted a green procurement policy

Another important international regulatory regime to protect human rights, labour rights and the environment against corporate abuse is the OECD Guidelines for Multinational Enterprises (OECD Guidelines). The EU and the EU Member States could contribute to the ongoing update process of the OECD Guidelines by supporting proposals to include a dedicated chapter or standards on business and human rights in line with the suggestions made by the SRSG, including the scope for reform of the Export Credit Group's Common Approaches for Export Credits. They could also consider how to link the findings of National Contact Points to consequences, such as the restriction or denial of public benefits to European corporations operating outside the European Union. The environmental chapter of the Guidelines could be amended to ensure that the provisions accurately reflect the range of environmental issues corporations need to address, including cross-cutting concerns such as climate change and biodiversity.

Existing legal tools to protect human rights and the environment in regulatory regimes related to trade and investment could be more systematically linked up with each other to enhance their efficacy and reduce legal and policy incoherence.

### **Criminal law, corporate law, and private international law**

European human rights law imposes duties on States to put into place effective criminal and civil remedy mechanisms. Similarly, certain international environmental treaties require States to implement effective domestic criminal and civil liability regimes to redress corporate abuses.

From the perspective of access to justice, corporate law can create significant legal obstacles to holding European corporations responsible for abuses committed by their third-country subsidiaries or contractors. Private international law can impede access to European courts for human rights and environmental abuses committed by subsidiaries or contractors of European corporations outside the European Union. Finally, and while beyond the scope of this study, the procedural law of the EU Member States can create significant additional legal and practical barriers to access to justice for third-country victims, including obstacles stemming from time limitations, costs and legal aid, the lack of support for public interest litigation or mass tort claims, and provisions on evidence.

However, criminal law and corporate law are also relevant to the State duty to prevent corporate human rights and environmental abuses. The criminal regime governing anti-corruption plays an important role in ensuring that individuals can realise their human and environmental rights. Moreover, greater clarity in relation to the consideration of corporate human rights and environmental impacts in the context of directors' duties and reporting requirements under corporate law, could assist corporations in fulfilling their responsibility to respect human rights, thus contributing to the development of 'rights-respecting corporate cultures' and broader prevention efforts.

International cooperation is crucial for the effective implementation and enforcement of criminal law in relation to globally operating MNCs. One persistent obstacle to effective international cooperation remains an insufficiently broad or too uneven participation of States in international treaties that criminalise conduct harmful to human rights and the environment. A further obstacle stems from differences in State practice in criminalising the relevant offences and in providing for criminal liability of corporations as legal persons. The criminal regime governing anti-corruption is an example of successful international cooperation, with a substantial degree of State ratification and participation in the dense web of regional and international agreements and initiatives to prevent and sanction corruption and related offences. The European Union has already made considerable progress in harmonizing the positions of the Member States, coordinating State action, and eliminating double criminality within its own borders. Such measures could provide a basis for the EU to further promote international cooperation on combating corruption in its external relations. At the same time, the European Union could seek to ensure a more comprehensive participation by Member States in key anti-corruption treaties, consider formulating a common policy on reservations in these treaties, and take other appropriate measures to promote cooperation, also in absence of double criminality (of corporations).

The majority of EU Member States provides for criminal liability of corporations as legal persons. In some EU Member States, parent corporations can also be liable for criminal offences committed by their subsidiaries, notwithstanding separate legal personality. One ground for liability is the active participation of the parent corporation in offences committed by a subsidiary. In more limited circumstances, the failure of parent corporations to put into place effective mechanisms of control to prevent criminal offences by the subsidiary can also lead to liability.

The criminal regime governing anti-corruption also evidences the need for, and the preparedness of States to resort to, extraterritorial jurisdiction where there is a strong common international concern with, and/or a sense of shared responsibility for, extraterritorial corporate activities harmful to human rights and the environment. Some anti-corruption treaties already provide for a wide interpretation of the territoriality principle that enables States to take jurisdiction over offences that are commenced or consummated in their territory. Moreover, assertions of

direct extraterritorial jurisdiction on the basis of the nationality of the offender appear widely accepted in the area of anti-corruption. States have also resorted to domestic measures with extraterritorial implications, imposing requirements on parent corporations domiciled in their States to control and prevent subsidiaries in third countries from committing relevant offences.

Under corporate law, the responsibility of European parent corporations for human rights and environmental abuses committed by their (third-country) subsidiaries remains very limited due to the doctrine of 'separate legal personality'. It appears to be common ground that ownership of shares or the mere potential to control the activities of the subsidiary are not sufficient to establish parent corporation liability. Provided further conditions are met, parent liability is, however, likely where the doctrine of separate legal personality is abused to defeat liability or to commit illicit acts, and/or where the subsidiary has entered into an insolvency process. Beyond that, and generally speaking, the closer the relationship between the parent corporation and the subsidiary, the more likely it is that the former will be liable for human rights and environmental abuses committed by the latter, particularly if the European parent corporation exercises actual substantive control or direction over the conduct of the subsidiary that results in the human rights or environmental abuse. Exceptions to the doctrine of separate legal personality recognised in the corporate laws of the EU Member States could provide the basis for further clarifying under which conditions parent corporations should be liable for human rights and environmental abuses committed by their subsidiaries outside the European Union. Moreover, and on this basis, it could be considered to introduce, through domestic regulation and in appropriately limited circumstances, a requirement on European parent corporations to exercise oversight or control over their subsidiaries in third countries, and to hold them responsible for failure to do so.

In relation to directors' duties and corporate reporting, the SRSG has stressed that corporate human rights and environmental impacts can be 'material' for the purpose of a corporation's commercial activities and financial performance under existing law. A number of EU Member States already require or permit directors to take corporate impacts on the community and the environment into account as part of their duty to the corporation. While there is no explicit requirement for directors to take human rights impacts into account, they may be required to do so under existing law to the extent that such impacts are relevant to the interest of the corporation – though this area could benefit from further guidance.

Encouraging or requiring corporations to report on their human rights and environmental policies and impacts would help to establish human rights and environmental protection as core business concerns. EU law already stipulates a requirement to report on environmental and employee matters to the extent necessary for understanding the performance and position of the corporation, although the requirement is not very specific or well-defined. A few EU Member States provide for reporting requirements that go beyond what is required by European legislation. The European Union and the EU Member States could further specify existing reporting requirements on environmental and social risks and impacts, and clarify when and under what conditions human rights risks and impacts should be disclosed. Both in the context of directors' duties and reporting requirements, human rights and environmental impacts of third-country subsidiaries and suppliers of European corporations could be taken into consideration. Effective implementation of these measures would require mechanisms within corporations to identify and address potential negative human rights and environmental impacts throughout the corporate structure, which requires greater exploration than is possible in this study.

In the European Union, private international law is largely harmonized by European regulations. While the Brussels I Regulation determines the competence of EU Member State courts to adjudicate private law disputes with a foreign element, the Rome I and Rome II Regulations determine the law applicable to such disputes.

The Brussels I Regulation enables third-country victims of corporate human rights and environmental abuses to sue corporations in an EU Member State court provided the corporation in question has its statutory seat, central administration, or principal place of business in that EU Member State. The law of some EU Member States permits claimants to sue third-country subsidiaries together with the European parent corporation provided the subsidiary can be considered a necessary or proper party to the claim. The Brussels I Regulation currently does not provide for access to EU Member State courts for claims against third-country subsidiaries and contractors of European corporations. The extension of the Brussels I Regulation to corporations not domiciled in the European Union has been raised as part of the current review process of the Regulation. For example, Article 6 Brussels I Regulation could be amended, in line with the law of some EU Member States, to enable claimants to sue a subsidiary domiciled in a third country together with the European parent corporation (e.g. as a joint defendant) provided the subsidiary can be considered a necessary or proper party to the claim. The creation of additional grounds of jurisdiction, including *forum necessitatis*, could also be considered. Proposals to reform the Brussels I Regulation should be scrutinized for their impact on access to justice for third-country victims of human rights and environmental abuses by European parent corporations and/or their third-country subsidiaries. In particular, the introduction of the *forum non conveniens* doctrine would risk significantly undermining access to justice for third-country victims.

While the Rome I and Rome II Regulations will in most cases lead to the application of the law of the country in which the corporate human rights and environmental abuse has taken place, there is evidence that as a matter of public policy, EU Member State courts can refuse the application of foreign law on grounds of 'manifest breaches' or 'flagrant denials' of human rights. Whether EU Member State courts are required to do so as a matter of European human rights law remains unsettled.

## **Conclusion**

The existing legal framework on human rights and the environment applicable to European Union enterprises operating outside the EU is complex and multi-faceted, consisting of different bodies of law at national, European and international levels. The existing European legal framework already contributes in some respects to the implementation of the UN Framework on business and human rights. However, in other respects legal gaps and policy incoherencies persist. This study has identified a number of opportunities for legal reforms that could be explored, with a view to better contributing to the further implementation of the UN Framework

The study is intended to provide a solid legal basis for policy makers, corporations, and civil society organisations to consider how best to effectively respond to the (legal) challenges posed by extraterritorial corporate violations of human rights and environmental law. While the study is concerned with the European *legal* framework, it is worth noting that in an area such as extraterritorial jurisdiction over corporate human rights and environmental abuses, where the boundaries between what is legally required or permissible and what is the politically feasible or opportune are often blurred, the role of political will and commitment is crucial.



## TABLE OF CONTENTS

I. INTRODUCTION	1
II. HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION IN RELATION TO EUROPEAN CORPORATIONS OPERATING OUTSIDE THE EUROPEAN UNION	6
1. The European debate on extraterritoriality, business, human rights and the environment	6
2. Three discernible patterns related to alleged extraterritorial corporate human rights and environmental abuses	8
3. Two challenges to legal reform	11
4. The extraterritorial dimension of the State duty to protect	13
III. MAIN RESEARCH OUTCOMES OF THE STUDY	18
1. European human rights and environmental law	18
1.1 European human rights law	18
1.2 European environmental law	25
1.3 Lessons for the European Union and the EU Member States	31
2. European human rights and environmental protection through trade law, investment rules, and related regulatory regimes	34
2.1 European human rights and environmental protection through trade law	35
2.2 European human rights and environmental protection through investment rules	41
2.3 European human rights and environmental protection through other regulatory regimes related to trade and investment	48
2.4 Lessons for the European Union and the EU Member States	52
3. European human rights and environmental protection through criminal law, corporate law, and private international law	55
3.1 The criminal regime governing anti-corruption applicable to European corporations operating outside the European Union	56
3.2 The role of corporate law in preventing and redressing extraterritorial corporate human rights and environmental abuses	61
3.3 Civil jurisdiction over corporate human rights and environmental violations committed by European corporations operating outside the European Union	67
3.4 Lessons for the European Union and the EU Member States	73
IV. CONCLUDING REMARKS	77
V. ANNEX: COMMENTS FROM THE MULTISTAKEHOLDER STEERING COMMITTEE	78

## LIST OF ABBREVIATIONS

BIT	Bilateral investment treaty
CDM	Clean development mechanism
CESCR	Committee on Economic, Social and Cultural Rights
CFI	Court of First Instance
CGC	Corporate Governance Code
CoE	Council of Europe
GPP	Green Public Procurement
CSR	Corporate social responsibility
DRC	Democratic Republic of Congo
EC	European Commission
ECA	Export Credit Agency
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECGD	Export Credit Guarantee Department
ECJ	European Court of Justice
EIA	Environmental impact assessment
EMAS	Eco-management and audit scheme
EU	European Union
EIB	European Investment Bank
FLEGT	Forest Law Enforcement, Governance and Trade Scheme
GSP	Generalized Scheme of Preferences
ICCPR	International Covenant on Civil and Political Rights
IFAs	International Framework Agreements
ILO	International Labour Organisation
MARPOL	Convention for the Prevention of Marine Pollution from Ships
MNC	Multi-national corporation
NAALC	North American Agreement on Labour Cooperation
NCP	National contact point
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
SIA	Sustainability impact assessment
SRI	Socially responsible investment
SRSG	Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNFCCC	UN Framework Convention on Climate Change
UNHRC	UN Human Rights Committee
VPA	Voluntary Partnership Agreement
WTO	World Trade Organisation





## I. INTRODUCTION

1. Economic globalisation has significantly altered the institutional and regulatory environment in which corporations operate. The internationalisation of business has created increasing gaps between the operational capacities of multinational corporations (MNCs) and the regulatory capacities of States. At the same time, privatisation of state functions has shifted powers and responsibilities from governments to the market. These developments have significant impacts on the international and domestic legal frameworks through which States, corporations, civil society organisations and citizens interact in relation to human rights and the environment. While States are under legal obligations to protect individuals against human rights and environmental harms, there are also increasing demands on corporations to respect human rights and the environment in their global operations. At the same time, the perceived dichotomy of business and human rights is increasingly displaced by a growing recognition of their interdependency. As David Kinley puts it, 'human rights must embrace the power of the global economy, while insisting that its power is harnessed so as to promote the overarching goals of human rights'.<sup>2</sup>
2. These developments pose three major challenges to the traditional state-centred paradigm of human rights under international and domestic law. First, to what extent human rights should directly come to bear on the relationship between corporations and citizens ('horizontality'); secondly, to what extent human rights should apply beyond the territorial confines of the State ('extraterritoriality'); and thirdly, to what extent traditional state-based 'command and control' approaches to protecting human rights and the environment should be complemented by 'softer' forms of regulation ('governance').
3. In 2003, a working group under the UN Sub-Commission on the Promotion and Protection of Human Rights drafted the 'Norms on the Responsibilities of Transnational Corporations and Other Business Entities with regard to Human Rights' (Draft UN Norms).<sup>3</sup> The Draft UN Norms proposed to address the challenges of horizontality and extraterritoriality by establishing a treaty-based international system of human rights obligations directly enforceable against MNCs. The Draft UN Norms were not adopted by the UN Human Rights Commission as some States considered they would undermine State sovereignty, and dilute State responsibility. They were also opposed by representatives of the business community. To move beyond the impasse, John Ruggie was appointed as Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG) in 2005. In a series of reports over the following years, the SRSG developed the 'Protect, Respect, and Remedy' Framework for better managing business and human rights challenges (UN Framework) that builds on three pillars: the State duty to protect human rights against abuses by third parties, including corporations, through appropriate policies, regulation, adjudication and enforcement measures; the corporate responsibility to respect human rights, meaning to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective remedies, both judicial and non-judicial, for corporate-related human rights abuses. The three pillars form a complementary whole in that each supports the others in achieving sustainable progress. Together, they posit a system in which States are duty-bound to incorporate and apply international and domestic human rights norms in relation to corporate activities, while corporations simultaneously respect autonomous global systems of institutionalised social norms, with both providing remedy mechanisms for

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<sup>2</sup> D. Kinley, *Civilizing Globalisation* (Cambridge 2009), at 9

<sup>3</sup> United Nations Economic and Social Council, Commission on Human Rights, Sub-commission on the Promotion and Protection of Human Rights, *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, UN Doc E/CN.4/Sub.2/2003/12 (26 August 2003)

breaches of these overlapping but not identical legal and governance systems within their respective jurisdictions.<sup>4</sup> In 2008, the UN Human Rights Council unanimously welcomed the UN Framework, and extended the SRSG's mandate for another three years with the task of 'operationalising' the Framework.

4. The UN Framework was welcomed and endorsed by the European Union, the European Member States, and leading European business representatives and civil society organisations. In its 2009 Conclusions on Human Rights and Democratisation in third countries, the Council of the European Union expressed its full support for the UN Framework.<sup>5</sup> Reiterating the universality, indivisibility, interdependence and interrelatedness of human rights, the Council reaffirmed its commitment to promote human rights internationally and to integrate them into all policy areas. In their common declaration concluding the EU 'Protect Respect Remedy' Stockholm conference in November 2009, the then Swedish Presidency and the incoming Spanish Presidency called on the European Union and its Member States to take a global lead and serve as a good example on CSR, human rights and environmental protection.<sup>6</sup> They considered the UN Framework a 'key element for the global development of CSR practices' and 'a significant input to the CSR work of the European Union' that now needs to be taken further by 'developing common frameworks, raising awareness and improving dialogue between all stakeholders, and measuring and evaluating tangible results'. The reception of the UN Framework by European business and civil society organisations was also generally positive. In a submission to the UN Special Representative, the Association of German Employers Federation welcomed the framework 'as a conclusive concept for better implementation of human rights'.<sup>7</sup> In particular, it stressed corporations' ethical and economic reasons for complying with human rights, as well as the detrimental effects of human rights violations to business operations. In a recent submission to the Spanish Presidency, Amnesty International called on the European Union to incorporate the UN framework at EU level, to address accountability gaps in the current EU and EU Member State legal frameworks, and to ensure effective access to justice within the EU for corporate violations committed outside the EU.<sup>8</sup>
5. The purpose of this study is 'to analyse the legal framework on human rights and the environment applicable to European enterprises operating outside the European Union'.<sup>9</sup> The study takes the UN Framework as its reference point to ensure consistency between the EU and the UN approach to business and human rights, and to identify opportunities for the European Union and its Member States to contribute to the further operationalisation of the UN Framework. Given the timeframe and purpose of the study, it is neither feasible nor

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<sup>4</sup> L. C. Backer, 'The United Nations "Protect-Respect-Remedy" Project: Operationalising a Global Human Rights Based Framework for the Regulation of Transnational Corporations', Draft Conference Paper (on file with the author)

<sup>5</sup> Council of the European Union, Council conclusions on Human Rights and Democratisation in third Countries, EU Doc, 2985<sup>th</sup> Foreign Affairs Council meeting (8 December 2009), at 5

<sup>6</sup> See [http://www.se2009.eu/polopoly\\_fs/1.23024!menu/standard/file/Deklaration%20engelska.pdf](http://www.se2009.eu/polopoly_fs/1.23024!menu/standard/file/Deklaration%20engelska.pdf)

<sup>7</sup> See <http://www.reports-and-materials.org/BDA-paper-re-Protect-Respect-Remedy-Feb-2010.pdf>

<sup>8</sup> Amnesty International, EU Office, Human Rights must be at the core of the Corporate Social Responsibility debate, Letter to Celestino Corbacho, Minister of Employment and Migration, Government of Spain (24 March 2010)

<sup>9</sup> See Call for Tenders, ENTR/09/045, available at

[http://ec.europa.eu/enterprise/newsroom/cf/itemlongdetail.cfm?item\\_id=3334](http://ec.europa.eu/enterprise/newsroom/cf/itemlongdetail.cfm?item_id=3334). Throughout, the study will refer to 'European corporations' as corporations domiciled in the European Union ('European parent corporations'), and constituent parts thereof not domiciled in the European Union ('third country subsidiaries' and/or 'third country suppliers'). 'Legal framework' refers to European and EU Member State law and standards and, where relevant, international law and standards.

desirable to revisit in detail the extensive research the SRSg has conducted on the general international legal framework governing the protection of human rights against corporate abuse.<sup>10</sup> Rather, the study complements the UN Framework by providing an overview of European and EU Member State law relevant to the protection of human rights and the environment in relation to European corporations operating outside the European Union, including pertinent international agreements and general international law. The study's focus on the European legal framework implies that it will predominantly be concerned with State regulation and enforcement measures under the 1<sup>st</sup> and the 3<sup>rd</sup> pillar of the UN Framework. The focus on European corporations operating outside the European Union requires that particular attention is paid to extraterritorial dimensions of European and EU Member State law. The study is not intended to, and deliberately avoids, drawing political or policy conclusions in relation to the feasibility of the legal options it identifies.

6. Within these parameters, the study
  - identifies gaps in the existing legal framework that may inhibit effective prevention of extraterritorial corporate human rights and environmental abuses, and make it hard for victims to obtain effective redress when they occur,
  - highlights existing legal tools in the European Union and the EU Member States to protect human rights and the environment in relation to European corporations operating outside the European Union, and on this twofold basis
  - draws lessons for the European Union and its Member States to improve the existing legal framework with a view to contributing to the further operationalisation of the UN Framework.
7. The focus on the European legal framework applicable to extraterritorial activities of European corporations should not deflect business and human rights challenges the EU faces within its own borders. Nor should it distract from the fact that many corporate human rights and environmental abuses originate in countries outside the European Union ('third countries'), either because third-country governments violate their State duty to protect, or because corporations domiciled in these countries do not comply with domestic law and international standards. Continuing efforts on the part of the EU and its Member States are required to protect human rights and the environment against corporate abuse within the European Union, and to strengthen governance and rule of law regimes in countries outside the European Union to enable these countries to effectively prevent and redress corporate violations of human rights and environmental law within their domestic jurisdictions.
8. The research conducted in preparation of this study analysed a broad range of areas of law relevant to the extraterritorial protection of human rights and the environment in relation to European corporations (including human rights and environmental law, climate change law,

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<sup>10</sup> See the SRSg's summary reports on *State obligations to provide access to remedy for human rights abuses by third parties, including business: an overview of international and regional provisions, commentary and decisions*, UN Doc A/HRC/11/13/Add.1 (15 May 2009) and *State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of the treaty body commentaries*, UN Doc A/HRC/4/35/Add.1 (13 February 2007), as well as the SRSg's individual treaty reports on the International Convention on the Elimination of All Forms of Racial Discrimination (Report No. 1, December 2006), the International Covenant on Economic, Social and Cultural Rights (Report No. 2, May 2007), the International Covenant on Civil and Political Rights (Report No. 3, June 2007), the Convention on the Elimination of All Forms of Discrimination Against Women (Report No. 4, September 2007), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Report No. 5, December 2007), the Convention on the Rights of the Child and its Protocols (Report No. 6, July 2007), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Report No. 7, January 2007).

trade law, investment law, labour law, corporate law, criminal law, and private international law), 8 EU Member State jurisdictions (Czech Republic, France, Germany, Italy, Poland, Romania, Slovenia, and the United Kingdom) and 6 jurisdictions outside the European Union (Chile, China, Ecuador, India, Nigeria, and Rwanda).<sup>11</sup> Not all research outcomes could be given equal consideration in the final text. Furthermore, while the study endorses the universality, indivisibility, interdependence and interrelatedness of all human rights, constraints of space and time prevent a detailed consideration of any particular human right. Given the twin focus of the study on human rights and environmental protection, particular attention is given to legal tools that evidence the interrelation of, and enable cross-learning between, human rights and environmental protection.

9. The study seeks to strike a balance between a level of generality necessary to appreciate the overall legal context in which extraterritorial corporate human rights and environmental abuses take place, and a level of detail necessary to make a useful contribution from a legal perspective to the ongoing debate on extraterritoriality, business, human rights and the environment. This implies that the study cannot and does not make any claim to comprehensiveness. A number of potentially useful tools for States to protect human rights and the environment against extraterritorial corporate violations, including ‘softer’ forms of regulation such as the OECD Guidelines on Multinational Enterprises, corporate liability under domestic private law, and non-judicial remedial mechanisms are not considered in depth. In the same vein, the study must at times limit itself to identifying obstacles in the current legal framework without being able to address them in detail, for example regarding accountability gaps that stem from the domestic procedural law of the European Member States.
10. Most considerations in this study concerning business and human rights in general also apply to business and labour rights in particular. Where pertinent, the study highlights the specific implications of legal tools to protect human rights for labour rights. At the same time, it was not possible to make detailed reference to more labour-specific tools to protect human rights in relation to European corporations operating outside the European Union, including supply chain management, international framework agreements, and European work councils. Various schemes have been developed at the EU and the EU Member State level to address violations of labour law in supply chains outside the European Union. All schemes appear to protect the core ILO labour standards,<sup>12</sup> but there is also an emerging trend towards adopting broader standards based on management principles. Schemes on supply chain management are predominantly private and voluntary in nature, with European corporations and multi-stakeholder initiatives developing common standards and establishing codes of conduct.<sup>13</sup> One approach to render such common standards effective in third countries consists of European corporations imposing contractual obligations on their third-country suppliers to comply with their corporate codes of conduct. As in the case of ILO standards, this translates international standards that do not directly bind corporations into contractual obligations suppliers are legally required to uphold. Some of these contracts also include clauses on the inspection of supplier facilities and the provision of information relating to labour conditions. Another

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<sup>11</sup> All research outcomes of the different strands of the study are available on the project website, <http://www.law.ed.ac.uk/euenterpriseslf/>

<sup>12</sup> I.e. freedom of association, non-discrimination, prohibition of child labour and forced labour

<sup>13</sup> For example, the Dutch Fair Wear Foundation is a multi-stakeholder initiative to promote ILO standards through supply chains. Similarly, the UK Ethical Trading Initiative seeks to act as a forum to share experience and learning, amongst others through a range of training and capacity building programmes. Both schemes are partly publicly and privately funded. In addition to such multi-stakeholder initiatives, there are also initiatives of business groups which are starting to have a substantial impact, for example the Business Social Compliance Initiative (BSCI).



approach is the ILO Better Work Programme that aims at enhancing the effective implementation and enforcement of the ILO core labour standards conventions in third countries. The Better Work Programme operates predominantly at a country level with a combination of compliance assessment and sharing of information around compliance, capacity building of local state enforcement agencies, and enterprise advisory and training services. Unlike other supply chain initiatives, the ILO Better Work Programme involves governments, employers and trade unions in the third country where production – and rights violations – take place. A third approach to encourage European corporations and their third-country suppliers to prevent and redress violations of labour rights in supply chains consists of coupling compliance with labour standards in third countries with State incentives within the European Union, including labelling schemes and public investment.<sup>14</sup> International framework agreements (IFAs) concluded between European trade union organisations and the management of MNCs are another useful tool to protect labour rights in third countries.<sup>15</sup> The usual content of such agreements includes a commitment to respect, at a minimum, the core labour standards of the ILO, and prohibitions to inhibit relations with trade unions. Some IFAs also contain more detailed provisions on, for example, the non-intervention of MNCs with organisational activities of trade unions at the national and local level, the establishment of effective arbitration, mediation and conflict resolution mechanisms, and the provision of resources necessary for the implementation and monitoring of IFAs. One important function of European work councils in this context can be the monitoring and oversight of information about compliance with the terms of IFAs.

11. Overall, the purpose of the study is to provide a solid legal basis for policy makers, corporations, and civil society organisations to consider how best to effectively respond to the (legal) challenges posed by extraterritorial corporate violations of human rights and environmental law. While the study is concerned with the European *legal* framework, it is worth noting at the outset that in an area such as extraterritorial jurisdiction over corporate human rights and environmental abuses, where the boundaries between what is legally required or permissible and what is the politically feasible or opportune are often blurred, the role of political will and commitment is crucial.

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<sup>14</sup> For more detailed analysis of these tools in the trade and investment nexus see below, section III.2

<sup>15</sup> The European Commission has recognised the potential benefits of International Framework Agreements as regards the promotion of social dialogue and the representation and collective defence of the interests of workers and employers, see European Commission, *The role of transnational company agreements in the context of increasing international integration* (2008)

## II. HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION IN RELATION TO EUROPEAN CORPORATIONS OPERATING OUTSIDE THE EUROPEAN UNION

### 1. The European debate on extraterritoriality, business, human rights and the environment

12. As early as in 1999, the European Parliament called on the Commission and the Council 'to develop the right legal basis for establishing a European multilateral framework governing companies operations worldwide'.<sup>16</sup> According to the European Parliament Resolution, a model Code of Conduct for European businesses should incorporate EU 'environmental, animal welfare and health standards', in addition to 'minimum applicable international standards'. The latter should include, *inter alia*, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises; the ILO core Conventions; the UN Declaration of Human Rights and different Covenants on Human Rights; the UN Convention on Biological Diversity and other relevant UN Conventions in the fields of environmental protection, animal welfare and public health; and the OECD anti-bribery convention. In particular, the Parliament called on the European Commission to

enforce the requirement that all private companies carrying out operations in third countries on behalf of the Union, and financed out of the Commission's budget or the European Development Fund, act in accordance with the Treaty on European Union in respect of fundamental rights, failing which such companies would not be entitled to continue to receive European Union funding, in particular from its instruments for assistance with investment in third countries.<sup>17</sup>

13. In 2001, the European Commission announced a 'more coherent and consistent approach' to human rights in its internal and external policies, with a view to promoting 'human rights and democratisation commitments in external relations' consistent with the EU Charter on Fundamental Rights.<sup>18</sup> In its 2001 Green Paper on Promoting a European Framework for Corporate Social Responsibility, the Commission recognised a European Union 'obligation in the framework of its Cooperation policy to ensure the respect of labour standards, environmental protection and human rights' and considered that codes of conduct 'are not an alternative to national, European and international laws and binding rules'.<sup>19</sup> In its 2007 Resolution, the European Parliament advocated a 'new partnership' in CSR.<sup>20</sup> While re-emphasising the primary duty of State authorities to exercise control over corporate compliance with social and environmental standards, the Parliament called for a shift from a process- to an outcome-orientated approach to CSR, and a combination of voluntary CSR initiatives with legally binding regulation that would permit holding corporations legally accountable. In its 2009 conclusions on human rights and democratisation in third countries, the Council of the European Union underlined 'the importance of integrating human rights aspects into all policy areas of the European Union, including all relevant geographical and thematic policies', and commended in this regard the work done by SRS and the European

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<sup>16</sup> European Parliament, Resolution on EU standards for European enterprises operating in developing countries: towards a European Code of Conduct, EU Doc A4-0508/98, OJ 104 (14 April 1999) 180-84

<sup>17</sup> *Ibid*, at para 23

<sup>18</sup> European Commission, Communication from the Commission to the Council and the European Parliament – The European Union's role in promoting human rights and democratisation in third countries, EU Doc COM/2001/0252 final, above n 11 at p 3

<sup>19</sup> Green Paper – Promoting a European Framework for Corporate Social Responsibility, EU Doc COM/2001/0366 final, at paras 52,54

<sup>20</sup> European Parliament, European Parliament resolution of 13 March 2007 on corporate social responsibility: a new partnership, EU Doc A6-0471/2006 final

Commission.<sup>21</sup> The Commission's recent proposals for a Europe 2020 Strategy include a commitment to put forward a renewed European policy to promote corporate social responsibility.<sup>22</sup> This is likely to take the form of a new Communication from the European Commission on CSR, to be adopted in early 2011. The Commission's 2010-11 work programme indicates that the new Communication will address three issues in particular: how companies disclose environmental, social and governance information; business and human rights; and EU support for international CSR instruments.<sup>23</sup> This study is expected to feed into the policy-making process for that Communication.

14. Negative human rights and environmental impacts of European corporations operating outside the European Union have received considerable attention in some of the so-called 'old' EU Member States. Over the past decade, various bills to enhance the liability of European corporations for extraterritorial human rights violations have been proposed in Belgium and the UK. In 2009, the Dutch Minister for Foreign Trade commissioned a study on 'the legal liability of Dutch parent companies for subsidiaries' involvement in violations of fundamental, internationally recognised rights'.<sup>24</sup> In Germany, the Working Group on Human Rights and Business comprised of the Federal Government, industry, employers associations, trade unions and civil society organisations has issued a joint declaration reaffirming the commitment of all signatories to respect and foster international human rights law.<sup>25</sup> In its most recent report, the UK House of Lords and House of Commons Joint Committee on Human Rights ('Joint Committee') identified various negative human rights and environmental impacts of UK business operating overseas, in particular in countries with 'weaker governance' than the UK.<sup>26</sup> Evidence considered by the Joint Committee revealed different degrees of corporate 'complicity' in human rights violations, ranging from 'direction, or inadequate supervision of subsidiaries, to operations in a country where human rights are abused and companies provide financial support to that country and profit from its operations there'.<sup>27</sup> The Joint Committee also highlighted the negative human rights impacts of high-risk industries and corporations operating in conflict zones. Considering the potential for protecting human rights in relation to UK corporations operating outside the European Union, the Joint Committee commended that 'the application of conditions to a parent company based in the UK, for the purposes of regulating its relationship with the UK Government or its shareholders in the UK', while having extraterritorial effects, was less intrusive than 'the direct application of jurisdiction of UK courts to breaches of the human rights obligations of the UK overseas'.<sup>28</sup> The

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<sup>21</sup> Council of the European Union, 2985<sup>th</sup> Foreign Affairs Council meeting, above n 4, at 1; see also the 2008 EU Annual Report on Human Rights, EU Doc 14146/2/08 REV 2, at 4.10

<sup>22</sup> European Commission, Europe 2020: A European Strategy for smart, sustainable and inclusive growth, EU Doc COM (2010) 2020

<sup>23</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Commission Work Programme 2010 'Time to Act', EU Doc COM(2010) 135final

<sup>24</sup> A.G. Castermans & J.A. van der Weide, *The legal liability of Dutch parent companies for subsidiaries' involvement in violations of fundamental, internationally recognised rights* (15 December 2009)

<sup>25</sup> See European Commission, 'Corporate Social Responsibility: National public policies in the European Union' (September 2007)

<sup>26</sup> House of Lords & House of Commons Joint Committee on Human Rights First Report of Session 2009-10, *Any of our business? Human Rights and the UK private sector* (16 December 2009), at paras 55-71

<sup>27</sup> *Ibid*, at para 66

<sup>28</sup> *Ibid*, at para 205, for this distinction see also below, section II.4. In its response, the UK government, while accepting that 'parent-based' regulation was less problematic than assertions of direct extraterritorial jurisdiction, raised concerns in particular with regard to the feasibility of implementing such regulation effectively and appropriately in practice, see *Any of our business? Human rights and the UK private sector: Government Response to the Committee's First Report of Session 2009-10* (8 March 2010), at para 41

Committee also recommended that the Government ‘considers which standards it expects UK companies to meet in respect of its own contracts with and support for those businesses’.<sup>29</sup> In this context, the UK Joint Committee and the French *Commission nationale consultative des droits de l’homme* have called on their governments to develop strategies on business and human rights to enhance legal and policy coherence both between State departments and in relation to private corporations.<sup>30</sup>

15. The current debate is less advanced in the so-called ‘new’ Member States under analysis in this study. In Poland, there has been up to date very little discussion, either political or legal, of the human rights and environmental impacts of Polish corporations operating outside the European Union. This also applies to a greater or lesser extent to the Czech Republic, Slovenia and Romania. One reason appears to be that relatively few corporations domiciled in these countries operate internationally, especially outside the European Union. Another, related reason is that traditionally MNCs operate, through their subsidiaries, *in* the new Member States rather than *from* these States. Accordingly, the business and human rights debate is still predominantly focused on corporate human rights and environmental abuses within the ‘new’ Member States. In Poland, a recurring problem is the employment of foreign workers by Polish corporations allegedly in violation of human rights standards.<sup>31</sup> Examples from Romania include alleged violations of human rights and environmental law by MNCs in the forestry and mining sector.<sup>32</sup> In the Czech Republic, various cases have been reported in which domestic courts were reluctant to even protect Czech citizens against corporate violations of human rights and environmental law. Examples include lawsuits against an MNC for alleged personal injury and environmental damages occurred in the course of the corporation’s steel producing activities in North Moravia.<sup>33</sup>

## 2. Three discernible patterns related to alleged extraterritorial corporate human rights and environmental abuses

16. Multinational corporations can make important positive contributions to creating a global environment in which everyone can enjoy their universal human rights. Corporations have an enormous capacity to create wealth, jobs and income, to finance public goods, and to generate innovation and development in many areas relevant to human rights and environmental protection, including medicine, food production, and environmental-friendly technologies. Moreover, many MNCs take their responsibility to respect human rights and the environment seriously, and already do more than what is legally required. Research conducted by the SRSG indicates that European businesses are amongst the leaders in their recognition of labour rights, and rights relating to privacy and security of the person, as well as their inclusion of human rights standards in supply chain management.<sup>34</sup>

<sup>29</sup> UK Joint Committee, above n 25 at para 205

<sup>30</sup> UK Joint Committee, above n 25; Commission nationale consultative des droits de l’homme, *Opinion on corporate human rights responsibility* (24 April 2008)

<sup>31</sup> See e.g. <http://www.business-humanrights.org/Categories/RegionsCountries/EuropeCentralAsia/Poland>

<sup>32</sup> See e.g. <http://www.ft.com/cms/s/0/78cc46e8-c92b-11db-9f7b-000b5df10621.html> and further below, section III.1.1

<sup>33</sup> For further details see *ArcelorMittal: Going nowhere slowly. A review of the global steel giant's environmental and social impacts in 2008-2009*, at 11-14, available at [http://www.nebenadostravou.cz/files/file/arcelormittal\\_going\\_nowhere\\_web.pdf](http://www.nebenadostravou.cz/files/file/arcelormittal_going_nowhere_web.pdf)

<sup>34</sup> Report of the SRSG, ‘Human Rights Policies and Management Practices: Results from questionnaire surveys of Governments and Fortune Global 500 firms’, UN Doc A/HRC/4/35/Add.3 (28 February 2007); Study conducted under the direction of the SRSG, ‘Business Recognition of Human Rights: Global Patterns, Regional and Sectoral Variations’, UN Doc A/HRC/4/035/Add.4 (12 December 2006)

17. However, it holds equally true that MNCs can have significant negative impacts on human rights and the environment in their global operations. Research conducted by the SRSG shows that corporate conduct can impact on the full range of human rights, including civil and political rights, economic, social and cultural rights, and labour rights.<sup>35</sup> 90% of all alleged human rights violations considered took place outside Europe and North America. Moreover, the SRSG's research illustrates the connections between alleged corporate involvements in corruption, environmental harm, and human rights violations. European NGOs have reported numerous human rights violations allegedly committed by European corporations outside the European Union over the past decade.<sup>36</sup> A number of criminal and civil proceedings have been brought in European courts,<sup>37</sup> and a considerable number of complaints have been considered by EU Member State National Contact Points (NCPs) established under the OECD Guidelines for Multinational Enterprises.<sup>38</sup> Research conducted in the course of this study in six countries outside the European Union where European corporations operate highlights in particular the strong link between corporate environmental degradation and human rights violations. Three patterns of human rights and environmental abuses allegedly committed by European corporations operating outside the European Union can be discerned.
18. First, the vast majority of alleged corporate human rights and environmental abuses examined were committed by subsidiaries or contractors of European corporations that are domiciled or resident in the country where the violation occurs, and are governed by the domestic regulatory and enforcement regime of that country. One consequence is that some European corporations may benefit from the operations of their third-country subsidiaries and contractors, while not being held directly responsible for human rights and environmental abuses committed in the course of these operations. This is particularly problematic when subsidiaries and contractors operate in countries with legal regimes that provide lower levels of human rights and environmental protection than the 'home' State of the European corporation.
19. Secondly, where subsidiaries or contractors of European corporations violate human rights and environmental law outside the European Union, third-country victims can encounter significant obstacles in obtaining effective redress both in the third country and in the European Union. Weak judicial and enforcement capacities, in some cases combined with apparent corporate pressure exercised over decision-makers and local communities, can impede effective access to justice in the State where the violation occurs. At the same time, the current legal framework can make it difficult for third-country victims to hold European corporations accountable in EU Member State courts for abuses committed by their subsidiaries and contractors abroad.

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<sup>35</sup> Report of the SRSG, 'Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse', UN Doc A/HRC/8/5/Add.2 (23 May 2008)

<sup>36</sup> See, for example, European Coalition for Corporate Justice, 'With Power Comes Responsibility' (May 2008); Brot fuer die Welt, FIAN & Evangelischer Entwicklungsdienst, 'Globalising economic and social human rights by strengthening extraterritorial state obligations - Seven case studies of German policies on human rights in the South' (February 2005); The Corporate Responsibility Coalition, 'The reality of rights - Barriers to accessing remedies when business operates beyond borders' (May 2009); and Amnesty International reports on corporate human rights abuses, available at

<http://www.protectthehuman.com/search?q=corporate+abuse&x=14&y=10>

<sup>37</sup> See European Centre For Constitutional and Human Rights (ECCHR), *Business and Human Rights European Cases Database*, <http://www.ecchr.eu/about.html>

<sup>38</sup> See, for example, the UK NCP's final statements on *Raid against Das AIR* (July 2008), *Global Witness against Afrimex* (August 2008), and the final statement and follow-up statement on *Survival International against Vedanta Resources plc* (September 2009 / March 2010)

20. Thirdly, the States in which subsidiaries and contractors of European corporations operate and/or EU Member States from which European corporations operate are often at least indirectly involved in corporate abuses of human rights and the environment. Some forms of indirect involvement by EU Member States, including failures to prevent and control extraterritorial effects of corporate activities harmful to human rights and the environment, can amount to breaches of domestic, European, or international law by the European Union and/or the EU Member States. Other forms of indirect involvement, including the financing or otherwise facilitating of business activities outside the European Union without due regard to potential negative impacts on human rights and the environment, will not necessarily amount to a breach of law. Yet they arguably involve failures on the part of the European Union and the EU Member States to protect human rights and the environment through law in relation to extraterritorial activities of European corporations.
21. Numerous court cases filed in Nigeria concerning environmental pollution and human rights violations allegedly caused by, amongst others, European MNCs exemplify the problems with effectively preventing and redressing extraterritorial corporate human rights and environmental abuses. In 2005, a Nigerian court held that the gas flaring activities of one Anglo-Dutch company and its 100% owned Nigerian subsidiary violated the applicant's fundamental rights to life and dignity of human persons, and ordered the gas flaring to cease.<sup>39</sup> Separately, the court also declared Nigerian legislation permitting gas flaring to be unconstitutional. Non-compliance with the judgment allegedly on the part of the corporation led to contempt of court proceedings in December 2005. In February 2006, the corporation was ordered to pay compensation for the environmental pollution it was deemed to have caused. These cases remain on appeal, and the company has raised concerns about the responsibility of the government and of its joint venture partner, the government-owned Nigerian National Petroleum Corporation, which holds the majority stake in the joint venture operated by the company's subsidiary.<sup>40</sup> A civil law suit for damages against the corporation and its Nigerian subsidiary concerning oil leaks in three Nigerian villages is currently pending in the Dutch courts. The plaintiffs allege that the parent and the subsidiary are jointly liable for failing to prevent the spills and failing to ensure a timely and adequate clean-up. In December 2009, the Hague District Court ruled that it had jurisdiction over both the European parent and the Nigerian subsidiary.<sup>41</sup> While at the time of writing there had been no finding with respect to liability, two new major environmental disasters connected to oil production activities of MNCs are reported from the Niger Delta.
22. Another recent case involved the shipment of allegedly toxic waste by an Anglo-Dutch oil trading corporation to the Côte d'Ivoire.<sup>42</sup> The following facts were alleged: on 2 July 2006, an oil/bulk/ore (OBO) carrier chartered by an Anglo-Dutch corporation, arrived at the port of Amsterdam in order to re-fuel and to dispose of waste liquids resulting from a chemical process it had conducted on board the ship. For slop disposal, the ship contacted Amsterdam Port Services (APS), a corporation certified for the operation of the port reception facility. Following APS' assessment of the likely cost of processing the slops, the corporation requested that the slops be re-loaded without processing. After several days of consultations, the Amsterdam Environment and Building Inspection Service decided to allow the OBO carrier to re-load the waste and leave the port. The waste was finally offloaded at a port discharge

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<sup>39</sup> FHC/B/CS/53/05 Federal High Court, Benin Judicial Division (14 November 2005)

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<sup>41</sup> Court of the Hague Civil Law Section 330891/HA ZA 09-579 (30 December 2009), see also further below section III.3.2 & III.3.3

<sup>42</sup> For the view and statements of the corporation see [http://www.trafigura.com/our\\_news/probo\\_koala\\_updates.aspx#zPC7gCzPA6MV](http://www.trafigura.com/our_news/probo_koala_updates.aspx#zPC7gCzPA6MV)

facility in Abidjan, Côte d'Ivoire, allegedly in accordance with the requirements of the International Convention for the Prevention of Pollution from Ships (MARPOL). The operators of the discharge facility, a local corporation, then disposed of the waste in landfill sites around Abidjan, allegedly causing severe health problems among local residents. In February 2007, the government of Côte d'Ivoire signed a settlement agreement in which, without admitting liability, the corporation committed to pay for a compensation fund, the construction of a waste treatment plant and to assist in the recovery operations. In November 2006, over 30,000 Ivoirian claimants brought a tort-based group claim for damages against the corporation in the United Kingdom. The proceedings were settled out of court in 2009, with the company agreeing to pay compensation, again without conceding liability. Allegations of fraud in the disbursement of the settlement monies and further court proceedings in Côte d'Ivoire delayed the distribution of payments among the claimants until March 2010. In 2008, the Dutch public prosecutor began criminal proceedings in the Netherlands against the company, as well as APS, the City of Amsterdam, and various individuals for alleged illegal export of hazardous waste to a developing country and falsification of the cargo documents of the OBO carrier.<sup>43</sup> In July 2010, a Dutch court ruled that the company had concealed the dangerous nature of the waste it offered to APS and had violated the European Waste Shipments Regulation, which prohibits exporting dangerous waste to developing countries, and fined it €1 million. The court also convicted a company employee and the captain of the ship for their respective roles in the matter. It acquitted the APS and the City of Amsterdam; it also acquitted the company of the allegations of forgery. The Dutch prosecutor has indicated that they will appeal against the size of the fine, and against the finding in relation to forgery. The company has said it will also appeal.

23. Both examples may be considered exceptional not only by virtue of the scale and magnitude of the alleged violations but also because they *did* have legal ramifications both in the 'home' and the 'host' country of the corporation. Many cases of alleged corporate violations of human rights and environmental law outside the European Union receive less public attention and confront numerous legal and practical barriers to accessing judicial remedy.

### **3. Two challenges to legal reform**

24. These three patterns relating to human rights and environmental abuses by European corporations operating outside the European Union can be contrasted with two challenges to reform inbuilt in the current legal framework.
25. The first major challenge is that international human rights law and public international environmental law generally do not directly impose obligations on MNCs to protect human rights and the environment. While international human rights and environmental law can require States to regulate corporate activities affecting human rights and the environment, and to enforce these regulations in case of corporate violations, they do not directly bind corporate actors. At the same time, those areas of law that are most relevant to the activities of corporations, including trade and investment law, corporate law, and private international law, primarily pursue different and at times conflicting objectives. As a consequence, targeted or detailed human rights and environmental protection through these areas of law constitutes the exception rather than the norm, which can result in what the SRSG has termed 'horizontal policy incoherence'.

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<sup>43</sup> Criminal proceedings were also brought in France in 2007 against French directors of the corporation for unintentional murder and injuries and active corruption. However, the public prosecutor decided not to pursue the case, a decision upheld by the Court of Appeal.

26. For example, the corporate law doctrines of separate legal personality and limited liability pursue the legitimate aim of protecting shareholders against financial risks of corporate activities beyond their initial investment. Yet when applied to MNCs in which corporations are shareholders of other corporations (equity-based MNCs), these doctrines can impede the liability of a European parent corporation for human rights and environmental abuses committed by a third-country subsidiary. To give another example, the central purpose of the regulatory regime governing international trade (principally the WTO) is to target protectionism by preventing States from discriminating against trading partners that enjoy a certain comparative advantage, such as low labour costs. This is done by prohibiting trade restrictions on the basis of activities that take place outside the State's jurisdiction. The consequence of this regime is that the European Union and the EU Member States can also be precluded from restricting trade for non-protectionist reasons such as human rights and environmental protection. Moreover, there is not always a bright line to be drawn between protectionist and non-protectionist trade restrictions as, for example, a tax on products produced in a carbon intensive manner may be designed to protect the environment, but may also serve to protect a domestic low carbon economy. For this reason, in particular developing countries often resist interpretations or amendments of WTO rules that would give the EU a general mandate to restrict trade to protect human rights and the environment extraterritorially.
27. The second major challenge to protecting human rights and the environment in relation to European corporations operating outside the European Union is that the international legal regime is premised upon the territorial sovereignty of States, and attributes jurisdiction primarily on that basis. Thus, the exercise of extraterritorial jurisdiction to protect human rights and the environment often encounters legal and political obstacles.<sup>44</sup> 'True' extraterritorial jurisdiction refers to the ability of States, via various legal, regulatory and judicial institutions, to exercise their authority over actors and activities located in other States. As 'territorial' jurisdiction is the rule, extraterritorial jurisdiction requires particular justification. Extraterritorial regulation and enforcement under public international law, including criminal law, must be justified according to one or more internationally recognised basis of jurisdiction. Extraterritorial jurisdiction over private law claims (such as tort or contract) is regulated by private international law that requires connecting factors between the parties, the subject matter of the dispute, and the State exercising jurisdiction.
28. Not all exercises of extraterritorial jurisdiction are problematic, and not all legal measures States can take to protect human rights and the environment in relation to corporate activities outside their territory amount to 'true' extraterritorial jurisdiction.<sup>45</sup> However, the exercise of extraterritorial jurisdiction to protect human rights and the environment will prove controversial if other States regard it as interference in their sovereign rights to regulate corporations within their own borders, and to pursue their own economic, social and cultural interests. In the past, the European Union and EU Member States have themselves objected to certain assertions of extraterritorial jurisdiction. When the US government, using the Trading with the Enemy Act, ordered the US parent company of a French subsidiary to halt the sale of vehicles to China, the French courts appointed administrators to run the subsidiary and carry on with the sale.<sup>46</sup> The US also tried to prevent European subsidiaries of US corporations, and European corporations using US technology from exporting equipment for the construction of a

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<sup>44</sup> The UK government's response to the proposals of the Joint Committee to regulate UK business operating abroad considered above is but one example, see *Government Response*, above n 27 at para 41

<sup>45</sup> See immediately below, section II.4

<sup>46</sup> *Société Fruehauf v. Massardy*, English translation in (1966) 4 ILM 476



pipeline carrying gas from the USSR to Western Europe.<sup>47</sup> Member States protested at the US regulations, and in some cases passed blocking legislation compelling their companies to carry out the contracts and disregard US law. The EU viewed the application of this legislation to European corporations (even if they were subsidiaries of US corporations) as a violation of the territorial jurisdiction of EU Member States and an abuse of the nationality principle.<sup>48</sup>

29. When applied to MNCs, extraterritorial jurisdiction over private law claims poses a distinctive set of problems. Private international law determines both the competence of courts to adjudicate private disputes, and the law applicable to such disputes ('conflict of laws'). In the case of MNCs that consist of separate legal persons, victims can encounter considerable difficulties in establishing the necessary connecting factor between a violation committed by a third-country subsidiary or contractor and the jurisdiction of an EU Member State court. This is particularly problematic in cases where there is a serious risk of denial of an effective remedy in the third country. Moreover, even if a third-country victim succeeds in establishing jurisdiction of an EU Member State court, the law applicable to such a dispute will generally be the law of the third country which may provide for lower standards of human rights and environmental protection than European law.
30. Finally, both challenges often combine and intersect. As the examples relating to trade considered above illustrate, States may object to legal measures protecting human rights and the environment against extraterritorial corporate abuse both on the grounds that such measures violate WTO law, and on the grounds that such measures amount to an illegitimate assertion of extraterritorial jurisdiction. Furthermore, the corporate law doctrine of separate legal personality has in and by itself extraterritorial effects in that it creates a presumption of the (non-)liability of constituent parts of MNCs operating in different territories for wrongful acts by other members of the corporate group. These effects are reinforced by the constraints on direct extraterritorial jurisdiction. While extraterritorial regulation of constituent parts of MNCs operating outside the territory of the regulating State is subject to the restrictions imposed by public international law, extraterritorial adjudication of private disputes is limited by the rules of private international law.
31. Part III of the study will elaborate these challenges States face to effectively prevent and redress human rights and environmental abuses by European corporations operating outside the European Union where necessary. However, the main focus will be on existing duties of, and existing opportunities for the European Union and its Member States to enhance the protection of human rights and the environment against corporate abuse in the areas of human rights and environmental law (III.1), trade and investment law (III.2) and criminal law, corporate law, and private international law (III.3). Yet before, it is necessary to examine in some more detail the second challenge identified above namely the extraterritorial dimension of the State duty to protect human rights and the environment in relation to corporate actors.

#### **4. The extraterritorial dimension of the State duty to protect**

32. International law creates substantive rules on the protection of human rights and the environment, and imposes duties on States to implement these substantive rules into domestic law through appropriate policies, regulation and enforcement. The SRSG has identified two broad categories of State duties under international human rights law: a duty to 'refrain from violating the enumerated rights of persons within their territory and/or

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<sup>47</sup> For a detailed discussion see P. Muchlinski, *Multinational Enterprises & the Law* (Oxford: 2007), at 130-2

<sup>48</sup> See Commission of the European Communities, 'Comments on the US Regulations Concerning Trade with the USSR', (1982) 21 *ILM* 864

jurisdiction'; and a duty 'to "ensure" (or some functionally equivalent verb) the enjoyment or realisation of those rights by the rights holders'.<sup>49</sup> The latter duty requires 'protection by States against other social actors, including business, who impede or negate those rights. Guidance from international human rights bodies suggests that the State duty to protect applies to all recognised rights that private parties are capable of impairing, and to all types of business enterprises'.<sup>50</sup> For example, according to the UN Human Rights Committee, which oversees the implementation of the International Covenant on Civil and Political Rights (ICCPR) 'the positive obligations on State Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights'.<sup>51</sup>

33. The SRSG's most recent report identifies five priority areas through which States should discharge their duty to protect against corporate human rights abuses:<sup>52</sup>
  - States should safeguard their own ability to meet their human rights obligations by not unduly constraining their existing capacities to protect human rights when pursuing other policy objectives, for example in the context of bilateral investment treaties (BITs)
  - States should protect human rights when they do business with business, for example by considering human rights impacts for the purpose of export credit guarantees and public procurement
  - States should foster corporate cultures respectful of rights at home and abroad, for example by encouraging or requiring corporations to report on human rights policies and impacts, and by clarifying the appropriate role and responsibilities of directors in preventing and addressing the corporation's negative human rights impacts
  - States should devise tools to protect human rights in relation to corporations operating in conflict-affected areas where the human rights regime is dysfunctional, illicit corporations flourish and reputable firms risk becoming implicated in abuses, and
  - States should examine the cross-cutting issue of extraterritorial jurisdiction.
34. Considering current State practice on extraterritorial jurisdiction, the SRSG notes that while in certain policy domains, including anti-corruption, anti-trust, securities regulation, environmental protection and general civil and criminal jurisdiction, States have agreed to certain uses of extraterritorial jurisdiction, this is typically not the case in business and human rights.<sup>53</sup> Moreover, and examining the treaty body commentaries and jurisprudence under the core UN human rights treaties, the SRSG observes that the extraterritorial dimension of the duty to protect human rights remains unsettled in international law: 'Current guidance from international human rights bodies suggests that States are not required to regulate the extraterritorial activities of businesses incorporated in their jurisdiction, nor are they generally prohibited from doing so provided there is a recognised jurisdictional basis, and that an overall test of reasonableness is met'.<sup>54</sup>

<sup>49</sup> See, for example, Report of the SRSG, 'Business and human rights: Towards operationalising the 'protect, respect, remedy' framework', UN Doc A/HRC/11/13 (22 April 2009), at para 13

<sup>50</sup> *Ibid*, at para 13

<sup>51</sup> Human Rights Committee, 'General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), at para 8

<sup>52</sup> Report of the SRSG, 'Business and human rights: Further steps toward the operationalisation of the 'protect, respect, remedy' framework', UN Doc A/HRC/14/27 (9 April 2010), at paras 16-53

<sup>53</sup> *Ibid*, at para 46

<sup>54</sup> UN Doc A/HRC/11/13 (22 April 2009), above n 48, at para 15; for further references see above, n 9

35. States are thus permitted under public international law to regulate corporate conduct outside their territory, and to provide for enforcement mechanisms in relation to extraterritorial corporate human rights and environmental abuses provided that the exercise of jurisdiction can be justified according to an internationally recognised basis of jurisdiction, most prominently territoriality and nationality and, in limited circumstances of serious international crimes, universality.<sup>55</sup> A second condition is that extraterritorial regulation and enforcement measures must not unreasonably interfere in the domestic affairs of other States. As a general rule, assertions of extraterritorial jurisdiction will be more readily accepted if permitted by an international treaty regime and/or if directed against an activity about which there is general international concern.<sup>56</sup> Criminal jurisdiction over serious and flagrant breaches of human rights outside the State's territory is but one example.
36. Moreover, not every regulation of extraterritorial corporate activities relevant to the protection of human rights and the environment amounts to an assertion of 'true' or direct extraterritorial jurisdiction. For example, a State can rely on its territorial jurisdiction to require a corporation within its jurisdiction to exercise oversight over its subsidiaries abroad, and hold it accountable for failure to do so. While such regulation has extraterritorial effects, it does not directly reach out into another country in the same manner as true extraterritorial jurisdiction. The SRSG has captured this difference by distinguishing 'direct extraterritorial jurisdiction' from 'domestic measures with extraterritorial implications':

In cases of direct extraterritorial jurisdiction, such as criminal regimes governing child sex tourism, states usually rely on a clear nationality link to the perpetrator as the basis for jurisdiction. In contrast, domestic measures with extraterritorial implications are addressed to decisions and operations made or carried out at home. Thus, such measures rely on territory as the jurisdictional basis, even though they may have extraterritorial implications. An example would be reporting requirements imposed on the corporate parent with regard to a company's overall human rights impacts, which may include those of its overseas subsidiaries.<sup>57</sup>

In his most recent report, the SRSG has integrated the distinction between 'direct extraterritorial jurisdiction' and 'domestic measures with extraterritorial implications' into an extraterritoriality matrix. Apart from these two 'rows' the matrix consists of three 'columns', namely 'public policies', 'regulation', and 'enforcement action', together yielding six 'cells' of extraterritoriality. One main purpose of the matrix is to de-polarise the debate on extraterritorial jurisdiction by showing that extraterritoriality is not a 'binary matter' but comprises a 'range of measures' that often cut across different 'cells'.<sup>58</sup>

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<sup>55</sup> 'Territoriality' requires a sufficiently close link between the territory of the State exercising jurisdiction and the conduct over which jurisdiction is exercised. 'Nationality' permits extraterritorial jurisdiction over a State's own nationals. 'Universality' gives States the right to assert jurisdiction over serious international crimes wherever they occur. Other, more contested bases for asserting extraterritorial jurisdiction include the 'effects doctrine', the 'protective principle' and the 'passive personality principle'. For a more detailed account of extraterritorial jurisdiction under international law, including the internationally recognised bases of jurisdiction and the reasonableness test, see Jennifer Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas', *Report for the Harvard Corporate Social Responsibility Initiative to help inform the mandate of the UNSG's Special Representative on Business and Human rights* (Working Paper No 59, June 2010)

<sup>56</sup> Extraterritorial jurisdiction under private international law is considered below, section III.3.3

<sup>57</sup> SRSG Keynote Presentation to the EU Presidency Conference on the 'Protect, Respect, Remedy' Framework in Stockholm (10 November 2009).

<sup>58</sup> See UN Doc A/HRC/14/27 (9 April 2010), above n 51 at para 49 and J. Zerk, above n 54 at pp 9-13. Wherever possible, the study shall take the matrix into account

37. Some of the UN treaty bodies have already encouraged States to protect human rights through domestic measures with extraterritorial implications. For example, in its General Comment on the right to the highest attainable standard of health, the U.N. Committee on Economic, Social and Cultural Rights (CESCR) notes that 'State parties have to respect the enjoyment of the right to health in other countries, and prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.'<sup>59</sup> In its 2002 General Comment on the right to water, the CESCR specifies that states should both 'refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries', and take steps 'to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries.'<sup>60</sup>
38. Finally, the European Convention on Human Rights imposes duties on States, albeit in relatively limited circumstances, to protect human rights in relation to private actors outside their territory.<sup>61</sup> The same goes for some international treaties and European and domestic legislation in other areas of law relevant to the protection of human rights and the environment against corporate violations considered in this study. Where and to the extent that these legal regimes apply, States are not merely permitted but required to protect human rights and the environment in relation to extraterritorial activities of European corporations, and can be liable if they fail to do so.
39. In principle, the above considerations apply not only to the EU Member States but also to the European Union. The European Union can conclude international agreements and become party to international treaties provided the treaty in question allows for the accession of 'regional economic integration organisations'.<sup>62</sup> For example, the EU is party to the major WTO agreements and directly bound by them. Moreover, Article 6(2) of the post-Lisbon Treaty on the European Union (TEU) provides for the accession of the European Union to the European Convention on Human Rights (ECHR). After accession, the European Union will be duty-bound to protect human rights against extraterritorial corporate violations in the same way as the European Member States.<sup>63</sup>
40. As regards the EU's competence to negotiate and conclude international agreements in relation to its Member States, Article 216(1) of the new Treaty on the Functioning of the European Union (TFEU) that largely codifies previous ECJ case law provides that the EU is competent
- where the Treaties provide so,
  - where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties,
  - where the conclusion of an agreement is provided for in a legally binding Union act, and
  - where the conclusion of an agreement is likely to affect common rules or alter their scope.

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<sup>59</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No 14, UN Doc E/C.12/2000/4 (2000) at para 39

<sup>60</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No 15, UN Doc E/C.12/2002/11 (2002), at paras 31, 33

<sup>61</sup> For details see below, section III.1.1

<sup>62</sup> As provided for in Article 33 of the Convention of Biological Diversity (Rio de Janeiro 1992)

<sup>63</sup> At present, the European Court of Human Rights (ECtHR) exercises indirect jurisdiction over the European Union through scrutinising EU Member State measures giving effect to EU law, see ECtHR, *Bosphorus v Ireland* (Judgment 30 June 2005) and, most recently *Bacila v Romania* (Judgment of 30 March 2010).

41. If the EU is competent, the further question arises of how this affects the capacity of EU Member States to act in the same area. The Treaties distinguish between exclusive EU competences (Member States cannot act), shared competences (Member States can act as long as the EU has not acted), and complementary competences (Member States can act next or in addition to the EU). Pursuant to Article 3(2) TFEU, the EU has exclusive competence for the conclusion of an international agreement 'when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope'. Article 216(2) clarifies that agreements concluded by the Union are binding upon EU institutions and the EU Member States.
42. The European Union does not have an explicit general (internal or external) competence to legislate on human rights. It has endowed itself with a Charter on Fundamental Rights that is now legally binding on EU institutions and EU Member States when implementing or claiming exceptions from EU law (Art 6(1) of the new Treaty on the European Union (TEU)). Moreover, Article 205 TFEU in conjunction with Article 3(5) (TEU) provides that EU external action shall contribute to the protection of human rights. This includes development cooperation and common commercial policy. The latter area, in which the EU has exclusive competence (Article 3(1) TFEU), includes trade agreements in goods and services and foreign direct investment. Pursuant to Article 191(4) TFEU, the EU and the Member States cooperate in environmental matters with third countries and international organisations 'within their respective spheres of competence'. The material scope of the EU's competence in this area is determined by the objectives of EU environmental policy listed in Article 191 TFEU.

### III. MAIN RESEARCH OUTCOMES OF THE STUDY

#### 1. European human rights law and environmental law

43. While perhaps self-referential, it is nonetheless significant to note at the outset that unlike other areas of law considered in this study, the primary purpose of human rights and environmental law is to protect human rights and the environment. It is significant because most State duties (as opposed to State opportunities) to protect human rights and the environment in relation to corporate actors stem from these areas of law. It is also significant because States may be required to comply with these duties when acting in other areas of law. For example, EU Member State courts are bound by European and domestic human rights law when adjudicating private disputes involving a corporation. Or, environmental law can impose duties on public authorities to disclose the environmental impact of their credit guarantees. Finally, it is significant because all things considered, the most obvious place to look for tools to close regulatory and accountability gaps in relation to corporate abuses of human rights and the environment is human rights and environmental law.
44. Against this background, the following overview of European human rights and environmental law applicable in relation to European corporations operating outside the European Union pursues a twofold objective. Firstly, it highlights existing duties of States to regulate and control extraterritorial corporate activities relevant to the protection of human rights and the environment, and to provide for effective enforcement mechanisms in case of their violation. Yet secondly, it also identifies procedural and substantive standards that can serve as guidance for States to further regulate corporate conduct relevant to the protection of human rights and the environment, to protect human rights and the environment through other areas of law (for example, trade and investment law), and to protect human rights and the environment even when they are currently not legally required to do so.

##### 1.1 European human rights law

45. Some of the European Member States under analysis in this study apply in limited circumstances their domestic human rights law to activities of private actors operating outside their territory.<sup>64</sup> The European Court of Justice (ECJ) has not yet pronounced on the application of EU fundamental rights in relation to European corporations operating outside the European Union.<sup>65</sup> However, with the EU Charter of Fundamental Rights now having legally binding

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<sup>64</sup> For example, the extraterritorial reach of German fundamental rights law in relation to private actors is determined by the extraterritorial scope of German public authority, whereby the standard of protection is mitigated by Germany's international treaty obligations, see BVerfGE 92, 26 (*Zweitregister*). The principles underpinning the extraterritorial application of the UK 1998 Human Rights Act are broadly similar to those stipulated by the ECHR, see for example *Al-Skeini v Secretary of State for Defence* [2008] 1 AC 153; *Al-Jedda v Secretary of State for Defence* [2008] 1 AC 332; *Al-Saadoon v Secretary of State for Defence* [2009] UKHRR 683.

<sup>65</sup> In *Zaoui*, relatives of a victim of a terrorist attack in Israel brought a claim for damages for non-contractual liability before the European Union courts. The applicants contended that the European Commission's grant of funds to the Palestinian Authority had directly contributed to the harm suffered by the applicants as a result of the attack. Both the Court of First Instance (CFT) and the ECJ dismissed the application because there was no sufficient causal link between the alleged conduct and the harm suffered. The courts thus did not have to consider the question of whether the European Union could be held responsible for extraterritorial human rights violations by private actors, see CFT, Case T73/03 and ECJ, Case C-288/03 P. In *Kadi*, the ECJ accepted jurisdiction to review measures that gave effect to resolutions of the United Nations in the light of EU human rights law, see ECJ, Joined Cases C-402/05 P and C-415/05 P (2008). While this judgement can be considered to have extraterritorial implications, it does not establish an extraterritorial dimension of EU human rights law in relation to European corporations.

effect on the European Union and its Member States and the EU becoming a party to the ECHR, it appears not unlikely that the ECJ will come to consider such cases in the future. The following observations mainly focus on the case law of the European Court of Human Rights (ECtHR) under the ECHR, a regional international human rights treaty, that provides for the most comprehensive and systematic treatment of state duties in relation extraterritorial corporate human rights violations. The ECHR binds all European Member States and, pending accession, also directly the European Union itself.

46. European human rights law does not apply directly between corporations and victims of corporate human rights violations ('direct horizontal effect'). Rather, it imposes duties on states to protect human rights and the environment against corporate abuses (a). States are duty-bound to regulate and control corporate actors to prevent human rights and environmental violations, and to provide effective enforcement mechanisms that is, to investigate, punish, and redress such violations when they occur (b). Under certain circumstances, these state duties have an extraterritorial dimension (c).

**a) The nature of the State duty to protect human rights in relation to European corporations**

47. Under European human rights law, there are two different constellations in which States are duty-bound to protect human rights against violations by corporate actors: positive duties of States to protect human rights against violations by corporations as non-state actors; and negative duties of corporations acting as state agents not to violate human rights.
48. Certain positive State duties to protect human rights against violations by corporations as non-state actors already flow from the text of the European Convention, including Article 1 (state duty to secure human rights to everyone within its jurisdiction), Article 2 (right to life) and Article 6 (fair trial). Others have been developed through the case law of the ECtHR on Article 3 (prohibition of torture), Article 4 (prohibition of slavery and forced labour), Article 5 (liberty and security of the person), Article 8 (private & family life and home), Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression), Article 11 (freedom of assembly and association), Article 13 (effective remedy), Article 1 Protocol 1 (peaceful enjoyment of possessions and property), and Article 2 Protocol 1 (right to education).
49. States are duty-bound not only to refrain from violating human rights themselves, but also to protect these rights 'in the sphere of the relations of individuals between themselves'.<sup>66</sup> Correspondingly, 'the acquiescence or connivance of the authorities of a Contracting State in acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State's responsibility under the Convention'.<sup>67</sup>
50. In *Fadeyeva*, the Court elaborates on the distinction between negative and positive state duties, and on the conditions under which States are required to protect Convention rights against corporate violations. The applicants lived in vicinity of the largest Russian steel plant owned and operated by a private corporation. Pollution levels from the plant had for many years exceeded permitted levels and were found to cause the applicant severe health problems. The applicant had applied numerous times without success to be resettled outside the plant's 'sanitary security zone' that separated the plant from the town's residential areas:

The Court notes that, at the material time, the Severstal steel plant was not owned, controlled, or operated by the State. Consequently, the Court considers that the Russian Federation cannot be

<sup>66</sup> ECtHR, *X and Y v The Netherlands* (Judgment of 27 February 1985), at para 23

<sup>67</sup> ECtHR, *Cyprus v Turkey* (Judgment of 10 May 2001), at para 81

said to have directly interfered with the applicant's private life or home. At the same time, the Court points out that the State's responsibility in environmental cases may arise from a failure to regulate private industry. Accordingly, the applicant's complaints fall to be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant's rights under Article 8(1) of the Convention. ...

The Court concludes that the authorities in the present case were certainly in a position to evaluate the pollution hazards and to take adequate measures to prevent or reduce them. The combination of these factors shows a sufficient nexus between the pollutant emissions and the State to raise an issue of the State's positive obligation under Article 8 of the Convention.<sup>68</sup>

51. In the second constellation identified above, corporations acting as state agents are, in the same way as public authorities, directly duty-bound not to violate human rights.<sup>69</sup> While the tests for directly attributing corporate behaviour to States vary across the European Union, they coalesce around two basic propositions: first, States cannot evade their duty to protect by outsourcing public functions to the private sector; secondly, corporations that are owned or controlled by the State and/or exercise State functions are directly subject to the State duty to protect.
52. Expanding the vertical direct effect of European directives,<sup>70</sup> the European Court of Justice (ECJ) held in *Foster* that British gas, at the time a nationalised industry with a monopoly of the gas-supply system in the UK, was an 'organ of the state' for the purpose of the 1976 Equal Treatment Directive. According to the court, the provisions of the directive could be relied on against an organisation or body 'whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals'.<sup>71</sup>
53. In the vast majority of European Member States under analysis, corporations are considered state agents by virtue of state ownership and control, by virtue of exercising public functions, or by virtue of a combination of both. In Germany, for example, legal entities under private law which are wholly state owned are directly bound by Article 1 (3) German Basic Law. In mixed legal entities under private law, only the public shareholder is bound by fundamental rights. In the UK, in contrast, for the Human Rights Act 1998 to apply to private entities, these entities have to satisfy the 'public function test' of s. 6(3)(b) of the Act, according to which a 'public authority' includes any person certain of whose functions are functions of a public nature'. In a recent judgment, the Czech Supreme Administrative Court held that CEZ, a major national energy corporation of which the Czech state holds 2/3 of the shares, is considered a 'public institution' by virtue of the control the state exercises through its voting rights.<sup>72</sup> The Administrative Court employed a 'public institution test' developed by the Czech Constitutional Court considering, among others, the institution's legal status (under

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<sup>68</sup> ECtHR, *Fadeyeva v Russia* (Judgment of 9 June 2005), at paras 89, 92

<sup>69</sup> The SRSG has emphasised on various occasions that the expectation on States to protect human rights against corporate violations is particularly high where there exists a strong nexus between the State and the corporation. As the SRSG notes in his 2010 Report, 'where companies are owned by and/or act as mere state agents, the State itself may be held legally responsible for such entities' wrongful acts', see UN Doc A/HRC/14/27 (9 April 2010), above n 51 at para 27.

<sup>70</sup> Directives are one of the main instruments of harmonization used by the European Union. Generally, directives are not directly effective because they require national implementation. Furthermore, even where they have direct effect, directives could traditionally not be invoked against a private actor, but only against the state.

<sup>71</sup> ECJ, Case C-188/89 A. *Foster and Others v British Gas plc* [1990] ECR I-3313, at para 20

<sup>72</sup> Judgement of the Czech Supreme Administrative Court of 6 October 2009, no 2Ans4/2009-93, available at [www.nssoud.cz](http://www.nssoud.cz)



public/private law), its independence from the state (e.g. state supervision), and its function (public/private).

54. The ECtHR uses a combination of different criteria to determine on a case-by-case basis whether a corporation acted as an agent of the state, including
- the corporation's legal status (under public law / separate legal entity under private law)
  - the rights conferred upon the corporation by virtue of its legal status (e.g. conferral of rights normally reserved to public authorities)
  - institutional independence (including state ownership)
  - operational independence (including *de jure* or *de facto* state supervision and control)
  - the nature of the corporate activity ('public function' or 'ordinary business', including delegation of core state functions to private entities)
  - the context in which the corporate activity is carried out (e.g. relevance of the activity for the public sector, privatised state industries with monopoly position in the market).<sup>73</sup>

**b) The content of the State duty to protect human rights in relation to European corporations**

55. The concrete measures States have to take to prevent human rights violations through the regulation and control of corporate actors are to a certain extent contingent on the Convention rights and freedoms affected. The study focuses on the growing body of ECtHR case-law on corporate human rights violations in the environmental sphere that most commonly involve Article 2, Article 8, and Article 1 Protocol 1.<sup>74</sup> The state duty to prevent corporate human rights violations in the environmental sphere has a substantive and a procedural dimension. Substantively, States are required to regulate and control corporate activities in a way that strikes a fair balance between the rights of those affected by the regulation, and the conflicting interests of the community as a whole. Procedurally, State decisions in relation to corporations that may impact on Convention rights (e.g. licensing and supervision of dangerous activities) must be taken in a transparent and inclusive way that enables States to evaluate in advance the risks involved in the corporate activity.
56. State duties to protect human rights against corporate violations in the environmental sphere that the Court has derived from various Convention rights include:<sup>75</sup>
- duties to adopt reasonable and appropriate measures to regulate and control environmental pollution and nuisance (including the licensing, setting up, operation, security and supervision of dangerous activities),
  - duties to ensure an informed decision-making process that involves investigations, studies, and environmental impact assessments to evaluate in advance the risks and effects of the envisaged activity,
  - duties to provide access to essential information about dangerous activities and, where necessary, to actively inform the public of immanent risks to life or health,

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<sup>73</sup> For a recent example see ECtHR, *Yershova v Russia* (Judgement of 8 April 2010) at paras 55-8.

<sup>74</sup> The growing body of case law in this area has led the Council of Europe to adopt Manual on Human Rights and the Environment in 2005, see 'Manual on human rights and the environment - Principles emerging from the case-law of the European Court of Human Rights' (Council of Europe Publishing: 2006). The Council of Europe currently reconsiders the possibility of drafting an additional protocol to the ECHR on the right to a healthy environment, see Committee of Experts for the Development of Human Rights, 'Relevant Excerpt from the Report of the CDDH's 69<sup>th</sup> Meeting on the Activity concerning Human Rights and the Environment', CoE Doc DH-DEV(2010)03 (26 February 2010)

<sup>75</sup> In addition to the above mentioned cases see ECtHR, *Tatar v Romania* (Judgment of 27 January 2009); *Hatton & Others v United Kingdom* (Grand Chamber Judgment of 7 August 2003); *Guerra v Italy* (Judgment of 19 February 1998); *Lopez Ostra v Spain* (Judgment of 09 December 1994).

- duties to enable public participation in the decision-making process and to ensure that the views of affected individuals are taken into account.

57. In *Öneryildiz*, a case concerning an explosion in a waste-collection site that killed numerous of the applicant's relatives, the Court held that 'the positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.'<sup>76</sup> *Taskin* involved the decision by local authorities to grant a licence to a corporation for the extraction of gold. On appeal by local residents, the Turkish Supreme Administrative Court quashed this decision due to dangers posed to the environment by the use of cyanide in the mine. With considerable delay, the State ordered the closure of the mine, only to authorize the resumption of mining after a number of subsequent developments. Pointing out that Article 8 also applies to cases where the dangerous effects of an activity were determined as part of an environmental impact assessment, the Court reiterates that 'whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect for the interests of the individual as safeguarded by Article 8. It is therefore necessary to consider all the procedural aspects, including the type of policy or decision involved, the extent to which the views of individuals were taken into account throughout the decision-making process, and the procedural safeguards available'.<sup>77</sup>
58. The ECHR furthermore imposes positive duties on States to provide for effective enforcement measures in relation to corporate human rights violations. States are duty-bound to investigate, punish and redress corporate human rights violations when they occur. Most significant in cases involving corporate human rights violations in the environmental sphere is the duty of States to ensure compliance with domestic law, both on the part of State authorities and in relation to private corporations. The characteristic feature of cases such as *Guerra*, *Lopez Ostra*, *Taskin*, *Fadeyeva*, *Öneryildiz* and *Tatar* is that the industrial activities in question were either operated illegally or in violation of environmental laws and emission standards. Such 'domestic irregularities' reduce the State's margin of appreciation<sup>78</sup> and are indicative of a violation of Convention rights.
59. In these circumstances, the ECHR confers rights on victims of human rights violations to have the domestic law enforced against corporate actors, and to have the judgments of national courts upheld. In *Öneryildiz*, the Court considered that the right to life 'entails a duty for the State to ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished'.<sup>79</sup> Where the legislative framework itself is deficient, States can be obliged to introduce new, or amend existing legislation.<sup>80</sup> Administrative authorities must contribute to the 'proper administration of justice' so as not to jeopardize 'the guarantees enjoyed by a litigant during the judicial phase of the proceedings'.<sup>81</sup> Finally, Convention States are duty-bound to organise a system

<sup>76</sup> ECtHR, *Öneryildiz v Turkey* (Judgement of 30 November 2004), at paras 89, 20

<sup>77</sup> ECtHR, *Taskin v Turkey* (Judgment of 10 November 2004) at paras 113, 118

<sup>78</sup> According to the 'margin of appreciation' doctrine, States generally enjoy a certain degree of discretion, subject to European supervision, when taking legislative, administrative, or judicial action in the area of a Convention right.

<sup>79</sup> See *Öneryildiz*, above n 75 at para 91

<sup>80</sup> *X and Y v Netherlands*, above n 65; *Young, James & Webster v United Kingdom* (Judgement of 26 June 1981)

<sup>81</sup> See *Taskin*, above n 76 at paras 124-5

for enforcement of judgments that is effective both in law and practice and ensures enforcement without any undue delay.<sup>82</sup>

60. The ECHR also imposes duties on States in relation to court proceedings between corporations and private individuals. Consistent with the domestic human rights law of the EU Member States under analysis, the ECtHR considers domestic courts (as public authorities) bound by Convention rights when adjudicating private disputes.<sup>83</sup> In *Steel and Morris*, a case concerning fair trial rights under Article 6 ECHR in defamation proceedings brought by a multinational corporation (McDonald's) against NGO campaigners in the UK, the ECtHR held that the State had violated the applicants' rights by not ensuring 'equality of arms' between the opposing sides. According to the Court, 'the disparity between the respective levels of legal assistance enjoyed by the applicant and McDonald's was of such a degree that it could not have failed, in this exceptionally demanding case, to have given rise to unfairness'. The Court also considered that a refusal to grant legal aid can violate Article 6 if it imposes an 'unfair restriction on the applicant's ability to present an effective defence'.<sup>84</sup>

**c) The extraterritorial dimension of the State duty to protect human rights**

61. The ECtHR's case law on the extraterritorial application of the European Convention on Human Rights is informed by an 'essentially territorial notion of jurisdiction' that the Court derives from Art 1 ECHR. While, accordingly, an extraterritorial application of Convention rights constitutes the exception rather than the norm, the Court has given the duty of States to protect human rights 'within their jurisdiction' a broad interpretation that encompasses both instances of direct extraterritorial jurisdiction and domestic measures with extraterritorial implications. As the Court says in *Bankovic*, 'acts of the contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 ECHR'.<sup>85</sup> Put differently, the Convention imposes duties on States to protect human rights against certain violations that are committed and produce effects outside their territory, and against certain violations that are committed inside their territory but produce effects outside their territory.
62. Broadly speaking, four categories of cases with an extraterritorial dimension can be distinguished in the Court's jurisprudence:
- direct extraterritorial jurisdiction involving a State exercising 'effective control' or 'decisive influence' over (a person in) an area outside its territory
  - direct extraterritorial jurisdiction involving (a) activities of diplomatic or consular agents abroad and (b) activities and persons on board aircraft and ships registered in, or flying the flag of, that State
  - domestic measures with extraterritorial implications involving the extradition or expulsion of an individual from a State's territory which may result in serious human rights violations outside the State's territory
  - other domestic measures with extraterritorial implications

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<sup>82</sup> See, for example, *Fuklev v Ukraine* (Judgment of 7 June 2005)

<sup>83</sup> *Pla and Puncernau v Andorra* (Judgment of 13 July 2004)

<sup>84</sup> *Steel and Morris v United Kingdom* (Judgment of 15 February 2005) at paras 59-71

<sup>85</sup> ECtHR, *Bankovic & Others v Belgium & Others* (Admissibility Decision of 12 December 2001) at para 67; for a recent restatement see *Al-Saadoon and Mufdhi v United Kingdom* (Admissibility Decision of 30 June 2009). The Court recently delivered its judgment on the merits; see *Al-Saadoon and Mufdhi v United Kingdom* (Judgement of 02 March 2010).

63. In 'effective control' cases, a State can be held accountable for violation of Convention rights 'of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State'. In *Issa*, the rationale for extending State duties beyond its territory was that 'Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State which it could not perpetrate on its own territory'.<sup>86</sup>
64. In *Ilascu*, the Court applied this doctrine to a case where human rights violations were committed by non-State actors in an area under the control yet outside the territory of the State.<sup>87</sup> The applicants complained of human rights violations committed by a separatist movement in Moldova supported by the Russian Federation. It was accepted by the Court that the area in which the violations took place (Transdniestria) was within the exclusive sovereignty but not under the *de facto* control of Moldova. Considering the responsibility of the Russian Federation for the violations committed by the separatists, the Court reiterated that 'the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage the State's responsibility under the Convention'.<sup>88</sup> Considering that the violations had taken place outside Russian territory, the Court held that they nonetheless came within the State's jurisdiction because the area in question had been 'under the effective authority, or at the very least the decisive influence, of the Russian Federation'.<sup>89</sup> *Ilascu* is furthermore instructive as regards the Court's attempt to ensure an effective protection of human rights in conflict areas. The Court considered that the human rights violations committed by the separatists also came within the jurisdiction of Moldova because 'even if absence of effective control over the Transdniestrian region, Moldova still has positive obligations under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure the applicants the rights guaranteed by the Convention'.<sup>90</sup>
65. The best known examples of violations of Convention rights through domestic measures with extraterritorial implications are cases involving the extradition or expulsion of an individual from the territory of a Convention State that may give rise to serious human rights violations outside the State's territory. Where an extradited person is likely to be subjected to violations of in particular Articles 2 and 3 of the Convention, the State's responsibility is engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its territory.<sup>91</sup> In a similar vein, Convention States 'are obliged to refuse their cooperation' with other States if it emerges that an act of the other State is 'the result of a flagrant denial of justice'.<sup>92</sup>
66. But the Court has also held that States can be in breach of the Convention through the domestic regulation of business activities that violate Convention rights outside the State's territory. In *Kovacic*, Croatian applicants complained that they were prevented by a Slovenian law from withdrawing funds from their accounts in the Croatian branch of a Slovenian bank.

<sup>86</sup> ECtHR, *Issa & Others v Turkey* (Judgment of 16 November 2004), at para 71; see also *Öcalan v Turkey* (Grand Chamber Judgment 12 May 2005)

<sup>87</sup> ECtHR, *Ilascu & Others v Moldova & Russia* (Judgement of 08 July 2004)

<sup>88</sup> *Ibid*, at para 318

<sup>89</sup> *Ibid*, at para 392

<sup>90</sup> *Ibid*, at para 331

<sup>91</sup> ECtHR, *Soering v United Kingdom* (Judgement of 7 July 1989)

<sup>92</sup> ECtHR, *Droz & Janousek v France & Spain* (Judgement of 26 June 1992), at paras 91 & 97

The Court accepted the banking legislation introduced by the Slovenian National Assembly ‘affected’ the applicants’ property rights (Article 1 Protocol 1). ‘This being so, the Court finds that the acts of the Slovenian authorities continue to produce effects, albeit outside Slovenian territory, such that Slovenia’s responsibility under the Convention could be engaged’.<sup>93</sup>

67. It should be noted that under the Court’s current jurisprudence, the State duty to protect human rights against corporate violations that take place or produce effects outside the State’s territory is more limited than the corresponding duty to protect human rights within its own territory. State responsibility for corporate human rights violations committed outside the State’s territory (direct extraterritorial jurisdiction) presupposes the State exercises at least ‘decisive influence’ over (a person in) the area outside its territory. On the logic of *Issa*, the Court may also be prepared to accept State responsibility for extraterritorial corporate human rights violations where the corporate conduct can be directly attributed to the State (corporations acting as State agents).<sup>94</sup> As far as domestic measures with extraterritorial implications are concerned, the Court’s jurisprudence may be taken as an indication that, in cases such as transboundary environmental pollution, Convention States can be liable for failures to regulate corporate activities within their territory that result in human rights violations outside their territory.

## 1.2 European environmental law

68. International environmental law imposes duties on the European Union and its Member States to protect the global environment and the environment of other States from harmful activities of European corporations, and to provide for enforcement mechanisms in relation to corporate violations of environmental law, either through criminal or civil liability regimes.<sup>95</sup> Most European environmental law relevant in this context consists of legislation implementing international treaties to which the European Union and/or its Member States are parties, and of ‘domestic’ European and EU Member State legislation.
69. As a general rule, EU environmental law and EU Member State environmental law do not apply extraterritorially. Both the EU and the Member States mainly rely on domestic measures with extraterritorial implications, that is, they take measures within their territory to protect the environment outside their territory – such as the control of transboundary pollution (e.g. sulphur emissions, ozone depleting substances, or greenhouse gas emissions), or the protection of endangered species and biodiversity. There are exceptions, however, notably regulations implementing the Basel Convention and the Marpol Convention referred to below, both of which apply extraterritorially at sea and within the territory or jurisdiction of other States.
70. International environmental treaties that have been implemented by European law and that are relevant to the protection of the environment in relation to extraterritorial activities of

<sup>93</sup> ECtHR, *Kovacic & Others v Slovenia* (Admissibility Decision of 1 April 2004), at page 34; the case was struck out at the merits stage due to new facts that had come to the Court’s attention.

<sup>94</sup> See *Issa*, above n 85. Indeed, it has been argued that the Court is moving towards a ‘control entails responsibility’ approach to extraterritorial jurisdiction for the purpose of which the scope of State duties to protect Convention rights and freedoms outside their territory is commensurate with their ability to do so, see R. Lawson, ‘Life After Bankovic’: On the Extraterritorial Application of the European Convention on Human Rights’, in F. Coomans and M.T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004), 83-124

<sup>95</sup> Criminal liability is considered in more detail below, section III.3.1. Corporate environmental liability under private international law is considered below, section III.3.3

European corporations include the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention), the 1973 International Convention for the Prevention of Pollution from Ships as modified by 1978 Protocol (Marpol Convention), the 1992 UN Framework Convention on Climate Change (UNFCCC), the 1998 Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention), the 1992 Convention on Biological Diversity (CBD), and the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention).

71. State measures under EU and EU Member State environmental law relevant to the protection of the environment in relation to European corporations operating outside the European Union include regulation and enforcement measures in relation to transboundary environmental pollution (a), and regulation and enforcement measures pertaining to access to environmental information, environmental decision-making, and access to justice in environmental matters (b).

**a) Regulation and enforcement measures in relation to transboundary environmental pollution**

72. The alleged dumping of toxic waste by a European corporation in Ivory Coast considered in section II above illustrates the importance of regulating transboundary environmental pollution by MNCs, and of providing for effective redress mechanisms when such pollution occurs. One prominent example of an international legal regime governing transboundary environmental pollution by corporate actors is the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention). The Basel Convention sets up a system for controlling the export, import and disposal of hazardous wastes to protect human health and the environment in particular in developing countries. It requires States to introduce legislation to prevent and punish corporate conduct that amounts to an illegal traffic in wastes.
73. Both the European Union and the European Member States are parties to the Basel Convention. Regulation (EC) No 1013/2006 on shipments of waste implements the provisions of the Basel Convention regulating transboundary movements of wastes into European law. It also requires Member States to provide for the organisation of checks throughout the entire waste shipment and waste recovery/waste disposal process. The provisions of the Basel Convention relating to enforcement have been implemented by the European Member States into their respective national law.
74. Under the Basel Convention and European implementing legislation, a ‘transboundary movement’ is any movement of hazardous wastes from an area under the national jurisdiction of one State to or through an area under the national jurisdiction of another State, or to or through an area not under the national jurisdiction of any State, provided at least two States are involved in the movement.
75. The Basel Convention imposes duties on the European Union and its Member States to take procedural and substantive measures at the domestic level to control and regulate transboundary movements of waste by European corporations that leads to environmental pollution outside their territory (domestic measures with extraterritorial implications). More specifically, the Basel Convention requires States to prohibit the export or import of hazardous wastes or other wastes to or from a non-party State (Article 2(5)). Moreover, States are obliged to prevent the export of hazardous wastes or other wastes if they have reason to believe that the wastes in question will not be handled in an ‘environmentally sound manner’

(Article 2(e)). ‘Environmentally sound management’ requires ‘taking all practicable steps to ensure that hazardous waste or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes’ (Art 2(8)). More detailed guidance is given in guidelines adopted by the parties.<sup>96</sup> In particular, what is environmentally sound in the country of import can depend on the level of technology and pollution control available in the exporting country. Exporting States cannot escape these obligations by transferring responsibility to the State of transit or import, but retain responsibility for ensuring its proper management at all stages until final disposal, and must permit re-import if necessary. States are furthermore required to have a system for authorising transboundary movements of wastes, to notify authorities in other States of the risks for human health and environment involved in the movements, and to ensure that wastes are packaged, labelled and transported in conformity with international rules.

76. Finally, pursuant to Article 4(3) Basel Convention, ‘the Parties consider that illegal traffic in hazardous wastes or other wastes is criminal’. Article 4(4) requires States to take all appropriate measures to enforce the provisions of the Convention, including the punishment of conduct in contravention of the Convention. Domestic regulation giving effect to Article 4(4) requires Member States to assert direct extraterritorial jurisdiction over the transport of hazardous wastes by corporations, that is, Member States can be required to apply their criminal law to offences committed outside their territory.<sup>97</sup>
77. Another example of regulation that provides for domestic measures with extraterritorial implications to reduce transboundary environmental pollution is the European legal regime governing climate change that has its bases in international, EU, and EU Member State law.<sup>98</sup> The market-based flexibility mechanisms of the Kyoto Protocol encourage developed States to meet part of their legally binding emission reduction commitments by, *inter alia*, facilitating and supporting investment of domestic corporations in industrial projects in third countries that generate emission reductions (the ‘clean development mechanism’ (CDM)).<sup>99</sup>
78. The European Union plays a dominant role in the global carbon market. EU investor parties account for 65% of registered CDM projects. Moreover, Designated Operational Entities in the European Economic Area account for 89% of all CDM projects.<sup>100</sup> Climate change in general and CDM in particular are thus regulatory areas in which the European Union can assert significant influence.

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<sup>96</sup> See in particular the Basel Declaration on Environmentally Sound Management, Decision V/1, *Rept. of 5<sup>th</sup> COP*, UNEP/CHW.5/29 (1999) Annex II; Decision II/13 on Technical Guidelines for the Environmentally Sound Management of Waste, *Rept. of 2<sup>nd</sup> COP*, UNEP/CHW.2/30 (1994); Decision VI/20 on Technical Guidelines for the Environmentally Sound Management of Biomedical and Health-care Wastes; Decision VI/21 on Technical Guidelines for the Identification and Environmentally Sound Management of Plastic Wastes; Decision VI/24 on Technical Guidelines for the Environmentally Sound Management of the Full and Partial Dismantling of Ships, *Rept. of 6<sup>th</sup> COP*, UNEP/CHW.6/40 (2003).

<sup>97</sup> A number of offences created in domestic legislation implementing the Basel Convention relate to corporate conduct within the regulating State, see for example Regulation 5 of the UK Transfrontier Shipment of Waste Regulation 2007.

<sup>98</sup> Most significantly the UN Framework Convention on Climate Change (1992) and its Kyoto Protocol (1997) both of which have been ratified by the EU and all Member States. The Protocol is approved by Decision 2002/358, OJ 2002 L 130/1 which also contains the ‘burden sharing agreement’ between Member States.

<sup>99</sup> Kyoto Protocol, Article 12.

<sup>100</sup> Designated Operational Entities are legal entities that validate and request registration for a proposed CDM project and subsequently verify its emission reductions, see <http://cdm.unfccc.int/DOE/index.html>

79. A condition for State support through CDM is that corporate investments in industrial projects in developing countries contribute to creating sustainable developmental benefits, including reduction of environmental pollution and technology transfer. However, such projects can also have significant negative impacts on human rights and the environment in third countries.<sup>101</sup> Regarding CDM's environmental impacts, a common concern is that projects often fail to create additional emission reductions ('additionality'), or to produce enduring sustainability benefits. A famous example is the widespread crediting (mainly in India and China) of CDM projects that reduce the industrial greenhouse gas HFC 23. Low additionality has created high windfall profits to firms, which in turn has prevented resources from being used more effectively elsewhere.<sup>102</sup>
80. The current CDM practice to credit projects involving gas flaring raises both environmental and human rights concerns.<sup>103</sup> Moreover, while CDM projects can benefit local communities, they often fail to ensure an effective consultation and participation of these communities in the planning phase of the project with detrimental impacts on people and environment.<sup>104</sup> To address these problems, France has introduced legislation that requires participants in certain CDM projects to ensure the effective consultation, due representation and public participation of affected local communities in the third country. Project participants are also under an obligation to provide access to all relevant information, including the environmental impact assessment.<sup>105</sup>

**b) Regulation and enforcement measures pertaining to access to environmental information, environmental decision-making and access to justice in environmental matters**

81. The Aarhus Convention on access to public information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention) has been implemented into European law, and binds EU institutions and bodies,<sup>106</sup> as well as EU Member State public authorities.<sup>107</sup> The broad definition of 'public authority' in Article 2(2) of Directive 2003/4/EC

<sup>101</sup> See generally, C Voigt, 'The Deadlock of the CDM' in BJ Richardson et al, *Climate Law and Developing Countries* (Edward Elgar, 2008)

<sup>102</sup> M. Wara & D. Victor, 'A Realistic Policy on International Carbon Offsets', *PESD Working Paper No. 74* (April 2008); S. Bakker et al, 'Differentiation in the CDM: Options and Impacts', *Report 500102 023 ECN-B-09-009* (May 2009)

<sup>103</sup> See AM0009 for 'Gas Flaring to Pipeline'; AM0037 for 'Gas Flaring to Energy or to Feedstock'

<sup>104</sup> See for example <http://infochangeindia.org/200611046614/Corporate-Responsibility/Features/Indian-tobacco-giant-turns-carbon-philanthropist.html>

<sup>105</sup> *Arrêté du 29 mai 2006 pris pour l'application des articles 3 et 4 du décret n° 2006-622 du 29 mai 2006 pris pour l'application des articles L. 229-20 à L. 229-24 du code de l'environnement et portant transposition de la directive 2004/101/CE du Parlement européen et du Conseil du 27 octobre 2004 modifiant la directive 2003/87/CE établissant un système d'échange de quotas d'émission de gaz à effet de serre dans la Communauté au titre des mécanismes de projet du protocole de Kyoto; Arrêté du 22 mars 2007 complétant les conditions mises à l'agrément des projets de production d'hydroélectricité d'une capacité de production excédant 20 MW et prévues par l'arrêté du 29 mai 2006 pris pour l'application des articles 3 et 4 du décret n° 2006-622 du 29 mai 2006*

<sup>106</sup> Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community Institutions and bodies

<sup>107</sup> Directive 2003/4/EC of the European Parliament and of the Council of January 28 2003 on public access to environmental information and repealing Council Directive 90/313/EEC; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and /61/EC. The provisions of the Aarhus Convention on access to justice have not yet been implemented in the European Member States, see Proposal for a Directive



includes private corporations that perform public administrative functions or provide public services in relation to the environment.

82. Unlike the ECHR, the Aarhus Convention is purely procedural in scope. But it confers enforceable rights quite broadly on 'the public concerned', defined as 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making' (Article 2.5). This also applies to NGOs promoting environmental protection, provided they meet the relevant requirements under national law.
83. The Aarhus Convention has two types of extraterritorial implications. First, it empowers individuals and NGOs inside the European Union to scrutinise decisions of EU institutions and EU Member State public authorities relevant to environmental protection in relation to European corporations operating outside the European Union. Secondly, it confers the same rights on 'the public' outside the European Union 'without discrimination as to citizenship, nationality or domicile' (Article 3.9).<sup>108</sup>
84. The Aarhus Convention contains three different types of rights: rights of access to environmental information held by public authorities, rights to public participation in environmental decision-making, and rights of access to justice in environmental matters. Article 6 Aarhus Convention contains detailed provisions on the environmental information to be made available, including descriptions of the site and the physical and technical characteristics of the proposed activity, of significant effects of the proposed activity on the environment, of measures envisaged to prevent and/or reduce these effects, and an outline of the main alternatives studied by the applicant. As regards public participation, Article 7 Aarhus Convention requires States parties 'to the extent appropriate [to] endeavour to provide opportunities for public participation in preparation of policies relating to the environment'. Under European implementing legislation, EU institutions and EU Member State public authorities are obliged to take the results of the public consultation into account, and to inform the public of the participation process and the final decision reached. European implementing legislation concerning access to information and public participation contains separate provisions making these rights enforceable against European institutions and EU Member State public authorities.
85. Article 9(3) Aarhus Convention requires States to ensure that 'members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons ... which contravene provisions of its national law relating to the environment'. This provision has not been implemented at the EU level. The draft EU Directive implementing the Aarhus provisions on access to justice has not been adopted yet.
86. EU Member State law can also impose enforceable obligations on domestic public authorities and/or private corporations acting as state agents to provide information on extraterritorial environmental impacts of domestic measures and decisions.<sup>109</sup> The German law on access to environmental information (*Umweltinformationsgesetz*) obliges the Ministry of Economics to disclose the climate change impacts of German export credit guarantees, despite the fact that the ultimate responsibility for environmental impacts lay with the corporations profiting from

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of the European Parliament and of the Council on access to justice in environmental matters COM(2003) 624 final.

<sup>108</sup> Directive 2003/4/EC and Directive 2003/35/EC echo the broad scope of Article 3(9) Aarhus Convention by broadly referring to 'the public' as 'one or more natural or legal persons'.

<sup>109</sup> These rights of access to environmental information stem from public law and must be distinguished from reporting requirements of corporations under private law considered below in section III.3.2.

German export guarantees.<sup>110</sup> In the CEZ judgement considered above,<sup>111</sup> the Czech Supreme Administrative Court held that being a ‘public institution’, the energy corporation was under a duty to provide access to information in accordance with the Czech Act on Free Access to Information. Given that Article 17 s. (2) of the Czech Charter of Fundamental Rights and Freedoms guarantees a right to information to ‘everyone’, it appears that it could also be used by foreign citizens against any State-owned Czech corporation to obtain information regarding its activities outside the Czech Republic.

87. Environmental impact assessments (EIAs) constitute another procedural tool to prevent corporate violations of environmental law through assessing in advance the likely environmental effects of certain projects and activities carried out by private entities. EIAs are fundamental to any regulatory system which seeks to identify environmental risks, and integrate environmental concerns into public decision-making, development projects, and the promotion of sustainable development. The European Union and the EU Member States are parties to the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention). Moreover, the European Union has regulated environmental impact assessments in a twofold way, through the Council Directive on the mandatory assessment of the effects of certain public and private projects on the environment (EIA Directive),<sup>112</sup> and through Regulation (EC) No 1221/2009 which provides a voluntary framework for the Community eco-management and audit scheme (EMAS Regulation).<sup>113</sup>
88. Article 1(vii) Espoo Convention gives a broad definition of ‘environmental impacts’ that encompasses ‘any effect caused by a proposed activity on the environment including human health and safety, flora, fauna, soil, air, water ...’ and ‘effects on cultural heritage or socio-economic conditions resulting from alterations to those factors’. The EIA Directive applies to projects that are likely to have significant effects on the environment and obliges EU Member States to ensure that, among others, the environmental impacts of projects of private corporations are assessed prior to granting authorization (Article 2). The provisions of the EIA Directive on public participation and access to justice in environmental matters are aligned to those of the Aarhus Convention. The EMAS Regulation, in contrast, encourages organisations, irrespective of their public or private ownership or legal form, to assess and improve their environmental performance in exchange for registration of such organisations and their use of the EMAS logo for communication and advertising purposes. While the EIA Directive thus imposes duties on Member States to assess the environmental impacts of projects conducted by private corporations, the EMAS Regulation obliges corporations that decide to participate in the scheme to assess their environmental impacts, including adopting an environmental management system, carrying out environmental auditing and preparing an environmental statement (Article 3 EMAS Regulation).
89. The Espoo Convention and the EMAS Regulation have implications for extraterritorial environmental protection in relation to European corporations. The Espoo Convention requires the assessment of ‘transboundary impacts’ that are caused by a proposed activity within an EU Member State that materialise outside the EU Member State, including impacts of a ‘global

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<sup>110</sup> Decision of Administrative Court Berlin, VG 10 A 215.04, available at [www.climatelaw.org/media/2006Feb03/](http://www.climatelaw.org/media/2006Feb03/)

<sup>111</sup> See above, III.1.1

<sup>112</sup> Directive 85/337 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 97/11 and Directive 2003/35

<sup>113</sup> Regulation (EC) No 1221/2009 of the European Parliament and of the Council of November 2009 on the voluntary participation by organisations in a Community eco-management and audit system (EMAS), repealing Regulation (EC) No 761/2001 and Commission Decisions 2001/681/EC and 2006/193/EC

nature' (Article 1(viii)). The EMAS Regulation provides for Member States to assess and control environmental impacts of European corporations operating outside the European Union that result from the corporation's interaction with third parties and that the corporation can influence to a reasonable degree (Article 2(7)). This includes the environmental performance and practice of contractors, subcontractors and suppliers. In addition, Member States 'may' provide competent bodies with responsibility for registration of corporations located outside the EU (Article 11(1)).

90. While Articles 1 & 2 EIA Directive do not delimit the territorial scope of 'environmental impacts' to be assessed, Article 7 specifies that the Directive only requires cooperation among EU Member States in the assessment of transboundary impacts on other EU Member States. Cooperation with third countries is currently outside the scope of the Directive. However, and equally significant for environmental protection in relation to European corporations operating outside the European Union, the EU has used cooperation and association agreements with third countries to promote the use of environmental impact assessments inspired by the EIA Directive within these countries.<sup>114</sup>

### **1.3 Lessons for the European Union and the EU Member States**

91. The existing European legal framework imposes significant duties on the European Union and the EU Member States to protect human rights and the environment in relation to European corporations operating outside the European Union. These duties encompass procedural measures to ensure inclusive, informed and transparent decision-making, substantive measures to regulate and control corporate activities relevant to human rights and environmental protection outside the European Union, and enforcement measures to investigate, punish and redress violations when they occur. Under some legal regimes, such as the ECHR, failure to comply with these duties can make States directly liable for corporate violations of human rights and environmental law.
92. While the ECHR is a comparatively advanced system of human rights protection against extraterritorial corporate abuse, it is still far from providing clear and unequivocal guidance for States to fully appreciate their human rights obligations, and to avoid liability for human rights violations. Yet the procedural and substantive standards of protection developed in the jurisprudence of the ECtHR could serve as a basis for the European Union and its Member States to further clarify and develop normative standards on business and human rights. Such normative standards could feed into, for example, the new Commission's CSR policy and the EU Member State business and human rights strategies.<sup>115</sup> They could provide guidance to different EU and EU Member State public authorities and agencies that directly interact with business, thus reducing existing legal and policy incoherence. Furthermore, they could clarify what States expect from corporations as regards their responsibility to respect human rights (2<sup>nd</sup> pillar of the UN Framework). One potential forum to negotiate and formulate such normative standards, and to monitor their compliance, could be the Council of Europe.<sup>116</sup> The Council of Europe would commend itself not only because it is the umbrella organisation of the ECHR, but also because

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<sup>114</sup> See, for example, Article 111 of the Stabilisation and Association Agreement with Montenegro (2007); Article 50 of the Palestine Euro-Mediterranean Agreement (1997); Article 45 of the Interim Agreement with Lebanon on trade and trade-related matters (2002); Article 5 of the Framework Agreement with South Korea for Trade and Corporation (2001); Article 5(1) of the Cooperation Agreement with Bangladesh (2001).

<sup>115</sup> See above, section II.1

<sup>116</sup> The SRSG has suggested that (regional) international human rights bodies can play an important role in clarifying the obligations of States to protect human rights in relation to corporate actors, see Report of the SRSG, 'A Framework for Business and Human Rights', UN Doc A/HRC/8/5 (7 April 2008), at para 43

normative standards developed under its authority would ensure the greatest possible level of inclusiveness in Europe. The normative standards could for example take the form of a CoE Committee of Ministers Recommendation that, while not legally binding, would reflect a common position endorsed by all Convention States, thus sending a strong and affirmative message to States and corporations both within and outside the European Union.

93. Existing State duties, even if properly understood, implemented and complied with, will often fall short of ensuring an effective protection of human rights and the environment in relation to European corporations operating outside the European Union, and there are considerable opportunities for the European Union and its Member States to improve the existing legal framework at the international, EU and EU Member State level.
94. Both the ECHR and EU and EU Member State regulation implementing the Basel Convention are examples of legal regimes that provide for assertions of direct extraterritorial jurisdiction and domestic measures with extraterritorial implications to protect human rights and the environment against corporate abuse. However, the European Union and its Member States not always make full use of existing legal opportunities under international law to protect human rights and the environment in relation to European corporations operating outside the European Union. One example are the provisions of the Aarhus Convention on access to justice, including Article 9(3) that is directly tailored to private actors, that have not (yet) been implemented into EU Member State law. In line with the Espoo Convention, the European Union could also consider extending the scope of the EIA Directive to include the assessment of transboundary environmental impacts beyond its borders. Moreover, and from a legal perspective, there is nothing to prevent States, through multilateral agreements, from extending human rights and environmental protection to extraterritorial corporate abuses not yet covered by international legal regimes.<sup>117</sup>
95. Research conducted in preparation of this study has shown strong links between corporate environmental abuses and human rights violations. As the examples of oil spills and gas flaring in Nigeria and dumping of toxic waste in Ivory Coast considered in part II indicate, a State's failure to protect the environment against corporate abuse will often also affect people's human rights. Other examples include lead pollution originating from toxic substances allegedly exported by a European corporation to Chile and water pollution allegedly caused by a European brewery in China. Most recently, the European Center for Constitutional and Human Rights (ECCHR) has filed a criminal complaint against two executive employees of a European corporation for allegedly flooding 30 villages, displacing over 4.700 families and destroying their livelihood in the course of constructing a dam in Northern Sudan.<sup>118</sup>
96. A case recently considered by the UK National Contact Point (NCP) under the OECD Guidelines for Multinational Enterprises illustrates the importance of procedural safeguards in the intersection of environmental and human rights protection where a third State allegedly applied lower standards than provided for under general international law. In 2004, a UK-based MNC and its Indian subsidiary obtained permission to clear a large section of forests and construct a bauxite mine in India.<sup>119</sup> The Indian Supreme Court eventually approved the forest

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<sup>117</sup> As the SRSG stressed in one of his early reports, 'there are no inherent conceptual barriers to states deciding to hold corporations directly responsible, either by extraterritorial application of domestic law to the operations of their own firms, or by establishing some form of international jurisdiction', see 'Interim Report of the SRSG', UN Doc E/CN.4/2006/97 (22 February 2006), at para 65

<sup>118</sup> See <http://www.ecchr.eu/lahmeyer-case.html>; the corporation has rejected the accusations.

<sup>119</sup> For the corporation's view and statements see <http://www.vedantaresources.com/sustainable-development.aspx>

clearance and the construction of the mine after the corporation had adopted a rehabilitation program for the affected area. Subsequently, a complaint was brought before the UK NCP alleging that the operation of the bauxite mine and supporting infrastructure had serious adverse effects on the environment and the local indigenous community. In spite of the decision of the Indian Supreme Court, the NCP found that the corporation had failed to respect the rights of the indigenous community ‘consistent with India’s commitments under various international instruments, including the UN International Covenant on Civil and Political Rights, the UN Convention on the Elimination of All Forms of Racial Discrimination, the Convention on Biological Diversity and the UN Declaration on the Rights of Indigenous Peoples’.<sup>120</sup> In particular, the NCP considered that the corporation had failed to put in place an adequate and timely consultation mechanism to engage with the indigenous community, and to conduct a satisfactory human and indigenous rights impact assessment. The NCP’s follow-up statement gives little indication that the corporation will implement the NCP’s recommendations.<sup>121</sup>

97. An effective protection of the environment against corporate abuse can contribute to reducing the risk of serious corporate human rights violations. The Reports of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights have repeatedly stressed the significance of the Basel Convention for protecting human rights in third countries.<sup>122</sup> At the same time, a number of human rights encompass an environmental dimension, and have been employed to protect individuals against environmental pollution and damages by corporations. The ECtHR has used, in particular, Article 2, Article 8 and Article 1 Protocol 1 ECHR to introduce environmental protection into its human rights jurisprudence. It has incorporated procedural standards of protection from the Aarhus Convention, and has found States in breach of Convention rights for not having conducted proper environmental impact assessments of mining projects run by private corporations.<sup>123</sup>
98. To give effect to the jurisprudence of the ECtHR and to enhance synergies between environmental and human rights protection in relation to European corporations operating outside the European Union, the EU and the EU Member States could explore possibilities to integrate human rights protection more systematically into existing legal tools and regulation protecting the environment. In the area of climate change law, this could consist of strengthening procedural safeguards to protect local communities in relation to corporations involved in CDM projects, including consultation, public participation, and environmental impact and sustainability impact assessments. Both the EIA Directive and the EMAS Regulation, in their current formulation, allow for the protection of certain human rights. EU environmental policy inherently targets human health protection and the EIA Directive requires, amongst others, the assessment of impacts on ‘human beings’ (Article 3). Implementing legislation in the EU Member States includes the assessment of cultural and socio-economic impacts (e.g. Poland & Czech Republic), and environmental impacts on the population as a whole (Germany). In addition, the existing legal obligation to consult potentially affected individuals allows for the consideration of human rights implications of proposed developments that may not be specifically covered by the text of the EIA Directive. The EMAS Regulation allows evaluating

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<sup>120</sup> See UK NCP, *Vedanta*, above n 37 at para 67; on the OECD Guidelines see also further below, section III.2.3

<sup>121</sup> See UK NCP, *Vedanta Follow Up Statement*, above n 37; see also the recent report by Amnesty International, ‘Don’t mine us out of existence: Bauxite mine and refinery devastate lives in India’ (20 January 2010).

<sup>122</sup> See UN Doc A/HRC/9/22 (13 August 2008) and UN Doc A/HRC/12/26 (15 July 2009), above n 9

<sup>123</sup> See ECtHR, *Tatar v Romania*, above n 74; *Taskin v Turkey*, above n 76

human rights impacts of European corporations operating outside the European Union through consideration of ‘the importance to stakeholders and employees of the organization’ (Annex I, para. 2(v)). The potential for including human rights considerations in the EIA Directive and the EMAS Regulation could be made more explicit and further developed. In particular, the use of the EIA Directive to assess human rights impacts would avoid creating new legal instruments and imposing parallel administrative burdens on the Member States. Possibilities to increase the take-up of EMAS by European corporations operating in third countries, and to promote the use of human rights-inclusive EIAs in third countries, could be explored with States that have concluded with the EU Association or other agreements containing environmental cooperation clauses. This could also provide the basis for a targeted cooperation on the operationalisation of the UN Framework, initiating a transparent and participatory process with third country governments and stakeholders, with a view to monitoring the conduct of European corporations abroad.

99. Finally, while outside the mandate of the current study, research conducted in its preparation has indicated that considerable obstacles to protect human rights and the environment against corporate violations also persist within the European Union, including the ‘old’ and the ‘new’ Member States. Some cases of alleged corporate abuse within the European Union resemble those found in countries outside the European Union. Others, such as human rights violations allegedly committed in immigration detention centres run by private corporations exercising State powers, are more specifically ‘European’ or ‘Western’ and reveal persisting legal uncertainty as regards the delimitation of responsibility and accountability between the State and the private sector. The credibility (and legitimacy) of the EU in promoting human rights in relation to corporations operating outside its borders is dependent on its ability to prevent and redress corporate abuses within its own borders. It is therefore suggested that the European Union pays at least equal attention to violations of human rights and environmental law committed by corporations within the European Union.

## **2. European human rights and environmental protection through trade law, investment rules, and related regulatory regimes**

100. States can promote human rights and environmental protection through trade law, investment rules, and related regulatory regimes by either defining the regulatory environment in which corporations operate outside the European Union, or by regulating corporate conduct within the European Union with extraterritorial implications. Such measures can be taken either unilaterally through domestic regulation, or pursuant to international agreements. One example is bilateral investment treaties (BITs) that consist of agreements between States on the reciprocal encouragement, promotion and protection of investments in each other’s territory by corporations based in either country. BITs can require States outside the European Union to protect human rights and the environment against corporate abuse within their territories. Another example would be restrictions imposed on trade in certain goods harmful to human rights and the environment that prevent European corporations from exporting or importing these goods from or to the European Union. Finally, an example of a more indirect form of State regulation is public procurement and export credit guarantee schemes that make the conveyance of State investments, contracts and benefits contingent on a corporation’s human rights and environmental performance.
101. Unlike human rights and environmental law considered in the previous section, the primary purpose of trade law and investment rules is not to protect human rights and the environment but, respectively, to liberalise trade and to promote foreign investment. These objectives do not necessarily conflict with human rights and environmental protection. Rather, both the

promotion of foreign investment and the liberalisation of international trade can contribute to more efficient and productive economies in which individuals enjoy a better standard of living and governments have greater resources at their disposal to protect human rights and the environment. For example, investment promotion rules can attract capital and know-how necessary to develop technologies and infrastructure. Liberalising trade can contribute to enhancing welfare and to creating employment and sustainable development, both globally and within each of the participating countries.<sup>124</sup>

102. However, trade law and investment rules can also have significant negative impacts on human rights and environmental protection in countries outside the European Union. Trade liberalisation can lead to unemployment of workers in inefficient industries, and may encourage a race to the bottom in terms of labour and environmental standards amongst countries keen to enhance the competitiveness of local industries. Increased production caused by trade liberalisation and foreign investment can have negative impacts on the environment and local communities, for example through the use of certain methods to produce goods (e.g. deforestation or carbon-intense industries) or transport them (e.g. so-called 'food miles'). And regulation of foreign investment backed up by compulsory arbitration regimes may insulate European corporations from complying with new bona fide human rights and environmental legislation introduced in the third country, or entitle them to seek compensation from the third country.
103. Understanding how regulating trade and investment affects the human rights and environmental impacts of European corporations operating outside the European Union is thus crucial for States to implement their duty to protect. However, because State measures in these areas are primarily geared towards liberalising trade and promoting foreign investment, States often do not (fully) realise or utilise their potential to protect human rights and the environment through trade law, investment rules, and related legal measures. This can lead, as the SRSG has repeatedly stressed, to substantial legal and policy incoherence and gaps in protecting human rights and the environment, which often entail significant negative consequences for victims, corporations and States themselves.

## **2.1 European human rights and environmental protection through trade law**

104. Trade law can be an important tool in promoting human rights and environmental objectives. The following overview focuses on EU border measures to protect human rights and the environment outside the European Union. Border measures include quantitative restrictions (quotas, embargoes, and licensing) and tariffs (i.e. custom duties).
105. However, the discretion of the EU and EU Member States to use trade measures to protect human rights and the environment against extraterritorial corporate abuse is restricted by their participation in the WTO. All EU Member States, and the EU itself, are WTO Members, and subject to WTO obligations. Due to the division of competences within the EU, the EU (via the Commission) acts for the EU in all WTO matters, including on those matters in which the Member States have not transferred full competence to the EU. The EU also assumes responsibility for Member State acts within the WTO.<sup>125</sup>

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<sup>124</sup> The Preamble to the Agreement establishing the World Trade Organisation (WTO) commits WTO members to conducting international trade with a view to, amongst others, raising standards of living, ensuring full employment, promoting sustainable development, and seeking to protect and preserve the environment.

<sup>125</sup> This means, for example, that challenges to EU Member State legislation will be defended by the EU. For example, the EU has defended a French ban on cement containing asbestos fibres, see WTO Appellate Body

106. As a general rule, WTO law prohibits quantitative restrictions but allows tariffs, so long as they do not exceed negotiated levels and do not discriminate between WTO Members.<sup>126</sup> Yet, there are exceptions to these rules which allow WTO Members to restrict or regulate trade in order to protect public morals, human, plant and animal health and welfare, and to conserve exhaustible natural resources. But in order to do so, WTO Members must meet stringent conditions. In particular, the General Agreement on Tariffs and Trade (GATT) imposes significant constraints on their power to regulate trade if the object of protection is located outside their territory. Whether and to what extent WTO law allows the EU to use trade measures to protect human rights and the environment outside the European Union cannot be answered dogmatically but must be decided on a case-by-case basis.
107. The WTO Appellate Body's decision in *US – Shrimp* demonstrates the obstacles for States to use trade measures to protect human rights and the environment.<sup>127</sup> In order to be justified under WTO law, trade measures must be non-discriminatory, and, in principle, they must be the least trade-restrictive alternative available to achieve a legitimate aim. Trade measures to protect human rights and the environment are more likely to satisfy the requirements of WTO law if they are the product of multilateral agreements. An example would be the ban on exports and imports of hazardous waste under the Basel Convention considered in section III.1.2.
108. There are two main ways in which the European Union can employ border measures to protect human rights and the environment against corporate abuse outside its territory: trade restrictions that prevent corporations from exporting or importing goods harmful to human rights and the environment (a); and conditions imposed upon preferential trade under free trade agreements and preference regimes that aim at ensuring human rights and environmental protection in third countries in which European corporations operate (b).
- a) Import and Export Bans based on international agreements and unilateral EU regulation**
109. A number of international treaties that have been implemented by European law require States to ban trade in certain goods harmful to human rights and the environment. Examples include the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and the 1998 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. In the vast majority of cases, these international treaties and implementing European legislation require the European Union and its Member States to prevent corporations from exporting or importing goods from or into their territories (domestic measures with extraterritorial implications).
110. The EU can also restrict trade on a unilateral basis to protect essential security interests in time of war or other emergency, or in relation to nuclear or military matters. The EU has used this provision in the past to justify measures with a human rights dimension, for example in the Balkan conflicts of the early 1990s. WTO law also allows trade sanctions required by the UN Security Council under Chapter VII of the UN Charter. Both the EU and EU Member States

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Report, *European Communities – Measures Affecting Asbestos and Asbestos-containing Products*, WT/DS135/AB/R, adopted 6 November 1998.

<sup>126</sup> Special rules apply to tariffs for developing countries and least developed countries.

<sup>127</sup> WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12 October 1998)



have implemented sanctions of this type.<sup>128</sup> Trade measures required by other international treaties or other UN organs can be authorized in the WTO by a special waiver if they are supported by three-fourth of the WTO membership.

111. An example of an import and export ban authorised by a WTO waiver is the European regulation implementing the Kimberley Process certification scheme for trade in 'conflict' diamonds.<sup>129</sup> The Kimberley Process (KP) is a multilateral initiative to prevent trade in diamonds that finance conflict. The initiative was welcomed by a United Nations General Assembly Resolution, and a certification scheme was adopted in 2003 following negotiations between governments, the international diamond industry and civil society groups. The KP requires participating parties to issue certificates accompanying diamonds, to ensure that imports and exports of diamonds are consistent with the KP, and that trade in diamonds is limited to other parties to the KP. Implementation is monitored through visits, annual reports and exchange of statistical data. European implementing legislation provides that whenever the KP conditions for the import or export of rough diamonds are not met, the competent EU Member State authorities have to detain the shipment. Moreover, all Member States are to determine dissuasive sanctions in their domestic law that are capable of preventing those responsible for an infringement from obtaining any economic benefit from their action.
112. The EU has also unilaterally imposed border measures to protect human rights and the environment that were neither security-related nor required or endorsed by UN organs. The EU ban on the import of seal skins<sup>130</sup> and Regulation (EEC) No 3254/91 that bans fur and fur products from countries permitting trapping methods which do not meet international humane trapping standards<sup>131</sup> are two examples in the environmental sphere. Council Regulation (EC) No 1236/2005 that gives effect, *inter alia*, to the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibits the import and export of goods which have no practical use other than for the purpose of capital punishment or for the purpose of torture and other cruel, inhuman or degrading treatment or punishment.<sup>132</sup> Finally, the EU has imposed country-specific trade restrictions, such as on exports to Zimbabwe that could be used for internal repression.<sup>133</sup>

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<sup>128</sup> For the former see European Commission, 'Restrictive measures (sanctions) in force', [http://ec.europa.eu/external\\_relations/cfsp/sanctions/docs/measures\\_en.pdf](http://ec.europa.eu/external_relations/cfsp/sanctions/docs/measures_en.pdf) and I. Cameron, *Respecting Human Rights and Fundamental Freedoms and EU/UN Sanctions: State of Play* (Brussels: European Parliament, 2008). For the latter see, for example, *Somalia (United Nations Sanctions) Order 2002, implementing Security Council Resolution No. 1425 of 22nd July 1992*.

<sup>129</sup> Council Regulation (EC) No 2368/2002 implementing the Kimberley Process certification scheme for the international trade in rough diamonds (20 December 2002); the WTO waiver was given by WTO GC Decisions WT/L/518 and WT/L/676.

<sup>130</sup> Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 19 September 2009 on trade in seal products; Canada and Norway have referred this import ban to the WTO for a decision.

<sup>131</sup> Council Regulation (EEC) No 3254/91 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards (4 November 1991)

<sup>132</sup> Council Regulation (EC) No 1236/2005 of June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment

<sup>133</sup> Council Regulation (EC) No 314/2004 of February 2004 concerning certain restrictive measures in respect of Zimbabwe

**b) Preferential trade under EU free trade agreements and EU Tariff Preference Regimes**

113. Most free trade agreements concluded between the EU and third countries contain provisions specifically authorizing trade restrictions for the protection of human rights. Since the early 1990s, these agreements contain 'human rights clauses' under which either party may take 'appropriate measures' if the other party fails to comply with human rights obligations and democratic principles. Such measures have been imposed by the EU on a number of occasions, though in practice they have taken the form of suspensions of financial aid rather than restrictions on trade in goods or services.<sup>134</sup>
114. In its trade agreements, the EU seeks to create a framework for cooperation, transparency and dialogue with partners as an effective means of promoting social and environmental standards. EU trade policy seeks to ensure the ratification and effective implementation of the ILO core labour standards, including the two ILO conventions on child labour. Additionally, the EU also seeks to promote the wider ILO Decent Work Agenda and the 2008 ILO Declaration on Social Justice. The EU applies a similar approach in Partnership and Cooperation Agreements (PCAs) under negotiation.<sup>135</sup> Adequate monitoring mechanisms and a role for civil society, not least trade unions are important.
115. The more recent free trade agreement with Korea and EU-Cariforum Economic Partnership agreement are examples of the EU approach to sustainable development, including social and environmental issues, in trade agreements. The parties commit to respecting, promoting and realising core labour rights, and to effectively implementing other ILO Conventions and multilateral environmental agreements to which they are parties 'to ensure that foreign direct investment is not encouraged by lowering domestic environmental, labour or occupational health and safety legislation and standards or by relaxing core labour standards or laws aimed at protecting and promoting cultural diversity'.
116. Noteworthy is Article 72 EU-Cariforum agreement that stipulates wide-ranging State duties to control the social, labour and environmental impact of corporate foreign investment:

The EC Party and the Signatory CARIFORUM States shall cooperate and take, within their own respective territories, such measures as may be necessary, *inter alia*, through domestic legislation, to ensure that:

- (a) Investors be forbidden from, and held liable for, offering, promising or giving any undue pecuniary or other advantage, whether directly or through intermediaries, to any public official ... in order to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relation to the investment
- (b) Investors act in accordance with core labour standards as required by the International Labour Organisation (ILO) Declaration on Fundamental Principles and Rights at Work 1998, to which the EC Party and the Signatory CARIFORUM States are parties
- (c) Investors do not manage or operate their investments in a manner that circumvents international environmental or labour obligations arising from agreements to which the EC Party and the Signatory CARIFORUM States are parties
- (d) Investors establish and maintain, where appropriate, local community liaison processes, especially in projects involving extensive natural resource-based activities, in so far as they do not nullify or impair the benefits accruing to the other Party under the terms of a specific commitment.

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<sup>134</sup> On these clauses, see L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford: OUP, 2005).

<sup>135</sup> Most recently the negotiations for the Partnership and Cooperation Agreements with Southeast Asian countries

Moreover, Article 13(6) of the EU-Korea agreement states that '[t]he Parties shall strive to facilitate and promote trade and foreign direct investment in environmental goods and services, including environmental technologies, sustainable renewable energy, energy efficient products and services and eco-labelled goods, including addressing related non-tariff barriers'. In particular, '[t]he Parties shall strive to facilitate and promote trade in goods that contribute to sustainable development, including goods that are the subject of schemes such as fair and ethical trade and those involving corporate social responsibility and accountability'.

117. Enforcement mechanisms provided for in these agreements do not rely on traditional trade sanctions but entitle State parties to resort to consultative procedures. The agreements build a framework for cooperation and dialogue on labour related issues, thus allowing for enhanced engagement. An important aspect of this framework is the involvement of civil society and in particular trade unions to review the implementation of the labour related commitments of the agreement.
118. The more recent trade agreements also further develop Trade Sustainability Impact Assessments (SIAs) that the EU began to conduct in the late 1990s. SIAs assess impacts of trade agreements on third countries prior to their conclusion. They currently focus on nine core sustainability indicators: real income, fixed capital formation, employment, biodiversity, environmental quality, natural resource stocks, poverty, equity and health and education. Thus far, SIAs do not have an explicit human rights focus. The innovation of both the EU-Korea agreement and the EU-Cariforum agreement are that they mandate a further SIA in the implementation phase of the agreement. For this purpose, a civil society consultation mechanism is established to foster 'dialogue and cooperation between representatives of organisations of civil society, including the academic community, and social and economic partners. Such dialogue and cooperation shall encompass all economic, social and environmental aspects of the relations between the [parties]'.
119. An example of innovative EU regulation to protect the environment through trade-related measures is the Forest Law Enforcement, Governance and Trade Scheme (FLEGT). FLEGT builds on a Council Regulation allowing for the control of the entry of timber to the EU from countries entering into bilateral Voluntary Partnership Agreements (VPAs) with the EU.<sup>136</sup> Voluntary Partnership Agreements include commitments and action from both parties to halt trade in illegal timber, and set up a licensing scheme to verify the legality of the timber. These agreements also promote an effective enforcement of forest and forest-related law, and an inclusive approach involving civil society and the private sector. Within these frameworks, compliance with the domestic law of the third State 'as set out in the VPA' can play a critical role in encouraging corporate compliance with environmental, human rights and labour standards in the forest sector.<sup>137</sup> While participation in the FLEGT scheme is voluntary, the EU does not permit imports of timber products exported from countries participating in FLEGT unless the shipment is covered by a FLEGT licence. At the same time, corporations exporting timber from third countries participating in FLEGT can have comparative advantages in the European market. A number of EU Member States have adopted green public procurement policies requiring timber and timber products to be from legal and sustainable sources.

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<sup>136</sup> Council Regulation (EC) No 2173/2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community.

<sup>137</sup> The VPA signed with Ghana, for instance, includes in the definition of legal harvest (Annex II), as agreed with local stakeholders, compliance with national forest legislation, social responsibility agreements, relevant cultural norms, and occupational and health safety legislation, see Voluntary Partnership Agreement between the European Community and the Republic of Ghana on Forest Law Enforcement, Governance and Trade in Timber Products into the Community (20 November 2009)

Moreover, a number of EU private sector timber trade federations have made commitments through their Codes of Conducts to eliminate illegally harvested timber from their supply chains, and several major banks have put policies in place to ensure clients are not associated with illegal logging activities.<sup>138</sup> To complement the FLEGT Scheme, the European Commission has proposed a Regulation that, once adopted, will impose due diligence and risk assessment obligations on corporations ('operators') placing timber products into the European market to ensure that the timber was legally harvested in the country of origin. The Regulation will cover raw timber and wood products like furniture and floorboards. It will also provide for fines and sanctions for corporations who fail to comply. The Regulation will apply to all timber products originating from countries not participating in FLEGT.<sup>139</sup>

120. A final category of border measures to influence the protection of human rights and the environment in third countries is the EU's tariff preferences regimes.<sup>140</sup> The most significant of these is the EU's Generalized Scheme of Preferences (GSP) for developing countries.<sup>141</sup> GSP offers developing countries a reduction in customs duties for some of their products entering the European market, amongst others with the aim of encouraging human rights protection and sustainable development in these countries. The EU reserves the right to withdraw GSP preferences in the event that a beneficiary developing country commits, amongst others, serious and systematic violations of certain UN/ILO conventions on human and labour rights. GSP preferences have been withdrawn from Myanmar and Belarus for violations of ILO labour rights.<sup>142</sup>
121. Additional GSP+ preferences are granted to 'vulnerable countries' (as defined by the Regulation) that have ratified and effectively implemented the listed human rights and environmental conventions, and that undertake to continue applying these conventions and accept that their implementation will be regularly monitored. Also GSP+ preferences can be withdrawn if third countries fail to meet the conditions of the scheme, as in the case of Venezuela in 2009 for failing to ratify the UN Convention Against Corruption, and in the case of Sri Lanka in February 2010.<sup>143</sup> Finally, the instrument under which the EU grants trade

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<sup>138</sup> See <http://ec.europa.eu/environment/forests/flegt.htm>

<sup>139</sup> Proposal for a Regulation of the European Parliament and the Council laying down the obligations of operators who place timber and timber products on the market 2008/0198 (COD). On 16 June 2010 the European Parliament, the Spanish EU Presidency and the European Commission reached an agreement on the final text of the Regulation that now has to be formally endorsed by the Parliament. The Regulation is expected to enter into force in 2012.

<sup>140</sup> GSP preferences are regulated by the WTO Enabling Clause, which requires GSP donor countries, such as the EU, not to discriminate between developing countries in their GSP programs (special rules apply for preferences for least developed countries). However, GSP donor countries may grant additional preferences to certain different developing countries so long as those preferences are a 'positive response' to a specific 'development, financial [or] trade need'. It is not certain that the negative conditionality in the EU's GSP and GSP+ schemes, nor even the positive conditionality in its GSP+ scheme, meet these conditions.

<sup>141</sup> Council Regulation (EC) No 732/2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 100/2006 and (EC) No 964/2007

<sup>142</sup> Myanmar and Belarus are currently subject to a temporary withdrawal of GSP preferences as a result of serious and systematic labour rights violations, see Council Regulation (EC) No 552/97 of 24 March 1997 temporarily withdrawing access to generalized tariff preferences from the Union of Myanmar, and Council Regulation (EC) No 1933/2006 of December 21 2006 withdrawing access to the generalised tariff preferences from the Republic of Belarus.

<sup>143</sup> See Commission Decision of 11 June 2009 (EC) No 454/2009; Implementing Regulation (EU) No 143/2010 of the Council of 15 February 2010 temporarily withdrawing the special incentive arrangement for sustainable development and good governance provide for under Regulation (EC) No 732/2008 with respect to the Democratic Socialist Republic of Sri Lanka.

preference to certain other countries, including certain Balkan States and Moldova, also requires compliance with human rights and environmental standards.

## **2.2 European human rights and environmental protection through investment rules**

122. Similarly to trade law, the EU and its Member States can protect human rights and the environment against extraterritorial corporate abuse through investment rules by way of domestic measures with extraterritorial implications and by way of international agreements. Regarding domestic measures with extraterritorial implications, EU and EU Member State promotion of investments by European corporations can be tied to the corporations' human rights and environmental performance outside the European Union. Measures to support investments by European corporations outside the European Union include promotion services, financial and fiscal incentives, and insurance mechanisms (a). Socially responsible investment inside the European Union can also contribute to avoiding corporate human rights and environmental abuses abroad (b). International agreements between the EU and third States, such as the EU-Cariforum agreement considered above, can oblige those States to protect human rights and the environment against corporate abuses within their territory. The most prominent example of international agreements regulating investment by European corporations outside the European Union is bilateral investment treaties (c).

### **a) Promotion services, financial and fiscal incentives, and insurance mechanisms supporting investment of European corporations outside the European Union**

123. Promotion services provided by the EU and EU Member States to assist European corporations investing in countries outside the European Union include advisory services, matchmaking, business planning assistance, financial structuring advice, and information about investment opportunities. Financial and fiscal incentives consist of grants, loans, and equity participation, as well as tax exemptions, tax deferrals, and tax credits. Insurance mechanisms are mechanisms offering coverage of political and other non-commercial risk not normally included under conventional, private insurance policies.

124. The EU and its Member States can use promotion services, financial and fiscal incentives, and insurance mechanisms to discourage negative human rights and environmental impacts of European corporations operating outside the European Union by scrutinising the potential adverse human rights and environmental impacts of proposed projects in third countries, and by emphasising investment opportunities with higher human rights and environmental benefits. Moreover, they can prioritise projects that expressly assess their human rights and environmental impacts, or limit promotion services, financial and fiscal incentives, and insurance mechanisms to projects that address human rights and environmental concerns.

125. The European Investment Bank (EIB), the European Union's long-term lending institution, contributes to the EU's external cooperation and development policies through the granting of loans. For example, EIB lending in Asia and Latin America (ALA) focuses on environmental sustainability, in particular climate change mitigation, and on strengthening the EU's presence in ALA through supporting EU development and cooperation programmes, foreign direct investment and technology and know-how transfers.<sup>144</sup> The EIB recognizes, at least in principle, the importance of integrating environmental and social concerns into its business activities. The Bank 'should foster sustainable economic and social development of

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<sup>144</sup> See also Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financial instrument for development cooperation

[developing countries, and respect for] human rights and fundamental freedoms'.<sup>145</sup> Moreover, the Bank seeks 'value added through the careful selection, appraisal, monitoring and evaluation of investment projects and programmes' and 'recognises the role that financial institutions can play to promote more ethical and sustainable investments through their respective activities'.<sup>146</sup> In some cases, the Bank has been criticised for supporting projects that allegedly did not comply with these standards.<sup>147</sup>

126. Human rights and environmental concerns play at best an indirect role in the provision of services aimed at promoting corporate investment outside the EU. For example, the UK FCO Toolkit on Business and Human Rights<sup>148</sup> provides guidance to UK officials in overseas missions on how to promote good corporate conduct of UK business operating outside the European Union. However, the Toolkit emphasizes that 'the UK does not owe legal obligations to ensure that UK companies comply with UK human rights standards overseas'. Among the measures suggested by the Toolkit are hosting seminars with business to address issues of corporate responsibility and share best practices, liaising with local human rights organizations, and raising awareness of the UK National Contact Point established under the OECD Guidelines for Multinational Enterprises ('OECD Guidelines'). In the Netherlands, corporations wishing to be represented in overseas trade missions must show that they do not use child labour in their supply chains.
127. While most Member States provide financial and fiscal incentives to businesses investing abroad, only a few, amongst them Germany, the Netherlands and the UK, take human rights and environmental impacts directly into account. The UK Export Credit Guarantee Department (ECGD) provides *inter alia* guarantees to lending banks in respect of loans these banks have granted to UK corporations investing outside the European Union. One of the objectives of the ECGD is to ensure that its activities accord with other Government objectives, including sustainable development, human rights, and good governance.<sup>149</sup> In Germany, the *Deutsche Investitions- und Entwicklungsgesellschaft* (DEG) and *KfW IPEX-Bank GmbH* (KfW IPEX), two subsidiaries of the German Credit Bank for Reconstruction (CBR) provide different kinds of financial incentives for investments abroad, including equity capital, mezzanine finance, long-term loans and guarantees. Both banks have adopted environmental and social guidelines. KfW IPEX takes the 'safeguard policies' of the World Bank as a yardstick for avoiding or alleviating negative social impacts. Supported projects must also 'comply with the environmental standards of the host country or other relevant laws'. The DEG does not provide financial support to projects that may involve 'forced or child labour' or that raise 'substantial environmental concerns' (radioactive waste, hazardous substances etc.).

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<sup>145</sup> Decision No 633/2009/EC of the European Parliament and of the Council of 13 July 2009 granting a Community guarantee to the European Investment Bank against losses under loans and loan guarantees for projects outside the Community, July 2009. See Case C 155/07 *Parliament v Council* (6 November 2008), where the European Court of Justice (ECJ) had emphasized that the EIB is bound into the development cooperation objectives of Article 177 EC, including fostering sustainable development, developing and consolidating democracy and the rule of law, respecting human rights and fundamental freedoms.

<sup>146</sup> EIB Group Statement on Corporate Social Responsibility (2005); In 2006, the EIB also published a Environmental and Social Practices Handbook that provides advice on planning and managing the environmental and social appraisal and monitoring, see EIB *Environmental and Social Practices Handbook* (2006, amended in 2010).

<sup>147</sup> See C Wright *EIB—Promoting Sustainable Development, "Where Appropriate"* (Prague, 2007)

<sup>148</sup> Available at <http://www.fco.gov.uk/resources/en/pdf/3849543/bus-human-rights-tool.pdf>

<sup>149</sup> The ECGD 2000 Business Principles state that 'ECGD will, when considering support, look not only at the payment risks but also at the underlying quality of the project, including its environmental, social and human rights impacts'. The ECGD applies a case impact analysis process to identify and assess the environmental, social and human rights impacts of projects which seek its support.

128. The relevance of corporate human rights and environmental impacts for the provision of insurance mechanisms differs from Member State to Member State. For example, the UK ECGD, which provides overseas investment insurance (OII) in the UK, does not require compliance with human rights and environmental standards but simply encourages companies to adopt multilateral corporate responsibility standards (such as the OECD Guidelines).<sup>150</sup> In Germany, every request for investment insurance is submitted to an environmental impact assessment, including screening, reviewing and monitoring steps. Moreover, corporations are required to respect the OECD Guidelines, although it is unclear whether this constitutes a contractual requirement. The French COFACE, the Polish KUKE and the Slovene SID condition the provision of political risk insurance on corporate compliance with the environmental and social standards of the OECD Recommendations for Environment and Export Credit ('OECD Recommendations'). The Czech Export Guarantee and Insurance Corporation (EGAP) requires an assessment of the environmental impacts of the investment project in the host country. EGAP states that all its procedures are in compliance with effective international rules on environmental protection. In particular, review of environmental impacts in the country of final destination is one of the basic conditions for insuring investment.<sup>151</sup> The Italian SACE has adopted guidelines on the basis of the OECD Recommendations. SACE commits to assess the environmental and social impacts of its activities, as well as of the activities of corporations it insures. In line with the OECD Recommendations, SACE has also adopted a policy of disclosure of environmental impact assessments prior to and after the concession of the insurance.
129. Critics argue that the actual impact of human rights and environmental considerations on decisions to provide financial incentives and insurance mechanisms is relatively low. In 2008, the UK Parliament's Environmental Audit Committee recommended that the ECGD improve its due diligence processes, increase disclosure and transparency, and revise its assessment procedure with regard to sustainable development and environmental impacts of supported projects.<sup>152</sup> In its 2009 Report, the UK Joint Committee on Human Rights questioned whether the ECGD's Business Principles, that guide the assessment of business impacts on human rights, had any impact on its decisions. It considered that the assessment process should follow more open and accountable procedures and, failing that, that the Business Principles should be incorporated into the ECGD's statutory framework.<sup>153</sup> Civil society organisations contend that the UK government's recent change of the ECGD's Business principles effectively lowers the applicable human rights standards, arguably including children's rights and the prohibition of forced labour.<sup>154</sup> In Italy, the *Campagna per la Riforma della Banca Mondiale* (CRBM) has in particular criticized the lack of transparency in SACE's procedures aimed at

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<sup>150</sup> In its detailed guide to OII, the ECGD states that 'in examining all applications, the ECGD must have regard to wider UK government policy. The government encourages companies to adopt the OECD Guidelines for Multinational Enterprises', see ECGD, *Guide to OII* (2009)

<sup>151</sup> See <http://www.egap.cz/zivotni-prostredi/vliv-vyvozu-a-investic/index-en.php>.

<sup>152</sup> House of Commons Environmental Audit Committee, 'Pre-Budget Report 2008: Green fiscal policy in a recession', Third Report of Session 2008-9 (10 March 2009)

<sup>153</sup> UK Joint Committee, above n 25 at para 247; most recently, a coalition of NGOs has strongly criticised a proposed revision of ECGD's Business Principles, see Joint NGO Response to ECGD Consultation (March 2010)

<sup>154</sup> See Export Credits Guarantee Department, 'Final Response published on the business principles consultation' (1 April 2010), available with further documentation on the ECGD's website, <http://www.ecgd.gov.uk/news-and-events/news/fin-resp-bus-princi-cons>. The policy change has been heavily criticised by civil society organisations, see and Letter of the Institute for Human Rights and Business to Lord Peter Mandelson of 30 March 2010, available at [http://www.institutehrb.org/pdf/Peter\\_Mandelson\\_Letter.pdf](http://www.institutehrb.org/pdf/Peter_Mandelson_Letter.pdf); M. Peel, 'Activists fight child labour policy reversal', FT.com (13 April 2010)

including environmental and social considerations in the concession of political risk insurance.<sup>155</sup>

130. In a recent speech addressing the OECD's Export Credit Group that currently considers the revision of the OECD Common Approaches, the SRSB has suggested four measures to better integrate human rights into export credit guarantee schemes.<sup>156</sup> First, the Common Approaches should clearly acknowledge the critical role of human rights in the social sustainability of enterprises and markets, and explicitly recognise the role of Export Credit Agencies (ECAs) in fostering the corporate responsibility to respect human rights. Secondly, the OECD should consider creating a human rights working group to develop tools for ECAs suitable to carry out human rights due diligence, and to help build the necessary knowledge base and competence of ECAs. Thirdly, to better manage and prevent non-financial and financial risks of corporate human rights abuses, ECAs should conduct human rights due diligence, and require where possible human rights due diligence of project sponsors. Finally, risk of conflict indicators should be incorporated into the Common Approaches to avoid ECA clients operating in or near conflict-affected areas to get drawn into egregious human rights violations.

**b) Socially responsible investment inside the European Union to discourage corporate human rights and environmental abuses outside the European Union**

131. The EU and its Member States can foster compliance of European corporations with human rights and environmental standards outside the European Union through encouraging and/or regulating socially responsible investment (SRI) in these corporations within the European Union. The majority of EU Member States, amongst them Austria, Belgium, France, the Netherlands, Spain, Sweden and the UK, have governmental SRI initiatives that range from 'soft law' instruments (campaigns, partnerships, economic incentives etc) to mandatory legal regulation.<sup>157</sup>
132. Belgium's regulation prohibits the financing of any Belgian or foreign corporation that produces, uses, repairs, offers, sells, distributes, imports, exports or stocks anti-personnel mines and cluster munitions. The law applies to any Belgian investor (including citizens, banks, investment funds and insurance companies registered or domiciled in Belgium) and encompasses the granting of loans, credits and bank guarantees to such corporations, as well as the acquiring of shares, notes or obligations issued by such corporations.
133. The Belgian occupational pension law, Swedish 2000 Public Pension Funds Act (2000), the French law on the generalisation of Employee Savings Plans (2001) and the UK Occupational Pension Schemes Amendment Regulations (1999) require their respective national pension and saving funds to disclose whether and to what extent social, environmental and ethical impacts of investments were taken into account.<sup>158</sup> In the UK, this disclosure requirement has had significant impacts on CSR policies of both pension funds and corporations in which these

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<sup>155</sup> See <http://www.crbm.org/modules.php?name=browse&mode=page&cntid=230>.

<sup>156</sup> Remarks by SRSB John Ruggie, 'Engaging Export Credit Agencies in Respecting Human Rights', OECD Expert Credit Group's "Common Approaches" Meeting (Paris, 23 June 2010)

<sup>157</sup> For an overview see A. Steurer, S. Margula & A. Martinuzzi, 'Socially Responsible Investment in EU Member States: Overview of government initiatives and SRI experts' expectations towards governments', Final Report to the EU High-Level Group on CSR (April 2008)

<sup>158</sup> See further European Commission, 'Corporate Social Responsibility: National Public Policies in the European Union' (7 May 2008)



pension funds invest.<sup>159</sup> Moreover, information on negative human rights and environmental impacts of European corporations operating abroad made available through disclosure or otherwise may lead public and private investors to withdraw funds from such corporations. For example, in the case of bauxite mining in India considered in section III.1.3, various public and private investors across Europe have ceased investing in the corporation for alleged human rights and environmental abuses.<sup>160</sup>

134. A slightly different question is whether public authorities are required to control or prevent investments of EU Member State-owned banks in corporations that are involved in corporate human rights and environmental abuses outside the European Union. In two recent applications for judicial review, several NGOs argued that the UK Treasury was duty-bound to require nationalised banks not to support ventures or businesses that might be harmful to human rights and the environment abroad. One case concerned investment in a US power generating corporation whose activities are believed to have contributed to exacerbating the conflict between Uganda and the Democratic Republic of Congo, as well as to human rights and environmental abuses. The other case concerns the bank's investment in corporate mining activities in India that allegedly violate human rights and environmental law.<sup>161</sup> In the first case, the NGOs alleged that according to the 'Green Book', which sets out guidelines for decision-making in central government, the Treasury erred in not going beyond a purely 'commercial approach' in its policy formulation vis-à-vis the bank. In particular, the Treasury should have included extraterritorial human rights and environmental impacts into its costs/benefits assessment. While the judge accepted that such impacts had to be taken into account, he stressed that they had to be reconciled with the primary objective of the Treasury's policy identified in the Green Book, namely to preserve the stability of the UK financial system. Accordingly, the Treasury was only obliged to assert its influence over the bank if human rights and environmental implications of foreign investments were such as to negatively impact on the value of the bank and its shares. In the second case, which is still pending, the NGOs have *inter alia* submitted that a provision in the 2006 UK Company Act that obliges Directors to 'have regard' to, amongst others, 'the impact of the company's operations on the community and the environment' requires the UK Treasury to give stronger consideration to human rights and environmental concerns when exercising its oversight functions over the bank.<sup>162</sup>
135. Even if the legal obligation of States to control or prevent investments of State-owned banks in projects detrimental to human rights and environmental protection abroad remains unsettled, the financial and non-financial risks of such investments, including adverse human rights and environmental impacts in the third country and reputational and political implications in the EU Member State, can be considerable. An example is the financing by a consortium of international banks led by a German State-owned bank of a major crude oil pipeline in Ecuador (*Oleoducto de Crudos Pesados*). The pipeline traverses seven national parks and protected areas, including a World Bank Global Environmental Facility Biodiversity Reserve. It was alleged that serious human rights violations were committed during the construction of the pipeline, including the jailing and ill-treatment of demonstrators. People living in vicinity of the pipeline allegedly lost access to fresh water supply. It appears that the MNC violated its

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<sup>159</sup> See D. McBarnett, 'Corporate social responsibility beyond law, through law, for law: the new corporate accountability', in D. McBarnett, A. Voiculescu & T. Campbell (eds), *The New Corporate Accountability* (Cambridge, 2009) 9-58

<sup>160</sup> See B. Jagger, 'The Battle with Vedanta is not over yet', *The Guardian* (18 February 2010)

<sup>161</sup> For the background of this case see above, section III.1.3

<sup>162</sup> UK Companies Act 2006, section 172 para 1(d); on directors duties under corporate law see below, section III.3.2

contractual obligations towards the financing banks to comply with the World Bank Group's social and environmental safeguard policies. In particular, the pipeline's long-term impacts on ecologically and culturally sensitive areas had not been accurately assessed or disclosed due to major shortcomings in the pipeline's environmental impact assessment.<sup>163</sup> It was reported that public outrage prompted German parliamentarians to criticise the loan, and the investing bank to publicly reaffirm that compliance with the World Bank environmental guidelines was an 'indispensable condition for any financial engagement' in the building of the pipeline.<sup>164</sup> Nevertheless, while the pipeline started its operation in 2003, there were no known legal ramifications arising from the alleged violations. In 2009, a rupture in the pipeline polluted parts of the Amazon jungle and a large river in what was reported to be one of Ecuador's biggest oil spills in years.<sup>165</sup>

### c) **Bilateral Investment Treaties**

136. Bilateral investment treaties (BITs) between the EU/EU Member States and developing countries primarily serve to encourage and protect foreign investment. The Lisbon Treaty has endowed the European Union with an exclusive competence on foreign direct investment as part of its commercial policy.<sup>166</sup>
137. BITs usually contain investment protection guarantees which in practice can restrict the ability of third States to regulate and control negative human rights and environmental impacts of European corporations investing in their countries.<sup>167</sup> While most protection guarantees in BITs are contingent on the corporation's compliance with the domestic law of the third State, they do not normally require compliance with human rights and environmental norms provided for by international law. Moreover, protection guarantees can limit the ability of third countries to adopt new bona fide regulatory measures (such as environmental standards) or modify previous measures (such as privatization programs or concession agreements), as these measures may be perceived by foreign investors as violations, for example, of the non-discrimination principle, the fair and equitable treatment principle or the guarantees against expropriation.
138. European corporations can normally resort to legally binding arbitration to enforce investment protection guarantees against the State in which they operate. Protection guarantees are usually worded in very general, open-ended terms and thus subject to broad interpretation by arbitral tribunals. As a consequence, the extent to which third States can protect human rights and the environment in relation to European corporations investing in their countries is often influenced by how arbitration tribunals interpret these guarantees. This can result in considerable legal uncertainty, including for the European corporations involved, and may

<sup>163</sup> See Robert Goodland, *Independent Compliance Assessment of OCP with the World Bank's Environmental and Social Policies* (9 September 2002). Amongst others, the report identifies the following shortcomings: failure to ensure the selection of the least impact route; failure to evaluate the sectoral, regional, and cumulative impacts of the pipeline; failure to identify and quantify impacts on the natural habitat; failure to minimise habitat loss and identify offsets; failure to garner adequate public participation and consultation of affected people; failure to analyse impacts on vulnerable ethnic minorities and Afro-Ecuadorians, and to provide for an indigenous peoples' development plan; failure to provide for a resettlement plan and policy; failure to address pervasive complaints with compensation procedures, including the lack of any offer of land for land in lieu of cash compensation; violations of basic principles of international EIA practice by assessing significant social and environmental impacts only after construction had commenced.

<sup>164</sup> See [http://www.rainforestinfo.org.au/ocp/background\\_files/ocp\\_ecuad.html](http://www.rainforestinfo.org.au/ocp/background_files/ocp_ecuad.html)

<sup>165</sup> See <http://www.reuters.com/article/idUSN2629678120090227>

<sup>166</sup> See above, section II.4

<sup>167</sup> For a recent example see UN Doc A/HRC/14/27 (9 April 2010), above n 51 at paras 20-24

curtail the third State's legitimate policy space to prevent negative corporate impacts on human rights and the environment.

139. For example, a broad reading of the 'in like circumstances' or 'in like situations' component of the national treatment standard can reduce third States' ability to introduce regulatory or fiscal differentiations justified on the basis of promoting/protecting human rights and the environment.<sup>168</sup> Moreover, regulatory measures designed to protect the environment have in some cases been treated by arbitrators as expropriation of property requiring compensation.<sup>169</sup> Finally, changes in domestic human rights and environmental law may be interpreted as a denial of 'fair and equitable treatment' if the tribunal finds that such changes frustrate legitimate expectations, lack transparency, or disregard due process,<sup>170</sup> or as a failure to maintain a stable legal and business environment.<sup>171</sup> Faced with such constraints, some States may simply shy away from better regulating and controlling negative human rights and environmental impacts of European corporations investing in their countries.
140. Some of the more recent BITs are drafted to avoid such harmful outcomes, provided the regulatory measures are non-discriminatory. For example, the United States model BIT provides more detailed definitions of the fair and equitable treatment standard (Annex A) and the concept of indirect expropriation (Annex B). General exception clauses may allow contracting parties to take measures in violation of the underlying protection guarantees if aimed at a set of public policy goals (which may include the protection of public morals, environment, public health, etc).<sup>172</sup> Article 224 of the EC-Cariforum Agreement contains such a general exception clause:
1. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where like conditions prevail, or a disguised restriction on trade in goods, services or establishment, nothing in this Agreement shall be construed to prevent the adoption or enforcement by the EC Party, the CARIFORUM States or a Signatory CARIFORUM State of measures which:
    - (a) are necessary to protect public security and public morals [including measures necessary to combat child labour] or to maintain public order;
    - (b) are necessary to protect human, animal or plant life or health;
    - (c) are necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including relating to (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts ...
141. Finally, express provisions can require contracting State parties to ensure that their legislation provides for high levels of human rights and environmental protection,<sup>173</sup> or to ensure that their domestic legislation, including environmental and social legislation, is effectively enforced. For example, Article 4 of the North American Agreement on Labour Cooperation (NAALC) requires each State party to ensure that persons with a legally recognised interest

<sup>168</sup> See *Occidental v Ecuador* (Award of 1 July 2004)

<sup>169</sup> See, for example, *Metalclad Corporation v United Mexican States*, ICSID No ARB(AF)/97/1 (2000); *SD Myers Inc v Canada*, UNCITRAL Partial Award (2000); *Methanex Corporation v United States of America*, UNCITRAL Final Award (2005). However, it should be noted that in these cases the measures concerned were also discriminatory or unnecessary. Accordingly, they should not be read as restricting bona fide and reasonable measures of environmental protection.

<sup>170</sup> *Metalclad Corporation v United Mexican States*, above n 148; *Emilio Agustin Maffezini v The Kingdom of Spain*, ICSID No ARB/97/7 (2000); *CME Czech Republic B.V v The Czech Republic*, UNCITRAL Partial Award (2001)

<sup>171</sup> See *CMS v Argentina* (Award of 12 May 2005)

<sup>172</sup> See Article XX GATT

<sup>173</sup> See, for example, Article 3, North American Agreement on Environmental Cooperation (NAAEC)

under its law have appropriate access to administrative, quasi-judicial, judicial or labour tribunals for the enforcement of the State's labour law. Moreover, 'each Party's law shall ensure that such persons may have recourse to, as appropriate, procedures by which rights arising under (1) its labour law, including in respect of occupational safety and health, employment standards, industrial relations and migrant workers, and (2) collective agreements can be enforced'.

### **2.3 European human rights and environmental protection through other regulatory regimes related to trade and investment**

142. Similarly to the EMAS Regulation considered in section III.1.2, EU and EU Member State labelling schemes encourage European corporations voluntarily participating in such schemes to control and avoid negative human rights and environmental impacts of their third country subsidiaries and suppliers. Labelling schemes are regulated through domestic (EU/EU Member State) legislation that requires participating corporations to provide accurate, non-deceptive information to consumers about the human rights and environmental impacts of production methods employed by their third-country subsidiaries and suppliers.<sup>174</sup> They thus constitute a particular type of domestic (parent-based) regulation with extraterritorial implications. While they do not pose particular problems from the perspective of extraterritoriality, they may require justification under the WTO.<sup>175</sup>
143. The EU voluntary ecolabel award scheme promotes goods with a reduced environmental impact during their entire life cycle by allowing corporations to place a logo on products that meet the standards of the scheme. The recently revised EU Ecolabel Regulation gives Member States influence over activities of participating corporations outside the European Union as it applies to any goods or services supplied for distribution, consumption or use in the EU market (Article 2), including imported goods (Articles 3(2) and 9(c)).<sup>176</sup> The Regulation also creates an entry point for taking human rights impacts into account as it includes, 'where appropriate', consideration of 'social and ethical aspects, by making reference to related international conventions and agreements such as relevant ILO standards and codes of conduct (Article 6(3)(e)). Similar labelling schemes exist in most EU Member States.<sup>177</sup>
144. One way to sanction corporate non-compliance with requirements of labelling schemes in which they participate, and more broadly with provisions on consumer protection within the EU relating to corporate abuses of human rights and the environment outside the EU, is through the medium of existing rules dealing with commercial practices and misleading advertising. The EC Unfair Commercial Practices Directive<sup>178</sup> prohibits unfair commercial practices, including practices that are contrary to the requirements of professional diligence and practices that (are likely to) materially distort the economic behaviour of customers (Article 5). Article 6(1) lists misleading actions covered by the Directive, including false or

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<sup>174</sup> Private labelling schemes are not considered in this study.

<sup>175</sup> If labelling initiatives pertaining to 'product characteristics' amount to regulations of imports into the European Union, they can come under the scope of the WTO; where this is the case, they must be justified in accordance with WTO rules.

<sup>176</sup> Regulation (EC) No 66/2010 of the European Parliament and of the Council on the EU Ecolabel (25 November 2009)

<sup>177</sup> Austria, Belgium, Czech Republic, Germany, Luxembourg, the Netherlands, Poland, Sweden and the UK use labels for ecologically produced products including environmentally sound tourism and environmentally sound clothing. The Danish Social Index, the Irish label for human resource development and the Italian 'lavoro etico' are examples of social quality labels.

<sup>178</sup> Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (11 May 2005)

deceiving information on the method of manufacture or provision of the product. Pursuant to Article 6(2), a commercial practice is considered misleading if the trader does not comply with commitments contained in codes of conduct, provided that the trader's commitment is firm and capable of being verified and the trader indicates in a commercial practice that he is bound by the Code. The 'blacklist' of commercial practices contained in Annex I of the Directive includes claims by a corporation that a product 'has been approved, endorsed or authored by a public authority or private body ... without complying with the terms of the approval, endorsement or authorisation'. The 2009 Directive on injunctions for the protection of consumers' interests<sup>179</sup> entitles 'qualified entities', including independent public bodies and consumer protection organisations, to apply for court injunctions terminating or prohibiting, amongst others, unfair commercial practices. The directive also provides for summary procedures and fines in case of non-compliance.

145. A recent example of a successful legal challenge in the context of misleading advertisement and unfair competition is a case brought by several NGOs and the Hamburg Customer Protection Agency against a German-based MNC that had falsely advertised its products as 'fair trade'.<sup>180</sup> In its advertisements, the MNC had promised its customers to ensure fair labour conditions and human rights standards in its textile supplier plants in Bangladesh. NGO investigations instead revealed unacceptable working conditions, including excessive overtime with scarce compensation, payroll deductions as punishment, prohibition of trade unions, and discrimination against female workers. The Court held that the MNC had to cease advertising with worldwide fair working conditions, as well as with its membership in the Business Social Compliance Initiative.
146. Public procurement provides another opportunity for the European Union and its Member States to protect human rights and the environment in relation to European corporations operating outside the European Union. In particular, public procurement can set standards that apply also to third country subsidiaries and suppliers, thus penetrating the whole production chain. An example would be the taking into consideration of FLEGT licences by EU Member States that have adopted a green procurement policy.<sup>181</sup> As with labelling schemes, while the extraterritorial implications of domestic EU/EU Member State public procurement do not pose particular problems from a legal perspective, certain measures may require justification under the WTO.<sup>182</sup>
147. In 2001, the European Commission published two interpretative communications on the possibilities of integrating social and environmental considerations into public procurement, followed by a handbook on green public procurement (GPP) in 2004.<sup>183</sup> Rather than

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<sup>179</sup> Directive 2009/22/EC of the European Parliament and of the Council on injunctions for the protection of consumers' interests (23 April 2009)

<sup>180</sup> See <http://www.ecchr.de/lidl-case.html>

<sup>181</sup> See above, section III.2.1

<sup>182</sup> The WTO Government Procurement Agreement (GPA) only applies to EU/EU Member State procurement policies in relation to third countries that are also parties to this Agreement (at present 13 countries outside the EU). Moreover, GPA does not apply to all types of public procurement, and contains various general and security-related exceptions. Where GPA applies, public procurement aimed at protection human rights and the environment against corporate abuse in third countries must be justified under the WTO. In this context, it should be noted that the EU itself has in the past commenced WTO proceedings against the United States concerning a Massachusetts law prohibiting government procurement from companies that invested in Burma, see WT/DS88. The proceedings were discontinued after the US legislation had been found unconstitutional on domestic law grounds.

<sup>183</sup> Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, COM(2001) 566 final (15

incorporating specific requirements to pursue social and environmental objectives into EU procurement law (with binding effect on the EU Member States), these initiatives aimed at clarifying the scope for Member State public procurement under existing EU law to take social and environmental considerations into account. The interpretative communication on social considerations makes reference to fundamental rights, non-discrimination, labour rights, and national and Community legislation applicable in the social field. The Handbook on green procurement suggests the use of ecolabels as a means of proof of compliance with the technical specifications of a tender, or as a benchmark against which offers are assessed at the award stage. In 2008, the Commission issued a Communication on 'public procurement for a better environment' that proposed the definition EU-wide common GPP criteria, the development of tools for more and better public procurement, and the implementation of these criteria and tools through national GPP strategies and increased cooperation.<sup>184</sup> In its 2008 Council Conclusions, the Environmental Council of the European Union endorsed a Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan proposed by the European Commission, underlining that the current fragmentation of incentives in the internal market should be reduced by setting common, non-binding GPP modalities that could serve as a reference for public procurement.<sup>185</sup> On this basis, the European Member States have drawn up National Action Plans for greening their public procurement.<sup>186</sup> The European Commission is currently preparing an updated handbook for public officials on how to integrate social considerations into public procurement.

148. Most EU Member States, including Belgium, Denmark, France, Germany, Poland and the United Kingdom have adopted either GPP or sustainable public procurement rules that take social, ecological and environmental aspects into account.<sup>187</sup> Section 46 of the 2009 Climate Change (Scotland) Act imposes duties on public bodies to report on how their procurement policies and activities have contributed to deliver the climate change abatement targets provided for in the Act. The Netherlands' criteria for sustainable public procurement include respect for international human rights standards. Both Belgium and the UK have published guidance on procurement for domestic public authorities. While the UK Government Sustainable Procurement Action Plan considers 'green' rights, it does not deal with human rights more generally, nor does it explicitly consider extraterritorial implications. In Germany and Italy, regional and local public authorities have also adopted procurement policies that include environmental and social criteria.
149. Another important international regulatory regime to protect human rights, labour rights and the environment against corporate abuse that was originally developed in the investment

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October 2001); Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating environmental considerations into public procurement, COM(2001) 274 final (04 July 2001); the handbook is available at

[http://ec.europa.eu/environment/gpp/pdf/buying\\_green\\_handbook\\_en.pdf](http://ec.europa.eu/environment/gpp/pdf/buying_green_handbook_en.pdf)

<sup>184</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public Procurement for a better Environment, COM(2008) 400 final (16.07.2008)

<sup>185</sup> See Communication from the Commission, 'Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan' COM(2008) 397 (16 July 2008); (Environmental) Council of the European Union, 'Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan – Council Conclusions' (5 December 2008)

<sup>186</sup> A detailed overview of EU Member State GPP policies and guidelines is available at [http://ec.europa.eu/environment/gpp/pdf/national\\_gpp\\_strategies\\_en.pdf](http://ec.europa.eu/environment/gpp/pdf/national_gpp_strategies_en.pdf)

<sup>187</sup> See, for example, <http://www.guidedesachatsdurables.be/>; <http://www.skovognatur.dk/common/404.htm>; <http://www.developpement-durable.gouv.fr/>; <http://www.cpet.org.uk/uk-government-timber-procurement-policy>; <http://www.umweltbundesamt.de/produkte/beschaffung/>

nexus is the OECD Guidelines for Multinational Enterprises (OECD Guidelines).<sup>188</sup> The OECD Guidelines, which are currently under review, stipulate legally non-binding standards of human rights and environmental protection, including sustainable development and core labour standards. Countries adhering to the OECD Guidelines are required to set up National Contact Points (NCPs) that raise awareness of the Guidelines and contribute to the resolution of disputes arising from their implementation. The update process of the OECD Guidelines specifically considers the inclusion of a dedicated chapter or standards on business and human rights.

150. The scope of the OECD Guidelines is not constrained by 'hard law' rules on jurisdiction under public or private international law. The Guidelines primarily apply to corporations operating in or from the territory of adhering States. However, failure to ensure that suppliers and subcontractors in third countries have complied with the Guidelines can also amount to a violation. This can benefit individual victims of corporate human rights and environmental abuses committed outside the European Union, but it also contributes to the consolidation and further development of international standards of human rights and environmental protection in relation to MNCs. One example is the case of bauxite mining in India considered in section III.1.3, in which the NCP held that the corporation was bound to respect international human rights law protecting indigenous communities, despite the fact that the Indian Supreme Court had approved the mining activities under domestic Indian law. Another example is a complaint recently considered by the UK NCP in which it was alleged that a European corporation had paid taxes to rebel forces in the Democratic Republic of Congo (DRC), and had practiced insufficient due diligence on their supply chains, sourcing minerals from mines that used child and forced labour working under unacceptable health and safety conditions.<sup>189</sup> Although the European corporation did not actively operate in the DRC, the NCP decided that it had sufficiently strong links with corporations in the country for it to ensure that its suppliers were complying with the relevant provisions of the Guidelines. In particular, the NCP considered that the European corporation had failed to apply sufficient due diligence to its supply chain, and to take adequate steps to contribute to the abolition of child and forced labour in the mines. The NCP's focus on the actual control the European corporation exercised over its third-country suppliers, rather than on the formal legal relationship between them, considerably strengthens the human rights and environmental standards enshrined in the OECD Guidelines in relation to third-country suppliers of European corporations. As Backer says, 'the supply chain governance rules, especially as applied against Afrimex, suggest the emergence of a new set of enterprise liability norms in which regulatory responsibility becomes the foundation for regulation of the legal relationships between unrelated companies'.<sup>190</sup>
151. In his submission to the OECD Roundtable on Corporate Responsibility, the SRSG has suggested that a human rights chapter should be added to the OECD Guidelines.<sup>191</sup> The revised OECD Guidelines should stress the duty of States under the 1<sup>st</sup> pillar of the UN Framework to ensure that the aims of the Guidelines are achieved, and reflect the elements of the 2<sup>nd</sup> pillar

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<sup>188</sup> See <http://www.oecd.org/dataoecd/56/36/1922428.pdf>; at present, there is only scant reference to human rights in the OECD Guidelines. Paragraph 2 of the General Policies calls on enterprises to 'respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments'.

<sup>189</sup> UK NCP Final Statement *Afrimex*, above n 37

<sup>190</sup> L. C. Backer, 'Small steps towards an autonomous transnational legal system for the regulation of multinational corporations', 10 *Melbourne Journal of International Law* (2009) 258, at 300

<sup>191</sup> Submission of the SRSG to the 10<sup>th</sup> OECD Roundtable on Corporate Responsibility, 'Updating the Guidelines for Multinational Enterprises Discussion Paper' (Paris, 30 June 2010)

of the UN Framework (corporate responsibility to respect), including a recognition that the corporate responsibility to respect encompasses the whole spectrum of rights, an affirmation of human rights due diligence as the appropriate response by business enterprises to managing the risks of infringing the rights of others, specific guidance for corporations to manage human rights risks in their supply chains, and, in accordance with the terms of reference for the Guidelines' update, the incorporation of relevant disclosure standards.

152. Virtually all EU Member States adhere to the OECD Guidelines and have established NCPs, whose institutional independence and effectiveness however vary from Member State to Member State. Most EU Member State NCPs are situated in government departments which, as the SRSg has pointed out, can lead to conflicts of interest in particular if the department is tasked with promoting business, trade and investment.<sup>192</sup> NCPs can also suffer from a lack of awareness or understanding of the Member State's human rights obligations, policies and laws. Moreover, the NCP's effectiveness is to a considerable extent dependent on its rules of procedure. For example, the UK NCP has adopted a flexible approach to standing, allowing 'any interested party' to bring a complaint provided it has a close interest in the case and is in a position to supply information about it. Moreover, the UK NCP has set a specific time frame for dealing with complaints, offers a review of its decisions, and has developed a follow-up procedure where a violation of the Guidelines has been found. While decisions of NCPs are not legally binding, they have considerable potential for redressing corporate abuses of human rights and the environment especially if linked to other consequences.<sup>193</sup> Institutional independence and procedures for effectively dealing with complaints are decisive factors in determining an NCP's real-world impact in this regard. In his contribution to the update process of the OECD Guidelines, the SRSg has stressed the importance of principles of effectiveness and credibility (including legitimacy, accessibility, predictability, equitability, rights-compatibility and transparency), of admissibility criteria that reflect current prevalent business models, and of a more effective implementation of NCP findings against corporations, including the publication of negative findings and where appropriate the limitation of the corporation's access to certain forms of public support.<sup>194</sup>

## 2.4 Lessons for the European Union and the EU Member States

153. As the SRSg emphasises in his 2010 report, 'States conduct many kinds of transactions with businesses: as owners, investors, insurers, procurers or simply promoters. ... Indeed, the closer an entity is to the State, or the more it relies on statutory authority or taxpayer support, the stronger is the State's policy rationale for ensuring that the entity promotes respect for human rights'.<sup>195</sup> Conversely, failures of the European Union and the EU Member States to protect human rights and the environment through trade, investment, and related regulatory regimes, may facilitate human rights and environmental abuses by European corporations operating outside the European Union.
154. The example of State-owned banks (the number of which has considerably increased recently) that invest in European corporations involved in alleged human rights and environmental abuses outside the European Union illustrates this well. While the legal responsibility of States for such violations either under domestic law or the ECHR<sup>196</sup> remains uncertain, the

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<sup>192</sup> UN Doc A/HRC/8/5 (7 April 2008), above n 115 at para 9

<sup>193</sup> *Ibid*, at para 98

<sup>194</sup> Submission of the SRSg, above n 190

<sup>195</sup> UN Doc A/HRC/14/27 (9 April 2010), above n 51 at para 26

<sup>196</sup> On the conditions for liability of States for human rights and environmental abuses committed by State-owned business entities under the ECHR see above, section III.1.1.



detrimental effects of these investments on human rights and the environment outside the European Union are hard to overlook.

155. In a recent statement, the (then) Swedish Presidency of the European Union and the incoming Spanish presidency encouraged the EU and the EU Member States to, amongst others, 'emphasise the importance of implementing human rights, fighting corruption throughout the European Union and the European External Action Service, for example within bilateral trade and investment treaties, host governments, export credit guarantees and overseas development programs'.<sup>197</sup> The EU has also recently reaffirmed its commitment to protect in particular the rights of children through measures in the trade and investment nexus.<sup>198</sup>
156. The existing legal framework gives the European Union and its Member States a number of legal options for improving the protection of human rights and the environment against extraterritorial corporate abuse through trade, investment and related regulatory regimes. State opportunities in the areas of trade and investment considered in this study generally do not require direct assertions of extraterritorial jurisdiction, but can be realised through domestic EU/EU Member State measures to protect human rights and the environment outside the European Union, and through international agreements that require third States to protect human rights and the environment within their territory. Certain measures, although legally permissible, may prove politically sensitive and should be considered with due regard to the legitimate interests of third States. Certain trade and trade-related measures are subject to, and require justification under, the WTO regime. Generally speaking, agreements with affected third States are more likely to comply with WTO rules than unilateral measures. It should be ensured that import and export bans fall within a relevant WTO exception. To ensure WTO compatibility, GSP preferences should only be used as a positive response to a trade, development or financial need of a beneficiary developing country.
157. Examples of EU measures to protect human rights and the environment through trade law include its GSP and GSP+ systems, its FLEGT regime, and its 'human rights clauses' in EU free trade agreements, in particular the EU-Cariforum and the EU-Korea agreements. Explicit reference to human rights considerations could be included into the EU's SIAs conducted prior to the conclusion of trade agreements to avoid negative human rights impacts of new trade commitments in third countries. The EU could also consider instituting a practice of 'implementation SIAs', supported in the case of free trade agreements by review clauses modelled after the EU-Cariforum Agreement.
158. Where investment promotion services, financial incentives or insurance guarantees are provided by the EU or the EU Member States in respect of corporate investment outside the European Union, the EU/EU Member States could consider requiring the competent authorities to include human rights and environmental conditions in the terms on which such services are provided, and to ensure that the extraterritorial human rights and environmental impacts of the supported project are assessed.
159. The scope and detail of human rights and environmental standards in risk insurance decision-making could be improved. The transparency of political risk insurance decision-making processes could be improved and the effectiveness of integrating human rights and environmental considerations in such processes could periodically be reviewed by an independent body. Finally, it could be considered to provide a mechanism for individuals or

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<sup>197</sup> See above, n 5

<sup>198</sup> Council of the European Union, 'Council Conclusions on Child Labour', 3023<sup>rd</sup> Foreign Affairs Council meeting (14 June 2010)

groups affected by projects benefiting from promotion services to challenge decisions of the relevant authority.

160. The EU Member States could ensure that investments in European corporations through public pension funds and/or state-owned banks do not contribute to corporate abuses of human rights and the environment outside the European Union. As regards pension funds, various Member States already provide for disclosure requirements in their domestic legislation. As regards publicly owned banks, States could consider how to best use their influence as directors or shareholders to scrutinise the human rights and environmental impact of investments in corporations operating outside the European Union.
161. The European Union could ensure that future bilateral investment treaties contain clear definitions of relevant protection guarantees (e.g. 'fair and equitable treatment', 'indirect expropriation'), as well as general exception clauses that allow host States to take non-discriminatory measures to protect human rights and the environment against corporate abuse. BITs could also include an obligation on the contracting State parties to adopt all necessary legislation to ensure compliance of investors with international human rights and environmental standards.
162. The EU and EU Member States could make use of their existing expertise in the areas of eco-labelling and public procurement to better promote and protect human rights in relation to European corporations operating outside the European Union. Both the EU Ecolabel Regulation and the European Commission's interpretative communication on integrating social considerations into public procurement already provide entry points for considering human rights. A few EU Member State public procurement criteria already make explicit reference to human rights. The potential for including human rights considerations in these areas could be clarified and further developed. Possibilities to increase the take-up of eco-labelling by European corporations operating in third countries could be explored with States that have concluded with the EU Association or other agreements containing environmental cooperation clauses. The scope for EU and EU Member State public procurement to take account of the extraterritorial human rights and environmental impacts of European corporations, including third-country subsidiaries and suppliers, could be clarified. On this basis, the consideration of extraterritorial human rights and environmental impacts could be systematically integrated in future EU communications or legislation on public procurement and in domestic public procurement regulations.
163. In the course of the ongoing review of the OECD Guidelines, the EU and its Member States could support the inclusion of a dedicated chapter or standards on business and human rights in line with the suggestions made by the SRSG, including the strengthening of the role of Export Credit Guarantee Agencies in promoting and protecting human rights. They could also contribute to reviewing the existing environmental provisions to ensure that they accurately reflect the range of environmental issues corporations need to address. The latter could include amending the Guidelines to better reflect cross-cutting concerns such as climate change and biodiversity by building on existing multilateral environmental agreements such as the Convention on Biological Diversity that already contain provisions on local and indigenous communities. European expertise in the area of EIAs and EMAS provides for a strong opportunity to contribute to the ongoing review of the OECD Guidelines, as well as to the further operationalisation of the UN Framework.
164. The EU Member States could work towards improving the independence and efficiency of their NCPs established under the OECD Guidelines, in line with the suggestions made by the SRSG. In furtherance thereof, the EU could work with the Member States to develop a model

composition and procedure for NCPs. Consideration could also be given to establishing a single EU NCP. The EU could furthermore play a key role in ensuring that the final statements of Member State NCPs are published and disseminated across the European Union to maximise their impact.

165. Existing legal tools to protect human rights and the environment in relation to European corporations operating outside the European Union could be more systematically linked up with each other to enhance their efficacy and reduce legal and policy incoherence. The European Commission has already suggested using the criteria for eco-labelling to establish a harmonized base for public procurement and incentives.<sup>199</sup> This could serve as a basis for the European Union to develop a more systematic approach to using EMAS and eco-labelling as conditions for privileged or exclusive access to public funding and other public benefits. Similarly, negative statements of NCPs could be used as a criterion for denying public benefits to European corporations operating outside the European Union.

### **3. European human rights and environmental protection through criminal law, corporate law, and private international law**

166. International human rights and environmental law impose duties on States to put into place effective criminal and civil remedy mechanisms. As the ECtHR held in *Öneryildiz*, the right to life (Article 2 ECHR) ‘entails a duty for the State to ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished’.<sup>200</sup> Similarly, international environmental treaties, such as the Basel Convention,<sup>201</sup> require States to domestically implement criminal or civil liability regimes to redress corporate abuses.
167. From the perspective of access to justice, while criminal law serves to penalise corporate conduct harmful to human rights and the environment, corporate law can create significant legal obstacles to holding European corporations liable for abuses committed by their third-country subsidiaries. Private international law can impede access to European courts for human rights and environmental abuses committed by subsidiaries or contractors of European corporations outside the European Union. Finally, and while beyond the scope of this study, the procedural law of the EU Member States can create significant additional legal and practical barriers to access to justice for third-country victims, including obstacles stemming from time limitations, costs and legal aid, the lack of support for public interest litigation or mass tort claims, and provisions on evidence.<sup>202</sup>

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<sup>199</sup> See COM(2008) 397 (16 July 2008), above n 184 at para 4 and the Commission’s handbook for public procurement, above n 185

<sup>200</sup> See *Öneryildiz*, above n 75 at para 91

<sup>201</sup> Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, see above section III.1.2; other examples include Articles 4(2) and 4(4) of the 1973 MARPOL Convention; Article 6(2) of the 1972 London Dumping Convention; Article 12(1) of the Paris Convention for the Prevention of Marine Pollution from Land-based Sources; Article 12(2) of the 1987 Protocol for the Prevention of Pollution of the South Pacific by Dumping; Articles 217(8) and 230 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS); and Article 8(1) of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

<sup>202</sup> Two recent studies on the Dutch and Polish legal system provide a more in depth analysis, see Castermans & van der Weide, above n 25, and International Commission of Jurists, ‘Access to Justice: Human Rights Abuses Involving Corporations - Poland’ (Geneva, 2010).

168. However, criminal law and corporate law are also relevant to the State duty to prevent corporate human rights and environmental abuses. For example, the criminal regime governing anti-corruption considered below plays an important role in ensuring that individuals can realise their human and environmental rights. Moreover, greater clarity in relation to the consideration of corporate human rights and environmental impacts in the context of, for example, directors' duties and reporting requirements under corporate law, can assist corporations in fulfilling their responsibility to respect human rights, thus contributing to the development of 'rights-respecting corporate cultures' and broader prevention efforts.<sup>203</sup>
169. The use of direct extraterritorial jurisdiction and domestic measures with extraterritorial implications varies considerably in the areas of criminal law, corporate law, and private international law. Criminal jurisdiction generally requires a territorial link between the conduct in question and the State exercising jurisdiction (territoriality principle). However, the territoriality principle has been interpreted in a wide sense, extending to situations where the crime was merely commenced or consummated in the State in question. Many countries, especially those within the civil law tradition, also apply their criminal laws to nationals abroad (nationality principle). Finally, in the case of certain serious crimes and serious human rights violations such as drug trafficking, terrorism, or genocide, assertions of extraterritorial jurisdiction can also be based on the universality principle, although particular applications of that principle remain contested.<sup>204</sup> Generally speaking, corporate law relies on domestic measures which may have extraterritorial implications. An example would be obligations imposed on EU domiciled parent corporations to exercise oversight of their subsidiaries operating outside the European Union. Finally, private international law has by its very nature an extraterritorial dimension as it regulates the jurisdiction of domestic courts over private disputes involving corporate human rights and environmental abuses outside the State's territory, as well as the law applicable to such disputes.

### **3.1 The criminal regime governing anti-corruption applicable to European corporations operating outside the European Union**

170. Corruption proves a major hindrance to sustainable development and human rights and environmental protection, with a disproportionate impact on poor communities. It impedes economic growth, distorts competition, and represents serious legal and reputational risks for States and corporations alike. Research conducted by the SRSG suggests that corruption can significantly impede the effective protection of human rights and the environment against corporate abuse.<sup>205</sup> In one quarter of a sample of 320 cases analysed by the SRSG, allegations of corruption were raised. Failures to disclose political and trade activity were reported as impairing the ability of stakeholders to judge the public commitments made by firms. Confidential, inadequate or non-existent impact assessments were seen as preventing affected communities and other stakeholders from assessing the impact and value of corporate activities. Finally, numerous suppliers were alleged to have falsified and destroyed records, and to have coached employees during inspections.
171. Given the significant negative impacts corrupt practices can have on, *inter alia*, public administration and economic competition, many domestic legal systems have for some time addressed aspects of the problem. However, only relatively recently has the subject emerged

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<sup>203</sup> See UN Doc A/HRC/14/27 (9 April 2010), above n 51 at paras 33-43

<sup>204</sup> On the grounds for extraterritorial jurisdiction under public international law see also above, section II.4. For a more detailed discussion of extraterritorial criminal and civil jurisdiction in a comparative international perspective see Zerk, above n 57 chapters 4 and 5.

<sup>205</sup> UN Doc A/HRC/8/5/Add.2 (23 May 2008), above n 34 at p 3

as a source of international concern, with associated efforts to approximate domestic criminal justice responses and to provide for international cooperation in the investigation and prosecution of relevant offences. A recent high profile example is the February 2010 action taken by UK and US authorities against a British defence contractor. The contractor was heavily fined, and sustained substantial reputational damage, for bribery and false accounting in Tanzania, South Africa, Hungary and the Czech Republic.<sup>206</sup> Another recent example are very substantial fines, reportedly exceeding US\$1.6 billion in total, imposed on a German corporation and its foreign subsidiaries by a German court in relation to 77 allegations of bribery in Russia, Nigeria, and Libya, and by a US court in relation to alleged bribery offences in Iraq, Argentina and Venezuela.

172. The criminal law of the EU Member States has a significant role to play in addressing corruption and related adverse impacts of European corporations operating outside the European Union. The EU Member States are parties to various international and European treaties that impose duties on States to criminalise and prosecute corruption and related offences (a). While the criminal law of most EU Member States provides for criminal liability of corporations as legal persons, corporate criminal liability of parent corporations for offences committed by subsidiaries is more difficult to establish (b). Finally, criminal anti-corruption regimes authorise or require both assertions of direct extraterritorial jurisdiction and domestic measures with extraterritorial implications (c).

**a) The international criminal regime governing anti-corruption in the EU Member States**

173. Early international treaties of significance include the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), the EU Convention against Corruption involving Officials (EU Convention), and the Council of Europe Criminal Law Convention on Corruption (CoE Convention).<sup>207</sup> The scope of the OECD Convention is relatively limited as it only requires the criminalisation of active bribery of foreign public officials in order to obtain or retain advantages in the conduct of international business. It does not, therefore, include matters such as passive bribery, active bribery outside of the context of international business, or the bribery of persons who are not foreign public officials. The EU Convention requires Member States to ensure that conduct constituting an act of active corruption or passive corruption by officials is a punishable criminal offence. The CoE Convention covers a broad range of conduct from active and passive bribery in a domestic context to trading in influence. It also includes bribery of foreign public officials without requiring a nexus with international business.
174. The 2003 UN Convention against Corruption (UN Convention) is the first international treaty with global reach, and it has attracted widespread yet not universal participation. The UN Convention attaches equal weight to the prevention and the criminalisation of corruption. As regards the former, it requires transparency and accountability in public services and public finance, with particular reference to the judiciary and public procurement. As regards the latter, the Convention requires States to establish criminal and other offences to cover a wide

<sup>206</sup> An earlier criminal investigation by the British authorities into the same corporation relating to a multibillion dollar ('al-Yamamah') arms contract with Saudi Arabia in the mid 1980s had been controversially abandoned in December 2006.

<sup>207</sup> Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (21 November 1997); Council Act of 26 May 1997 drawing up the Convention made on the basis of Article K.3 (2)(c) of the Treaty on European Union, on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union (Official Journal C 195 of 25 June 1997); Criminal Law Convention on Corruption (27.01.1999)

range of acts of corruption, including bribery and the embezzlement of public funds, trading in influence, the concealment and laundering of the proceeds of corruption, and offences in support of corruption such as money-laundering and obstructing justice.

175. One common obstacle to the effective operation of these international regimes is an insufficiently broad participation of States. Another obstacle is the right of participating States to formulate reservations. Resulting divergences in the (scope of) criminalisation of corruption, in addition to raising concerns about the lack of a level playing field, can hamper international cooperation in the investigation and prosecution of relevant corruption offences. This is largely due to the well-established principle of double criminality that impedes or precludes cooperation (especially in relation to the use of compulsory powers) where conduct is criminal in one State but not in another.
176. The EU is currently only party to the UN Convention. While all EU Member States are party to the CoE Convention and the UN Convention (except Estonia), fewer Member States participate in the OECD Convention. The CoE Convention specifies areas not subject to reservations (including active bribery of foreign public officials), and restricts the overall number of reservations a State can make. In the anti-money laundering area, a European Union Joint Action has sought to harmonise the position of the EU Member States in the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.<sup>208</sup> This was in turn amended and strengthened by a Framework Decision of 26 June 2001.<sup>209</sup> Finally, and within the borders of the European Union, the European Evidence Warrant eliminates double criminality as an obstacle to cooperation in respect of 32 categories of serious offences, including environmental crime, corruption and money laundering.<sup>210</sup> Upon its taking full force and effect in January 2011, a Member State whose law provides for criminal liability will be able to obtain relevant cooperation from another Member State that only uses administrative or civil sanctions to combat the relevant offences.
177. A further obstacle to an effective international cooperation in combating corruption can arise from differences in State practice concerning the criminal liability of corporations as legal persons. In response, some international instruments, including the UN Convention, require States to cooperate 'to the fullest extent possible' even in the absence of reciprocity of treatment, 'with respect to investigations, prosecutions and judicial proceedings in relation to offences for which a legal person may be held liable' (Article 46(2)). Article 18(8) of the 1990 Council of Europe Money Laundering Convention prohibits refusal of cooperation on the ground that proceedings relate to a legal person.<sup>211</sup> In a similar vein, Article 3(2) of the EU Convention on Mutual Assistance in Criminal Matters requires mutual assistance between the EU Member States in connection with criminal proceedings 'which relate to offences or infringements for which a legal person may be held liable in the requesting Member State'. According to the official explanatory report, 'the fact that the law of the requested Member

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<sup>208</sup> Joint Action of 3 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime (98/699/JHA)

<sup>209</sup> Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (2001/500/JHA)

<sup>210</sup> Council Framework Decision of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters (2008/978/JHA)

<sup>211</sup> Convention on Laundering, Search, Seizure and confiscation of the Proceeds from Crime (08 November 1990); under certain circumstances, the Convention is also open to non-European countries. A similar stance is adopted in Article 28(8)(a) of the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (16 May 2005). This text has, as yet, been less heavily ratified by EU Member States.

State does not provide for administrative or criminal liability of legal persons for the offences concerned can no longer in itself give rise to refusing a request for assistance’.<sup>212</sup>

**b) Criminal liability of corporations as legal persons in the EU Member States**

178. Another critical consideration in maximising the potential of criminal law to combat corruption and other adverse impacts of corporate activity is the extent to which domestic criminal laws apply directly to corporations *qua* legal persons (corporate criminal liability). Approaches to corporate criminal liability vary considerably across the European Union. Common law jurisdictions such as the United Kingdom and increasingly also EU civil law jurisdictions extend criminal liability to corporations and other legal persons. To date, corporate criminal liability has been established in 17 Member States (Austria, Belgium, Denmark, Estonia, Finland, France, Hungary, Ireland, the Netherlands, Portugal, Slovenia, United Kingdom, Romania, Lithuania, Latvia, Malta and Cyprus). Sanctions vary from confiscation of proceeds to financial penalties. Non-criminal (administrative or civil) liability of legal persons, either as an alternative or in addition to criminal liability, is provided for in Austria, Czech Republic, Estonia, Finland, Germany, Greece, Italy, Slovenia and Spain. Examples of the most common sanctions include the prohibition of contracts with public authorities, the revocation of the authorisation to act in a specific area, or the obligation to pay damages.<sup>213</sup>
179. The standards for attributing criminal offences of directors, employees etc to the corporation also vary from Member State to Member State. In Italy, for example, a corporation can be liable for offences committed by its directors, representatives, managers and other natural persons who exercise *de facto* control over the activities of the corporation, as well as for offences committed by individuals under the supervision or control of the above persons. A second condition for liability is that the corporation profited from the offence.<sup>214</sup> Pursuant to Article 6(1) of the decree, it is a defence for the corporation to prove that it had in place an effective organisation, management and control model; that it had established an internal monitoring body vested with sufficient independence and powers to exercise the supervision and control as provided by the organisational model; that the offence was committed fraudulently; and that there was no failure to supervise or control on the part of the internal monitoring body.
180. Problems for corporate criminal liability that stem from the doctrine of separate legal personality (i.e. parent and subsidiary operate as independent legal entities) are addressed

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<sup>212</sup> Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union (12 July 2000); Explanatory Report of 29 May 2000 on the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (27 December 2000), at p 10

<sup>213</sup> The 2006 OECD Council Recommendation to Deter Bribery in Officially Supported Export Credits (TD/ECD(2006)11 of 11 May 2006) suggests that States require corporations applying for export credit guarantees to provide a ‘no bribery’ undertaking, and to disclose whether they or anyone acting on their behalf are currently under charge, or have been convicted within the last five years, for violations of laws against bribery of foreign public officials. Pursuant to the 2009 OECD Council Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, ‘Member countries’ laws and regulations should permit authorities to suspend, to an appropriate degree, from competition for public contracts or other public advantages, including public procurement contracts and contracts funded by official development assistance, enterprises determined to have bribed foreign public officials in contravention of that Member’s national laws and, to the extent a Member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials’.

<sup>214</sup> Article 5 Legislative Decree No 231 of 8 June 2001

differently in the EU Member States. If the domestic criminal law of the EU Member States provides so, a parent corporation can be (jointly) liable for offences committed by its subsidiary if it 'aids and abets' the criminal offence. Both the UN Convention and the OECD Convention mandate State parties to criminalise the participation of parent corporations in offences committed by their subsidiaries, including subsidiaries operating outside the territory of the State.<sup>215</sup> Moreover, a parent corporation can be criminally liable for failure to supervise a subsidiary, or for failure to take the necessary steps to prevent offences committed by a subsidiary over which it exercises control. Recent case-law under the Italian Decree considered above indicates that the Decree's supervision and control test can also establish parent liability for offences committed in the interest or to the advantage of a subsidiary, notwithstanding separate legal personality.<sup>216</sup> The new UK Bribery Act (2010) extends the liability of parent corporations to criminal offences committed by subsidiaries and sub-contractors.<sup>217</sup> Under this innovative provision, a corporation can be held liable for failure to prevent bribery if an 'associated person' bribes another within the meaning of the Act. Associated persons include employees, agents, subsidiaries and sub-contractors. It is a defence for the corporation to prove that adequate procedures to prevent bribery had been put in place.

**c) The extraterritorial dimension of the European criminal legal regime governing anti-corruption**

181. International treaties on anti-corruption and related offences, especially at the global level, do not generally require States to assert extraterritorial jurisdiction.<sup>218</sup> Article 42 of the UN Convention only requires States to criminalise relevant offences 'committed in the territory of that State party' (territoriality principle). Other bases of jurisdiction, including nationality, may be resorted to on an optional basis. Instruments of more limited geographic scope on occasion go further. Both the OECD and CoE Conventions adopt a broader notion of 'territoriality' that requires States to criminalise offences committed in whole or in part in their territory. Moreover, both Conventions either encourage or require the use of extraterritorial jurisdiction based on nationality. Similarly, the EU Convention requires EU Member States to assert extraterritorial jurisdiction if the offence is committed in whole or in part in their territory, or if the offender is one of their nationals.
182. EU money laundering legislation, while not expressly permitting direct extraterritorial jurisdiction, can have significant extraterritorial implications. Council Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering requires the domestic criminalisation of money laundering regardless of where the underlying or 'predicate' criminal conduct took place, thus indirectly targeting offences committed outside the European Union.<sup>219</sup> In addition, Council Directive 2005/60/EC provides for all Member

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<sup>215</sup> Pursuant to Article 27(1) UN Convention, 'each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or investigator in an offence established in accordance with this Convention'. Pursuant to Article 1(2) CoE Convention, 'each State Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence'.

<sup>216</sup> This will typically be the case where a parent corporation is the majority shareholder or director of the subsidiary, as in such cases an advantage obtained by the subsidiary will also be considered an advantage of the parent.

<sup>217</sup> UK Bribery Act 2010, c. 23

<sup>218</sup> For a more detailed treatment of extraterritorial jurisdiction in the area of anti-corruption see Zerk, above n 54, chapter 1

<sup>219</sup> Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, as amended by Directive 2001/97/EC of the European Parliament and of the



States to introduce laws requiring financial institutions to apply the 'customer due diligence' procedures of the Directive (Article 8) also to branches and subsidiaries in third countries.<sup>220</sup>

183. In addition to extraterritorial jurisdiction authorised by the territoriality principle, most EU Member States generally assert direct extraterritorial jurisdiction on the basis of the nationality principle, that is, they apply their domestic criminal law to offences committed by their nationals abroad. Except for the Czech Republic, Hungary and Luxembourg, double criminality is required. Austria, Belgium, Bulgaria, Czech Republic, Denmark, France, Germany, Hungary, Italy, the Netherlands, Poland, Portugal, the Slovak Republic, Sweden and Romania also exercise extraterritorial criminal jurisdiction over non-nationals. In most cases, specific requirements must be met, including double criminality, the arrest of the perpetrator on the national territory and his/her non-extradition (following either lack of request or refusal to extradite).
184. The domestic criminal law of most EU Member States generally applies to the bribery of a foreign public official outside the State's territory. Sometimes extraterritoriality is explicitly linked to corporate liability. For instance, the Czech Republic provides for a form of corporate non-criminal liability for bribery of a foreign public official by non-Czech nationals (agents, employees or board members of a Czech company), who commit the act abroad. The sanction imposed in this context is the exclusion from public procurement procedures. In the Netherlands and Slovakia, a corporation can criminally liable for corruption and related offences committed outside the State's territory on the basis of the nationality principle. The 2010 UK Bribery Act criminalises bribery committed by corporations, including their subsidiaries and subcontractors, outside the United Kingdom, so long as the conduct would be punishable under UK law if perpetrated on British territory.

### **3.2 The role of corporate law in preventing and redressing extraterritorial corporate human rights and environmental abuses**

185. The doctrine of separate legal personality can create significant obstacles for holding European corporations responsible for human rights and environmental harm caused by their third-country subsidiaries, despite the fact that the former may have owned, controlled, directed or managed the latter (a).<sup>221</sup> This becomes particularly problematic if victims of corporate human rights and environmental abuses cannot obtain satisfactory redress from the third-country subsidiary that committed the abuse, for example because the subsidiary has no funds or assets, or because access to justice or due process in the third country is not guaranteed.

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Council of 4 December 2001. The Financial Action Task Force (FATF) Recommendation No 1 on the scope of the criminal offence of money laundering furthermore suggests that 'countries may provide that the only prerequisite [for predicate offences for money laundering] is that the conduct would have constituted a predicate offence had it occurred domestically', thus eliminating the double criminality requirement. The European Commission and the 'old' EU Member States are members of FATF. The other Member States have subscribed to the FATF Recommendations through their membership in the MONEYVAL Committee of the Council of Europe.

<sup>220</sup> Directive 2005/60/EC of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (26 October 2005)

<sup>221</sup> For the purpose of this study, a consideration of the relationship between a 'European parent corporation' and its 'third-country subsidiaries' is sufficient to shed light on the role of corporate law in human rights and environmental protection. It should, however, be noted that in practice things are considerably more complex, not least due to the fact that MNCs can operate in a variety of different legal forms. A well-known example of non-equity based relationships within an MNC is contractual agreements between a (parent/subsidiary) corporation and a supplier.

186. Another obstacle to human rights and environmental protection is that corporate law provisions on directors' duties often fail to specify what directors of corporations are required or permitted to do to oversee their corporation's respect for human rights.<sup>222</sup> Furthermore, the possibilities for individual shareholders, stakeholders, and (contingent) creditors to enforce a breach of directors' duties against the director are extremely limited. As a consequence, directors of European corporations, including European parent corporations that are directors of third-country subsidiaries, often lack clear guidance on how to fulfil their responsibility to respect human rights, and are generally shielded from liability for decisions that have negative human rights and environmental impacts outside the European Union (b).

187. A third area in which corporate law can have significant impacts on human rights and environmental protection in relation to European corporations operating outside the European Union is that of corporate reporting (c). Encouraging or requiring corporations to report on their human rights and environmental policies and impacts enables shareholders and other stakeholders to better engage with business, assess risk and compare performance within and across industries. It also helps corporations to integrate human rights and environmental protection as core business concerns.<sup>223</sup> Nevertheless, the SRSG's corporate law project has shown that while financial reporting is very tightly regulated, requiring corporations under the pain of sanctions to disclose all information that is 'material' or 'significant' to their operations and financial condition, human rights-related risks are generally not considered 'material' for that purpose.<sup>224</sup>

**a) Exceptions to the doctrine of separate legal personality relevant for the protection of human rights and the environment against extraterritorial corporate abuse**

188. In spite of the general rule that constituent parts of MNCs operate as independent legal persons, the corporate law of the EU Member States permits victims of human rights and environmental abuses committed by third-country subsidiaries in exceptional circumstances to obtain redress from the European (parent) corporation. Relevant exceptions to the principle of separate legal personality include the doctrine known as 'piercing the corporate veil'; concepts of 'enterprise liability' or 'network liability'; and functional equivalents to 'piercing the corporate veil'. Where such exceptions apply, for the liability of a European parent corporation to arise, it is immaterial whether the corporate abuse was committed by subsidiaries inside or outside the territory of the State in which the European parent corporation is domiciled.

189. The corporate law of most EU Member States analysed in this study recognises a doctrine commonly known as 'piercing the corporate veil', that is, a rule or principle of law which enables victims of corporate abuse to obtain direct legal recourse against shareholders or directors of that corporation. 'Piercing the corporate veil' may thus enable victims of corporate abuse committed by third-country subsidiaries to obtain redress from the European parent corporation. However, it should be stressed that the jurisdictions that recognise this doctrine consider it as a narrow exception to the broader principle of separate legal

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<sup>222</sup> See UN Doc A/HRC/14/27 (9 April 2010), above n 51 at para 39. Corporate duties of care that may be derived from general private law, including tort law, are not considered in this study. Whether and to what extent private law imposes such duties on parent corporations to third parties injured through the operations of their subsidiaries (and suppliers) will depend on the domestic law of the EU Member State in which the parent corporation is domiciled. Much remains unsettled. For two recent studies that address the problem in slightly different ways see Castermans & van der Weide, above n 25 and Zerk, above n 54 chapter 5

<sup>223</sup> UN Doc A/HRC/14/27 (9 April 2010), above n 51 at para 36

<sup>224</sup> *Ibid*, at para 38; see further the SRSG's Corporate Law Tools Project, <http://www.business-humanrights.org/SpecialRepPortal/Home/CorporateLawTools>

personality. Liability is usually conditional on the parent exercising actual direct or indirect control, direction or coordination over the activities of the subsidiary.<sup>225</sup> Simple ownership of the shares or the mere potential to control the subsidiary is not sufficient. Moreover, in some countries including Germany and France, parent liability is only possible if the subsidiary has entered into an insolvency process such as liquidation. In the majority of Member States, the corporate veil can be lifted on either of the following two grounds: admixture of assets of the parent and the subsidiary and dissipation or abuse of the subsidiary's assets in bad faith (e.g. Germany, Italy, Romania, Slovenia, and France); and abuse of the separate legal personality of the subsidiary or the limited liability of the parent as shareholder in order to defeat the existing rights of stakeholders of the subsidiary, or as a means of committing illegal or unlawful activities (e.g. France, Slovenia, and Italy).

190. None of the jurisdictions examined explicitly recognises a concept known as 'enterprise liability' or 'network liability'.<sup>226</sup> However, all EU Member State jurisdictions analysed recognise the possibility for victims of corporate human rights and environmental abuses committed by a subsidiary in a corporate group to obtain recourse against another corporation in the group if the former corporation has transferred assets to the latter corporation at less than their market value prior to the onset of its insolvency. The particular grounds and conditions for retrieving assets vary from Member State to Member State.
191. As regards functional equivalents to the doctrine of 'piercing the corporate veil', a number of EU Member States provide for legal mechanisms that in exceptional circumstances specifically impose liability on a parent corporation to the stakeholders of its subsidiary. The effect is the same as in cases of where the corporate veil is lifted: the European parent corporation can be liable for human rights and environmental abuses committed by a third-country subsidiary notwithstanding the doctrine of separate legal personality. This type of parent liability has two main general conditions: first, the European parent corporation must hold the entire or at least a super-majority (i.e. 2/3rds or 75%) of the share capital of the third-country subsidiary; and secondly, the European parent corporation must actually direct, control, or coordinate the activities of the third-country subsidiary. All jurisdictions that recognise this exception to the doctrine of separate legal personality stipulate additional conditions for parent liability. For example, in some jurisdictions there is a requirement that the exercise of control by the parent corporation results in prejudice or harm to the subsidiary corporation (e.g. Germany & Italy), whereas in other jurisdictions, this is not necessarily the case (e.g. Poland, France, Czech Republic). Some jurisdictions impose such liability as a matter of course where the parent has exercised actual control over the affairs of the subsidiary (France & Germany) whereas others

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<sup>225</sup> Examples include the German *Konzernrecht* and the French *Société fictive*. In Polish law, it is possible for a parent corporation which is in control of a subsidiary to be held liable to a stakeholder injured or harmed by the subsidiary where the parent has failed to (i) enter into a legally binding document with the subsidiary company (which is known as a 'management agreement') and/or (ii) submit that document to the Polish National Court Register. The management agreement sets out the extent and limits of the liability of the parent for the subsidiary and vice versa.

<sup>226</sup> Theories of 'enterprise liability' or 'network liability' have been relied on by courts in various individual State jurisdictions within the US. They enable a stakeholder of a corporation in a corporate group to hold the entire, or certain sections of, the group liable for claims against, or debts due by, that corporation if the corporate group is pursuing a unified interest such that the separate existence of individual corporations has effectively ceased and where treating each of them as separate entities would lead to injustice. In a case currently pending before the Dutch courts against an Anglo-Dutch MNC and its Nigerian subsidiary for alleged environmental damage and loss of livelihoods caused by oil spills in Nigeria, the plaintiffs sought to rely on enterprise liability in their statement of claim, arguing that the MNC operates as one entity with the European parent corporation setting the terms of business with which the Nigerian subsidiary complies, see above, section II.3 and Zerk, above n 54 at p 171.

are restricted to circumstances where the parent company has the legal or economic power to exercise such control. In the legal systems of certain Member States, a creditor of a subsidiary will only be permitted to obtain a remedy from the parent where the subsidiary has entered into an insolvency process or is verging on insolvency (e.g. Germany, France, and Czech Republic).

**b) The role and responsibilities of directors in preventing and addressing negative corporate impacts on human rights and the environment**

192. In all Member States under analysis, directors of corporations owe a duty of care that generally consists of acting with the diligence of a conscientious, prudent and fair manager, and to deal with the company's assets as if they were their own personal property. In a number of Member States, this includes an obligation to monitor and supervise the activities of managers and other directors.<sup>227</sup> Likewise, all Member States impose a duty of loyalty on directors that requires them to promote the long-term success of the corporation, not to compete with the corporation, and not to disclose, divulge or deal with confidential information or trade secrets of the corporation.
193. None of the EU Member State jurisdictions under analysis explicitly permits or requires directors to take human rights impacts into account. In Romania and the UK, directors are legally required to take corporate impacts on communities into account. The UK and the Slovenian law also cover environmental impacts. Under German law, directors are entitled to take 'common welfare' interests into account.
194. In Italy, Romania, the UK and the Czech Republic, the duties of care and loyalty impose a legal requirement on directors to take into account, consider, or have regard to the impact of corporate activities on non-shareholder constituencies (such as suppliers, customers and creditors). While in Germany, Italy and Romania, directors are entitled to consider the impact of the corporation's subsidiaries, in Slovenia they are legally required to do so. Slovenian law appears to impose liability on directors for failures to take impacts of subsidiaries into account.<sup>228</sup> There is generally no specific territorial limitation on directors' duties, that is, it is in principle immaterial where the corporate impacts are felt.
195. In all Member States under analysis, directors are only entitled or required to take social, community, environmental etc impacts of the corporation or its subsidiaries into account so long as this is compatible with, for example, the interest of the corporation ('*Unternehmensinteresse*', Germany), or promoting the success of the company for the benefit of its members as a whole (UK).
196. However, directors may violate their duties if a failure to consider or prevent negative human rights and environmental impacts is also detrimental to the corporation's economic development.<sup>229</sup> This, in turn, may more often be the case than is commonly assumed. Bad human rights and environmental performance puts the corporation at risk of losing public and

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<sup>227</sup> In Member States which operate on the basis of a two-tier board (divided into a supervisory board and a management board) directors in the supervisory board must monitor and supervise the actions of the directors in the management board.

<sup>228</sup> Thus far, there have been no cases in which a Slovenian court has confirmed that this is the authoritative interpretation of Slovenian law, or imposed liability for breach on a director.

<sup>229</sup> See, for example, the pending case against the UK Treasury for investments of a State-owned bank in corporations that allegedly violate human rights and the environment outside the European Union considered in section III.2.2

private investments and other State benefits.<sup>230</sup> Research conducted by the SRSG shows that the costs to a corporation of its negative human rights and environmental impacts can be significant. For example, in the extractive industry, they can include the costs of delays in granting of permits, construction and operation; problematic relations with local labour markets; higher costs for financing, insurance and security; collateral impacts such as diverted staff time and reputational hits; and even project cancellations that force the corporation to write off its entire investment.<sup>231</sup>

197. All domestic corporate laws stipulate that directors' duties of care and loyalty are owed to the corporation itself. In some Member States, including Italy and Romania, duties of care are also owed to individual shareholders and individual creditors. Furthermore, under some EU Member State corporate laws can a parent corporation which operates as a *de facto* or shadow director of a subsidiary owe duties of care and loyalty to the subsidiary, its minority shareholders, third parties, creditors or their representatives.
198. In all domestic corporate laws under analysis the possibilities for victims of corporate human rights and environmental abuse (as 'stakeholders' or 'contingent creditors') to enforce violations of directors' duties against the director are extremely limited. Enforcement requires that the stakeholder is able to demonstrate that, in addition to some prejudicial affect on his/her/its own interests, the best interests or long-term value of the corporation as a whole have been, or will be, prejudiced or adversely affected by the actions of the director in committing the corporation to a particular course of action; and/or that the corporation has entered into an insolvency process, or is in the vicinity of insolvency (e.g. UK, France, Germany and Romania); and/or that the director has engaged in activities which have compromised or seriously reduced the level of integrity of the corporation's share capital (e.g. UK for plcs, France, Italy, Germany for AGs but not necessarily for GmbHs); and/or the corporation has failed to compensate the affected stakeholder first (e.g. Slovenia).

**c) Corporate reporting requirements on (extraterritorial) human rights and environmental impacts**

199. Various regulatory regimes considered elsewhere in this study can impose reporting requirements relevant to human rights and environmental protection on corporations and other business entities. For example, one aim of the EMAS regulation discussed in section III.1.2 is to provide information on corporate environmental performance to the public and other stakeholders. Accordingly, corporations voluntarily participating in EMAS are required to produce an annual publicly available environmental performance statement. Another example is domestic regulations that require national pension and saving funds to disclose whether and to what extent social, environmental and ethical impacts of investments were taken into account.<sup>232</sup>
200. At the EU level, the Fourth and Seventh Directives on Company Law, as amended by Directive 2003/51/EC, have created more uniform disclosure standards for single unit corporations and for corporate groups operating within the European Union.<sup>233</sup> Directive 2003/51/EC provides

<sup>230</sup> See above, sections III.2.2 and III.2.3 on the potential consequences of corporate human rights and environmental abuses in the context of socially responsible investment, public procurement, and insurance guarantees for foreign investment.

<sup>231</sup> UN Doc A/HRC/14/27 (9 April 2010), above n 51 at paras 70-1

<sup>232</sup> See above, section III.2.2

<sup>233</sup> Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies and Seventh Council Directive 83/349/EEC of 13 June 1983 based on

for EU Member States to ‘where appropriate’ permit or require corporations to include information relating to environmental and social matters in their annual and consolidated annual report.<sup>234</sup> Pursuant to Article 46(1) of Council Directive 78/660/EEC as amended by Directive 2003/51/EC, the annual report shall provide a ‘balanced and comprehensive analysis of the development and performance of the company’s business’, including ‘to the extent necessary for an understanding of the company’s development, performance and position ... non-financial key performance indicators relevant to the particular business, including information relating to environmental and employee matters’.

201. Neither environmental nor social reporting is defined in detail. As regards the former, the Preamble of Directive 2003/51/EC makes reference to the Commission Recommendation 2001/453/EC of May 2001 which contains guidelines on adequate environmental reporting in annual accounts and annual reports of corporations.<sup>235</sup> The recommendation, which applies to all corporations covered by the fourth and seventh Company Law Directives, includes requirements for recognition, measurement and disclosure of environmental expenditures, environmental liabilities, and other risks and events that (are likely to) affect the financial position of the reporting entity. Member States are expected to ensure the application of the recommendation, and to notify the Commission of measures taken in this regard. Social reporting, which is not defined in the Directive, is commonly understood to refer to labour and community matters, which may also include human rights.<sup>236</sup> While there is no specific provision in the European Treaties that provides for the EU to introduce human rights reporting, the legal basis of Directive 2003/51/EC (Article 44(1) EC Treaty, now Article 50 TFEU on freedom of establishment) would allow for an amendment of the existing Company Law Directives to explicitly include human rights.
202. Under current EU law, corporations may need to include information relating to the performance of their subsidiaries, and (less likely) the performance of their suppliers, in their accounts if this is material in order to give a true and fair view of the corporation’s position. Pursuant to Article 17 of Directive 78/660/EC as amended by Directive 2003/51/EC, corporations are required to report on ‘participating interests’ which are defined as ‘rights in the capital of other undertakings, whether or not represented by certificates, which, by creating a durable link with those undertakings, are intended to contribute to the company’s activities’, whereby ‘the holding of part of the capital of another company shall be presumed to constitute a participating interest where it exceeds a percentage fixed by the Member States which may not exceed 20%’. While under Article 1 of Directive 83/349/EC, control was the dominant factor for deciding whether a corporation must include a subsidiary in its account reporting, the amendment through Directive 2003/51/EC makes it more difficult for corporations to hide off-balance-sheet financing. Pursuant to Article 2(1), consolidated accounts must now be drawn up if ‘a parent undertaking has the power to exercise, or actually

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Article 54(3)(g) of the Treaty on consolidated accounts, as amended by Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003

<sup>234</sup> Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings; the Preamble of Directive 2003/51/EC clarifies that Member States ‘may choose to waive the obligation to provide non-financial information’.

<sup>235</sup> Commission Recommendation of 30 May 2001 on the recognition, measurement and disclosure of environmental issues in the annual accounts and annual reports of companies (2001/453/EC)

<sup>236</sup> According to an UNCTAD survey, social issues typically include workplace health and safety, employee satisfaction and corporate philanthropy, as well as labour and human rights, diversity of the workforce and supplier relations, see Report by the UNCTAD Secretariat, *Disclosure of the impact of corporations on society: Current trends and issues*, UN Doc TD/B/COM.2/ISAR20 (15 August 2003)

exercises, dominant influence or control over another undertaking' or if a parent and a subsidiary 'are managed on a unified basis by the parent undertaking'.

203. A number of EU Member States require (listed) corporations to report on environmental and/or social matters, including community matters.<sup>237</sup> No Member State under analysis in this study explicitly provides for human rights reporting. In Denmark, the 1995 Danish Green Accounting Law imposes a statutory duty on corporations carrying out certain particularly polluting activities (including production and processing of iron, steel, metals, wood and plastic; extraction and processing of mineral oil, mineral oil products and natural gas; chemical production; and power and heat generation) to annually report on their social and environmental impacts, as well as on their efforts to mitigate these impacts. A new law passed in 2008 requires the 1000 largest Danish corporations to state whether they have a CSR policy, if so how they implement it, and what results the policy has achieved. The UK Companies Act 2006 provides that, except in the case of small corporations, the director's report must include a business review to inform members of the corporation and to help them assess how the directors have performed their duty to promote the success of the corporation. In the case of quoted corporations, the business review must, to the extent necessary for an understanding of the development, performance or position of the corporation, include information about environmental matters, the corporation's employees, and social and community matters.
204. The French law on the new economic regulations (2001) requires all corporations listed on the French Stock Exchange to include information on social and environmental impacts and their mitigation in their annual reports (Article 116). A 2002 decree further specifies the quality and quantity criteria for reporting, including labour and employment matters, community issues, the impact of corporate activities on local development and local populations, and environmental consequences of corporate activities.<sup>238</sup> The disclosure requirements also apply to environmental impacts of foreign subsidiaries. As regards labour standards, corporations have to report on the way in which their international subsidiaries respect the ILO core labour conventions, as well as the way in which they promote the ILO conventions with regard to their international subcontractors. A new bill will extend standardized sustainability reporting requirements to non-listed corporations.<sup>239</sup> In Germany, a new provision in the Commercial Code requires (listed) stock corporations to issue a comprehensive governance statement as a separate part of their annual report. Corporations are required to issue a declaration of conformity with the Corporate Governance Code (CGC) in which they state whether and how they have taken the CGC recommendations into account, and justify omissions.<sup>240</sup>

### **3.3 Civil jurisdiction over corporate human rights and environmental violations committed by European corporations operating outside the European Union**

205. If subsidiaries of European corporations commit human rights and environmental abuses outside the European Union, two further questions that arise are whether EU Member State courts have jurisdiction to adjudicate private disputes on damages (tort/contract) arising from such abuses, and what (domestic or foreign) law shall apply to such disputes. These questions

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<sup>237</sup> For an overview see also *Corporate Social Responsibility*, above n 147

<sup>238</sup> *Décret no 2002-221 du 20 février 2002 pris pour l'application de l'article L. 225-102-1 du code de commerce et modifiant le décret no 67-236 du 23 mars 1967 sur les sociétés commerciales*

<sup>239</sup> With the exception of small and medium-sized corporations, see UN Doc A/HRC/14/27 (9 April 2010), above n 54 at para 38

<sup>240</sup> See Article 289a Commercial Code (HGB); the governance statement must also include corporate practices that are relevant for the corporation as a whole. The explanatory notes to Article 289a (2) lists as examples 'employment and social standards', yet no explicit reference is made to human rights.

are governed by domestic regulations of private international law that, unlike public international law, generally require one or more 'connecting factors' between the parties, the subject matter of the dispute, and the State exercising jurisdiction (e.g. the corporation is domiciled in the State exercising jurisdiction).

206. Provided these conditions are met, private international law authorises domestic courts to assert jurisdiction directly over corporate actors in relation to human rights and environmental abuses committed abroad. In the vast majority of cases, the corporation committing the extraterritorial abuse will have to be domiciled in the State exercising civil jurisdiction.
207. Unlike extraterritorial criminal jurisdiction that always applies the law of the forum (i.e. the law of the State exercising jurisdiction), private international law provides for a choice between the law of the forum and the law of the third country where the corporate abuse has taken place. Most problematic from the perspective of extraterritoriality, and accordingly rare, are cases in which domestic courts apply the law of the forum to corporate abuses committed abroad.
208. In the European Union, private international law is largely harmonized by European regulations. While the Brussels I Regulation determines the competence of EU Member State courts to adjudicate private law disputes with a foreign element (a), the Rome I and Rome II Regulations determine the law applicable to such disputes (b).<sup>241</sup>

**a) The jurisdiction of EU Member State courts to adjudicate private disputes arising from human rights and environmental abuses by European corporations outside the EU**

209. Pursuant to the Brussels I Regulation, an EU Member State court is competent to adjudicate private disputes involving foreign actors or conduct if the defendant is domiciled in that Member State.<sup>242</sup> A corporation or other legal person is domiciled at the place where it has its statutory seat, its central administration or its principal place of business (Article 60(1)). Accordingly, if corporate human rights and environmental abuses are committed by third-country subsidiaries of European parent corporations, the Brussels I Regulation allows victims to sue the European parent corporation in the EU Member State where it is domiciled. However, the doctrine of separate legal personality may impede liability of the parent corporation for violations committed by its third-country subsidiaries or contractors.<sup>243</sup>
210. The Brussels I Regulation does not regulate jurisdiction of EU Member State courts over third-country subsidiaries unless these subsidiaries, too, are domiciled in an EU Member State. Rather, and pursuant to Article 4(1) Brussels I Regulation, the jurisdiction over civil law claims against foreign subsidiaries is determined by the domestic law of the EU Member States ('residual jurisdiction'). As a general rule, the domestic laws of most EU Member States contain jurisdiction rules similar to those of the Brussels I Regulation, with the consequence

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<sup>241</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters ('Brussels I Regulation'); Regulation (EC) No 593/2008 of the European Parliament and of the Council of June 2008 on the law applicable to contractual obligations ('Rome I Regulation'); Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ('Rome II Regulation').

<sup>242</sup> For a more detailed treatment of the Brussels I Regulation see A. Nuyts et al, 'Study on Residual Jurisdiction', European Commission Study LS/C4/2005/07-30-CE)0040309/00-37 (3 September 2007); B. Hess et al, 'Report on the Application of Regulation Brussels I in the Member States', European Commission Study JLS/C4/2005/03 (September 2007)

<sup>243</sup> See above, section III.3.2



that victims of human rights and environmental abuses will often be barred from seeking redress from a third-country subsidiary of a European corporation in an EU Member State court. However, some EU Member States provide for additional grounds of jurisdiction which, in relatively limited circumstances, may be of help to victims of human rights and environmental abuses committed by corporations not domiciled in an EU Member State.

211. Most EU Member States provide for jurisdiction of their courts over subsidiaries of European corporations domiciled outside the EU if these subsidiaries have secondary establishments or assets within that Member State. Most EU Member States also contain special jurisdiction rules for tort claims that provide for jurisdiction both at the place where the causal event for the damage occurred and the place where the damage is sustained. In these Member States, victims could bring proceedings against third-country subsidiaries of European corporations if it can be shown that the causal event for the damage occurred within this EU Member State.<sup>244</sup>
212. Ten Member States, including Belgium and the Netherlands, provide for civil jurisdiction over non-EU defendants on the basis that there is no other forum available abroad (*forum necessitatis*). In both Belgium and the Netherlands, *forum necessitatis* was introduced rather recently, amongst others with a view to giving effect to the fair trial guarantee of Article 6 ECHR.<sup>245</sup> The conditions for *forum necessitatis* vary from Member State to Member State, yet it always constitutes an exceptional ground for jurisdiction. In most cases, the claimant will have to demonstrate that it is 'unreasonable' or 'unacceptable' to bring proceedings abroad. This may be due to legal obstacles (e.g. no guarantee of fair trial in the third country) or factual obstacles, including that the claimant would be deprived, in practice, of effective access to court in the third country in seeking to bring a claim against the relevant subsidiary. In almost all Member States, a further condition is some kind of connection between the subsidiary and the forum.<sup>246</sup>
213. Finally, a subsidiary domiciled in a third country may be sued together with the European parent corporation (e.g. as a joint defendant) if it can be considered a necessary or proper party to the claim. For example, under Dutch law this is possible if there is a sufficient connection between the claims brought against the parent and the subsidiary to warrant a joint treatment of the cases for reasons of efficiency. The parent/subsidiary relationship, the common basis for, and identical nature of, the claims are indicative in this context.<sup>247</sup> The parallel provision of Article 6 Brussels I Regulation currently only applies to co-defendants (i.e. subsidiaries of European corporations) that are themselves domiciled in an EU Member State.
214. In common law jurisdictions, including the England, Scotland and Ireland, courts are generally permitted to decline jurisdiction and stay proceedings on the basis that the dispute has closer

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<sup>244</sup> For example, in Austria jurisdiction in tort matters is established 'where the behaviour occurred which led to the damages', and in the Czech Republic at the 'place where an incident causing damage has occurred, for further details see Nuyts, above n 244 at p 33.

<sup>245</sup> See Nuyts, above n 244 at p 64

<sup>246</sup> *Ibid*, at p 65. For example, the Dutch civil code provides for jurisdiction on the ground of *forum necessitatis* if access to a foreign court is not possible in practice due to natural disasters or war (Article 9(b) Code of Civil Procedure), or if due process may not be guaranteed in the third country (Article 9(c) Code of Civil Procedure). In the latter case, a sufficient connection with the forum, such as the presence of a Dutch parent corporation, is required, see Castermans & van der Weide, above n 23 at p 46

<sup>247</sup> Castermans & van der Weide, above n 23 at p 46; in the case against the Anglo-Dutch parent corporation and its Nigerian subsidiary currently pending in the Netherlands, the Dutch court accepted jurisdiction against both the parent and the subsidiary on the basis that the facts underlying the claims were interconnected, see above, III.3.2 and Court of the Hague Civil Law Section 330891/HA ZA 09-579 (30 December 2009).

connections with another State and should therefore be litigated in that State (*forum non conveniens*). The English courts traditionally apply a ‘two-part’ test to determine whether they should retain jurisdiction, or dismiss a case in favour of another jurisdiction.<sup>248</sup> *Forum non conveniens* can be used to stay proceedings in cases involving human rights and environmental abuses committed by third-country subsidiaries of European parent corporations. However, courts may retain jurisdiction even where another State is the more appropriate forum if there is a strong probability that the claimants would not obtain effective legal redress in the third State.<sup>249</sup> In 2000, the European Court of Justice held in *Owuso* that within the scope of the Brussels I Regulation, domestic courts were not permitted to decline jurisdiction on *forum non conveniens* grounds.<sup>250</sup> According to the ECJ, ‘application of the *forum non conveniens* doctrine, which allows the court seized a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of Article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention. *Forum non conveniens* continues to apply to cases outside the scope of the Brussels I Regulation, including claims for damages for human rights and environmental abuses committed by third-country subsidiaries of European corporations not domiciled in the European Union.

**b) The law applicable to private disputes involving human rights and environmental abuses by European corporations outside the European Union**

215. If a victim of corporate human rights and environmental abuses outside the European Union succeeds in establishing the jurisdiction of an EU Member State court, the further question that arises is whether the law governing the dispute should be that of the EU Member State or that of the third country (‘conflict of laws’). From the perspective of the claimant, the application of EU Member State law may often prove more beneficial as it may provide for higher standards of human rights and environmental protection. Yet at the same time, the choice of EU Member State law can prove problematic from the perspective of extraterritoriality, as it effectively applies and enforces the domestic law of one State in relation to actors and conduct in the territory of another State. Accordingly, and as a general rule, the law applicable to corporate human rights and environmental abuses will be that of the country where the abuse has occurred.
216. If corporate human rights and environmental abuses are committed outside the European Union, both proceedings against the European parent corporation and the third-country subsidiary are governed by conflict of law rules. If the claimant succeeds in establishing jurisdiction against the European parent corporation and the third-country subsidiary, the law applicable to the European parent corporation may either follow the law applicable to the subsidiary (*lex societatis*), or it may be determined separately on the basis of the general conflict of law rules.
217. In the European Union, the rules governing the law applicable to private disputes involving a foreign element are harmonised through the Rome I Regulation (contractual obligations) and

<sup>248</sup> *Silpada v Cansulex* [1987] AC 460

<sup>249</sup> *Lubbe v Cape plc* [2000] 1 WLR 1545

<sup>250</sup> ECJ, *Owuso v Jackson* C-281/02 (2005); the scope of the *Owuso* doctrine is limited to the facts of the case, with the consequence that *forum non conveniens* may still be applicable in relation to certain cases under the scope of the Brussels I Regulation, see for example *Konkola Copper Mines Plc v Coromin* (2005) EWHC 896 (Comm.).

the Rome II Regulation (non-contractual obligations).<sup>251</sup> It is irrelevant for the application of the Rome I and the Rome II Regulation in EU Member State courts whether or not any of the parties have a connection with the EU Member State in which it is applied. Thus, whenever a victim of corporate human rights and environmental abuses committed outside the European Union succeeds in establishing the jurisdiction of an EU Member State court, the Rome I and II Regulations will determine the law applicable to claims for damages resulting from the violation of contractual and non-contractual obligations.

218. The Rome I Regulation applies to contractual obligations in civil and commercial matters, including individual employment contracts<sup>252</sup> but excluding questions governed by company law (Article 1). Accordingly, the Rome I Regulation is relevant whenever corporate human rights and environmental abuses stem from violations of contractual obligations of the European parent corporation or a third-country subsidiary.
219. The law governing individual employment contracts is regulated in Article 8 Rome I Regulation. As a general rule, Article 8 will lead to the application of the law of the third country. EU Member State law applies to disputes involving individual employment contracts if the employment contract contains a valid choice of law agreement designating EU Member State law as the applicable law; failing that, if the EU Member State is the country in which or from which the employee habitually carries out his work in performance of the contract; failing that, if the place of business through which the employee is engaged is the EU Member State; or where it appears from the circumstances as a whole that the contract is more closely connected to the EU Member State.
220. The Rome II Regulation applies to non-contractual obligations in civil and commercial matters, including tort, product liability, and *culpa in contrahendo*, i.e. fault in conclusion of a contract (Article 2). All of these grounds for liability can be of relevance to third country victims of corporate human rights and environmental abuses. Similarly to the Rome I Regulation, the Rome II Regulation will in most cases lead to the application of the law of the third country. Accordingly, the law of the third country will determine, amongst others, the basis and extent of liability, the grounds for exemption from liability and limitations of liability, the existence, nature and the assessment of damage or the remedy claimed, and the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation (Article 16).
221. In absence of a valid choice of law agreement between the parties, Article 4(1) Rome II Regulation provides that the law applicable to a non-contractual obligation arising out of a tort will be the law of the country in which the damage occurs (*lex loci damni*), thus in cases of corporate human rights and environmental abuses committed in third countries the law of the third country.<sup>253</sup> However, where it is clear from all the circumstances of the case that a tort is

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<sup>251</sup> See above, n 243

<sup>252</sup> The Rome I Regulation makes no direct provision for collective agreements such as international framework agreements and transnational company agreements. On the latter see Betsch et al, *International private law aspects and dispute settlement related to transnational company agreements*, European Commission Study VC/2009/0157 (October 2009)

<sup>253</sup> This general rule not only mitigates concerns about assertions of extraterritorial jurisdiction, but is also inherent in the modern conception of tort law that, rather than regulating behaviour, primarily aims at protecting victims and redistributing loss, see A. van Hoek, 'Transnational corporate social responsibility – some issues with regard to the liability of European corporations for labour infringements in the countries of establishment of their suppliers', in F. Pennings et al (eds), *Social Responsibility in Labour Relations: European and Comparative Perspectives* (Kluwer, 2008), at p 163

manifestly more closely connected with an EU Member State, the domestic law of that Member State will apply to damages occurring outside the European Union (Article 4(3)).

222. In the case of environmental damages and damages sustained by persons or property as a result of such damages, Article 7 Rome II Regulation provides for a choice of the claimant between the law of the country where the damage occurred, and the law of the country 'in which the event giving rise to the damage occurred'. Article 7 allows victims of corporate environmental abuses<sup>254</sup> that are committed within an EU Member State but materialise outside the EU Member State to choose between the law of the Member State and the law of the third country. It has been argued that Article 7 may also apply to environmental damages in third countries that are the result of a failure on the part of a European parent corporation to control or supervise a third-country subsidiary. However, and in absence of pertinent case law, such a broad interpretation appears difficult to reconcile with the purpose of the provision to prevent transboundary pollution, and to give effect to the 'polluter pays' principle.<sup>255</sup>
223. There are two constellations in which, although the Rome II Regulation leads to the application of the law of a third country, EU Member State law will remain applicable, or the law of the third country will not be applied. Pursuant to Article 16 Rome II Regulation, 'mandatory provisions' of domestic law remain applicable irrespective of the law otherwise applicable to the dispute. According to the (narrow) interpretation of the ECJ, mandatory provisions of the forum are 'national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State'.<sup>256</sup> A number of EU Member State mandatory provisions protect human rights, in particular labour rights.<sup>257</sup> However, these provisions generally require a connecting factor between the claimant and the State exercising jurisdiction, which considerably limits their scope of application in relation to corporate human rights and environmental abuses committed outside the European Union.<sup>258</sup>
224. Pursuant to Article 26 Rome II Regulation, the application of a provision of foreign law may be refused 'if such application is manifestly incompatible with the public policy (*ordre public*) of the forum'. It should be emphasised that courts will only in exceptional circumstances disapply foreign law on public policy grounds. However, there is some evidence that the *ordre public* reservation can be invoked where provisions of foreign law are incompatible with international and/or domestic human rights law. In *Krombach*, the ECJ had to consider

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<sup>254</sup> And to the extent that environmental abuses lead to human rights violations also victims of corporate human rights abuses.

<sup>255</sup> Article 7 Rome II Regulation reflects the principle of ubiquity that disadvantages trans-boundary polluters as compared to domestic polluters which are only subject to the liability regime of the State in which they reside, see also Castermans & van der Weide, above n 23 at p 53

<sup>256</sup> ECJ, *Arblade* Joint Cases C/369/96 and C-376/96 (23 November 1999), at para 30

<sup>257</sup> For example, in the UK s. 204(1) of the Employment Rights Act 1996; s. 4 Race Relations Act 1976; s. 10(1) and s. 10(1A) of the Sex Discrimination Act 1975; s.11 (1) of the Equal Pay Act 1970 as amended by the Contracts (Applicable) Law Act 1990 s. 5 & Sch.4. It remains to be seen whether these provisions will qualify as 'mandatory' under the narrow interpretation of the ECJ.

<sup>258</sup> For example, the UK Sex Discrimination Act 1975 prohibits discrimination at an establishment in Great Britain. Employment is regarded at an establishment in Great Britain if the work is done wholly or partly in Great Britain, or the employee does his work wholly outside Great Britain and the conditions of s. 10(1A) are satisfied. Pursuant to s. 10(1A), employment will be regarded as being at an establishment in Great Britain if (a) the employer has a place of business at an establishment in Great Britain, (b) the work is for the purposes of the business carried out at that establishment, and (c) the employee is ordinarily resident in Great Britain at the time he applies for the employment or during the employment.

whether the enforcement of a foreign judgement could be refused on public policy grounds. Considering EU fundamental rights law and the ECHR, the court held that in ‘exceptional cases’ of a ‘manifest breach’ of human rights, States were entitled to refuse the enforcement of a judgment under the *ordre public* reservation.<sup>259</sup> Similarly, considering the UK Human Rights Act 1998 and the ECHR, the House of Lords held that the registration of a US confiscation order in the UK could be refused in cases of ‘flagrant denials’ or ‘fundamental breaches’ of human rights.<sup>260</sup>

225. According to the Introductory Act to the German Civil Code (EGBGB), norms of foreign law must not be applied if their application would lead to a result incompatible with the essential principles of German law, in particular German fundamental rights law. In the UK, the application of the *ordre public* reservation to protect human rights was discussed in the House of Lords European Union Committee Report on the Rome II Regulation.<sup>261</sup> The Committee was content that (now) Art 26 Rome II Regulation would permit British courts to decline the application of foreign law that violates human rights, including freedom of expression and information, prohibition of torture, and reparation claims made by victims of torture. Provisions of foreign law which are ‘contrary to morality’ or ‘an essential moral interest’, amount to a ‘gross breach of the established rules of international law’ or a very grave infringement of human rights will not be applied by English courts even if there is no connection with England other than that England is the forum of the claim.<sup>262</sup>

### 3.4 Lessons for the European Union and the EU Member States

226. International cooperation is crucial for the effective implementation and enforcement of criminal law in relation to globally operating MNCs. One persistent obstacle to effective international cooperation remains an insufficiently broad or too uneven participation of States in the main international treaties. The criminal regime governing anti-corruption is an example of successful international cooperation, with a substantial degree of State ratification and participation in the dense web of regional and international agreements and initiatives to prevent and sanction corruption and related offences.
227. A further obstacle stems from differences in State practice in criminalising the relevant offences and in providing for criminal liability of corporations as legal persons. Recent high-profile prosecutions of MNCs for bribery in different States suggest that these obstacles can be overcome. The European Union has already made considerable progress in harmonizing the positions of the Member States, coordinating State action, and eliminating double criminality within its own borders. Such measures could provide a basis for the EU to further promote international cooperation on combating corruption in its external relations. At the same time, the European Union could seek to ensure a comprehensive participation by Member States in key anti-corruption treaties, consider formulating a common policy on reservations in these treaties, and take other appropriate measures to ensure that cooperation is available even in absence of double criminality (of corporations).
228. The majority of EU Member States provides for criminal liability of corporations as legal persons. In some EU Member States, parent corporations can also be liable for criminal

<sup>259</sup> ECJ, *Krombach*, Case C-7/98 (28 March 2000), at para 44

<sup>260</sup> House of Lords, *United States v Montgomery* (No.2) [2004] UKHL 37

<sup>261</sup> House of Lords European Union Committee, 8<sup>th</sup> Report of Session 2003-04, ‘The Rome II Regulation’ (7 April 2004)

<sup>262</sup> See *Re Missouri Steamship Co* (1889) 42 Ch.D. per Lord Halsberg L.C.; *Kuwait Airways Corp v Iraqi Airways Co* (No.6), [2002] UKHL 19; *Oppenheimer v Cattermole* [1976] A.C. 249, per Lord Cross

offences committed by their subsidiaries, notwithstanding separate legal personality. One ground for liability is the active participation of the parent corporation in offences committed by a subsidiary. In more limited circumstances, the failure of parent corporations to put into place effective mechanisms of control to prevent criminal offences by the subsidiary can also lead to liability. Particularly noteworthy in this context is the parent liability for failure to prevent bribery by subsidiaries and sub-contractors provided for in the recent UK Bribery Act, which also applies to bribery offences committed outside UK territory.

229. The criminal regime governing anti-corruption also evidences the need for, and the preparedness of States to resort to, extraterritorial jurisdiction where there is a strong common international concern with, and/or a sense of shared responsibility for, extraterritorial corporate activities harmful to human rights and the environment. Some anti-corruption treaties already provide for a wide interpretation of the territoriality principle that enables States to take jurisdiction over offences that are merely commenced or consummated in their territory. Moreover, assertions of direct extraterritorial jurisdiction on the basis of the nationality of the offender appear widely accepted in the area of anti-corruption. A consistent application of the nationality principle by all European Member States would minimize obstacles to the provision of judicial assistance and enhance the effectiveness of the international legal regime governing anti-corruption. Finally, EU Member States have also resorted to domestic measures with extraterritorial implications, imposing requirements on parent corporations domiciled in their States to control and prevent subsidiaries in third countries from committing relevant offences. The new UK offence of ‘failing to prevent’ bribery by foreign subsidiaries and sub-contractors is a prominent example.
230. While in the criminal law context, there are a few examples of States imposing criminal liability on parent corporations for failure to control or prevent violations by their subsidiaries notwithstanding separate legal personality, the responsibility of European parent corporations for human rights and environmental abuses committed by their subsidiaries under corporate law remains relatively limited. It appears common ground that ownership in shares or the mere potential to control activities of the subsidiary are not sufficient to establish parent liability. Provided further conditions are met, parent liability is, however, likely where the doctrine of separate legal personality is abused to defeat liability or to commit illicit acts, and/or where the subsidiary has entered into an insolvency process. Beyond that, and generally speaking, the closer the relationship between the parent corporation and the subsidiary, the more likely it is that the former will be liable for human rights and environmental abuses committed by the latter, particularly where the European parent corporation exercises actual substantive control or direction over the conduct of the subsidiary that results in the human rights or environmental abuse. Exceptions to the doctrine of separate legal personality recognised in the corporate laws of the EU Member States could provide the basis for further clarifying under which conditions parent corporations should be liable for human rights and environmental abuses committed by their subsidiaries. On this basis, it could be considered to impose, through domestic regulation and in appropriately limited circumstances, a requirement on European parent corporations to exercise oversight or control over its subsidiaries in third countries, and to hold them responsible for failure to do so.<sup>263</sup>
231. In relation to directors’ duties the SRSG has stressed that human rights and environmental considerations can be ‘material’ for the purpose of a corporation’s commercial activities and financial condition under existing law. A number of EU Member States already require or permit directors to take corporate impacts on the community and the environment into

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<sup>263</sup> This option has been considered by the UK Joint Committee on Human Rights, see above section II.1

account as part of their duty to the corporation. While there is no explicit requirement for directors to take human rights impacts into account, they may be required to do so under existing law to the extent that such impacts are relevant to the interest of the corporation. Against this background, it could be clarified what directors are permitted or required to do, as part of their duty to the corporation, to promote human rights and environmental protection. Human rights and environmental impacts of third-country subsidiaries and suppliers of European corporations could also be taken into account.

232. The insight that human rights and environmental considerations can be ‘material’ for the corporation’s commercial activities and financial condition is also relevant in relation to corporate reporting. Encouraging or requiring corporations to report on their human rights and environmental policies and impacts would be a significant step towards establishing human rights and environmental protection as a core business concerns. EU law already stipulates some requirements on environmental and social corporate reporting, albeit not very specific or well-defined. A few EU Member States provide for reporting requirements that go beyond what is required by European legislation. The EU and the EU Member States could further specify existing reporting requirements on environmental and social impacts, and clarify when and under what conditions human rights risks and impacts should be disclosed, including human rights and environmental impacts of third-country subsidiaries and suppliers of European corporations
233. Both as regards directors’ duties and reporting requirements, it should be noted that an effective implementation of the suggested measures furthermore requires effective mechanisms within corporations to identify and address potential negative human rights and environmental impacts throughout the corporate structure. While an elaboration of such mechanisms is beyond the scope of this study, the valuable work of the SRSG on corporate human rights due diligence is commended.<sup>264</sup> As regards corporate human rights reporting, the European Union could draw on its existing expertise in the areas of environmental and social reporting.
234. The Brussels I Regulation enables third-country victims of corporate human rights and environmental abuses to sue corporations in an EU Member State court provided they have their statutory seat, central administration, or principal place of business in that EU Member State. This generally permits third-country victims to pursue their claims against the European (parent) corporation in European courts for civil damages caused by human rights and environmental abuses committed by their subsidiaries and contractors outside the European Union. The law of some EU Member States permits claimants to sue third-country subsidiaries together with the European parent corporation provided the subsidiary can be considered a necessary or proper party to the claim.
235. The Brussels I Regulation currently does not provide for access to EU Member State courts for claims against third-country subsidiaries of European corporations. In the ongoing review of the Brussels I Regulation, the European Commission Green Paper raises the option of extending the scope of the Regulation to defendants not domiciled in EU Member States.<sup>265</sup> This would enable victims of corporate human rights and environmental abuses committed by subsidiaries of European corporations domiciled in third countries to seek civil redress from these subsidiaries in the EU Member State courts. It would also ensure a consistent practice

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<sup>264</sup> For an overview see UN Doc A/HRC/14/27 (9 April 2010), above n 51 at paras 79-86

<sup>265</sup> European Commission Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters COM(2009) 175 final (21 April 2009)

across the European Union as regards defendants not domiciled in EU Member States, and reduce forum shopping. At the same time, it is unlikely to unduly impinge on the territorial jurisdiction of other States as it merely provides access to Member State courts, rather than applying or enforcing EU Member State law outside the State's jurisdiction.<sup>266</sup> Thus, and notwithstanding concerns raised by a number of Member States during the consultation process, it could be considered to extend the Brussels I Regulation to corporations not domiciled in the European Union. One possibility would be to amend Article 6 Brussels I Regulation, in line with the law of some EU Member States, to enable claimants to sue a subsidiary domiciled in a third country together with the European parent corporation (e.g. as a joint defendant) provided the subsidiary can be considered a necessary or proper party to the claim. It could also be considered to create additional grounds of jurisdiction, including *forum necessitatis* as proposed by the Dutch and the Spanish contributions to the consultation process.

236. All proposals to reform the Brussels I Regulation should be scrutinised for their impact on access to justice for third-country victims of human rights and environmental abuses by European parent corporations and/or their third-country subsidiaries. In particular, the introduction of the *forum non conveniens* doctrine as suggested in the consultation process could risk significantly undermining access to justice for third-country victims. The Brussels I Regulation strikes an appropriate balance between concerns with effective access to justice and concerns with assertions of contested assertions of extraterritorial jurisdiction, so that there is no apparent need for courts to fall back on *forum non conveniens*. At the same time, the application of the *forum non conveniens* doctrine has proven to have considerable negative impacts on civil litigation against MNCs in EU Member State courts, amongst others because it encourages protracted and expensive 'satellite litigation' on grounds of forum and considerably reduces legal certainty for potential claimants.
237. While the Rome I and Rome II Regulations will in most cases lead to the application of the law of the country in which the corporate human rights and environmental abuse has taken place, there is evidence that as a matter of public policy, EU Member State courts can refuse the application of foreign law on grounds of 'manifest breaches' or 'flagrant denials' of human rights. Whether EU Member State courts are required to do so as a matter of European human rights law remains unsettled.
238. Finally, and while outside the scope of this study, it should be stressed that even if third-country victims of corporate abuse succeed in securing access to EU Member State courts, they will face very significant procedural obstacles in obtaining redress from MNCs including obstacles pertaining to time limitations, legal aid and due process, non-availability of public interest litigation and mass tort claims, and provisions on evidence. In his most recent report, the SRSG has highlighted three types of procedural obstacles in particular: the problem of costs of obtaining legal advice and of the case itself should the claim prove unsuccessful; procedural barriers resulting from limitations on standing and on the ability to bring group claims for compensation; and financial, social and political disincentives for lawyers to represent claimants in this area.<sup>267</sup> The European Union and the EU Member States should address these procedural obstacles as part of their State duty to protect.

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<sup>266</sup> Depending on the circumstances, third countries may actively support the jurisdiction of EU Member State over corporate human rights and environmental abuses committed in their territory. For example, in the Bhopal case the Indian government actively supported litigation in the US.

<sup>267</sup> UN Doc A/HRC/14/27 (9 April 2010), above n 51 at paras 109-112



#### IV. CONCLUDING REMARKS

239. The existing legal framework on human rights and the environment applicable to European Union enterprises operating outside the EU is complex and multi-faceted, consisting of different bodies of law at national, European and international levels. The existing European legal framework already contributes in some respects to the implementation of the UN Framework on business and human rights. However, in other respects legal gaps and policy incoherencies persist. This study has identified a number of opportunities for legal reforms that could be explored, with a view to better contributing to the further implementation of the UN Framework.
240. The study is intended to provide a solid legal basis for policy makers, corporations, and civil society organisations to consider how best to effectively respond to the (legal) challenges posed by extraterritorial corporate violations of human rights and environmental law. While the study is concerned with the European *legal* framework, it is worth noting that in an area such as extraterritorial jurisdiction over corporate human rights and environmental abuses, where the boundaries between what is legally required or permissible and what is the politically feasible or opportune are often blurred, the role of political will and commitment is crucial.

## **V. ANNEX: COMMENTS FROM THE MULTISTAKEHOLDER STEERING COMMITTEE**

### **1. Amnesty International**

Amnesty International welcomes the European Commission's initiative in conducting this study and the opportunity to provide comments during the process. The study provides a valuable overview of the existing legal frameworks, which we hope will provide the foundation for the necessary reforms in law and policy to ensure that European Union (EU) companies are effectively regulated and that the EU and its member states do not provide assistance to or otherwise support corporate human rights abuses within or outside the EU. While broadly welcoming the study, Amnesty International would make the following critical observations:

#### *Lack of clear distinction between legal and voluntary or non-binding frameworks*

Given the study's objective of clarifying the existing legal framework for human rights and environmental issues applicable to European enterprises operating outside the EU, Amnesty International is concerned by the way in which some voluntary or non-binding initiatives are included and referenced in the final report. Specifically, the critique provided on some issues – such as in relation to the OECD Guidelines on Multinational Enterprises, the Common Approaches on Export Credit Agencies – is based on theoretical notions of the value of such frameworks or initiatives rather than on an evidence-based understanding of how they are applied, and their effectiveness in terms of protection of human rights and the environment.

The OECD Guidelines on Multinational Enterprises are not a legal framework. Although this is briefly acknowledged in the text the language used is – for the most part – very misleading, suggesting at several points that the OECD Guidelines are a regulatory framework with substantial force and effect. The Guidelines are voluntary, and have not been shown to be effective as a means to regulate corporate activity or address corporate human rights abuses.

The approach to OECD National Contact Points (NCPs) is also misleading. While non-judicial mechanisms have a role to play in addressing human rights abuses, it is inaccurate to describe non-judicial mechanisms, such as which have little or no capacity to provide remedy, as remedial mechanisms. NCPs were not established to provide remedy. They are a means to raise alleged breaches by companies of the OECD Guidelines. Despite a largely positive assessment in the study of the remedial potential of NCPs, no substantiating references or evidence are provided to support the statement made. The NCP process may – in some circumstances – result in a remedial outcome for those who have suffered human rights harms, but any such outcome is usually dependent on the voluntary cooperation of the company that is alleged to have harmed rights in the first place.

In the case of Export Credit Agencies (ECAs) there is a lack of clarity in the text on the distinction between what ECAs are – or could be – required to do by law and what requirements ECAs may be able to place on companies that receive ECA support. Additionally the reference to the revision of the OECD Common Approaches on the Environment and Officially Supported Export Credits appears to focus primarily on non-legal reforms.

#### *Lack of clarity on human rights impacts versus other negative impacts of corporate activity*

The study lacks conceptual and structural clarity in that it does not clearly frame its analysis of the different legal and non-legal regimes in terms of: (a) a clear description of the existing legal framework; and (b) the connection between the specific legal framework and the human rights impacts of companies. As a consequence, at several points legal frameworks that can address

corporate misconduct are referenced without clarity on whether human rights impacts can be specifically considered. While frameworks that address corruption or environmental damage caused by EU-based companies or their subsidiaries operating beyond the borders of the EU may help prevent or address some negative human rights impacts, the opportunities are often limited and many human rights abuses cannot be considered within such frameworks.

## **2. Antje Gerstein, BDA – Confederation of German Employers' Association, on behalf of BUSINESSEUROPE**

It was a useful exercise to launch this study in order to stimulate the debate on how European companies can address human rights issues in their proper scope and how to operationalise the UN framework "Protect, Respect, Remedy" developed by John Ruggie in the European context. The study covers a wide range of legal issues and the authors nevertheless succeeded in choosing a clear and understandable language to present their findings and ideas.

A more constructive approach in the study would have been preferable, including ideas on how European companies could be helped and assisted in addressing human rights issues along the Ruggie framework, in particular when they are confronted with dilemma situations in third countries. Instead the study focuses on criminal law which reduces its perspective accordingly. This leads to a general tone in this study that is not always appropriate, as if suggesting that companies are intentionally trying to evade their human rights responsibilities by outsourcing operations to third countries. The contrary is true: John Ruggie himself recognized already in 2007 that, "leading business players recognize human rights and adapt means to ensure basic accountability".

The most problematic policy recommendation is the idea of extending Brussels I to third countries. For several years John Ruggie in his capacity as SRS is dealing with the vast issue of extraterritoriality. A number of recognized law firms and international law specialists are currently examining this issue and its possible consequences on behalf of John Ruggie. He rightly stresses that this highly complex topic must be further elaborated, before concrete policy recommendations can follow. Therefore at this stage it is not appropriate to come up with this proposal which has far reaching consequences not only for companies but also for the human rights behaviour of third countries. Generally such an approach would only work under the condition that there are common judicial standards in place, which is very unrealistic. If the third countries have a weak or even failing legal system, or if their system is in contradiction to internationally agreed human rights standards and norms, such an extension would cause tremendous legal uncertainties for companies. The extension as proposed would for example enable consumer complaints against European companies from outside Europe. This could mean a European internet company which has a contract with a Chinese consumer could be sued in China under the application of Chinese law. There are many other possible consequences and scenarios which are unfortunately not reflected in the study.

The European Commission should take the results of this study as one element of an important discussion on Human Rights and Enterprises which needs further development. A purely and isolated legal approach will not significantly contribute to solve Human Rights abuses in third countries. The situations often are extremely complex and need tailor made solutions, which need careful consideration and space for conflict solution between the parties, preferably outside courts.

## **3. Thomas Koenen, CSR Europe & econsense**

CSR Europe as a member of the Coordination Committee of the Multi-Stakeholder Forum on Corporate Social Responsibility (CSR) and as the central network of business with regard to CSR in Europe welcomes the active engagement of the European Commission (EC) in the subject of

Business and Human Rights. Business and Human Rights is a crucial part in the CSR debate and should from our perspective be an integral part in any company's CSR policy. With this regard, CSR Europe believes that the "Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside of the European Union" conducted by the University of Edinburgh and commissioned by the EC offers valuable insights into the complex legal and political question of extraterritorial jurisdiction over companies for the participation in human rights abuses.

As the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Professor John G. Ruggie, has put it in his recent speech at the EU Presidency Conference in November 2010 in Stockholm, "[...] *the subject of extraterritorial jurisdiction is enormously complex and needs to be handled with great care*" which means that state sovereignty and the international legal principle of non-intervention are often in danger of being affected. The single areas of law which have been addressed in the study all require specific and sensitive approaches as to how best human rights can be protected and integrated. In order to avoid uncertainty and unbearable competitive disadvantages for European business and especially for SMEs, clear alignment with the Special Representative's framework on the international level and harmonized approaches on the EU level would be beneficial on the way forward. For that matter, we encourage the EC to invite the High Level Group to discuss the subject of Business and Human Rights, to deepen the national debates and improve awareness within the national business communities.

In support of the European Strategy 2020 and specifically in regard to the announced European communication on CSR, we encourage the EC with the support of all relevant services to act as a catalyst in order to facilitate further stakeholder dialogue on the subject of Business and Human Rights, to support training and further capacity building for companies in how best to integrate human rights into their daily work, to support institutions on national level committed to Business and Human Rights, to foster aspiring pilot projects and to help strengthen the scientific knowledge within the debate. Last but not least we encourage the EC to take into account the possibility of setting up a central coordination and information point on the subject of Business and Human Rights in Europe (e.g. an institute) where companies and other institutions can find information, advice, networking opportunities as well as the professional means to help find the appropriate remedy on business and human rights related matters. Such a "one-stop-body" would be a valuable step forward in practically operationalising the Ruggie framework and show European leadership in responsible business conduct.

CSR Europe and its German partner organization econsense – Forum for Sustainable Development of German Business remain very active on the subject of Business and Human Rights. As part of CSR Europe's new initiative "Enterprise 2020", we will explore new possible partnerships with member companies and other stakeholders to enhance knowledge and build capacity in this field. We would be thankful if we could support the EC as partners in the future on the topic of CSR in general and Business and Human Rights in special.

#### **4. Hannah Ellis, The Corporate Responsibility (CORE) Coalition, on behalf of The European Coalition for Corporate Justice (ECCJ)**

The ECCJ welcomes the European Commission's recent work in the area of law, business and human rights. This study's central conclusion that many European corporations benefit financially from operations outside the EU yet evade responsibility for their human rights and environmental impacts is an issue that the EU cannot afford to ignore. Furthermore, the recommendations it outlines illustrate some of the many opportunities the EU now have to take this work forward.

The report makes many recommendations and as a next step ECCJ would encourage the EU to take immediate action in the following three areas:

Reform to the *4th and 7th Directives on the Annual and Consolidated Accounts of Companies* (Directives 78/660/EEC and 83/349/EEC respectively) offers a great opportunity for the EU to be more transparent about the impact of its operations abroad through the mandatory introduction of clear, audited, comparable and enforceable standards for large and medium sized companies. Where reporting mechanisms are coupled with effective enforcement mechanisms, greater transparency can help human rights and environmental protection.

European law governing the remedy of violations caused by companies operating outside of the EU, as the study indicates, is central to any review of the effectiveness of existing legal frameworks. Within this context, reform of Brussels I Regulation and Rome II Regulation could play a pivotal role.

Brussels I plays a significant role in enabling third-country victims of corporate human rights and environmental abuses to sue corporations in an EU Member State. ECCJ supports the recommendation that significant improvements could be introduced through amendments to *Brussels I Regulation*. By enabling claimants to sue a subsidiary domiciled in a third country, together with the European parent corporation, and through the creation of additional grounds of jurisdiction, including forum necessitates, some of the deficiencies in existing accountability frameworks could be addressed.

The effectiveness of redress, as the report indicates, does not rest solely on Brussels I reform. The determination of applicable law, governed by *Rome I and Rome II Regulations* could also improve the efficiency of the current regulatory environment, through ensuring that manifest breaches of human rights are never permitted.