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Comparative Analysis and Legal Reflection on the Boundaries of Human Rights Due Diligence in the Supply Chain

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Abstract: *As global supply chains become increasingly lengthy and complex, human rights due diligence in the supply chain is becoming a controversial focal point in the accountability of multinational corporations. In recent years, legislative practices in the field of human rights due diligence have shown a trend from voluntary soft law toward mandatory hard law, and from corporate due diligence for their own operations towards extended due diligence for the entire supply chain. However, there is a divergence in national practices regarding the extent to which human rights due diligence should extend along the supply chain and the manner in which it should be incorporated into domestic legal policies. International soft law interpretations surrounding the boundaries of human rights due diligence in the supply chain are decentralized, posing risks of interpretation diversification, boundary blurring, and procedural formalization, as well as risks of misinterpretation and misuse. Meanwhile, some countries and regions are vigorously promoting mandatory legislation on human rights due diligence in the supply chain, which has profound implications for the stability of global supply chains and the international economic and trade order. Against this backdrop, it is crucial to explore the reasonable boundaries of human rights due diligence in the supply chain. Instead of applying a one-size-fits-all approach, the rationality of legal factors and the complexity of practical factors should be considered, applying context-specific measures based on the varying degrees of linkage between companies and negative human rights impacts in the supply chain. China should be particularly wary of the "chilling effect" of mandatory legislation on human rights due diligence in the supply chain, attaching great importance to national supply chain security and international supply chain competitiveness. Additionally, China should actively promote the implementation of voluntary human rights due diligence under the United Nations framework, and accelerate the enhancement of China's discourse power in the international rule-making process in the fields of industry and*

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commerce as well as human rights.

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Introduction

With the vigorous development of the corporate social responsibility (CSR) legalization movement, human rights due diligence in the supply chain has increasingly become a hot topic in the development of corporate human rights responsibilities. It is also a controversial issue in the United Nations' process concerning business and human rights. Since the adoption of the *United Nations Guiding Principles on Business and Human Rights* (hereinafter referred to as the *Guiding Principles*) by the United Nations Human Rights Council in 2011, which embedded human rights due diligence into corporate governance,[1] related international standards, guiding documents and practices have proliferated globally.[2] In recent years, the legislative practice of human rights due diligence has shown a trend of transformation from voluntary soft law to mandatory hard law, and from human rights due diligence for a company's own business to human rights due diligence in the supply chain. In some countries, there are even legislative rules for mandatory human rights due diligence in the supply chain. Legislation on mandatory human rights due diligence in the supply chain, due to its extraterritorial effects in terms of implementation, has a profound impact on the global economic and trade order and the adjustment of supply chain structures, especially bringing challenges to businesses from developing countries. To prevent some countries from abusing legislation on human rights due diligence in the supply chain as a tool for their foreign trade policy, it is urgent to examine the current legislative practices in the international community and to discuss the reasonable boundaries of corporate human rights due diligence in the supply chain from a legal perspective, including the scope of human rights, the connotation of due diligence obligations, the scope of applicable enterprises, and the scope of the supply chain, among other aspects. Clarifying these boundaries not only is conducive to balancing the relationship between the human rights responsibilities that companies should bear and the legitimate rights and interests that companies should enjoy, but also plays a positive role in maintaining the fairness, justice, and sustainable development of the global economic and trade order. At present, the academic community has paid attention to the recent practices, implementation models and development trends of legislation on human rights due diligence in the supply chain,[3] but there is insufficient reflection and criticism on the

1. United Nations Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, A/HRC/17/31, 2011, page 17.

2. John Gerard Ruggie, "*Global Governance* and 'New Governance Theory': Lessons from Business and Human Rights," 20 *Global Governance* 1 (2014): 12.

3. Wang Xiumei and Yang Caiting, "Human Rights Protection in International Supply Chain: Evolution of Rules and Practical Process," *Tribune of Social Sciences* 3 (2022); Li Zhuolun, "Legal Regulation of Human Rights Responsibilities of Multinational Corporations from the Perspective of Global Supply Chains," *Journal of Human Rights Law* 4 (2022).

legal boundaries of human rights due diligence in the supply chain. Therefore, this paper proposes the core legal disputes when it comes to legislation on human rights due diligence in the supply chain through a comparative analysis of different legal elements in international soft law, European Union legislation and national legislation, and reflects on and explores their reasonable boundaries.

I. Core Legal Disputes over the Boundaries of Human Rights Due Diligence in the Supply Chain

Human rights due diligence in the supply chain is an integral part of human rights due diligence. It can be understood as the extension of a company's human rights due diligence obligations from its own activities to the supply chain in which the company is located. It is also a concept that is continuously evolving. In the era of economic globalization, in order to bridge the "governance gap" and "accountability gap" in the field of business and human rights between different countries and regions, John Ruggie, the Special Representative of the United Nations Secretary-General, was the first to formally propose the "human rights due diligence" framework.[4] "Human rights due diligence" has been included by the United Nations Human Rights Council as the core content of the second pillar of the *Guiding Principles*, Corporate Responsibility to Respect Human Rights. When proposing the concept of human rights due diligence, the *Guiding Principles* pointed out that its scope covers not only the negative human rights impacts caused or exacerbated by the "own activities" of business enterprises, but also those directly related to their business, products or services due to business relationships.[5] Therefore, the concept of human rights due diligence in the supply chain was derived. Although the concept of human rights due diligence in the *Guiding Principles* has been widely recognized by the international community, the legislative practices of different countries vary greatly as to the extent to which human rights due diligence should be extended to the supply chain and in what manner it should be incorporated into domestic legislation. Surrounding the core legal disputes over the legislation on human rights due diligence in the supply chain, this part uses current legislative practices at the international, regional and domestic levels as samples to conduct a comparative analysis of legal elements such as the scope of human rights, due diligence's connotations, enterprise scope, and supply chain scope, which are covered by legislation on human rights due diligence in the supply chain.

A. Disputes over the scope of human rights

The first legal element of legislation on human rights due diligence in the supply chain is the scope of human rights it covers. Para. 12 of the *Guiding Principles* states that "The responsibility of business enterprises to respect human rights refers to internationally recognized human rights — understood, at a minimum, as those expressed in the *International Bill of Human Rights* and the principles concerning fundamental

4. United Nations Human Rights Council, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, A/HRC/8/5, April 7, 2008, para. 10.

5. United Nations Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, A/HRC/17/31, 2011, para. 17.

rights set out in the *International Labour Organization's Declaration on Fundamental Principles and Rights at Work*."[6] However, the *Guiding Principles* does not exhaustively list all human rights found in other core international human rights instruments. Considering the universality, indivisibility, interdependence and interrelationship of human rights, it seems that an all-round model of human rights protection should be adopted.[7]

However, existing legislation on human rights due diligence in the supply chain mainly adopts three regulatory models in defining the scope of human rights. The first model is to focus specifically on human rights risks in specific industries (such as timber mining, metallurgy and mining, food safety, etc.) or specific issues (such as the elimination of slavery and human trafficking, labor rights, etc.). In terms of specific industries, Section 1502 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* of the United States focuses on whether tin, tungsten, tantalum and gold (conflict-affected minerals) in the supply chain come from the Democratic Republic of the Congo and adjacent areas;[8] *Regulation (EU) 2017/821* of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas;[9] the Australian *Illegal Logging Prohibition Act* focuses on specific industries such as conflict-affected minerals and timber mining.[10] In terms of specific matters, the United Kingdom's *Modern Slavery Act* 2015[11] and Australia's *Modern Slavery Act* 2018[12] both prohibit slavery, servitude, forced labor and human trafficking, while the Dutch *Child Labor Due Diligence Law* adopted in 2019 only prohibits child labor in supply chains. The second model is to cover all human rights in a general way without limiting the scope of human rights instruments. For example, the "serious violations of human rights and fundamental freedoms"[13] in France's *Loi relative au devoir de vigilance* (hereinafter referred to as the French *Duty of Vigilance Law*) and the "internationally recognized human rights"[14] in the legislative proposal Swiss *Responsible Business Initiative* both adopt the second legislative model. The third model attempts to cover a wider range of human rights but refers to specific international human rights treaties. For example, Norway's *Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og*

6. The commentary to Para. 12 of the *Guiding Principles* states that depending on circumstances, business enterprises may need to consider additional standards. For instance, UN human rights instruments that address specific human rights groups or issues, and international humanitarian law standards in situations of armed conflict.

7. Tang Yingxia, "Considerations and Typology of Mandatory Human Rights Due Diligence Legislation," *Chinese Journal of Human Rights* 1 (2022): 48.

8. Section 1502 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*.

9. Regulation (EU) 2017/821 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold (3TGs) originating from conflict-affected and high-risk areas.

10. *Australian Illegal Logging Prohibition Act*.

11. *Modem Slavery Act* 2015.

12. *Modern Slavery Act* 2018.

13. *Loi relative au devoir de vigilance, 2017*, art. L. 225-102-4-1 (Code de Commerce).

14. Swiss *Responsible Business Initiative*, § 2 (a).

anstendige arbeidsforhold (hereinafter referred to as the *Transparency Act*)[15], the *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive* (EU) 2019/1937[16], the *Directive (EU) 2022/2464 as egards corporate sustainability reporting*,[17] and Germany's *Lieferkettensorgfaltspflichtengesetz, LkSG* (hereinafter referred to as the *Supply Chain Due Diligence Act*)[18] all cite a series of international human rights treaties to interpret the scope of human rights they protect.

It is worth noting that due to the inseparable relationship between human rights and the environment, some supply chain due diligence legislation has adopted a comprehensive legislative model that covers both human rights and environmental impacts. For example, the French *Duty of Vigilance Law* stipulates that due diligence should cover "serious violations of human rights and fundamental freedoms, serious bodily harm, environmental damage or health risks,"[19] but it does not clearly define the specific scope it covers. In contrast, German *Supply Chain Due Diligence Act* provides relatively complete definitions of human rights risks and environmental risks, respectively. "Human rights risks" are defined as situations where there is a "reasonable possibility" of violating the relevant prohibitions in the international human rights treaties and specific human rights norms listed therein; "environmental risks" are defined as situations where there is "reasonable possibility" of violating the relevant prohibitions in the specific international environmental conventions listed therein, which are mainly related to the use and manufacture of mercury, irresponsible waste disposal and the export of hazardous waste.[20] The European Union's *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive* also comprehensively regulates human rights and environmental impacts, where "adverse human rights impacts" are defined as adverse effects on protected persons caused by a violation of one of the rights listed in Section 1 of Annex I or the prohibitions contained in the international conventions listed in the Annex (Part I Section 2). "Adverse environmental impacts" are defined as adverse effects on the environment caused by a violation of one of the prohibitions and obligations of the international environmental conventions listed in Part II of the Annex.[21] Although there is a great deal of overlap between the German *Supply Chain Due Diligence Act* and the European Union's *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and*

15. *Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold*, §3 (b).

16. European Commission, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive* (EU) 2019/1937, 23 February 2022, Annex, Part I Section 2.

17. Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting.

18. *Lieferkettensorg/bltsp/Zichtengesetz-LkSG*, § 2.

19. *Loi relative au devoir de vigilance*, 2017, art. L. 225-102-4-I (Code de Commerce).

20. *Lieferkettensorgfaltspflichtengesetz-LkSG*, § 2 (2), § 2 (3).

21. European Commission, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive* (EU) 2019/1937, 23 February 2022, art. 3.

amending Directive in the definition of human rights, there are significant differences between the two in the definition of the environmental scope. The former emphasizes biodiversity protection, while the latter focuses on climate due diligence.

From the above, it can be seen that although legislation on human rights due diligence in the supply chain attempts to define the scope of human rights it protects, there is still a lack of consensus on the definitions of concepts such as human rights risks, human rights impacts, and human rights violations. Especially when environmental impacts are included in the scope of the legislation, the differences surrounding the scope of human rights and the environment become more significant. Even if the relevant legislation cites international human rights conventions or international environmental conventions, it cannot escape the ambiguity problem of the international conventions themselves in defining human rights standards or environmental standards. In particular, when companies adopt preventive due diligence measures, they may face multiple human rights risks or negative human rights impacts of varying severity at the same time. In a complex context where human rights risks vary in importance and urgency, the severity of human rights risks is not an absolute concept in itself, but varies according to different internal and external conditions, not only between different companies, but also at different times within the same company. This undoubtedly increases the complexity and uncertainty of human rights risk assessments. In summary, the ambiguity and controversy of the scope of human rights not only leave companies without clear criteria when fulfilling their human rights due diligence, but also give judicial or administrative authorities broad discretion when assessing the company's fulfillment of human rights due diligence, leading to questions about the stability and predictability in the legislation on human rights due diligence.

B. Disputes over the connotation of due diligence

The legal connotation of obligations is the core legal element of human rights due diligence in the supply chain. The *Guiding Principles* takes a descriptive rather than a defining approach to explaining human rights due diligence, requiring companies to identify, prevent, mitigate, account for, and remedy their negative human rights impacts, and provide a set of practical procedures to fulfill the company's responsibility to respect human rights.[22] However, this explanation in the *Guiding Principles* actually covers two different levels of the connotation of "due diligence": one is the objective behavioral standard as a duty of care, and the other is the due diligence process as a business risk management process. The *Guiding Principles* do not distinguish between these two legal connotations, leading to confusion in the interpretation and application of the concept of due diligence. On the one hand, due diligence can be understood as the "due care" that a specific entity can reasonably be expected to maintain compliance with legal requirements or fulfill its obligations, which has appeared in various fields such as tort law, corporate law, and international law. On the other hand, due diligence can be understood as the "due diligence process" that a company carries out in the process of business risk management. These two legal connotations have subtle

22. United Nations Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, A/HRC/17/31, 2011, para. 17-21.

differences in the scope of obligations and responsibilities, so it is necessary to clarify them.

On the one hand, due diligence can be understood as the objective behavioral standard required to fulfill the "duty of care."[23] This interpretation can be traced back to the *dihgens patterfarnilias* in Roman law, which means that if an accidental injury is caused by an individual's failure to meet the *dihgens patterfarnilias*, then that person shall be held responsible for the accidental damage caused to others.[24] The *dihgens patterfarnilias* lays the foundation for the "reasonable man" in the theory of negligence,[25] influencing the development of the "duty of care" in modern tort law systems.[26] In the context of tort law, due diligence is the core for determining whether a party is at fault and thus bears responsibility, and it is the objective behavioral standard required to fulfill the "duty of care." In addition, the concept of due diligence also exists in international law. For example, the principle of no harm to the environment of other states in international environmental law requires countries to be diligent in preventing significant transboundary damage occurring within their territories. Due diligence in international human rights law refers to the reasonable duty of care that states must exercise to prevent or respond to human rights violations by private actors within their jurisdiction. Although the above concepts of due diligence differ in different legal fields, they have something in common: first, they can all be understood as behavioral standards under the "duty of care," and this behavioral standard is objective, meaning that the judgment of whether due diligence is exercised must be based on objective facts and laws, rather than being judged based on the subjective intentions of the actor. Second, this due diligence is an obligation of conduct rather than an obligation of result, and does not bear strict liability for all damaging results.[27]

On the other hand, due diligence can also be understood as the "due diligence procedures" of enterprises in the process of business risk management. The due diligence procedures originated from the Securities Exchange Act of the United States in the 1930s,[28] and have since gradually expanded to commercial areas such as investment, mergers and acquisitions, joint ventures, contract signing, and partner selection, becoming a routine step in the modern enterprise management system to assess and manage various business risks.[29] From this perspective, human rights due diligence can be understood as a company's due diligence process for ongoing management

23. Reinhard Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996), page 1009.

24. Charles Lobingier, *The Evolution of the Roman Law: From Before the Twelve Tables to the Corpus Juris* 2nd edtion, 1923, 105.

25. Doug Cassel, "Outlining the Case for a Common Law Duty of Care of Business Human Rights Due Diligence," 1 *Business and Human Rights Journal* 2 (2016): 179.

26. Van Dam, "Tort Law and Human Rights: Brothers in Arms: On the Role of Tort Law in the Area of Business and Human Rights," 2 *Journal of European Tort Law* 3 (2011): 237.

27. Jonathan Bonnitcha and Robert McCorquodale, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights," 28 *The European Journal of International Law* 3 (2017): 905.

28. Federal Securities Act 1933, 48 Statute 74, Section 11.

29. Maria Tissen and Ruta Sneidere, "Origination of Due Diligence and Scope of Its Application," *Journal of Business and Management* 4 (2011): 101.

of existing or potential risks in the field of human rights. It is from this perspective that para. 17 of the *Guiding Principles* summarizes human rights due diligence into four core steps: assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.[30] In this regard, the United Nations Working Group on Business and Human Rights further elaborated on these four core steps in the summary of its report submitted to the UN General Assembly. First, assess the actual or potential negative human rights impacts that the company may cause or contribute to through its own activities, or that may be directly related to its business, products or services through its business relationships. Second, integrate the findings of the impact assessment into relevant company processes and take appropriate actions based on the depth of its involvement in the impact. Third, track the effectiveness of measures and procedures to address negative human rights impacts to understand whether these measures and procedures are effective. Fourth, communicate how the impacts are addressed and demonstrate to stakeholders — especially affected stakeholders — that appropriate policies and procedures are in place.[31]

Confusing the dual connotations of due diligence will raise two legal issues. The first issue is how to determine whether a company has fulfilled its human rights due diligence obligations. Is it based on fulfilling the "duty of care" or implementing the "due diligence process"? The second legal issue is if human rights violations still occur despite reasonable care being taken, does the company still have a duty to remedy the situation? If human rights due diligence is understood as a behavioral obligation at the level of "duty of care, then companies are only responsible for negative human rights impacts caused by their failure to exercise reasonable duty of care. According to this interpretation, if a company has made every effort to avoid causing adverse human rights impacts, but causes serious adverse human rights impacts due to unforeseen factors, the enterprise does not violate its human rights due diligence obligations and is not required to bear the responsibility to remedy the consequences of its human rights damage. On the contrary, if human rights due diligence is understood as a "due diligence process," then depending on the specific content of the due diligence process, companies may still need to bear the responsibility to remedy human rights damage, regardless of whether the company has exercised sufficient care or prudence, and regardless of whether such damage is unforeseeable. Therefore, distinguishing between the two is of great legal significance for clarifying the scope of corporate human rights due diligence obligations.

In the existing due diligence legislation in the supply chain, the main obligation models include reporting due diligence obligations based on information disclosure, preventive due diligence obligations based on the duty of care, and all-around due diligence obligations based on the due diligence process from prevention to remediation.

30. United Nations Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, A/HRC/17/31, 2011, para. 17.

31. Summary of the Report of the Working Group on Business and Human Rights to the General Assembly, *Corporate Human Rights Due Diligence: Emerging Practices, Challenges and Ways Forward*, A/73/163, October 2018.

The first obligation model mainly appears in early human rights due diligence legislation, such as the *California Transparency in Supply Chains Act*[32] in the United States, the *Modern Slavery Act* in the United Kingdom, the *Modern Slavery Act* in Australia, and the *Non-financial Reporting Directive* of the European Union.[33] The latter two types of due diligence obligations are both substantive due diligence obligations and often appear simultaneously in legislation, making it increasingly difficult to distinguish the boundary between the two. For example, Germany's *Supply Chain Due Diligence Act*, the Dutch's *Child Labor Due Diligence Law*, Norwegian *Transparency Act* and the European Union's *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive* all include obligations at both the duty of care and due diligence process levels.[34]

C. Disputes over scope of enterprises

The scope of enterprises to which existing legislation on human rights due diligence in the supply chain applies varies widely. Para. 14 of the *Guiding Principles* states that "The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operation scope, ownership and structure." But the commentary on this paragraph also points out that small and medium-sized enterprises may have less capacity as well as more informal processes and management structures than larger companies, so their respective policies and processes will take on different forms.[35] This has led to disputes over whether SMEs should be included in the scope of legislative regulation. On the issue of the size of enterprises to which the legislation applies, there is no consensus on a threshold in existing legislation, with some applying to large companies that have reached a certain scale, and others to companies of all sizes. For example, the French *Duty of Vigilance Law* applies to companies that employ at least 5,000 employees, including their direct and indirect subsidiaries, for two consecutive financial years.[36] The EU's *Non-financial Reporting Directive* applies to large public interest entities (including large public companies, banks, and insurance companies) with more than 500 employees.[37] The German *Supply Chain Due Diligence Act* applies to businesses of different sizes in two phases: from January 1, 2023, the *Act* applies to companies with at least 3,000 employees in Germany; and from January 1, 2024, the scope of the *Act* is extended to companies with at least 1,000 employees in Germany.[38]

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32. The *California Transparency in Supply Chains Act*.

33. Tang Yingxia, "Considerations and Typology of Mandatory Human Rights Due Diligence Legislation," *Chinese Journal of Human Rights* 1 (2022): 49.

34. Li Zhuolun, "A Review of Corporate Due Diligence Legislation in the European Union and Its Member States," *Chinese Journal of Human Rights* 2 (2022): 50-60.

35. United Nations Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy,"* Framework, A/HRC/17/31, 2011, commentary 14.

36. *Loi relative au devoir de vigilance*, 2017, art. L. 225-102-4-1 (Code de Commerce).

37. Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-financial and Diversity Information by Certain Large Undertakings and Groups.

38. *Liefeferkettensorgferkettensorgfaitspflichtengesetz-LkSG*, § 1 (1).

Existing legislation on human rights due diligence in the supply chain has significant differences in the basis of jurisdiction, with some legislation notably going beyond traditional principles of jurisdiction. The German *Supply Chain Due Diligence Act* applies not only to enterprises with their headquarters or principal place of business or registered office in Germany but also to foreign enterprises with branches in Germany.[39] If the German legislation, which establishes jurisdiction over foreign enterprises based on branches, has some reasonable territorial jurisdiction basis, there are other legislations that establish jurisdiction over foreign enterprises merely based on the provision of goods or services within the territory, which clearly goes beyond the traditional principle of territorial jurisdiction. For instance, the Dutch *Child Labor Due Diligence Law* applies not only to enterprises established in the Netherlands but also to those that provide products or services to end users in the Netherlands at least twice a year.[40] Similarly, the supply chain transparency obligations in the UK's *Modern Slavery Act* apply to business organizations that provide goods or services in the UK and have a total annual turnover exceeding 36 million.[41] Again, the European Union's *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive* applies not only to EU enterprises that reach a certain employee size and business volume but also to third-country enterprises that generate a certain business volume in the European Union, and it lowers the threshold of size or business volume for enterprises in high-risk sectors.[42] The common ground of such legislation is that jurisdiction is established based on conducting business within the territories or generating a certain amount of turnover within the territories, which clearly goes beyond the traditional principles of personal jurisdiction or territorial jurisdiction and has obvious extraterritorial effects and unilateral characteristics.

D. Disputes over the scope of supply chains

Due to the transmission and leverage effects of the supply chain, determining the scope of supply chains has become a core legal issue that needs to be resolved in the interpretation and application of legislation on human rights due diligence in the supply chain, that is, to which level of the "supply chain" human rights due diligence should be extended. It is necessary to point out that a supply chain often includes multiple interrelated suppliers, and a company is often involved in multiple interwoven supply chains. Especially with the deepening of economic globalization and the refinement of the industrial division of labor, the supply chain in the real world is often a large and complex network, and enterprises are nodes in the complex supply chain network. In the case of a huge and complex supply chain network, if enterprises are indiscriminately required to fulfill human rights due diligence for all actors involved in their supply chain, it will not only bring a heavy burden to the enterprises, but also

39. *Lieferkettensorgfaltspflichtengesetz-LkSG*, § 1 (1).

40. *Wet Zorgplicht Kinderarbeidm*, 2019, art. 1.

41. Modern Slavery Act 2015, Part 6, Section 54.

42. European Commission, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive* (EU) 2019/1937, 23 February 2022, art. 2.

lack operability in reality. Therefore, clarifying the scope of supply chains is crucial for defining the scope of enterprises' due diligence obligations.

Based on the different definitions of the supply chain in the academic community, the supply chain can be understood as a series of business links or value chains involved from the procurement of raw materials to the final delivery to clients, involving a series of entities (organizations or individuals) such as manufacturers, suppliers, distributors, retailers, transporters, information and other logistics management service providers of goods, raw materials or components, to the ultimate client. The concept related to the supply chain is the "value chain." The "value chain" refers to the entire life cycle of a product or process, including material procurement, production, consumption, disposal, and recycling processes.[43] The supply chain is not only a logistics chain, information flow chain, and capital flow chain from suppliers to consumers, but also a value-added chain. Therefore, there is a certain mapping relationship between the supply chain and the value chain at various stages of the flow of goods or services.[44] As shown in Figure 1, with the core enterprise as the center, each supply chain in the supply chain network, according to its complexity and scope length, can be divided into three levels or three types: the direct supply chain, extended supply chain, and ultimate supply chain.

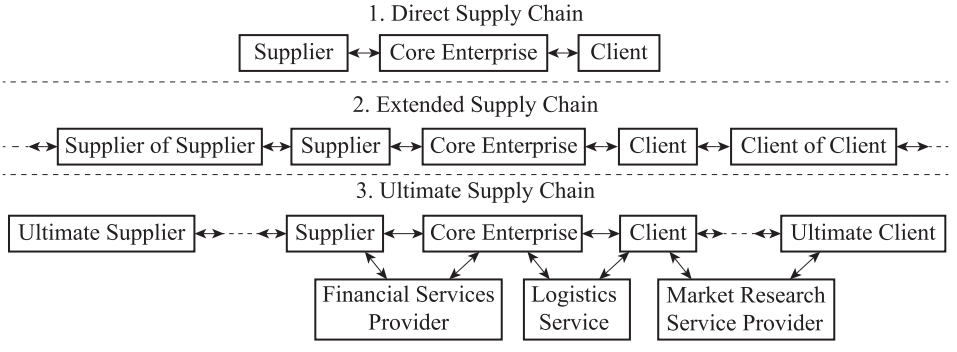

Figure 1 Different types of supply chains

Existing legislation on human rights due diligence in the supply chain has significant differences in the definition of the scope of supply chains, mainly consisting of four modes. The first mode of definition essentially requires enterprises to fulfill human rights due diligence for the "entire supply chain" without clarifying and explaining the specific scope of the supply chain or value chain. For example, the European Union's *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive* extends the scope of human rights due diligence to direct or indirect business relationships established in

43. World Business Council for Sustainable Development, "Collaboration, Innovation, Transformation: Ideas and Inspiration to Accelerate Sustainable Growth — A Value Chain Approach," 2011, https://docs.wbcsd.org/2011/12/CollaborationInnovationTransformation.pdf, page 3.

44. Graham C. Stevens, "Integrating the Supply Chain," 19 *International Journal of Physical Distribution and Materials Management* 8 (1989): 3-8.

the value chain, including suppliers and contractors operating globally.[45] The second mode of definition explicitly includes entities that have established specific business relationships with the company, but does not explicitly cover or exclude other entities on the supply chain that have specific business relationships with the company. For example, in the French *Duty of Vigilance Law*, the supply chain scope covered by risk assessment includes its own business activities, subsidiaries directly or indirectly controlled, and suppliers with stable business relationships.[46] Among them, "stable business relationships" refer to stable and regular business relationships that reach a certain volume of business, but such business relationships do not necessarily require a contract as a prerequisite, as long as there is a reasonable expectation for the continuation of the business relationships. Similarly, the Dutch *Child Labor Due Diligence Law* stipulates that when receiving goods or services from companies that have issued a due diligence statement, one should also fulfill due diligence regarding those goods and services.[47] If interpreted narrowly, the scope of due diligence can be understood to cover only the first tier of the supply chain, but it is not clear whether the due diligence obligation extends beyond the first tier of the supply chain. The third mode of definition mainly refers to the upstream part of the supply chain, excluding the downstream part of it. For instance, the "supply chain in the Australian *Modern Slavery Act* refers to entities both within and outside Australia that supply goods or services (including labor) for the production of goods or the provision of services for a business or specific entity, usually only including the upstream entities of the business's or specific entity's supply chain. The fourth mode of definition sets different due diligence obligations according to different tiers of the supply chain. Although the "supply chain" in the German *Supply Chain Due Diligence Act* includes all activities carried out both within and outside Germany by the company in producing products and providing services, covering the company's own business activities and the production and business activities of direct and indirect suppliers from the acquisition of raw materials to the delivery to the ultimate client. However, the German *Supply Chain Due Diligence Act* takes into account the degree of association between the company and different tiers of the supply chain, and sets a two-tiered due diligence obligation, that is, the company has a higher standard of due diligence obligations for its own business and the business of direct suppliers, while it has a lower standard of due diligence obligations for the business of indirect suppliers.[48] The core due diligence obligations (such as risk assessment and risk management, taking preventive and remedial measures, and the obligation to report publicly) only apply to the company's own business and the business of its direct suppliers. These due diligence obligations only apply to the business of indirect suppliers when the company has "reason to know" that its indirect suppliers may (within the scope of their business) infringe on protected human

45. European Commission, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive* (EU) 2019/1937, 23 February 2022, art. 6.

46. *Loi relative au devoir de vigilance*, 2017, art. L. 225-102-4-I (Code de Commerce).

47. *Wet Zorgplicht Kinderarbeidm*, 2019, art. 5.

48. *Lieferketten Sorgfaltspflichtengesetz*, 2021, §§3, 5, 6, 7.

rights.[49]

As can be seen from the above, the definition of the scope of the supply chain is one of the core legal disputes regarding human rights due diligence in the supply chain. The determination of its reasonable boundaries requires a more in-depth legal standard and theoretical support. The second part of this paper, combined with the decentralized interpretation of human rights due diligence in the supply chain in international soft law documents, summarizes the legal standards regarding the definition of the scope of the supply chain, which is inspiring for discussing and establishing the reasonable boundaries of the scope of supply chains.

E. Disputes over the enforcement mechanism

In addition to defining the scope of the legal elements it covers, legislation on human rights due diligence in the supply chain should also include a set of law enforcement mechanisms. Due to the lack of direct accountability mechanisms for enterprises in international law, the enforcement of human rights due diligence in the supply chain mainly relies on national legal mechanisms. Countries, based on the consideration and balance of different interests, show a great diversity in their law enforcement mechanisms. There is no universally applicable template,[50] but they usually include two aspects: supervision mechanisms and liability mechanisms.

To supervise the effective fulfillment of due diligence obligations by companies, existing supply chain due diligence legislation has established two types of supervision mechanisms: public institution supervision and multi-stakeholder supervision. Germany, Norway, and the Netherlands all have specialized public institutions to supervise the implementation of due diligence by companies. The Norwegian *Transparency Act* stipulates that the Consumer Authority supervises the compliance of enterprises and has the power to influence companies to comply with their obligations either on its own initiative or at the request of others, by contacting the enterprises or relevant entities.[51] The German *Supply Chain Due Diligence Act* stipulates that the Federal Office for Economic Affairs and Export Control is responsible for supervising and assessing the due diligence of companies, ensuring that they meet the standards required by the Act, and requiring companies to take specific actions to fulfill their obligations.[52] In contrast, the French *Duty of Vigilance Law* does not support supervision by public authorities, but by stakeholders with legitimate interests, such as non-governmental organizations, trade unions, and those whose rights are affected, who can track the vigilance plan or initiate civil proceedings against companies that violate the plan.[53] The European Union's *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending*

49. *Lieferketten Sorgfzltspflichtengesetz*, 2021, § 9.

50. Tang Yingxia, "Considerations and Typology of Mandatory Human Rights Due Diligence Legislation," *Chinese Journal of Human Rights* 1 (2022): 48.

51. *Lov om virksomheters apenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold*, § 9.

52. *Lieferketten Sorgferketten Sorgfaitsplichtengesetz*, 2021, §§12 - 15.

53. *Loi relative au devoir de vigilance*, 2017, arts. L. 225-102-4, L. 225-102-5 (Code de Commerce).

Directive takes a comprehensive approach by combining two methods: one is the intervention mechanism of national regulatory authorities, where concerns can be raised with the authorities if there is reason to believe that a company has failed to fulfill its obligations, and the authorities must investigate and assess the issue; the other is the company complaint mechanism, where companies must establish a complaint mechanism to allow for reasonable concerns about actual or potential human rights and environmental impacts in their own business, subsidiaries, or supply chains, and follow up on such complaints. In addition, the *EU Proposal Directive* requires member states to designate at least one supervisory authority to supervise and enforce the fulfillment of companies' due diligence obligations,[54] and provides for cooperation mechanisms among supervisory authorities, including mutual assistance in information, joint investigations, and the establishment of networks.[55]

To effectively hold accountable those who have not fulfilled their due diligence obligations, existing legislation to varying degrees introduces civil, criminal, and administrative liabilities and their combinations of different kinds. According to the French *Duty of Vigilance Law*, if a company has not fulfilled its obligations three months after receiving formal notice from stakeholders, the latter may request an injunction from the competent court ordering compliance and payment of a fine.[56] The French *Climate and Resilience Law* in 2021 further strengthens the implementation of the *Duty of Vigilance Law* by requiring certain companies to disclose information on the impact of their activities and the use of their products and services on climate change, their social commitments to sustainable development and the circular economy, and explicitly requires the development and effective implementation of a human rights due diligence plan, and the legal disclosure of non-financial information such as climate, as a qualification condition for companies to participate in public procurement.[57] According to the German *Supply Chain Due Diligence Act*, supervisory authorities have the power to order companies that violate due diligence obligations to cease illegal activities, take specific actions to ensure the company fulfills its due diligence obligations, and impose fines on the company.[58] Although enforcement actions are mainly at the discretion of relevant authorities, they may also be initiated at the request of the rights holder. The penalties for not fulfilling due diligence obligations include not only economic fines but also measures such as exclusion from public procurement[59] or public support.[60] In addition to providing administrative enforcement measures, the Dutch *Child Labor Due Diligence Law* also incorporates criminal liabil-

54. European Commission, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive* (EU) 2019/1937, 23 February 2022, art. 17.

55. European Commission, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive* (EU) 2019/1937, 23 February 2022, art. 21.

56. *Loi relative au devoir de vigilance*, 2017, 255-102-4-II (Code de Commerce).

57. *Loi no 2021 — 1104 du 22 aout 2021 portant lutte contre le dereglement climatique et renforcement de la resilience face à ses effets*, Articles 35 & 138, https://www.legifrance.gouv.fr/jorf7id/J0RFTEXT000043956924.

58. *Lieferketten Sorgfaltspflichtengesetz*, 2021, § 23.

59. *Lieferketten Sorgfaltspflichtengesetz*, 2021, §22.

60. European Commission, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive* (EU) 2019/1937, 23 February 2022, art. 24.

ity.[61] Furthermore, both the French *Duty of Vigilance Law* and the European Union's *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive* provide for remedies for civil damages. In contrast, the German *Supply Chain Due Diligence Act*, the Dutch *Child Labor Due Diligence Law*, and the Norwegian *Transparency Act* do not explicitly provide for civil litigation remedies. It can be seen that there is a divergence in existing legislation regarding whether due diligence obligations should introduce civil liabilities. It is worth noting that the application of civil liability provisions may encounter burden of proof obstacles in practice. If the general burden of proof is applied, the victim must prove the harm they have suffered, the company's violation of obligations, and the causal relationship between the two. When the harm comes from a distant part of the supply chain, especially when there is an asymmetry of information between the victim and the company, the burden of proof for the victim will be very heavy. In such cases, a proper reversal of the burden of proof will help the victim to obtain relief.

II. The Poly-centric Interpretation of the Boundaries of Human Rights Due Diligence in the Supply Chain by International Soft Law

As the negotiation process of the United Nations business and human rights treaty advances, the international community has increasingly attached importance to the reflective application of international soft law norms represented by the *Guiding Principles*.[62] From the perspective of social construction, the *Guiding Principles* are spreading to the global public sphere through distributed networks, triggering "norm cascading" and being continuously replicated, standardized and internalized.[63] However, as international organizations increasingly incorporate human rights due diligence in their supply chains, they also interpret its connotations and application differently. Under the poly-centric international human rights law governance structure, since the United Nations Human Rights Council and the Office of the High Commissioner for Human Rights have not provided an authoritative interpretation of the *Guiding Principles*,[64] international organizations have been encouraged to adopt poly-centric interpretations in the process of interpreting and applying supply chain human rights due diligence,[65] which in turn has led to inconsistency and in harmony in the interpretation standards. The overlapping yet divergent poly-centric interpretations, on the one hand, consolidate and improve the universal understanding and the iterative evolution of human rights due diligence in the supply chain, and on the other hand, reflect the complexity and richness of the legal connotations of human rights due diligence in the

61. *Wet Zorgplicht Kinderarbeidm*, 2019, art. 7.

62. Liang Xiaohui and Liu Ci, "Normative Path Selection and Implementation Paradox in Building a United Nations Treaty on Business and Human Rights," *Chinese Journal of Human Rights* 3 (2021): 5.

63. Nicola Jägers, Zhang Wei and Liu Linyu, "Sustainable Development Goals and the Business and Human Rights Discourse: Ships Passing in the Night?," *Journal of China University of Political Science and Law* 1 (2021): 296.

64. United Nations Human Rights Council Resolution A/HRC/RES/35/7 (June 22, 2017).

65. Karin Buhmann, "Business and Human Rights: Understanding the UN Guiding Principles from the Perspective of Transnational Business Governance Interactions," 6 *Transnational Legal Theory* 2 (2015): 399.

supply chain. As mentioned above, the definition of the scope of supply chains is one of the crucial aspects of the core legal disputes regarding human rights due diligence in the supply chain, so it is necessary to discuss the rational boundaries of the scope of supply chains and their theoretical basis. The poly-centric interpretation of the boundaries of human rights due diligence in the supply chain by international soft law is instructive for exploring the rational boundaries of the scope of supply chains.

A. Office of the United Nations High Commissioner for Human Rights: "direct linkage" standard

According to the *Guiding Principles*, companies need to continuously and proactively carry out human rights due diligence procedures, adopt mechanisms such as policy commitments, human rights impact assessments, ensuring internal remedies, tracking feedback, and external communication to identify, prevent, mitigate, and document the negative human rights impacts that the company may be involved in. Para. 13 of the *Guiding Principles* states that companies may be linked to negative human rights impacts through their "own activities" or "business relationships," which actually covers two levels: the first level is the negative human rights impacts that the company "causes" or "contributes to" through its "own activities"; the second level is that a company's business, products or services are "directly linked" to adverse human rights impacts through its "business relationships." For negative human rights impacts caused by the company's "own activities," the company must take necessary measures to stop or prevent such impacts and provide remedies. However, for the second level, the term "business relationship" is very broad and actually requires companies to fulfill "human rights due diligence" obligations in the "supply chain."[66] It is extremely difficult and complex for a company to identify its negative human rights impacts and determine appropriate actions on the "supply chain" because it may involve entities that do not have a direct contractual relationship with the company. Therefore, in this case, the *Guiding Principles* do not unrealistically require companies to implement "human rights due diligence" for all entities in their supply chain, but rather limit it to those that are "directly linked" to the company's business, products or services.

However, the *Guiding Principles* do not explain what constitutes a "direct linkage," nor do they clarify the theoretical basis behind it. Nevertheless, the Office of the United Nations High Commissioner for Human Rights (OHCHR) provided an official non-binding interpretation in 2013, clarifying that "direct linkage" in the *Guiding Principles* does not refer to a direct linkage between a company and human rights violations, but rather to a direct linkage between the company's "products, services, or business" and human rights violations through "another company" (through business relationships).[67] At the same time, this "direct linkage" is not intended to create two categories of links — one "direct and the other "indirect — but merely to determine

66. Huang Yao and Yuan Lvli, "On the Duty of Prevention of Human Rights Violations by Multinational Corporations in the Home Country: A Review of the Prevention Provisions of the Draft International Legal Document on 'Multinational Corporations and Human Rights'," *Academic Research* 5 (2021): 69.

67. Office of the United Nations High Commissioner for Human Rights, "Response to the Request from the Chair of the OECD Working Party on Responsible Business Conduct," page 3, https://www.ohchr.org/Documents/Issues/Business/LetterOECD.pdf.

whether a "direct linkage" exists. The OHCHR further explains that "direct linkage" may include relationships beyond the first tier (or any prescribed number of tiers) in a value chain.[68] However, the "direct linkage" between a company and human rights violations through "another company" (a business relationship) also needs to be reasonably limited. If there is no "direct linkage," then the *Guiding Principles* do not apply, and the company does not have to bear the corresponding human rights responsibilities. For example, if a garment company's upstream supplier has another production line supplying bags for a bag company, then although there is a direct business relationship between the garment company and the upstream supplier, there is no "direct linkage" between the garment company and the human rights impacts in the bag production line.

In summary, the *Guiding Principles* require companies to fulfill ongoing human rights due diligence obligations for adverse human rights impacts that are "directly linked" to their business, products or services. Even if there is no contractual relationship between a company and its suppliers, it still has an obligation to identify, prevent and mitigate the adverse human rights impacts they may be involved in through their "business relationship". However, the interpretation standard for "direct linkage" is still very broad, which not only lacks operability in practice, but also easily leads to disputes and disagreements.

B. Organization for Economic Cooperation and Development: "substantial contribution" standard

The Organization for Economic Cooperation and Development (OECD), as the earliest international organization to focus on the regulation of multinational corporations, revised the *OECD Guidelines for Multinational Enterprises* (hereinafter referred to as the *OECD Guidelines*) in 2011, universally applying the concept of "human rights due diligence" to areas such as employment and labor relations, environment, bribery, consumer rights and interests, technology transfer, competition, and taxation.[69] The OECD has also established sector-specific guidelines, providing useful tools for enterprises in specific sectors to implement responsible human rights due diligence. In the guiding documents for the implementation of specific areas of the *OECD Guidelines*, the OECD further explicitly applies "human rights due diligence" to the "supply chains" in areas such as agriculture,[70] mining,[71] clothing and footwear.[72] In May 2018, the OECD focused on the procedural and terminological issues of "due diligence" in its *Due Diligence Guidance for Responsible Business Conduct*,[73] further promoting the development and implementation of "human rights due diligence."

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68. Office of the United Nations High Commissioner for Human Rights, "Response to the Request from the Chair of the OECD Working Party on Responsible Business Conduct," page 4, https://www.ohchr.org/Documents/Issues/Business/LetterOECD.pdf.

69. OECD *Guidelines for Multinational Enterprises* (2011).

70. OECD-FAO *Guidance for Responsible Agricultural Supply Chains* (2016).

71. OECD *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (2016).

72. OECD *Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector* (2017).

73. OECD *Due Diligence Guidance for Responsible Business Conduct* (2018).

Regarding the scope of "supply chain due diligence," the OECD document offers a narrower interpretation than the *Guiding Principles*—the "substantial contribution" standard. According to the OECD *Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector*,[74] if a company's actions cause, facilitate, or incentivise another entity to cause adverse human rights impacts, the company "contributes to" adverse human rights impacts. The *Guidance* introduces an important qualification that such a "contribution" must be "substantial." In 2018, the OECD released the OECD *Due Diligence Guidance for Responsible Business Conduct*, which re-emphasizes the "substantiality" of the contribution and proposes reference factors for assessing the "substantiality," including the extent to which a company's activities increase the risk of adverse human rights impacts occurring, the degree to which the risks are foreseeable, and the extent to which the company actually mitigates the risk of adverse human rights impacts occurring.[75]

The OECD's "substantial contribution" standard, compared to the "direct linkage" standard in the UN *Guiding Principles*, provides clearer, more precise, and operational guidance for guiding corporate practices. For this reason, the *OECD Guidelines* have become the main reference for many multinational companies to implement "human rights due diligence."[76]

C. International Organization for Standardization: "sphere of influence" standard

The International Organization for Standardization (ISO) is an international non-governmental organization composed of standard-setting organizations. In addition to its core work of formulating technology-related standards, it is also involved in the formulation of management system standards (for example, incorporating public policy objectives such as environmental protection, health and safety into corporate management procedures). The ISO issued the *ISO 26000: 2010, Guidance on Social Responsibility* (hereinafter referred to as *ISO 26000*)[77] in 2010, making its first attempt in the field of human rights and corporate responsibility.[78]

Regarding the scope of human rights due diligence, *ISO 26000* differs significantly from the *Guiding Principles*. *ISO 26000* does not use the term "direct linkage" from the *Guiding Principles*, but instead uses the concept of "sphere of influence," which means that companies have an obligation to promote, fulfill, and protect human rights within their "sphere of influence." The concept of "sphere of influence" originated from the legislative attempt of the failed *Draft United Nations Code of Conduct on Transnational Corporations*,[79] which acknowledges that companies have the abil-

74. Enrico Partiti, "Polycentricity and Polyphony in International Law: Interpreting the Corporate Responsibility to Respect Human Rights," 70 *International and Comparative Law Quarterly* 1 (2021): 149.

75. OECD *Due Diligence Guidance for Responsible Business Conduct* (2018), page 70.

76. Catie Shavin, "Unlocking the Potential of the New OECD Due Diligence Guidance on Responsible Business Conduct," 4 *Business and Human Rights Journal* 1(2019).

77. *ISO 26000: 2010, Guidance on Social Responsibility*, (2010) ISO/FDIS 26000: 2010(E).

78. Ibid.

79. United Nations document E/CN. 4/Sub. 2/2003/12.

ity to exert influence through their relationships with other entities, especially those closely related to the company.

Using "sphere of influence" as the basis for a company's human rights due diligence obligations lacks legal support. It is impossible for a company to be held accountable for human rights harms committed by every entity over which it has influence, and it is unreasonable to assign responsibility to a company based solely on its sphere of influence. Regarding the "sphere of influence" standard in *ISO 26000*, the architect of the *Guiding Principles*, John Ruggie, expressed clear skepticism and opposition. Ruggie emphasized that there are problems with the "sphere of influence" standard, which could lead to the generalization of corporate human rights responsibilities, even including situations that have no causal relationship with the company.[80] By mixing negative, positive, impact-based, and leverage-based concepts of responsibility,[81] *ISO 26000* broadly "attributes" all human rights impacts of other entities to the human rights responsibilities that companies should bear. Instead of clarifying the scope of human rights due diligence, it has caused considerable confusion. Therefore, the scope of "human rights due diligence" needs a clearer and more precise interpretation and guidance, otherwise it will lead to confusion of human rights responsibilities between governments and corporations.

D. International Finance Corporation: "reasonable control" standard

The International Finance Corporation (IFC), as one of the two major affiliates of the World Bank and one of the specialized agencies of the United Nations, assists the World Bank in providing funds to private enterprises in member countries (especially developing countries) to promote their economic development. The IFC's *Performance Standards on Environmental and Social Sustainability* (hereinafter referred to as *Performance Standards*) stipulate that clients "should respect human rights, which means to avoid infringing on the human rights of others and address adverse human rights impacts business may cause or contribute to."[82] But it does not mention the concept of "direct linkage." The IFC requires clients to conduct "due diligence" on the social and environmental impacts within their employment relationships, specifically covering these three categories: "direct workers" directly employed by the client; "contracted workers" employed by the client through a third party to perform the core business processes of the project for a certain period of time; and "supply chain workers" employed by the client's main suppliers. For the social and environmental impacts arising from these three types of employment relationships, the *Performance Standards* set different due diligence requirements. Regarding the risks and impacts caused by the actions of third parties, clients need to deal with them in a manner commensurate with their "control and influence" over the third parties. In situations where clients can "reasonably exercise control," the risk identification process needs

80. United Nations document A/HRC/8/16.

81. Stepan Wood, "The Case for Leverage-based Corporate Human Rights Responsibility," 22 *Business Ethics Quarterly* 1 (2012): 71.

82. IFC's *Performance Standards on Environmental and Social Sustainability* (2012), page 6.

to take into account the risks and impacts related to the "primary supply chains."[83] The so-called "primary supply chains" refer to goods or materials that are crucial to the project's "core business processes."[84] This wording indicates that the scope of "supply chain due diligence" in the *Performance Standards* is limited on the one hand by the company's "reasonable control," and on the other hand is limited to the "primary supply chains" that are crucial to the "core business processes."

It can be seen that the *Performance Standards* limit the scope of human rights due diligence in the supply chain from two aspects. First, human rights due diligence in the supply chain only includes suppliers and other entities in the supply chain that the company can "reasonably control." The "reasonable control" standard here is clearly higher than the "direct linkage" standard in the *Guiding Principles* and the sphere of influence standard in *ISO 26000*. Second, the supply chains covered by human rights due diligence are limited to products or services necessary for the "core business processes" of the project, which means that there is no due diligence obligation for other business relationships in the supply chain.[85] The relatively narrow interpretation of human rights due diligence adopted by the *Performance Standards* reflects the two considerations of the IFC when reviewing the qualifications of corporate clients. On the one hand, it conforms to the core spirit of the *Guiding Principles*, which requires companies to fulfill "human rights due diligence." On the other hand, it avoids overly stringent standards that could become an obstacle for companies to obtain funding, thereby helping to promote economic development in member countries (especially developing ones).

The different standards such as "direct linkage," "sphere of influence," "reasonable control," and "substantial contribution" adopted by the above-mentioned different international soft law documents actually take into account the different degrees of connection between companies and other enterprises in their supply chains, providing a measure and scale for the scope of the supply chain that is applicable to human rights due diligence, which is inspiring for enhancing the rationality and clarity of such legislation in China.

III. Legal Reflection on the Boundaries of Human Rights Due Diligence in the Supply Chain

Both voluntary international soft law and mandatory hard law at the EU and national levels have created various forms of supply chain human rights due diligence obligations for multinational companies and more general business enterprises. To a certain extent, this marks that the legalization process of corporate social responsibility has entered a new stage of development and reflects the trend of human rights mainstreaming and humanism. Although the international soft law related to human rights due diligence in the supply chain has been widely recognized, there are still considerable disputes over whether and how it can be transformed into domestic hard

83. Ibid., 9.

84. Ibid., 17.

85. Enrico Partiti, "Polycentricity and Polyphony in International Law: Interpreting the Corporate Responsibility to Respect Human Rights," 70 *International and Comparative Law Quarterly* 1 (2021): 153.

law, especially regarding the legislative boundaries and enforcement procedures. Therefore, it is necessary to reflect on the legitimacy of legislative elements.

A. The discourse transformation from being voluntary to mandatory

For a long time, the market-based private autonomy model has dominated supply chain management. In this model, the legitimacy of supply chain management rules comes from the power granted by supply chain participants and customers, rather than the state. Enterprises internalize the negative externalities they generate through voluntary actions and self-regulation.[86] Under this discourse system, enterprises appear in a positive light, emphasizing their efforts and contributions to promoting environmental and social sustainable development. Under the market-based voluntary due diligence paradigm, the role of the state is to support and encourage companies to maintain and improve their voluntary due diligence standards, rather than to control corporate actions. Therefore, from a market-centrism perspective, mandatory due diligence legislation is criticized as being repressive, punitive, excessive, inappropriate, and even dangerous.[87]

The political process of mandatory due diligence legislation has become highly contentious and polarized, with the emergence of a poly-centric discourse system. The poly-centric discourse system emphasizes the synergy between appropriate coercive laws and voluntary measures, allowing both public and private governance systems to play their unique roles, complement each other's weaknesses, and reinforce each other's functions.[88] This model focuses on collaborative decision-making, such as bridging the gap between markets, states, and private actors through multi-stakeholder dialogue mechanisms and public-private partnerships. Under the poly-centric discourse system, the state provides coordination, support, and guidance for corporate actions, but does not impose unreasonable burdens on companies. Therefore, the poly-centric discourse system supports a moderate due diligence legislative model, providing a minimum standard of due diligence for companies, which helps companies to be responsible without affecting their competitiveness and market opportunities.

However, the state-centered discourse system repositions the role of the state in supply chain management. State centrism emphasizes state intervention, that is, ensuring the supervision, implementation, and enforcement of human rights due diligence through coercive force. Under this discourse system, companies that violate the law will be subject to legal sanctions, human rights and environmental damages will be remedied, and human rights victims will receive relief. Therefore, this discourse system does not rely on market-centered disclosure and reporting mechanisms, but rather ensure corporate accountability through state supervision and enforcement mechanisms, making companies directly bear the legal responsibility for prevention and

86. Genevieve LeBaron, Jane Lister and Peter Dauvergne, "Governing Global Supply Chain Sustainability through the Ethical Audit Regime," 14 *Globalizations* 6 (2017): 958-975.

87. Press communication by Afep (2017), *Reaction d la decision du Conseil constitutionnel sur le devoir de vigilance*, https://afep. com/presse/communique-de-presse-devoir-de-vigilance/.

88. Maria-Therese Gustafsson, Almut Schilling-Vacaflor and Andrea Lenschow, "Foreign Corporate Accountability: The Contested Institutionalization of Mandatory Due Diligence in France and Germany," *Regulation & Governance: Early View*, page 8.

remedy.

The three discourse systems have three fundamentally different understandings of supply chain due diligence legislation, from voluntary to mandatory. State centrism emphasizes that the state's regulatory power should play an effective role in the complex management of global supply chains. Market centrism, on the other hand, emphasizes that regulatory power should be decentralized to private actors, with companies voluntarily and proactively fulfilling their due diligence obligations. Therefore, the latter opposes the former's enforcement of human rights due diligence through command and control mechanisms, especially the incorporation of legal liability and civil remedies into the law. Some believe that inappropriate legal proceedings against a company will result in unnecessary loss of the company's reputation, property and time.[89] Therefore, the legislation on supply chain due diligence, from voluntary to mandatory, is the result of the game between different discourse systems and the political forces they represent. The compromise between state centrism and market centrism often results in a poly-centric discourse system of public-private co-governance, but with varying degrees of state dominance. This leads to the diversity of legislation on human rights due diligence in the supply chain, especially when it comes to different positions on its mandatory nature, comprehensiveness and enforceability.

B. The generalization of human rights implies the risk of politicization of human rights

As described in the first part of this paper, legislation on human rights due diligence in the supply chain generally requires companies to prevent or remedy potential or actual adverse human rights or environmental impacts in their supply chains, but does not specify the exact scope of adverse human rights or environmental impacts. Firstly, there are issues with vague definitions, lack of standards, and unclear scope of adverse human rights or environmental impacts, which makes it difficult for the authorities and other stakeholders to accurately understand the exact scope of adverse human rights or environmental impacts that companies need to identify, prevent, and mitigate. Second, the "risk-based" due diligence path itself means that companies need to consider the possibility and severity of adverse human rights or environmental impacts. However, the severity of risks or impacts is not an absolute concept, but one that has priorities and degrees of urgency, which inevitably leaves companies and stakeholders room for choice and subjective initiative when it comes to the assessment and judgment of due diligence measures. Finally, when holding companies accountable for causing or contributing to adverse human rights or environmental impacts, due to the inability to accurately specify the scope of human rights impacts that companies need to remedy, companies also face uncertainty in the scope of human rights when bearing legal responsibilities. It can be seen that the generalization of the scope of human rights is one of the difficulties in effectively implementing and robustly operating legislation on mandatory human rights due diligence.

There is a significant ambiguity in the scope of human rights risks or impacts,

89. Ibid., 10.

which can easily lead to situations where human rights are subject to political manipulation or control by third parties. The legislation on "mandatory" human rights due diligence in the supply chain deviates from the realities and actual needs of the vast number of developing countries around the world, forcing other countries to comply with human rights standards recognized or established unilaterally by them, showing an obvious expansion of extraterritorial effect and unilateralism, and thus may become a tool for a country to seek its own diplomatic and economic interests and to consolidate the unequal international economic order today. In the enforcement of such legislation, it is possible that some businessmen or politicians with ulterior motives may use means of public opinion to exaggerate the human rights risks existing in other countries or enterprises, in order to protect their business interests or to achieve the purpose of supply chain restructuring, making human rights a tool for them to gain political or economic benefits. In particular, when enterprises judge the human rights risks in overseas supply chains, they will inevitably be influenced by third-party sources of information such as reports from international organizations, media exposure, and systematic reporting. These unverified and non-authoritative third-party information sources may mislead enterprises in their assessment and judgment of human rights risks. Furthermore, due to the lack of avenues for appeal and redress when enterprises on the supply chain are subjected to false accusations, human rights, once politicized and misused as a tool, will inevitably distort the trade market and have a negative impact on a fair, competitive business environment.

C. The expansion of extraterritorial jurisdiction lacks a legitimate basis

As described in the first part of this paper, some legislation on human rights due diligence in the supply chain has gone beyond the traditional jurisdictional basis of using domestic registered institutions or branches as the nexus point, and establishes jurisdiction over foreign companies based on domestic operations or turnover as the nexus point. This does not conform to the traditional principles of personal or territorial jurisdiction and lacks a legitimate basis. These legislations not only directly incorporate foreign enterprises providing goods or services domestically into their jurisdiction but also have a substantial impact on other enterprises in the global supply chain of the enterprises under their jurisdiction, demonstrating a clear expansion of extraterritorial effect and unilateralism.

At the same time, mandatory supply chain due diligence legislation endows relevant enterprises with the "private power" to enforce public law and the "legitimate power" to intervene in the market, transferring the power traditionally exercised by public authorities to private entities, reflecting a trend of the "privatization of public power" for the mechanisms of unilateral human rights sanctions.[90] Some scholars have likened the due diligence management measures implemented by multinational corporations against their foreign subsidiaries and suppliers to the chartered rights exercised by charter companies during the colonial expansion period. The common point between the two is that the state authorities delegate the power to enforce and monitor

90. Li Zhuolun, "Models, Orientations, and Insights: Enforcement of Corporate Human Rights Due Diligence," *Tribune of Social Sciences* 3 (2022): 133.

the implementation of the law to private entities. As a result, private entities have gained significant invisible regulatory power.[91] Private entities can exclude enterprises with alleged potential human rights risks from their supply chain through various means, including terminating contractual relationships or cutting off business dealings under special circumstances. This approach does not help to fundamentally solve the human rights risks existing in the global supply chain but may further exacerbate the unequal power structure in the global supply chain, posing threats and challenges to the security and stability of the order of the global supply chain. In particular, for small and medium-sized enterprises on the supply chain, implementing human rights due diligence in response to legislation on mandatory human rights due diligence with varying requirements will inevitably require a significant expenditure of human and material resources, which will undoubtedly increase the human rights compliance burden and operating costs for small and medium-sized enterprises, further exacerbating their competitive disadvantage in the global economic order.

D. Legal elements and flexible scales of the boundaries of due diligence

As described in the second part of this paper, the poly-centric standards such as "direct linkage,' "sphere of influence," "reasonable control," and "substantial contribution" adopted by international soft law actually take into account the different degrees of connection between enterprises and other enterprises in their supply chain, providing legal standards and theoretical basis for the boundaries of human rights due diligence in the supply chain. However, in the legislation on human rights due diligence in the supply chain at the EU and national levels, apart from the German *Supply Chain Due Diligence Act* which considers the degree of connection between enterprises and different enterprises in the supply chain and sets up a two-tiered due diligence obligation according to different supply chain levels, other legislations generally apply human rights due diligence to the entire supply chain in principle, or although they distinguish different tiers of the supply chain, they do not clarify the differences in their obligations. The author believes that the approach of imposing the same degree of human rights due diligence obligations on the entire supply chain without distinction not only lacks rationality but also lacks operability in practical application, directly affecting the immediate interests of the subjects of rights and obligations. If the scope of the supply chain is not properly defined, the rationality, clarity, predictability and operability of the law will be undermined.

When there is ambiguity in the boundaries of human rights due diligence legislation, judicial practice can play a role in filling the legislative gap to a certain extent. In fact, as most of the extraterritorial legislation on human rights due diligence has been passed in the last decade, with some just coming into effect or not yet implemented, the boundaries of human rights due diligence in judicial practice still await the test of time. However, there are still some domestic court cases that can provide a reference for determining the boundaries of human rights due diligence. For example, the UK courts have established strict legal conditions in judicial practice for determining that

91. Trang (Mae) Nguyen, "Hidden Power in Global Supply Chains," *Harvard International Law Journal*, vol. 64, issue. 1 (2023): 35.

a parent company owes a duty of care to its subsidiaries. In the case of David Brian Chandler v. Cape PLC, the UK court reviewed and cited the standards for judging the duty of care established by the UK court in the case of Caparo Industries PLC v. Dickman: the damage is foreseeable; there is a neighboring relationship between the obligor and the right holder; and the court believed that it is fair, proper and reasonable to impose a duty of care on one party for the benefit of another party.[92] Furthermore, the UK Supreme Court followed this legal theory in Vedanta Resources PLC and another v. Lungowe and others to determine that a parent company has a duty of care for the tortious acts of its subsidiary. Influenced by UK case law, Dutch courts have innovatively extended the duty of care of parent companies to corporate supply chain obligations.[93]

In combination with the legal standards in the above-mentioned judicial cases, the author believes that the reasonable boundaries of supply chain human rights due diligence should at least take into account the three legal elements of "relevance," "foreseeability" and "feasibility." First, "relevance" means that there is a certain degree of connection between an enterprise and the adverse human rights impacts in its supply chain, which is a prerequisite for the enterprise to fulfill its due diligence obligations for human rights risks in its supply chain. This connection may be based on direct linkage, reasonable control, substantial contribution, or causal relationship, but the specific degree of connection still has room for further discussion. Second, "foreseeability" means that human rights risks in the supply chain should be within the scope of the prudence of relevant company executives in accordance with the standard of a reasonable man, and should not exceed their reasonable foreseeability, such as whether the company "know" or "should know" about the existence of or potential human rights risks. Finally, "feasibility" means that companies should have the ability to take due diligence measures on human rights risks in their supply chains, that is, the due diligence measures taken by companies should be feasible in themselves. From these three legal elements, companies should not be held accountable for all adverse human rights impacts in their supply chain, as it may disproportionately increase the burden of corporate human rights due diligence obligations and lacks operability in reality.

At the same time, the author believes that considering the different degrees of linkage between companies and adverse human rights impacts in their supply chains, the connotation of the obligation of human rights due diligence in the supply chain should not be generalized but should be distinguished according to the degree of linkage between the company and the adverse human rights impacts in its supply chain in specific contexts. First, in cases where a company has direct control or causal relationship with the adverse human rights impacts in its supply chain, it may be considered to require the company to assume relatively comprehensive obligations from prevention

92. Yu Liang, "The Civil Liability Dimension of Corporate Human Rights Due Diligence," *Chinese Journal of Human Rights* 2 (2023): 94; Wang Huiru, "The Judicial Remedy Dilemma of Multinational Corporations' Human Rights Violations: Taking the Interaction of International Law and Domestic Law as the Solution," *Global Law Review* 4 (2021): 186; *David Brian Chandler f. Cape PLC*, [2011] EWHC 951 (QB), para. 64.

93. Yu Liang, "The Civil Liability Dimension of Corporate Human Rights Due Diligence," *Chinese Journal of Human Rights* 2 (2023): 97; *Vereni-gung Milieudefensie and others v. Royal Dutch Shell PLC*, Case No. C/09/571932/HA ZA 19 - 379, Judgment of 26 May 2021, para. 4. 4. 18.

to remediation. Second, in cases where there is no direct control or causal relationship between a company and the adverse human rights impacts in its supply chain, but there is relevance, foreseeability and due diligence feasibility, the company may be required to assume a duty of care, which is more of a preventive duty than a remedial duty. Finally, in cases where there is no relevance, foreseeability and due diligence feasibility for the adverse human rights impacts on its supply chain, there is no sufficient reason to require the company to assume due diligence obligations. Given the complexity of the degree of linkage between companies and adverse human rights impacts in real situations, there is still room for further discussion on what legal elements to adopt, which leaves room for discretion in subsequent judicial decisions. However, no matter what legal elements are adopted in judicial practice, the fairness, rationality and balance of the allocation of rights and obligations between different parties should be ensured, and legal ethics including the principle of proportionality should be met.

IV. Conclusion

The iterative evolution of soft and hard laws on human rights due diligence in the supply chain continues to reflect the transcendence and transformation of existing human rights protection theories and legal frameworks, marking a new stage of development in the legalization of corporate social responsibility. However, the legislation on mandatory human rights due diligence in the supply chain of the European Union and some countries goes beyond the voluntary due diligence framework under international soft law, and deviates from the realities of various countries and the actual situation of corporate development, and its rationality and legitimacy are questioned. It can be seen from the poly-centric interpretations of different international organizations on the boundaries of human rights due diligence in the supply chain that the boundaries of human rights due diligence in the supply chain themselves are quite vague and controversial. However, there are significant differences in many legal elements of the mandatory supply chain due diligence legislation in some countries. The author believes that, against the backdrop of uneven global human rights development levels, legislation on mandatory supply chain human rights due diligence will not only fail to address systemic human rights issues at their root and achieve the goal of improving human rights protection, but may also lead to the risk of politicizing and instrumentalizing human rights, exacerbating the unequal power structure in the global supply chain and posing threats and challenges to the security of the global supply chain order and the stability of the international economic and trade order.

Against the backdrop of deepening industrial division of labor and global allocation of resources and factors, China has become deeply embedded in the global supply chain. Legislation on mandatory supply chain human rights due diligence brings challenges to Chinese companies' overseas investment and operations and their participation in global economic and trade activities, but also brings opportunities to China's legislative and decision-making departments. In the *Human Rights Action Plan of China (2021-2025)*, the Chinese government solemnly pledged to "implement human rights due diligence" and promote responsible business conduct in global

supply chains.[94] On the one hand, China should promote the implementation of the "voluntary" framework of the UN *Guiding Principles* and accelerate the enhancement of China's voice in the formulation of international rules and standards in the field of business and human rights. On the other hand, China should be highly vigilant about the possible "chilling effect" of legislation on mandatory supply chain human rights due diligence in some European countries and the United States, and prevent certain countries from relocating their supply chains and industrial chains outside of China under the banner of "human rights." The author believes that the boundaries of human rights due diligence in the supply chain should not be generalized, but should take into account the rationality of legal factors and the complexity of practical factors. The connotation of due diligence obligations should be differentiated according to the different degrees of linkage between companies and adverse human rights impacts in the supply chain in specific situations. Human rights due diligence obligations should be flexibly applied by taking into account different national conditions, fields, enterprise scales, business scenarios and other practical factors. For the vast majority of developing countries and their enterprises, it is not advisable to rush to adopt an overly stringent mandatory human rights due diligence legislation model. While enhancing the awareness, ability and responsibility of enterprises to respect human rights, the goal of good laws and good governance can only be achieved by respecting the stages, differences and limitations of human rights development levels in various countries and coordinating the formulation and enforcement of laws with the levels of political, economic and social development.

(Translated by *CHEN Feng*)

94. State Council Information Office, *Human Rights Action Plan of China (2021-2025)*, website of the Chinese government, accessed January 10, 2024, http://www. gov.cn/xinwen/2021-09/09/content_5636384.htm.