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5. Mandatory Corporate Sustainability Due Diligence and its Limitations: The persistence of unequal exchange.

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Abstract

Global value chains are the main contemporary sites where workers' exploitation and environmental degradation occur. In 2024, the EU approved the Corporate Sustainability Due Diligence directive (CSDDD), which aims to make large companies perform due diligence in their value chains to prevent violations of human, environmental and labour rights. Notably, this law does not apply only to EU companies, but to all large transnational companies operating in the EU. In this chapter we analyse the CSDDD from a world-system perspective, assessing whether it might address the unequal exchange between core and peripheral countries. As the CSDDD aims to enhance the respect of human rights, labour rights and to fight climate change, it would jeopardize two of the pillars of unequal exchange, «cheap labor» and «cheap nature». However, we show that the law suffers from structural limitations, which will make it unlikely that this will happen. In turn, these limitations are linked to entrenched capital interest, which has limited the reach of regulation.

Keywords

unequal exchange, unequal ecological exchange, corporate sustainability due diligence, world-system, European governance, global value chains

Introduction

At the end of 2023, garment sector workers in Bangladesh revolted against inhumane working conditions and for better salaries. Ten years had passed since the tragedy of Rana Plaza. Despite the adoption of ethical codes and the spread of corporate social responsibility initiatives, the working conditions in the 'secret abodes of production' are still unbearable. On 24 April 2013, the collapse of a garment factory in Bangladesh caused the death of more than one thousand workers. The goods they produced were used by some of the most renowned fashion brands. The tragedy attracted attention to the dark side of garment production and generated a process that also had legal ramifications in the European Union (EU) concerning reporting, transparency and due diligence along the value chain. The French law on the duty of vigilance of 2017 was the first example in Europe of the passage from voluntary to binding due diligence regulations. The law established the duty of holding companies to adopt a vigilance plan to prevent the violation of human rights and environmental degradation in their value chain. The French example has been followed by other European countries, and it has now been adopted by the entire EU, with the approval of the Corporate Sustainability Due Diligence Directive (CSDDD) in 2024[1].

The recurring revolts against inhumane working conditions and environmental depletion show that transnational corporations still rely on the exploitation of the Global South to realize profits in a capitalist world-system ever more in crisis and ridden by fast-growing contradictions. The capitalist system has always been, since its beginnings, a world-system anchored in a transnational and a hierarchical dimension (Wallerstein, 2011 [1974]; Arrighi, 2010 [1994]; Robinson, 2021 [1983]); further cycles of expansion have established its truly global reach (Hopkins and Wallerstein, 1982; Harvey, 2005). However, since the turn to the neoliberal regime of accumulation (Harvey, 1990: 121; Harvey, 2005), there has been a further expansion of trade, and, most prominently, of foreign direct investment, that have spurred spatial (Harvey, 2018 [1982]: 415) and racial fixes (Knox, 2016) to the structural crisis of the 1970s.

In this socio-economic and regulatory context, world trade is predominantly organized through global value chains (GVCs), which rely on a global system of unequal exchange between the core and the periphery. Being the main form of organization of production and exchange, GVCs are the sites where exploitation, value extraction and environmental degradation occur (Selwyn, 2019; Suwandi, 2019). Therefore, it should come as no surprise that class struggles have tried to challenge these practices and that these conflicts have also translated into legal conflicts for the regulation of transnational corporations' practices.

Combining political economy and legal analysis, in this chapter we focus on one notable instance of the new attempts of regulating GVCs - the EU's CSDDD. The CSDDD aims to force transnational companies to participate in the transformation towards a more sustainable and responsible economic model through due diligence on their value chains. Should it effectively achieve this aim, the directive would limit the unequal exchange between the core and the periphery that is at the basis of value chain capitalism. However, the CSDDD suffers from structural limitations that will make it unlikely that this will happen.

The rising geopolitical tensions between the EU, the US and China also influence the regulation of GVCs. In the context of the polycrisis (see Introduction to this volume), for the EU the regulation of global value chains is one of the possible tools in designing the political economy of a post-neoliberal order. Yet, it does also engender conflict. While we do not have the space here to deal with the role that different capital fractions and labour played in shaping the directive, our analysis of the CSDDD nevertheless hints to the multiple contradictory interests that are involved in the process, and the struggles it may generate.

The rise of mandatory corporate sustainability due diligence in Europe

The CSDDD is an important step in the adoption of a mandatory due diligence framework at the European level. It is the result of a triple movement forward: from voluntary due diligence rules to mandatory ones; from mere reporting to due diligence obligations; from national and sectoral

initiatives to a general European framework. The present regulatory moment has been preceded by a strand of voluntary principles, guidelines and initiatives. The main sources of inspiration in this field are the OECD Principles for Multinational Enterprises and the United Nations Guiding Principles on Business and Human Rights (UNGP). Yet, these have proven ineffective (Deva, 2023). While there has been an expansion of multi-stakeholder initiatives aiming at forcing transnational companies to pay greater attention to the respect of human and labour rights in their transnational operations, the assessments of the efficacy of corporate social responsibility schemes are grim (ECCJ and CORE, 2020; World Benchmarking Alliance, 2022). Even when codes of conducts have been made mandatory for suppliers through contracts, their violations do not usually lead to any major consequence. Moreover, price demands by buyers make it almost impossible to respect the policies they pretend to impose on their suppliers (Anner, 2019; LeBaron et al., 2021).

This voluntary movement on due diligence was coupled with legislative interventions that asked corporations to report on at least some aspects of their due diligence practices, such as those regarding forced labour. Over time, the scope of sustainability reporting has progressively expanded to more social and environmental issues, as in the case of the recently approved EU's Corporate Sustainability Reporting Directive. The rationale behind these laws is that - by asking companies to provide consumers and investors with more information about their practices - reporting requirements would have also 'nudged' them to improve their behaviour. Hence, the link with due diligence is only an indirect one.

Possibly as a result of the perceived ineffectiveness of voluntary initiatives and reporting frameworks, national legislators have slowly but steadily begun to draft laws directly imposing due diligence requirements on corporations. Europe has been the main region where this has happened. France has been the first country to introduce a national law on due diligence in 2017. Other countries, such as Germany, have followed suit, and many others announced the intention to do the same. While having similar aims, these national laws differed in many respects. Notably, the French law foresees

civil liability for those companies failing to perform their due diligence obligations, whereas the German law only has administrative fines.

Historically, harmonization of national corporate law has been a powerful driver of European integration to ensure smooth capital accumulation within the internal market (Buch-Hansen and Wigger, 2011). Given the proliferation of different national laws on corporate sustainability due diligence, and the potential distortions to the European Single Market that diverging national legislation may entail, the European Commission decided to draft a proposal for a Europe-wide Directive, which it published in January 2022 (COM/2022/71 final). The European Parliament and the Council reached a first political agreement on the Directive in December 2023. However, divisions within the Council slowed down further the approval of the law, which was finally adopted only in May 2024. These divisions also contributed to water down some aspects of the original proposal, as we critically analyse in section 4. The CSDDD establishes legal accountability for companies to respect environmental and human rights, not only within the perimeter of the firm, but also along their 'chain of activities'.[2] To do so, companies have to carry out human rights and environmental due diligence to identify, prevent, mitigate and remedy actual and potential adverse impacts in those areas. The Annex to the Directive provides a precise list of human and environmental rights that ought to be the subject of companies' due diligence. If it is not possible to bring an end to an adverse impact, the company will have to mitigate it. In any case, the company should provide compensation to those affected by the damage it caused. To ensure the enforcement of companies' duties, the law combines the principle of civil liability under the French law, and that of administrative liability under the German law. Overall, the approval of the CSDDD constitutes a significant innovation. As we will argue in the next pages, however, the Directive also suffers from structural limitations.

Theorizing unequal exchange

Critical political economy approaches highlight how capitalism is structurally based on core-peripheries inequalities (see the Introduction to this volume), which arise first and foremost through unequal exchange (Hickel et al., 2024). Unequal exchange is a complex theory that has many lineages and has been formulated in many different ways (Kvangraven, 2023; Féliz, 2021). In a nutshell, it rests on the fact that the core benefits from an extraction of value from countries of the periphery and semi-periphery (Ricci, 2019, Id., 2021). The organization of production along GVCs reinforces the dynamics of unequal exchange (Suwandi, 2019; Selwyn, 2015; Heintz, 2006; Somel, 2004). We contend that unequal exchange (economic as well as ecological) is a meaningful theoretical framework to assess the rights violations and environmental degradation that stem from transnational companies' operations. Hence, to understand whether the CSDDD can be effective, we propose to assess its provisions in the context of their socio-economic relations and to evaluate whether the directive can substantially modify them. Analysing how the CSDDD will impact unequal exchange is crucial in assessing whether it can effectively mitigate rights violations and environmental damages.

There is an ongoing debate on the main drivers of unequal exchange. Some scholars attribute it mainly to superior productivity dynamics in core countries (Carchedi and Roberts, 2021). Others claim that for export-oriented sectors there are not such productivity differentials, and that unequal exchange arise mainly from lower wages in peripheral countries (Amin, 1973: 117; Selwyn, 2019; Suwandi, 2019: 17, 48). Nevertheless, even authors who support the first version of the theory argue that a fraction of the unequal exchange still derives from lower wages (Emmanuel, 1972; Rotta and Kumar, 2024). In our analysis, we posit that unequal exchange in GVCs mainly derives from lower wages in the periphery and semi-periphery. Unequal exchange is one of the main causes of violations of labour and human rights along the value chain, as it constrains the possibility of reforms and struggles for those workers that participate in the capitalist world-system. It is no coincidence that, in the recitals (n. 46, 47 and 54) and in the text of the CSDDD (art. 10) purchasing practices of leading firms are identified as a key aspect that shall be modified to prevent the violation of human rights in

GVCs. Therefore, to assess CSDDD's effectiveness in preventing and mitigating the violation of workers' rights, it is crucial to assess whether it directly or indirectly limits and contrasts unequal exchange, for instance, by reinforcing labour power and protecting union rights.

As argued already in the Introduction of this book, the uneven relationship in global trade between centre and periphery does not concern only the value extracted from labour, but also the depletion and plunder of environmental resources (Foster and Holleman, 2014; Moore, 2011; Moore, 2015. Hickel et al., 2022; Althouse et al., 2023), determining an uneven ecological exchange (Jorgenson, 2006; Rice, 2007; Dorninger et al., 2021; Hornborg, 2009; Givens et al., 2019). Since its inception, the capitalist world-system has been built upon the exhaustion of human and natural resources; the depletion of labour and natural resources are intertwined (Wallerstein, 2011[1974]). Uneven ecological exchange and uneven economic exchange are thus inextricably intertwined (Althouse et al., 2023; Amin, 1973: 131). As Foster and Holleman (2014: 205) put it: 'just as unequal economic exchange theory postulated the exchange of more labor for less, unequal ecological exchange theory had as its basis the exchange of more ecological use value (or nature's product) for less.' GVCs reinforce not only uneven economic exchange, but also uneven ecological exchange (Rivera-Basques et al., 2021; Kvangraven, 2023: 158-159), as transnational companies in the Global North extract not only surplus value but also natural resources from the Global South.

Analysing the CSDDD through the framework of unequal exchange allows us to cast light on fundamental issues that have not been explored so far and allows us to consider the directive in the context of the transformation of the European and global regimes of accumulation. In particular, it allows us to, first, properly contextualize the impact of the directive in the context of GVCs. This perspective overcomes the simple legal analysis of the text and puts it into the context of its impact on political economy. Second, it informs the legal analysis of the text in order to grasp whether the provisions can have an effective impact on the protection of workers and the environment in the GVC, through the impact on value distribution. We argue that to effectively challenge the violations of human and labour rights, as well as to mitigate climate change, the CSDDD should transform the

socio-economic relations that produce these phenomena. These practices do not depend simply on the misbehaviour of companies, but on the structures of transnational production and commercialization of commodities. To sum up, to be effective, the CSDDD should aim at changing the structural political economy of GVCs.

Corporate sustainability due diligence and the persistence of unequal exchange

It can be doubted that the directive, as it has been finally approved (even though its subsequent national implementations and applications will have to be carefully assessed), can seriously challenge the unequal exchange that undergirds human and labour rights violations and environmental degradation along GVCs. For sure, the directive is an important step forward with regard to voluntary commitments and sectoral laws, as it establishes a mandatory and overarching framework that sets forth due diligence obligations for (some) European and non-European companies. This entails also a symbolic dimension, as this implies that severe rights violations are produced in the chain of activities of transnational corporations. The expansion of transnational liability for the violations occurring along the chain of activities is the major breakthrough. Indeed, legal scholarship has highlighted that limited liability constitutes a major obstacle in the effectiveness of tort law in internalizing what mainstream economics conceived as negative externalities (Hansmann and Kraakman, 1991). Transnational corporations rely on limited liability to outsource dangerous activities, from which could stem liability (Pacces, 2023). In this respect, the directive, following the path of national legislations and litigation, goes a step forward, attributing liability to the company that commands the value chain.

The legislation also constitutes a step forward in relation to EU neoliberal pro-competitive legislation (Buch-Hansen and Wigger, 2011), because it adopts a functionalist perspective to achieve a public-policy goal. The directive reflects concerns relating to the necessity to organize, diversify and make safer value chains after the supply shock of COVID-19 and the risks and threats posed by climate change and geopolitical tensions. Moreover, it provides for the involvement of stakeholders

in the Global South (see article 13). Even though this provision has been watered down in respect to the original proposal by the EU Parliament, it still sets forth more stringent provisions than national laws. While the directive has been rightly criticized because it has not involved actors from the Global South in its elaboration, some of these voices could at least be heard in the elaboration of due diligence policies (Omari Lichuma, 2024). However, the directive does not depart from most of the criticism that have been addressed at due diligence schemes. Most importantly, it is focused on the procedural dimension, while little importance is devoted to concrete outcomes. Therefore, it does not seriously challenge the roots and dynamics of unequal exchange. Many deficiencies can be identified and deserve attention.

The scope of application, subjective and material, of the directive is limited. The directive applies only to large companies with at least 1000 employees and a net worldwide turnover of more than EUR 450 million in the last financial year, and the threshold has been raised in the final version of the directive. The directive applies also to some non-EU companies, if they do have a net turnover of more than EUR 450 million in the EU. This constitutes an extraterritorial effect of EU legislation, which aims to reduce unfair competition from third-country companies. The establishment of a threshold based on net turnover and number of employees can be criticized. On the one hand, all companies should be subjected to due diligence obligations. Even if one accepts the logic that smaller companies should be exempted from the directive because the costs for compliance would be too onerous, the threshold of application that the law establishes is too high. As it stands, the directive will only apply to approximately 0.05% of EU companies, around 5400 in total (ECCJ, 2024). By comparison, the Norwegian due diligence law, which concerns only companies doing business in Norway, applies to approximately 8000 firms.[3] Moreover, the directive does not prevent the externalisation of damaging activity through legal mechanisms outside the company and its value chain. For instance, the directive does not provide any sanctions for the sale of damaging businesses. If these activities are operated by another company, maybe even subject to less regulation and scrutiny, the policy aim is not fulfilled at all. The outcome could even be worse, as the activity could

be performed by a company, maybe poorly capitalized, incorporated in a country with loose environmental regulation.

The material scope of the directive is limited, too. Indeed, the list of rights provided for in Parts I and II of the Annex, upon which the definition of "adverse impact" is defined, is quite restrictive (Holly, 2024: 10 ff.). For instance, the European Convention of Human Rights is not mentioned, even though it is the Treaty that underpins most of human rights and climate litigation in the EU. By contrast, according to the UNGP, companies have to respect *all* human rights (Meyer and Patz, 2024). The list of rights is restrictive and presents relevant loopholes also in relation to environmental impacts, and it does not align with the standards provided for by the OECD Guidelines for Multinational Enterprises (Rouas et al., 2024a). Furthermore, the exclusion of some part of the downstream chain for all companies (for instance: waste management) can be extremely detrimental in relation to environmental impacts, some of which occur exactly in this segment of the chain (Rouas et al., 2024b).

Moreover, the directive limits the due diligence obligations for the financial sector, differently from the Commission's proposal. Given the role that credit plays in the capitalist cycle of accumulation, the importance of involving the financial sector fully in due diligence processes is quintessential. Yet, in the final version of CSDDD financial undertakings are only required to carry out due diligence for the upstream part of their value chain, hence excluding downstream business partners that are receiving their services and products. Moreover, this exclusion could even worsen the situation in those member states where existing due diligence laws include the financial sector, such as France. There, litigation is ongoing against banks for their investment in and finance of new fossil fuel projects and businesses that violate labour and human rights.[4] The exception for the financial sector departs from the OECD Principles, under which parties have referred to national contact points in the past (for instance, see the Dutch case against ING[5]). Such an exclusion has been decried even by financial regulators, such as the European Central Bank.

The legal draft of due diligence obligation is quite vague and leaves a large margin of manoeuvre to companies, also to advance defences in case of challenges, and is again mostly focused on the process instead of the outcome. Articles 9, 10 and 11 are drafted on the premises of a risk-based approach, based on rather fuzzy terms. Moreover, they create loopholes that companies can exploit. Three examples can suffice: companies can mitigate adverse impacts instead of preventing or bringing them to an end (article 10, para 1); if it is not feasible to prevent, mitigate or bring to an end all adverse impacts at the same time, companies can prioritise some of them on the basis of the severity and likelihood (article 9) ; companies can decide to not bring to an end the contractual relation that entail the violation, if the adverse impact deriving from suspending or terminating the relationship could be more severe than the one deriving from continuing it (article 10, para. 6). All these rules (and many others) provide for space of discretional appreciation of companies and delay an effective and tough approach to the adverse impact that the company creates and exploits. Moreover, these rules will for sure be the object of long and costly discussions (and the company will profit from greater information and in-depth knowledge of the context) during the enforcement mechanism (civil liability and administrative sanctions), hindering the deterrence of the directive.

The scope of rights whose violations may entail liability and responsibility is quite limited in many respects. Concerning civil liability in general (article 29), it can be easily grasped that it has been the terrain of a struggle that led to a compromise that does not stand out for legal clarity, and that sets forth restrictive conditions (Bueno and Oehm, 2024). This lack of clarity sides with transnational companies that can try to build upon it delaying legal tactics and to foster compromise interpretations. One example stands out: paragraph 1 of article 29 states that ‘a company cannot be held liable if the damage was caused only by its business partners in its chain of activities’. The implications of these wording are potentially devastating and they could undermine the whole logic of due diligence, as most of the violations actually occur in the global South with no direct participation from the leading firms, which however reaps the profits built upon those violations.

Moreover, there is a clear exclusion of punitive damages (para. 2), and no inversion of the burden of proof. This entails that traditional tort elements such as fault and causation must be proved by victims, and as national litigation shows this creates serious hurdles for plaintiffs. It will also be extremely difficult to prove that a specific damage derives from an inadequate due diligence policy, that is what the focus on process seems to entail. In relation to standing (the subjects who are legally entitled to sue a company that does not fulfil the obligations set forth by the CSDDD), trade unions and NGOs can sue, but only on behalf of a specific victim (para. 3(d)), and therefore, unless other applicable laws provide for this, they will not be able to play the role of plaintiff in a context where undue pressures and violence can forbid claims from individuals.

The articles of the directive do not meaningfully challenge environmental degradation, resources depletion and the fostering of climate change, that are at the basis of the uneven ecological exchange. No specific provision addresses the issue of the plunder of natural resources and of environmental degradation from the Global South. There are no mechanisms that address the issue of replenishment of natural resources exhausted by the metabolism of capital (apart from very sectoral and specific rights mentioned in the Annex), that would be necessary to challenge the exhaustion of natural resources (Durand and Keucheyan, 2024: 92 ff.). Indeed, adverse environmental impact is narrowly defined (article 3, para. 1(b)) as one that derives from the violation of the specific rights set forth by the Treaties mentioned in the Annex. Furthermore, civil liability for environmental impacts can be established only if there is also an impact on human rights of a legal or natural person (therefore excluding purely environmental damage): apart from revealing an anthropocentric approach, this also greatly limits the effectiveness of environmental due diligence (Bueno and Oehm, 2024; Rouas, Otten and Torán, 2024a). In addition, the directive excludes civil liability for contributing to climate change: indeed, civil liability is not linked to article 22 that sets forth the duty to elaborate a strategy for reaching net-zero in accordance with the Paris Agreement.

Finally, while the law combines civil liability and administrative fines as enforcement methods, also the latter, dealt by article 27, are vaguely defined. Much space is left to national

implementation, and the effectiveness of enforcement will thus depend on the way in which the directive will be transposed, and in particular on the real power and resources assigned to national supervisory authorities.

This brief analysis of the directive leads us to conclude that it cannot seriously challenge unequal exchange and, therefore, the root causes of the violations of human and social rights, and environmental degradation. Indeed, to address these issues, it would have been necessary to challenge, directly and indirectly, the causes of workers' exploitation and environmental degradation. This should be done by raising wages, obtaining better working conditions (that inevitably raise the costs of productions) in the Global South and fostering those social institutions that can be more effective in the protection of workers' rights, such as trade unions. Articles 10, para 2 (d) and article 11, para 3 (e) mention the modification of purchasing practices as one element that companies should consider to prevent and bring adverse impact to an end. However, the provision is extremely vague, it is mentioned with many other actions and does not provide for compelling obligations. No provision clearly establishes the duty to pay a fair price. On the contrary, scholarship on voluntary due diligence has highlighted that, when confronted with the impossibility to respect the code of conduct at the price they were offering, lead firms refused any increase and threatened to change suppliers (Smit et al., 2021: 964).

Conclusion

In the context of the polycrisis, the approval of the CSDDD is a considerable novelty as an attempt by the EU of regulating global dynamics of capital accumulation. The directive goes beyond voluntary corporate initiatives and mere reporting standards, which have proven ineffective to safeguard human and environmental rights. It creates transnational corporate governance obligations for large companies, including non-EU ones. In so doing, it might replicate the effects of other pieces of EU legislation, such as data protection, that have been imposed also onto foreign companies.

At the same time, combining legal and critical political economy analysis, we have argued that the directive is unlikely to challenge the persistent unequal exchange between the global North and the global South, and hence to seriously protect human and environmental rights. Conflicting interests account for the final text of the directive and its contradictory provisions. As the law looks for a delicate balance between the interest of transnational companies in the international arena and limiting their predatory practices, it is flawed and sometimes inconsistent. The final compromise on the directive limits significantly its scope, and companies might find further legal loopholes from its provisions. A granular juridical analysis shows how apparently highly technical rules on joint liability, strict liability, burden of proofs and defences have strong political content in shaping transnational economic relations in GVCs. It remains to be seen how social forces will react to the approval of the directive. Whereas capital is already trying to dampen the enforcement of the legislation,[6] labour might at least try to use to its advantage some of the most progressive provisions of the law. The directive proves how challenging it is to limit predatory practices and, at the same time, not hinder capital accumulation. This contradiction is reflected in the due diligence approach, which focuses on the *process* and not on the *outcome* of preventing violations of human and social rights as well as environmental degradations.

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[1] At the moment of writing (January 2025), the content of a so-called *Omnibus law*, announced by European Commission President Ursula von der Leyen, has not been disclosed. Following EU officials' public declarations, this legislation should modify the Corporate Sustainability Reporting Directive, the Taxonomy regulation and the CSDDD. However, its impact upon the obligations laid down by the CSDDD is still unknown.

[2] This constitutes a reduced definition of 'value chain' as usually intended, such as in the UNPG and OECD guidelines. For instance, this definition does not include the disposal and recycling of goods.

[3] The Norwegian law on due diligence applies to companies which falls under at least two of these three criteria:
- Sales revenues more than 70 million of Norwegian krone (NOK), or 7 million euros;
- Balance sheet total more than NOK 35 million, or 3,5 million euros;
- More than 50 full-time employees.

[4] Notre Affaire à Tous v. BNP Paribas, filed on February 23, 2023, in the Judicial Court of Paris, see: http://climatecasechart.com/non-us-case/notre-affaire-a-tous-les-amis-de-la-terre-and-oxfam-france-v-bnp-paribas; Comissão Pastoral da Terra and Notre Affaire à Tous v. BNP Paribas, see: https://climatecasechart.com/non-us-case/comissa%cc%83o-pastoral-da-terra-and-notre-affaire-a-tous-v-bnp-paribas/

[5] BankTrack, et al. vs. ING Bank; https://climatecasechart.com/non-us-case/banktrack-et-al-vs-ing-bank/

[6] See the 'Joint industry statement on the implementation of the Corporate Sustainability Due Diligence Directive', available at: https://ceemet.org/wp-content/uploads/2024/11/Joint-Trade-Association-Statement_Towards-EU-due-diligence-that-works-for-all.pdf