

# A RACE TO THE TOP:

**Lessons learnt from the EU's law on illegal fishing to secure an EU framework to lead global sustainable corporate governance**



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## Executive Summary

The European Union is a leader when it comes to driving international cooperation for environmental and human rights protections, but EU consumption also continues to fuel the 'Triple Emergency' of climate change, biodiversity loss, and poverty.

Europeans consume 1.5 to 2.5 times more land, carbon, and water per capita than the global average,<sup>1</sup> and EU value chains are riddled with abuse of human rights and the environment.<sup>2</sup> Seafood is a salient example. The EU seafood market is the world's largest in terms of value.<sup>3</sup> In 2017, each EU citizen ate on average over 24 kilogrammes (kg) of seafood, 75% of which was caught in the wild.<sup>4</sup> To meet this demand, 60% of the seafood consumed in the EU is imported.<sup>5</sup> However, a lack of transparency creates opportunities for bringing illegally-caught seafood into legal supply chains. An estimated total of 11 to 26 million tonnes of seafood is illegally plundered from the ocean every year, amounting globally to losses worth USD10 and USD23.5 billion.<sup>6</sup> In the EU, roughly 1 in 6 seafood products imported are untraceable and at risk of being sourced from illegal fishing.<sup>7</sup> Illegal fishing often goes hand-in-hand with environmental and human rights abuse, including overfishing and forced labour.<sup>8,9,10</sup> Under current EU rules it is almost impossible for consumers to know that the fish on their plates does not come from vessels linked to such abuse.

The EU's commitment to delivering an EU-level Sustainable Corporate Governance directive that covers mandatory human rights and environmental due diligence (mHREDD) is a critical and welcome opportunity to address the negative impacts of EU consumption, safeguard its strategic autonomy and take a leading role in a fair global transition towards a more equitable and sustainable future for all.

The legislative proposal was expected in mid-2021, but has yet to be delivered.<sup>11</sup> The Environmental Justice Foundation, Oceana, The Nature Conservancy and WWF strongly encourage the EU to deliver on its promises of a robust and world-leading sustainable corporate governance law, covering both directors' obligations and mHREDD. This will send a strong signal that the EU is committed to the eradication of human rights and environmental abuses from EU business and consumer value chains.

To protect human rights, the environment and its strategic autonomy, the EU needs a Sustainable Corporate Governance directive to deliver mandatory due diligence with transparency requirements and respect for human rights and the environment, structured within a Failure to Prevent model.<sup>12</sup> Much can be learnt from the EU Regulation to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing,<sup>13</sup> building on its successes and resolving gaps to design and implement

rules which will level the playing field for EU businesses and catalyse a corporate 'race to the top' to protect people and planet, helping to deliver the EU Green Deal.

To be effective, an EU Sustainable Corporate Governance directive must apply to the entirety of the value chain - including the seafood and fish products sectors - covering all subsidiaries, suppliers, and contractors as well as all business purchasing practices, and have at its core the following six requirements:

- 1. Clarify existing directors' obligations** and accountability mechanisms to require effective governance and oversight by company senior management, and **enshrine an active and proportional duty of care** that extends to all stakeholders affected by business operations. This must cover care for shareholders, employees, suppliers, and the communities impacted along the value chain, including future rights holders who will be impacted tomorrow by the corporate behaviours of today;
- 2. Follow a 'Failure to Prevent' model** to encourage the proactive prevention of human rights abuses and environmental harm;
- 3. Require company directors to define and integrate stakeholders' interests and corporate sustainability risks, impacts and opportunities into corporate strategies** with measurable and time-bound human rights and environmental targets based on the latest available science;
- 4. Include the means to hold companies accountable** when they fail to prevent environmental or human rights abuses, including with **a system of clear and reasonable administrative, civil and/ or criminal liability** and grievance mechanisms and access to remedy based on restorative justice;
- 5. Work with non-EU countries to improve meaningful compliance with international obligations** and instil long-term changes in policy and implementation to underpin sustainability goals; and
- 6. Support SMEs and small-scale producers** who have high-risk supply chains with **proportional due diligence requirements which reflect the size, risk and impact of business operations**, including by providing regular assessments of all EU businesses' exposure to environmental and human rights abuses in third countries.

## Introduction

The climate crisis is fuelling profound social injustice: those who contribute the least to our heating planet - including indigenous peoples and low-income communities - are suffering the worst impacts of a changing climate and a degraded environment. Meanwhile many of the world's wealthy continue to consume irresponsibly and avoid the worst consequences of our 'addiction to carbon'. With 450 million consumers, the EU is the largest single market in the world and has a disproportionately large environmental footprint:<sup>14</sup> EU per capita land, carbon, and water consumption are 1.5 to 2.5 times higher than the global average.<sup>15</sup> The EU is home to only 7% of the world's population yet consumes almost 20% of the earth's biocapacity.<sup>16</sup> The European Green Deal sets out a powerful vision for a greener future that can address the EU's global footprint; however, it is equally important to tackle Europe's global environmental footprint in a way that promotes justice and protects human rights across the world.

We urgently need visionary, decisive political leadership to rein in environmental and human rights abuses to protect people and our shared planet. Voluntary measures and industry initiatives have failed to deliver the system-wide change needed to protect the health of ecosystems such as oceans and forests.<sup>17</sup> Our 'blue planet' depends on healthy oceans that produce more than 50% of the world's oxygen;<sup>18</sup> provide habitats for some 238,000 known species;<sup>19</sup> and sustain the livelihoods and food security of more than 3 billion people.<sup>20</sup> Over recent decades, with regard to setting up due diligence, international seafood companies have agreed to a range of voluntary measures, including sustainability certifications, yet global fish populations are plummeting,<sup>21</sup> and reports of human rights abuses at sea continue unabated. Terrestrial ecosystems fare no better: despite industry initiatives such as the Roundtable on Sustainable Palm Oil (RSPO) certification, palm oil has been responsible for at least 39% of forest loss in Borneo since 2000.<sup>22</sup>



## Box 1 Blood and Water: human rights abuses and environmental destruction in the fishing industry

The EU imported around EUR27 billion worth of seafood in 2019.<sup>23</sup> Per capita global fish consumption has risen from just 9.9 kg of fish consumed in the 1960s to 20.5 kg in 2017<sup>24</sup> (over 24 kg per capita in Europe<sup>25</sup>), and this ever-growing demand for cheap seafood from buyers around the world has seen employment in this sector expand at a phenomenal rate. This growth in the seafood industry is not sustainable: 34.2% of fish stocks are fished beyond sustainable limits and 59.6% are already fished at maximal sustainable limits.<sup>26</sup> Falling revenue, very largely due to declining fish stocks, coupled with the growing demand for cheap seafood, have created powerful economic forces, driving down profits in many fisheries and leading to increased abuse of crews and forced or bonded labour.<sup>27</sup> Illegal, unreported and unregulated (IUU) fishing is both a contributor to and a product of our collapsing global fisheries. IUU fishing amounts to losses between USD10 and USD23.5 billion a year.<sup>28</sup>

Without mandatory supply chain legislation, illegally caught seafood and seafood tainted by human rights and environmental abuses make their way into global supply chains and onto consumers' plates.

## Lessons learnt: what can the EU IUU Regulation teach us?

Legislation can and does radically transform production and value chains that have been associated with environmental damage and associated human rights abuses. New laws may be the only mechanism to build systemic change through mandatory requirements for transparency, traceability and far more stringent environmental governance. The successful EU Regulation to prevent, deter and eliminate illegal, unreported and unregulated fishing (EU IUU Regulation), which came into force in 2010, has been transformative, showing how the EU's leadership and leverage can secure positive change in governance of natural resources, in this instance the enhanced management and oversight of global fisheries.

The EU IUU Regulation introduces a requirement that only marine products validated as legal by the competent flag state or exporting state can be imported to the EU in order to halt the flow of illegally-caught seafood products coming into the EU market. The approach is supported by a system of warnings (known as 'yellow cards') and trade sanctions ('red cards') that can be applied to non-EU countries that neither comply with international standards for fisheries management nor cooperate in the fight against IUU fishing. Through this scheme, the EU has engaged with over 60 third countries to address and reduce IUU fishing. Countries such as Thailand that were previously afflicted by widespread illegal fishing have rapidly initiated reforms following dialogue prompted by the EU Commission's actions (a yellow card) through the EU IUU Regulation. The Regulation has helped prompt a wholesale review of the policies and enforcement governing the Thai fishing fleet, sending a clear and decisive message across the sector and the associated international supply chains.

Some seafood processors and importers are also voluntarily adopting more stringent approaches to their own due diligence and analysis of supply chains risks. However, large gaps still remain (see Box 2). The EU IUU Regulation is narrowly targeted at preventing *illegal, unreported and unregulated* fisheries products from entering the EU market - but it does not provide all of the tools we need to ensure that the seafood available to EU consumers is fully sustainable and free from human right abuses. A mandatory approach to corporate human rights and environmental due diligence would reinforce the progress made under the EU IUU Regulation, help to create a 'level playing field' and fairer competition between businesses across multiple value chains, and would more effectively prevent human rights and environmental violations in EU value chains. Overfishing<sup>29</sup> and other unsustainable resource extraction should be specifically covered as part of a non-restrictive definition of 'adverse environmental impact' in the future Sustainable Corporate Governance directive.



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## **Box 2 The EU IUU Regulation in action: progress made, but a way to go still in protecting the ocean and human rights on Taiwanese fishing vessels**

The EU is the world's largest import market for fisheries products by value.<sup>30</sup> In 2019, the EU imported 30 million EUR worth of fishery products from Taiwan, representing over 30% increase compared to 2018.<sup>31</sup> In October 2015, the European Commission issued a warning (yellow card) to Taiwan due to its insufficient efforts fighting IUU fishing. The warning issued under the IUU Regulation's 'carding scheme' prompted a period of intense dialogue and cooperation between Taiwan and the EU. This collaboration resulted in a deep reform of Taiwanese fisheries governance, which provided Taiwanese authorities with a broad range of modern and efficient tools to fight IUU fishing. Recognising Taiwan's efforts, the European Commission lifted the yellow card in June 2019.<sup>32</sup>

However, despite the successes of the negotiations connected to the yellow card in prompting new legal frameworks, gaps remain in the implementation of sustainable fisheries laws. In 2020, the Environmental Justice Foundation (EJF) documented seven cases of Taiwanese vessels using destructive fishing methods and deliberately targeting marine mammals, including dolphins, that were brutally killed to be used as bait to catch sharks or as trophies.<sup>33</sup> Over the past three years, EJF has provided the Taiwanese Fisheries Agency with a series of briefings and IUU fishing notifications relating to 20 vessels using similar practices. So far, no significant sanctions have been brought against these vessel owners by the Taiwanese Fisheries Agency for such practices, demonstrating that far more needs to be undertaken to instil a sea-change in the way in which fisheries vessels are monitored and controlled.

Taiwan has the world's second largest distant-water fishing (DWF) fleets, employing more than 22,000 migrant crew members,<sup>34</sup> mainly from Indonesia and the Philippines. Due to the remote nature of fishing, language barriers and information gaps, fishing crew are particularly vulnerable to lawless abuse and exploitation, including beatings at gunpoint, forced labour and dangerous working conditions.<sup>35</sup> The scope of the EU IUU Regulation only covers the legality of fisheries products and does not address working conditions on fishing vessels. Nonetheless, the European Commission (DG EMPL<sup>36</sup>) has been working directly with Taiwan to improve labour conditions and address ongoing issues. Over the past year, Taiwanese authorities have reformed regulations to increase protection of migrant workers on Taiwanese vessels. Despite these improvements in the legal framework, enforcement by the Taiwanese authorities to identify and prosecute those engaged in human trafficking has been very limited. In 2020, EJF interviewed 38 crew members - working on 36 Taiwanese-flagged and two Taiwanese-owned fishing vessels - who alleged serious, ongoing labour abuses including withholding of wages (reported on 92% of vessels), excessive overtime (82%), verbal abuse and threats (37%) and physical abuse (21%).<sup>37</sup> EJF observed a similar level of reported abuse in previous years. Between 2018 to 2019, EJF interviewed 71 crew members working on 62 vessels: withholding of wages was reported on 92% of vessels, excessive overtime on 82%, verbal abuse on 34% and physical abuse on 24% of vessels.<sup>38</sup> This suggests that strengthened laws have not resulted in improved results on the water.

The EU's dialogue with Taiwan has shown that international cooperation is a powerful driver towards a more rules-based management of natural resources. The limited scope of the EU IUU Regulation has been a critical first step in addressing the environmental impact of EU seafood consumption, but as EJF's investigations in Taiwan reveal, significant gaps remain. A robust and expansive mandatory human rights and environmental due diligence directive could reinforce the progress made under the EU IUU Regulation, and go further to address the environmental and human rights abuses in the seafood sector which are not covered by the Regulation, keeping unsustainable fish and human rights abuses off of European plates.

## Sustainable Corporate Governance: an opportunity for EU leadership towards a greener, more just future for all

The Environmental Justice Foundation, Oceana, The Nature Conservancy and WWF urge the EU to end the delay on the Sustainable Corporate Governance proposal and send a strong message to constituents, businesses, and the Member States that it is time for the EU to take a leading role in promoting more just and sustainable business worldwide. The Sustainable Corporate Governance initiative is a critical juncture in setting a new standard for mandatory human rights and environmental due diligence across European value chains: its scope must not be weakened or limited, as failure to act boldly today will only lead to disappointing results and the collapse of the Commission's European Green Deal ambitions. The initiative has received significant support from the public: a survey conducted as part of the EU Commission's study on mHREDD indicated that 75% of business respondents favoured a single, harmonised EU-level standard over different national or industry standards.<sup>39</sup> A robust and legally binding Sustainable Corporate Governance and mHREDD legislation will positively impact the European way of life, advance the ideals of the Green Deal, and uphold the EU's role as a global human rights and environmental leader.

The COVID-19 pandemic has forced us to recognise the interconnectedness of the multiple crises that humanity faces. Not only do we need to conserve key ecosystems such as oceans and forests, but we must 'connect the dots' between the charismatic species and landscapes to the triple crises of climate change, biodiversity collapse, and to the challenges of achieving the Sustainable Development Goals for the world's most vulnerable communities. The only way to solve these challenges is by addressing them as parts of a whole. It is critical that the EU take the lead in recognising the interdependency of people and planet and develop a unified, cross-sectoral legislation that not only integrates environment and human rights at every stage, but requires businesses to adopt clear and rigorous standards and transparent and accountable reporting throughout their procurement, production and supply chains.

**We can no longer afford to leave sustainability and justice in the hands of voluntary measures, or put the burden on consumers to protect people and the planet: we need bold, comprehensive legislation to enshrine human rights and environmental protections in business practices.**



### Box 3 Follow the money: tackling abuses in the financial flows of the seafood industry

Ghana is one of the countries most negatively impacted by IUU fishing and human rights abuses perpetrated aboard foreign-owned distant water fleet vessels. In 2002, Ghana banned foreign ownership from its trawl sector,<sup>40</sup> yet Chinese interests in particular have managed to establish and maintain 'front joint ventures', which are built on ownership structures opaque and complex enough to hide their ultimate beneficiaries. On paper, interests are entirely Ghanaian. In reality, Chinese companies have used these illegal front joint ventures to import their trawlers into the Ghanaian fleet register and obtain a licence to fish. EJV found that 90-95% of the Ghanaian trawl fleet are actually connected to Chinese interests, with eight Chinese companies beneficially owning around 75% of the trawl fleet.<sup>41</sup> In the decade before 2018, imports of fisheries products from Ghana into the EU's internal market increased in tonnes and value (up to almost EUR160 million in 2018).<sup>42</sup>

Murky financial dealings in the seafood industry are often linked to environmental destruction, human rights abuses, and even organised crime - and the same pattern is true across other industries at the frontier of environmental exploitation. It is therefore critical that the new EU Sustainable Corporate Governance framework and the mHREDD obligation extend to cover the financial sector and investment flows, in order to stop underwriting the destruction of our planet and the exploitation of marginalised communities.

## Recommendations

The Environmental Justice Foundation, Oceana, The Nature Conservancy and WWF urge EU decision makers to use this opportunity to give a positive global footprint to the European Green Deal by driving historic change in the architecture of environmental and human rights governance in one of the world's most influential markets. The EU can take a leadership role by delivering a unified, cross-sectoral legislation that aligns private sector behaviour with the United Nations Guiding Principles on Business and Human Rights.

An EU Sustainable Corporate Governance directive should apply to all business enterprises, including financial institutions, which are domiciled in and/or operating in the EU single market, with appropriate and proportional mHREDD requirements to prevent human rights and environmental abuses in their supply chains. By harmonising and strengthening a patchwork of due diligence laws at EU level (see Table 1), a new legislation will provide a level playing field and certainty to companies, reduce administrative burden of meeting differing Member State requirements and enhance transparency and comparability. The legislation should enshrine protection for human rights and the environment in all business decisions and require that such decisions are open to scrutiny and decision makers more readily held to account. By creating ambitious and sweeping protections, the EU can avoid displacing abuses and end the cycle of destructive business practices.



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**Table 1: A patchwork of mandatory due diligence legislative requirements in EU Member States**

FRANCE	GERMANY
<p>France's 'Loi de Vigilance' was passed in 2017 and came into force in 2018.</p> <p>The law, which applies only to the largest companies registered or operating in France, requires businesses to assess and prevent the negative human rights and environmental impacts of their activities on people and the planet, by publishing and implementing annual, public vigilance plans. The law covers impacts linked to their own activities, as well as those of companies under their control, and of suppliers and subcontractors. Failure to comply with these legal obligations including failure to publish the vigilance plans can result in administrative fines, and in the case that failure to comply led to preventable harm, the victims of abuse are empowered to bring the issue to a judge.</p> <p><b>Who is covered?</b> Companies headquartered in France with &gt;5,000 employees in France, or companies with &gt;10,000 employees worldwide. There are an estimated 300 companies covered under this scope.<sup>43</sup></p> <p><b>What kinds of abuse?</b> Human rights abuses (including fundamental freedoms and health and safety) and damages to the environment.</p> <p><b>Liability provisions?</b> Civil liability</p>	<p>Germany's 'Supply Chain Due Diligence Act' (Lieferkettengesetz) was adopted in June 2021.</p> <p>The law requires large businesses registered or operating in Germany to take precautionary measures and systematically analyse the risks to people and the environment in their supply chain via <i>direct</i> suppliers. For <i>indirect</i> suppliers this is to be done on an ad-hoc basis, namely if there is '<i>substantiated knowledge</i>' of a possible risk. A Federal authority (BAFA) can be urged by affected parties to take action. This authority can impose fines (of at least 175,000 EUR) based on the severity of the offence and a company's turnover. Other sanctions (exclusion from public procurement) contracts are also possible.</p> <p><b>Who is covered?</b> Companies (including foreign ones with a branch in Germany) with &gt;3,000 employees, and from 1 January 2024 it is &gt;1,000 employees.</p> <p><b>What kinds of abuse?</b> Some human rights abuses and certain (human health-related) damages to the environment (persistent organic pollutants, mercury, hazardous wastes).</p> <p><b>Liability provisions?</b> No clear civil liability provisions. Persons can appeal to a Federal authority (BAFA) if their rights are violated.</p>



## BELGIUM

In April 2021, the Belgian Parliament voted to advance a legislative proposal for corporate due diligence.

If passed, the law would require all companies registered or operating in Belgium to identify and prevent human rights abuses and to mitigate environmental risks in their supply chains, including in their subsidiary companies. Companies may be liable for failure to prevent harm due to the absence or insufficiency of risk mitigation measures. Large companies (as defined under the EU Commission's 2003 recommendation<sup>44</sup>) as well as companies operating in high-risk sectors and regions would be required to publish vigilance plans for risk mitigation. However, company obligations would be proportionate to its size, ability and means to identify, prevent and/or remedy risks in its supply chains.

### Who is covered?

All companies registered or operating in Belgium, with obligations proportionate to size, ability, means, and risk exposure.

### What kinds of abuse?

Human rights violations and social and environmental risks.

### Liability provisions?

Civil liability and access to remedy for victims.

## NETHERLANDS

The Dutch 'Child Labour Due Diligence law' (Wet Zorgplicht Kinderarbeid) was adopted in May 2019. It is expected to enter into force in January 2022.

Companies are obliged to submit to a competent authority a declaration of due care. A company exercises due care when it investigates or holds a reasonable suspicion that goods or services in its supply chain are produced by child labour. If the suspicion is confirmed, then the company must adopt and act on a plan of action. If a company fails to comply, an administrative fine can follow. Several administrative fines can result in criminal prosecution.

### Who is covered?

In principle, *every* company (based in the Netherlands or not) is required to prevent with due care that it sells to end-users in the Netherlands goods or services that have been produced by child labour. The law does foresee possible exemptions (a company that buys products from a company that submitted a declaration of due care does not need to submit one).

### What kinds of abuse?

Child labour

### Liability provisions?

Affected persons can submit a complaint to a competent authority if a company is observed not to comply with the law. The authority can follow up on the complaint if a company has not responded to the complaint within 6 months.

An EU Sustainable Corporate Governance and mHREDD framework must require businesses to identify, cease, prevent, mitigate, monitor, account for and remedy all potential and actual human rights abuses and environmental impacts through a continuous due diligence and risk prevention process that meets at a minimum the international standards laid out by the Organisation for Economic Cooperation and Development (OECD) and the UN Guiding Principles on Business and Human Rights (UNGPs). Accordingly, the legislation should set robust criteria and performance standards that support environmental and human rights protections over profit.

To be effective and fair, mandatory requirements on business should be applied along the entirety of the value chain, covering all subsidiaries, suppliers, and contractors as well as all business purchasing practices, and require mandatory transparency at every level. A proportional and legally enforceable mandatory due diligence legislation is an opportunity to bolster a 'level playing field' in the EU's private sector and accelerate a 'race to the top', supporting in and rewarding businesses for developing, implementing and demonstrating adherence to best practices in protecting global human rights and our shared planet.

The EU Sustainable Corporate Governance directive should firmly establish the EU's frontrunner status in sustainability and justice by affirming the growing body of international law around the human rights and environmental protection obligations of states. Member State and international case law recognises that the right to (family) life also entails a positive obligation to prevent harm from environmental pollution and the risks of climate change.<sup>45,46</sup> In October 2021, the UN Human Rights Council recognised 'the right to a safe, clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights'.<sup>47</sup> Both at UN and Member State level it has been considered that 'environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life', but also that 'there is now global agreement that human rights norms apply to the full spectrum of environmental issues, including climate change'.<sup>48,49,50</sup> As the obligation to respect and ensure the right to life 'extends to reasonably foreseeable threats',<sup>51</sup> the range of possible abuse to human rights and the environment that should fall under the scope of this legislation should not be defined restrictively. A non-restrictive definition of 'adverse environmental impact' and/or environmental abuse and environmental degradation should be clearly stated in the future Sustainable Corporate Governance directive.<sup>52</sup>

In order to be effective, the Environmental Justice Foundation, Oceana, The Nature Conservancy and WWF have six key recommendations for an EU law to protect people and our shared planet.

### **1. Enshrine the UNGP's definition of an active and proportional corporate duty of care and clarify existing procedural directors' obligations:**

The directive must clarify as a fundamental principle, recalled in the UNGPs, a duty of care that requires companies to respect human rights,<sup>53</sup> including the right to a safe and healthy environment.

Since 2011, the European Commission has set an expectation that companies respect human rights, as defined by the UNGPs.<sup>54</sup> Under a new EU Sustainable Corporate Governance directive, this corporate duty of care should be defined as an *active* responsibility to respect human rights. Under the UNGPs, such a responsibility '*requires action on the part of businesses*' which go '*over and above compliance with national laws and regulations protecting human rights*'.<sup>55</sup>

In line with the UNGPs, an active duty of care to respect human rights should mean that companies:

- a. avoid causing or contributing to adverse human rights or environmental impacts through their own activities,<sup>56,57</sup> and address such impacts when they occur;
- b. seek to prevent or mitigate adverse human rights and environmental impacts that are directly linked to their operations, products or services by their business relationships,<sup>58,59</sup> even if they have not contributed to those impacts; and
- c. respect human rights and the environment throughout the company's entire value chain.<sup>60,61</sup>

The *active* responsibility to respect human rights and the environment should apply fully and equally to all enterprises regardless of their size, sector, operational context, ownership and structure. Directors of companies must be obliged to extend their duty of care to all stakeholders affected by business operations - shareholders, employees, suppliers, and the communities impacted along the value chain. This must also include the consideration of future rights holders who will be impacted tomorrow by the corporate behaviours of today, in order to address short-term incentives that may prevent companies addressing long-term environmental and human rights abuses.

Additionally, proportionality should be foundational to the definition of a duty of care. However, the **means** through which a business enterprise should meet its responsibility to respect human rights and the environment should be **proportional** to its size, capacity or the 'severity of impacts'.<sup>62</sup> Accordingly,

the new EU Sustainable Corporate Governance directive must specify **turnover-based**<sup>63</sup> criteria to identify which companies are considered to have these **means** (size and capacity). This will ensure operators have predictability concerning their rights and obligations under this new directive.

Enshrining an active and proportional corporate duty of care is key, but a clarification of the **procedural requirements of existing directors' obligations** - existing under national law and the UNGPs - is also fundamental. This clarification is critical for governance and oversight from companies' senior management and the board to be effective. It is particularly important where sustainability risks and impacts are connected to the company's core business model, as these risks may in turn require the directors to oversee changes to the company's corporate strategy, including necessary business model changes, and financial planning. A non-exhaustive list of these procedural obligations must at least consist of:

- a. approving a forward-looking corporate strategy fully integrating sustainability considerations, including climate impacts and ecosystem risks;
- b. adopting targets relevant for the prevention and mitigation of salient climate and sustainability risks and impacts, identified by the company during the due diligence process; and
- c. overseeing the quality of the double-materiality determination<sup>64</sup> and due diligence processes.

Enshrining a definition of an active and proportional duty of care based on the UNGPs *and* clarifying existing procedural directors' obligations will thus be mutually reinforcing and contribute to an effective and standardised Sustainable Corporate Governance framework.

## 2. Built upon a 'Failure to Prevent' model:

The legislation must build on the 'do no harm' principle enshrined in international environmental law and the European Green Deal by including a more active 'Failure to Prevent' (F2P) liability requirement. This would involve requiring companies to undertake mandatory human rights and environmental due diligence across their value chains, *and* hold companies accountable when they fail to prevent environmental or human rights abuses. This would mean that a company can be held liable if it cannot prove due care, thus incentivising proactive prevention of harm and putting the burden of proof where it belongs: on the companies. An F2P law would further transparency, disclosure, and accountability as the foundational pillars of the law, building on the requirements of the EU IUU Regulation which requires proof of legality for imported seafood products. Setting clear, consistent and reasonable standards for liability will be critical to ensuring the Sustainable Corporate Governance framework is implementable and impactful.

## Box 4 Failure to Prevent - The example of the UK's anti-bribery legislation

In 2010 the UK passed the Anti-Bribery Act, which introduced a corporate offence of failing to prevent bribery by persons associated with relevant commercial organisations.<sup>65</sup> The Failure to Prevent Offence carries strict liability: a bribe paid anywhere in the world by a company's 'associated person' with or without the company's knowledge counts as an offence for which the company can be held liable. The only defence admissible under the Failure to Prevent Offence is that a company has implemented 'adequate procedures' to prevent bribery. The Anti-Bribery Act is generally considered a success. There have been few prosecutions, but companies have adopted harm reduction practices in their behaviour. There have been no reports of negative impacts or loss of competitive advantage due to the Anti-Bribery Act.

The F2P model of the UK Anti-Bribery Act is informative for the design of an effective European Sustainable Corporate Governance framework as rather than simply creating a procedural obligation (the danger of a 'tickbox exercise'), it creates a duty to prevent harm from taking place. This places the onus on the company to change its behaviour, in a manner specific to the context and facts of each company's activities, while allowing a corporate defence that it undertook 'reasonable under all circumstances' due diligence measures to prevent human rights abuses and environmental damages from occurring.

**3. Sustainability performance:** An EU Sustainable Corporate Governance framework must align with the Corporate Sustainability Reporting Directive and the Renewed Sustainable Finance Strategy as part of an F2P approach so that corporate governance more accurately reflects the challenges of protecting people and the planet. The new legislation should require company directors to include sustainability risks, impacts and opportunities into corporate strategies with measurable and time-bound, science-based targets including targets aligned to the Paris Agreement and biodiversity, marine conservation, and deforestation targets. The EU should investigate policy proposals regarding executive compensation as a way to combat short-termism and more tightly link corporate performance evaluations to performance against environmental and human rights targets. This will encourage compliance with the 'do no harm' ethos of the European Green Deal and level the playing field for companies already investing in environmental and social governance practices.

Compliance with performance targets should be assessed independently, ideally by a designated Member State public body, and take into account public and corporate governance and corruption as potential threats to environmental and human rights standards and should focus on the entire value chain from initial producer to the final retail stage.

#### **4. Clear and reasonable legal accountability, grievances and access to remedy mechanisms:**

An effective Sustainable Corporate Governance directive must set up a system of clear, consistent and reasonable administrative, civil and/or criminal liability for failure to comply with due diligence requirements and failure to prevent environmental harm or human rights abuses. In addition to business liability, the EU Sustainable Corporate Governance framework must include grievance mechanisms and access to remedy that emphasises restorative justice, including accountability for past grievances for affected rights holders. All liability mechanisms must be transparent and open for public and rights holders' input and participation in enforcement processes, including enshrined access to information and pathways for third-party complaints and dispute mechanisms coupled with rapid remedial procedures.

#### **5. Bilateral dialogues with countries associated with environmental crimes and human rights abuses:**

The example of the EU IUU Regulation is informative: specifically the 'carding scheme' which demonstrates the importance of working with non-EU countries to improve compliance with and enforcement of international obligations and instil long-term changes in policy and implementation for improved governance of natural resources. Since the EU IUU Regulation came into effect in 2010, the European Commission has entered into dialogue with more than 60 third countries to assess their systems to fight IUU fishing and compliance with international law.<sup>66</sup> Since 2012, out of the 27 procedures initiated (when shortcomings were detected and unresolved), only three countries have eventually failed to show sufficient improvement to avoid trade-related sanctions and have their 'red card' lifted.<sup>67</sup> This process enjoys the widespread support of the EU catching industry, which values its contribution to creating a level playing field where all actors work to prevent illegal fishing,<sup>68</sup> while the EU seafood processing and retail sectors recognise the merit of the EU IUU Regulation in establishing the legality of their product.<sup>69</sup> In the U.S.A, the Federal Government operates several mechanisms where non-U.S. countries are assessed for their efforts to tackle a range of structural issues, such as human trafficking<sup>70</sup> and forced labour.<sup>71</sup> Assessments are published annually, providing recommendations for non-U.S. countries to improve and providing valuable information to strengthen corporate due diligence measures. Both of these models serve as examples in which the EU and Member State mandatory due diligence mechanisms could support business actors and promote transparency in business practices.

In the seafood sector, it is important that future bilateral dialogue complement those already undertaken under the EU IUU Regulation.

#### **6. A just and proportional distribution of the due diligence burden:**

In many high-risk value chains, producers – and especially smallholder producers – carry the majority of the risk and compliance burden, while also bearing the brunt of immediate impacts of climate change and environmental degradation and potentially suffering from human rights abuses and injustices from the bigger buyers and processors. The EU Sustainable Corporate Governance directive should build in opportunities for proactive cooperation and EU support for improved human rights and environmental practices along value chains, particularly in low-income producer countries. This will accelerate the potential for improvements in non-EU countries and reduce the burden on corporate actors.

A new law must recognise that asymmetric power distribution between high-income consumer countries and low-income developing states, and between primary producers, workers, and corporate and financial actors, are one of the root causes of environmental and human rights abuses. Therefore, the new legislation must avoid over-burdening or over-punishing already vulnerable actors in the value chain.

In line with this recognition, as well as the definition of an active *and* **proportional** corporate duty of care (see recommendation 1), the legislation should require appropriate action that is proportional to the extent of a company's leverage over the harm.<sup>72</sup>

Concretely, it should firstly create provisions in support of creating capacity for vulnerable actors, including SMEs, to achieve environmental and human rights targets. This could include rules on fair purchasing practices and providing specific technical guidance or tools to assist SMEs to comply with the Sustainable Corporate Governance framework.<sup>73</sup> Again, the example of the EU IUU Regulation is instructive, as it places lower information burdens on products from small-scale fisheries that are exported to the EU.<sup>74</sup>

Whilst targets and procedures need to be time-bound, the proposed mandatory due diligence regulatory procedures may benefit from a phased approach, enabling SMEs to build their capacity in order to comply with procedures and meaningfully adapt their value chains and reporting to best practices.

Finally, the European Commission should regularly assess the performance of non-EU countries in tackling environmental and human rights abuse in high-risk sectors with global and complex value chains, including fisheries.<sup>75</sup>

This can be a service to businesses, especially SMEs, as it would provide them with basic, yet authoritative information that they can use to estimate their potential exposure to entities in source countries engaged in environmental and human rights abuse.

Specifically, **we recommend a 3-tiered system that allows for incidental, periodical and structural risk assessment**, again drawing lessons from the advantages and shortcomings of the IUU Regulation.

Incidental risk assessment is possible under the IUU Regulation. Under the so-called 'Mutual Assistance' system, the European Commission (DG MARE) can analyse information about possible non-compliance with the IUU Regulation, and pass on its assessment to Member States and non-EU countries concerned. The Commission can give recommendations that allow for swift action<sup>76</sup> and information exchanged through this system feeds the carding process.<sup>77</sup>

Periodical risk assessment that is made publicly available has no legal basis under the IUU Regulation. However, in the U.S.A. there is institutionalised reporting on performance of third countries in tackling human rights and environmental abuse (see Box 5). DG Trade is due to present a potentially comparable reporting scheme, namely, the Commission's first consolidated annual report on implementation and enforcement of EU trade agreements. However, it remains to be seen what will be the content of this annual report, and specifically how and to what extent it could influence human rights and environmental protection globally.<sup>78</sup>

Finally, for risks that are deemed to be structural that are officially and legally recognised in the Official Journal of the European Union, and for which the European Commission has given notice that there are reasonable doubts concerning the proper application of environmental and human rights provisions that fall under the scope of the Sustainable Corporate Governance directive,<sup>79</sup> operators connected to human rights or environmental abuse<sup>80</sup> should take reasonable steps to mitigate and address that risk, and if they fail to do so, they can be held liable. The Commission shall, without delay, publish structural risk assessments on the basis of, inter alia, information obtained via both the incidental and the periodical risk assessments. Should a country fail to address the conditions which are creating the environmental or human rights risk, a wholesale ban on the product in question could be adopted. This is the equivalent of a country receiving a 'red card' under the IUU regulation.<sup>81</sup>

This 3-tiered system could help keep an ambitious scope (rec. 1) while also avoiding a too open-ended liability regime. At the same time it could transform the EU's approach to fighting human rights and the environmental abuse in supply chains globally. As alert systems are open to grassroots level input, civil society will help channel information on the ground to companies and policymakers.

### Box 5 Support for assessing risk - the example of the U.S. reporting on human rights abuse

Based on the Trafficking Victims Protection Act - the TVPA of 2000 - the U.S. State Department publishes an annual report that tracks the performance of 188 countries and territories (2021 report), including the U.S. itself, in preventing, protecting against and prosecuting human trafficking. A country is assessed against its own past performance, as well as a set of minimum requirements which are enshrined in U.S. law. Countries are grouped in one of four tiers: ranging from those that meet the minimum requirements (tier 1); those which do not, but are making efforts to be in compliance (tier 2 / tier 2 watch list); to those that do not appear to make any progress (tier 3).<sup>82</sup> This annual report on human trafficking also incorporates country-specific reporting that highlights persistent problems. Through the Trafficking Victims Protection Reauthorization Act of 2005 more sector-specific analysis has been required, which is provided by the U.S. Department of Labor's *List of Goods Produced by Child Labor and Forced Labor*. As of the time of writing, for 156 goods from 77 countries, the Department of Labor describes the existence of child and/or forced labour, including in fisheries.<sup>83</sup> Based on this reporting, the U.S. International Trade Commission has developed a methodology that allows it to estimate the level of risk of human trafficking, forced and child labour for specific source countries.<sup>84</sup>

This reporting can be valuable for businesses inside - and outside - the U.S. to estimate and, if necessary, address the risk that they are sourcing products from countries which insufficiently tackle human rights abuse onboard vessels of distant water fishing fleets.<sup>85</sup> The U.S. Department of Labor has developed mobile applications, intended to facilitate companies' access to its reporting on child and forced labour and to assess risk in their supply chains.<sup>86</sup>

Climate change, biodiversity loss, the destruction of key ecosystems such as oceans and forests, and the human rights abuses they are engendering are the biggest challenges of our era. The time to act is now: the EU must take decisive, urgent action to establish itself as the global sustainability leader to protect people and the planet by rapidly developing and enacting a world-leading sustainable corporate governance framework and legally-enforceable mandatory requirements for human rights and environmental due diligence.

## Endnotes

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The Environmental Justice Foundation, Oceana, The Nature Conservancy and WWF are working together to promote, align and strengthen traceability systems in key seafood markets in order to end illegal, unreported and unregulated (IUU) fishing.

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