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The role of due diligence obligations in climate change litigation to fill in the corporate climate accountability gap.

Analysis of the application of the French Duty of Vigilance law in the case Friends of the Earth et al. v. TotalEnergies.

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Foreword & Acknowledgement

It is with great pleasure and gratitude that I present this thesis on the role of due diligence laws in climate change litigation. This work is the result of months of in-depth research and analysis and is intended to shed light on an increasingly important area of environmental and climate change law.

Throughout this process, I have been fortunate to receive guidance and support from my supervisor Dr. Annalisa Savaresi. Her knowledge and expertise in the field of environmental law played a significant role in shaping my research. Her insightful critiques and constructive feedback have allowed me to perfect my thesis. I wish to thank Professor Jacqueline Peel who has dedicated time to answering my questions and providing valuable insights for my research. Additionally, I am grateful to my friends and family who have engaged in countless discussions on the role of corporations in climate change and provided valuable feedback which has allowed me to shape my arguments.

Delving into the intricate nuances of due diligence obligations in the context of climate change litigation has required me to explore legal framework, analyze case law and to understand the socio-economic dynamics at play. By examining a vast array of sources, I have sought to provide insights on how due diligence obligations can contribute to a just transition towards a more sustainable and resilient future. It is my sincere hope that this thesis contributes to further research and ultimately to the development of effective legal strategies based on due diligence obligations to fill in the corporate climate accountability gap.

Abstract

This thesis aims at answering the following legal question: to what extent can due diligence legislation be used in climate governance to fill in the corporate climate accountability gap through climate change litigation?

The objective of this research is to critically assess the legal potential of due diligence legislation within corporate climate litigation cases. In other words, the research will assess the possible weaknesses in regards due diligence obligations, and how could they be remedied with in order to obtain a game changer when it comes to corporate climate change litigation.

To conduct the research, a legal doctrinal research approach followed by a case study approach will be used in order to understand how due diligence legislation applies in practice.

This thesis aims at contributing to the already existing body of literature on the subject of due diligence legislation and its potential role within corporate climate change litigation. The case study approach will allow to draw conclusions on the legal potential of due diligence legislation and most importantly on the aspects that need to be revised, reinforced, or even modified for it to fill the corporate climate accountability gap.

1 Introduction

1.1 Factual Background

As a result of increasing climate awareness, the international community gathered multiple times to discuss the necessary measures to prevent a climate catastrophe. A series of international agreements have been adopted throughout the years, but unfortunately mostly remembered by their failure or inefficiency. The most recent climate agreement is the Paris Agreement which aims at strengthening the global response to the threat of climate change by pursing efforts to limit the temperature increase to 1.5°C above pre-industrial levels.[1]

The Paris Agreement has been adopted in 2015, and today we are far-off from achieving the targets it sets. As for preceding international climate agreements, the rationale behind the inefficiency of the Paris Agreement lies behind the lack of ambitious target, a too smaller scope[2], lack of enforcement mechanisms and lack of incentives, among other reasons.

Together with the increasing scientific evidence of climate change and the lack of action from states, the civil society began taking measures to try and have concrete climate mitigation and/or adaption measures adopted by their governments. Within this movement, a lot of different measures at different levels have been initiated. Among these, climate change litigation has gradually taken an important place.

Climate change litigation includes cases pending before judicial and quasi-judicial bodies that involve material issues of climate change science, policy, or law.[3] Climate change litigation can be directed at public and private corporations, governments, city administration, etc.… and is being used to hold these bodies accountable to the problem of climate change.[4]

Within the movement of climate litigation, one particular type of litigation – right-based climate litigation – has been expanding greatly across different jurisdictions. Right-based climate lawsuits have generally been filed against states for lack of appropriate action towards the climate emergency. Within the literature of environment and human rights, right-based climate

[1] Paris Agreement, articles 2(1) and (2).

[2] Act Alliance EU.

[3] Setzer and Higham 2022, p. 6.

[4] Hussain 2018.

litigation is typically described as '*litigation according to the types of rights invoked, which in turn require states to take different kinds of action'*.[5] Right-based climate litigation is a very young trend and has been pushed forwards by several landmark case.[6] But what about the legal possibilities of climate lawsuit against corporations?

The purpose of a corporation is to '*conduct a lawful, ethical, profitable, and sustainable business in order to create value over the long term […]*'.[7] However, it is clear that some of these purposes are not a priority for many corporations.

The fossil fuel industry, as well known, is the most polluting industry. It is only composed of a small number of corporations which exploit natural resources such as oil, coal, and natural gas to produce power. The Carbon Majors Report[8] points out that just one hundred companies are responsible for 71% of global emissions. These numbers tell us that corporations (specifically the ones operating in the fossil fuel industry) are key to effective national and transnational environmental protection, not only due to their capacity to produce environmental harm, but also their ability to develop new, environmentally friendly technology and management practices that can be disseminated internationally.[9]

Litigating corporations on the basis of human rights law in order to obtain climate positive outcomes has been shown to be more complex compared to litigations against states. That is mainly due to the fact that human rights obligations of corporations are less clear than the one of states.[10] But new laws requiring specific obligations from corporations have started to emerge.

For instance, due diligence legislation has spread over several jurisdictions after making its place within the international framework. In general terms, due diligence entails an obligation of conduct on the part of a subject of law.[11] In regard to corporations, due diligence is understood as '*the process through which enterprises can identify, prevent, mitigate, and*

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[5] Savaresi and Setzer 2022, p. 19.

[6] *Urgenda Foundation v. The State of the Netherlands*

[7] Lipton, Savittet al. 2020.

[8] The Carbon Majors Database 2017, p. 5.

[9] Olga et al. 2022, p. 25.

[10] Savaresi and Setzer 2022, p. 19.

[11] Koivurora and Singh 2022.

account for how they address their actual and potential adverse impact as an integral part of business decision-making and risk management systems'.[12]

In the best scenario, obligations entail accountability mechanisms. As a result of national legislatures adopting due diligence obligations addressed to corporations, legal possibilities arise for corporate climate change litigation. In that context, France adopts the French Duty of Vigilance Law in 2017. That adoption is groundbreaking as it is the first law of the sorts. Stakeholders, amongst which non-governmental orgnaizations (hereinafter 'NGOs), have regarded this law as a new tool to form new legal arguments in climate change litigation. Inspiring other countries, Germany, the Netherlands as well as Norway adopt silimar due diligence legislation. Eventually, the European Parliament calls for the introduction of a mandatory due diligence framework based on the French Duty of Vigilance.[13] In 2019, the European Commission adopted a proposal for a Directive on corporate sustainability due diligence.[14] The proposed directive has as a goal to promote and advance Europe's green transition and plays a key role in building a sustainable economy and society.[15] It will require companies to identify and where necessary prevent, end or mitigate adverse impacts such as human rights violations and environmental degradation, for example pollution and biodiversity loss.[16] The proposal should, *a prioris*, be adopted in the spring of this year, if adopted by the Parliament and Council, and enter into force in 2025.

1.2 Research questions and research objectives

This thesis aims at answering the following legal question: to what extent can due diligence legislation be used in climate governance to fill in the corporate climate accountability gap through climate change litigation?

To that end, court's judgements as well as pending case law will be assessed, together with legal articles on the subject. To answer the legal research question stated above, a set of sub-questions need to be answered first.

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[12] OECD Guidelines for Multinational Entreprises 2011, p. 23, §14.

[13] Clerc 2021, p. 1.

[14] European Commission Proposal Directive 2022.

[15] European Commission Proposal, preamble 14.

[16] European Commission Proposal, article 1(1).

Sub-question 1: What are due diligence obligations?

Sub-question 2: Is the notion of climate change present within due diligence obligation?

Sub-question 3: How have due diligence obligations been formulated in climate litigation?

Sub-question 4: What are the legal consequences of due diligence legislation in practice?

Sub-question 5: Is there a need to modify or stretch the meaning due diligence legislation for it to be efficient?

The objective of this research is to critically assess the legal potential of due diligence legislation within corporate climate litigation cases. In other words, the research will assess the possible weaknesses in regards due diligence obligations, and how could they be remedied with in order to obtain a game changer when it comes to corporate climate change litigation.

1.3 Method of research

In a first instance, I will seek to understand the role of due diligence obligations in corporate climate litigation by examining the climate dimension of due diligence obligations. To do so, I will adopt a legal doctrinal research approach by analyzing the conclusions made in different academic legal articles based on international law. Moreover, I will rely on international frameworks such as United Nations Guiding Principles (UNGPS) and Organization for Economic Co-operation Development (OECD) Guidelines and examine how these have evolved together with the movement of filling the corporate climate accountability gap. That section of the research will be based on international business law and international human rights law in order to define what is understood by climate due diligence.[17]

In a second instance, to examine the phenomena of the role of due diligence obligations in climate change litigation, I will rely on a case study approach. A case study approach will allow me to come to conclusions on how due diligence laws are understood and why they are applied and misapplied, subverted, complied with or rejected within the area of corporate climate change litigation.[18] In order to do so, I will be looking at two parallel case studies, one being the French case Friends of the Earth et al. v. TotalEnergies and the second, the French Duty of

[17] Macchi 2021.

[18] Webley 2016, p. 3.

Vigilance Law from 2017. Both the case and the law are inseparable in understanding how the French law has been used in practice and understanding its legal consequences on corporate climate litigation. The French Duty of Vigilance is a recent enacted law which has the intent to regulate corporate's actions in relation to climate change mitigation and adaptation and thus has the potential to trigger a new set of corporate climate cases.[19] The potential behind this French law makes France the most relevant case study in this context. However, my research will be supplemented by other cases for further understanding and for the sake of comparison, such as Notre Affaire à Tous et al. v TotalEnergies and other national due diligence legislation, such as the German one. In other words, I will look at the law from the inside perspective. Also, I will make use of the EU Proposal Directive on Corporate Sustainability Due Diligence and understand the legal impacts it will have on the French Duty of Vigilance Law.

As stated above, the specific phenomenon of corporate climate litigation is less developed compared to climate litigation against states. Nonetheless there are legal articles dealing with the subject and several conclusions can be drawn. For instance, Annalisa Savaresi and Joana Setzer have categorized different types of climate change litigation together with the different existing litigation trends and concluded that human rights law and remedies are not particularly well suited to pursuing corporate actors. The increase of right-based litigation against corporate actors must be viewed as part and parcel of the global movement to enhance corporate climate accountability. In other words, human rights law and remedies have subsequent limitations, which emphasizes the need for the further development and use of due diligence legislation.[20] In another article on due diligence laws and climate change litigation written by Mikko Rajavuori, Annalisa Savaresi and Harro van Hasselt, it has been concluded that due diligence law has two potential impacts, first, the covering of corporate climate impacts and responsibilities and second, the extending of international due diligence obligations to cover also greenhouse gases emissions. Nonetheless, they conclude that despite due diligence obligation providing entry points to strengthen corporate climate accountability, existing due diligence legislation suffer from structural weaknesses.[21]

[19] LOI n°2017-399 of 27 March 2017 on the duty of care of parent companies and ordering companies.

[20] Savaresi and Setzer 2022, p. 28.

[21] Mikko et al., 2022, p. 15.

Important to note is that the word "corporation" refers to an entity that has a legal personality which is separate and distinct from its owners and shareholders. A corporation is formed to conduct business activities generally, with the aim of generating profits.[22] In the context of this thesis, the term "corporation" specifically focuses on those operating within the fossil fuel industry, particularly these which bear responsibility for climate change and its consequences. Important to note is that the terms "corporations", "enterprises", "companies" and "businesses" will be used interchangeably in this paper, and all refer to the same concept of a corporation as defined above, with a focus on the fossil fuel industry.

This thesis aims at contributing to the already existing body of literature on the subject of due diligence legislation and its potential role within corporate climate change litigation. The case study approach will allow to draw conclusions on the legal potential of due diligence legislation and most importantly on the aspects that need to be revised, reinforced, or even modified for it to fill the corporate climate accountability gap.

1.4 Thesis structure

In the first chapter, the paper will focus on due diligence laws in general terms. First, the origins will be put forward and the development of due diligence obligations at the international level will be explained. Most importantly, the paper will analyze the subsequent inclusion of climate change within the international framework of corporate obligations of behavior. Second, the interrelation between climate change and human rights law will be analyzed. Certain, if not all due diligence legislation contains aspects of human rights; thus, these aspects need to be understood to appreciate the full picture that surrounds due diligence legislation.

In a second chapter, the paper will analyze how the development of due diligence obligations at the international level translated to the national level. One law in particular law will be put forward, namely the French Duty of Vigilance from 2017. This law will be put into context within the French legal system.

In a third chapter, the paper will examine the legal consequences of putting the French Duty of Vigilance into practice. To that end, in a first part, cases which have been filed against corporations based on the French law will be examined. Due to the recent aspect of the French

[22] Investopedia 2022.

law, only one case contains a final judgement by a Court while other cases are still pending. Therefore, a comparison between legal arguments made on the basis of due diligence legislation brough forward by the applicants (in most cases non-governmental organizations) will be made. This analytical comparison will lead to the second part of this chapter to conclude on the main challenges in regard due diligence obligations and the subsequent changes needed within the law in order to allow a new set of revolutionary climate cases against corporations.

In a fourth chapter, I will examine the reaction of the legal team from the case Notre Affaire à Tous and others. v. TotalEnergies and highlight the important points which will need to be emphazised on during the trials for this case. Following that chapter, The proposed European Directive will be examined and conclusions will be dranw on how it this Directive, if adopted, can supplement the already exisiting French Duty of Vigilance.

2 Defining due diligence obligations

This chapter considers the concept of due diligence from an international law perspective. Although international law applies to state rather than non-state actors – in this case corporations – it is important to understand what the concept of due diligence entails as it is states that will develop and adopt legally binding corporate due diligence legislation guided by the international interpretation of due diligence and its climate dimension.

Due diligence emerged in the international practice of the 19th century in relation to diplomatic protection and security of states The term and practice of "due diligence" originates from the United States of America and means due, or merited, care.[23] Throughout the centuries it developed as a concept linked to the responsibility of states and for that reason, up until recently, the notion of due diligence was considered to pertain to the realm of international responsibility.[24] But due diligence has spread to other areas of international law and has particularly evolved in international environmental law from the second half of the 20th century onwards.[25] A general consensus has emerged on the impacts of companies and businesses on the environment, which cannot be disregarded. Through international commitments and civil society pressure, different companies have had to take measures to address the environmental risks their activities pose to the environment. Thus, with the rise of environmental concerns and the manifestations of climate change, companies have had no choice but to adopt certain guidelines on environmental and climate change due diligence.

The notion of due diligence has been given different meanings within legal academic literature. For instance, on the one hand, the International Law Commission refers to due diligence as a broad principle of international law, but also as specific obligations in several branches of international law.[26] On the other hand, Barnidge refers to due diligence as a 'well-established principle of international law'.[27] Although no uniform widely agreed definition of due diligence exists, some key parameters of the concept can be identified. First, due diligence is an obligation of conduct as opposed to an obligation of result. In other words, failing to deliver a certain

[23] Carsten 2000, p. 120-124.

[24] Ollino 2022, p. 17-63.

[25] ILA Study Group on Due Diligence in International Law 2014, p. 5.

[26] ILA Study Group on Due Diligence in International Law 2014, p. 19.

[27] Barnidge Jr. 2006, pp. 81–82; Barnidge Jr. 2008, p. 69.

result does not automatically mean that due diligence obligations have been breached. A breach of due diligence obligation happens only if the diligent steps towards the wanted result have not been taken.[28] A second key parameter lies in the attribution of rights and duties. Duty-bearers in international human rights law are mostly states, and right-holders are individuals and whilst duty-bearers in international climate change law are also states, the right-holders are other states and not individuals.[29] A third key parameter of the concept of due diligence lies in the fact that risk management lies at the heart of due diligence obligations.[30]

Moreover, due diligence is a principle of international law which is applied differently according to the area of international law to which it applies. Therefore, it is important to highlight the relevant areas of international law which will contribute to the understanding of the application of due diligence laws in the context of corporate climate change litigation. The two areas of international law which are relevant in the context of my research are human rights law and climate change law. International human rights law needs to be taken into account because of the interrelation between climate change and human rights. As stated in the introduction, a growing movement of right-based climate litigation has been evolving in an attempt to fill the gaps in climate change governance. Human rights law is a useful tool because it contains, one the one hand, remedies for damage provoked by climate change and on the other hand, paradigms which can be applied to determine what corporate actors should be doing in the face of climate change.[31] However, it has become clear that human rights law is not designed to specifically deal with the issue of climate change, and particularly not when it comes to corporate climate accountability.[32] This is the point where international climate change law comes into play. It is clear that climate law, contains gaps concerning corporate climate accountability.[33] In order to remedy these gaps, without solely making use of human rights law, better and more efficient legislation needs to be adopted and importantly, needs to be consistently and stringently enforced.[34] In line with the different climate cases which have

[28] Medes 2021, p. 129-130.

[29] Olga et al. 2022, p. 3-4.

[30] Medes 2021, p. 128.

[31] Mikko et al., 2022.

[32] YouTube Video COP26 2021.

[33] Ibid.

[34] Ibid.

been filed throughout the globe, the international level began to extent due diligence obligation into the area of international climate change law.

2.1 Unpacking corporate due diligence with respect to human rights

In the next part of the chapter the unpacking of corporate due diligence to respect human rights will be conducted on the basis of the work carried out by the ILA Study Group on Due Diligence in International Law. Thereafter, the emergence of the environmental aspect in corporate social responsibility and business and human rights will be analyzed. To reach that understanding, we will look into the United Nations Guiding Principles on Business and Human Rights, as well as the OECD Due Diligence Guidance for Responsible Businesses. The goal of the research of this chapter is to understand and conclude whether there is a climate dimension to the notion of due diligence.

2.1.1 Due Diligence in the contet of international human rights law

As well as civil society actors, academics and lawyers have sought to explore solutions to tackle the devastating consequences of climate change through the lens of human rights. A growing recognition of the close relationship between human rights and the environment began its way into the international community.[35] In 2021, the United Nation Human Rights Council recognized the right to a clean, heathy, and sustainable environment as[36] a human right of itself in a landmark resolution.[37] Moreover, certain human rights which relate specifically to the protection of the environment have made their way into national constitutions as well as regional human rights treaties. Despite the majority of issues that these rights ultimately address relate to the operation of actions of companies, none of the human rights themselves are directly addressing companies as non-state actors.[38] This leads to the general observation that since public international law is not directly applicable to non-state actors, corporations are ultimately only legally responsible for complying with the applicable law in the country in which they

[35] Olga et al. 2022, p. 1.

[36] Turner 2021, p. 4.

[37] General Assembly Seventy-Sixth session 2022.

[38] Turner 2021, p. 4.

operate.[39] However, there have been developments in that area that indicate a way towards a progressive inclusion of human rights due diligence obligations to non-state actors.

2.1.2 United Nations Guiding Principle on Business and Human Rights.

In June 2011, the UN Human Rights Council unanimously endorsed the United Nations Guiding Principles on Business and Human Rights ('UNGPs') which were developed by John Ruggie, the Special Representative of the Secretary-General, in collaboration with civil society, businesses, governments, and victims of corporate human rights abuses.[40] The UNGPs present a set of guidelines to operationalize the 'protect, respect and remedy' framework and define the key duties and responsibilities of states and corporations in regard to business-related human rights abuse.[41] It was clarified that corporations, regardless of their size, nature, or location, should be subject to the Framework and Guiding Principles.[42] In order to meet their responsibilities under international human rights law, corporations should put into place processes and policies appropriate to their size and circumstances, those include among other, a human rights due diligence process to '*identify, prevent, mitigate and account for how they address their impacts on human rights*'.[43] Principle 17 of the UNGPs defines the parameters for human rights due diligence, while the following Principles elaborate on its essential components.[44] Human rights due diligence should cover the potential impacts that the enterprise may cause or contribute through its own activities, or through its operations, products or services and even by its business relationships.[45] Moreover, human rights due diligence should be an ongoing process, which entails the recognition that human risks may evolve over time with the evolution of business's activities and operations.[46] With that in mind and the interrelation between human rights and the environment, it is surprising to notice that there is limited consideration given to the environment in the business and human rights discourse.[47]

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[39] Ibid.

[40] Bright 2020, p. 1.

[41] The United Nations Guiding Principles on Business and Human Rights, p. 2.

[42] Guiding Principle in Business and Human Rights 2011, p. 1.

[43] Principle 15 of the United Nations Guiding Principles.

[44] Guiding Principles on Business and Human Rights 2011, p. 17-18.

[45] Principles 17 15 of the United Nations Guiding Principles.

[46] Ibid.

[47] Olga et al. 2022, p. 1.

Nonetheless, the fact that the UNGPs do not establish standards on the environment, and more particularly on climate change does not entail that such corporate responsibilities are non-existent.[48] On the contrary, through the adoption of a climate lens and in light of the climate jurisprudence, Chiara Macchi and Nadia Bernaz enunciated the responsibilities of banks in terms of climate change and human rights, with the inclusion of a climate due diligence process.[49] The line of argumentation which led the authors to this conclusion will be further explored then talking about the climate dimension of due diligence obligations.

2.2 Unpacking of due diligence obligation with regards to the environment and climate change

2.2.1 Notion of Corporate Social Responsibility

Moving away from the area of international human rights, it is important to look at the notion of Corporate Social Responsibility (CSR). CSR is mainly understood as being grounded in the adoption of voluntary practices arising from moral and social expectations of appropriate corporate conduct, together with the responsibilities that arise from such expectations.[50] Ever since awareness increased in relation to the impacts of corporation's operations on the environment and the inaction from corporations which continue to be solely concerned by profit, the consideration of environmental issues became a broader part of the CSR framework. CSR has been described by the European Union as a concept whereby 'companies integrate social and environmental concerns in their business operations' and specified that social responsibility entails going further than what is legally expected from a company and to actively invest more for the benefit of the environment.[51] Within the concept of CSR developed Corporate Environmental Responsibility (CER) which can be defined as voluntary practices which pursue to protect/benefit the environment and mitigate corporate adverse impacts beyond what is required by law.[52] Gradually, CSR became a key component of due diligence processes and is now being adopted by most if not all companies, as a lack of it could result into negative financial outcomes for the company. But despite all these concepts emerging which include the

[48] Olga et al. 2022, p 10; Macchi and Bernaz 2021.

[49] Ibid.

[50] Deva et al. 2019, pp. 201–212.

[51] Global Risk Profile True Diligence 2020, p. 5.

[52] Gunningham 2009, pp. 215–231.

environment as a vital factor within corporate responsibilities, and thus within due diligence processes, one vital issue remains in the fact that CSR is not a specific and delineated legal obligation.[53] Rather, it is a superfluous concept for which it is difficult to impose strict rules which could lead to accountability mechanisms.[54] For a potential efficient use of CSR, binding laws would have to be enacted at the national level, with corresponding enforcement mechanisms. This has been the case in a few countries, for example France with the adoption of the French Duty of Vigilance[55], Germany with the Act on Corporate Due Diligence to Prevent Human rights Violations in Supply Chains[56] and The Netherlands[57] with the Bill on Responsible and Sustainable International Business Conduct.

2.3 OECD Guidelines for Multinational Enterprises and its Due Diligence Guidance for Responsible Business Conduct.

In 1976, the OECD adopts the Guidelines for Multinational Enterprises. From the perspective of the Guidelines, due diligence is understood as the steps through which corporations can '*identify, mitigate, and account*' for how they address their past, present, and future adverse impacts as an integral part of their decision-making.[58] The scope of due diligence extends to the corporation's operations, products or activities carried out by entities in their supply chains in relation to human rights and the environment among other topics.[59] It is thus confirmed in the Guidelines that the environment forms an integral part of the due diligence processes.[60] Since then, it has been revised five times to ensure that the guidelines remain up to date and a leading tool to promote responsible business conduct in the changing landscape of the global economy.[61] The latest update took place in 2011 and aimed at incorporating the concepts from the UNGPs. This revision made a major contribution to the raise of expectations of due diligence by corporation to an international consensus. The 2011 revision resulted in the OECD

[53] Global Risk Profile True Diligence 2020, p. 7.

[54] Ibid.

[55] LOI n°2017-399 of 27 March 2017 on the duty of care of parent companies and ordering companies.

[56] The Act on Corporate Due Diligence Guidance Obligation in Supply Chains of 1st January 2023.

[57] The Responsible and Sustainable International Business Conduct Act of the 1st of June 2023.

[58] OECD Guidelines for Multinational Enterprises, p. 23, §14.

[59] Ibid.

[60] OECD 2018, p. 3.

[61] OECD 2023.

Due Diligence Guidance for Responsible Business Conduct which has as a purpose to guide corporations in the implementation of due diligence required by the OECD Guidelines and to promote a common understanding amongst states and stakeholders on the meaning of the due diligence for responsible business conduct.[62] This Guidance is very relevant for a number of different reasons. First, the Guidance details the meaning of due diligence and its limitations. Second, it describes the processes which should arise from its application to the decision-making of a company. As stated beforehand, there is no consensus on a definition of the concept of due diligence. For that reason, it is important to understand the contributions of the OECD Guidance made to the content of the notion of due diligence in respect to corporate behavior. Moreover, it is important to understand the exact meaning of due diligence within the Guidance as some national legislations have based their due diligence obligations on what the OECD prescribes.[63]

2.3.1 Defining due diligence in light of the OCED Guidelines

First, due diligence is preventative.[64] In other words, the purpose of due diligence is to avoid being the cause or contributing to adverse impacts originating from the activities or operations from corporations, whether it is on people, the environment or society.[65] Corporations should actively seek to prevent adverse impacts, and in the scenarios where harm or damage is inevitable, due diligence requires corporations to actively mitigate the harmful consequences and actively prevent its repetition and if relevant, remediate them.[66] Thus, in order to fulfill the purpose of due diligence, responsible business conduct should be embedded into policies and management systems of each corporation according to its size and location.[67]

Second, due diligence must involve several processes and objectives.[68] To begin with, processes must be put into place to identify the potential adverse impacts of an activity or operation. In order to do so, the Guidance proposes the carrying out of a broad scoping exercise

[62] OECD Watch (2018).

[63] Worldfavor (2023).

[64] OCED 2018, p.16.

[65] Ibid.

[66] Ibid.

[67] Ibid.

[68] Ibid.

in relation to all areas of the business, its operations, and relationships, including the ones in its supply chains, where potential risks are most likely to occur.[69] Within this scoping exercise, prioritization should be installed in order to carry out further assessment of the most significant risks and determine which risks should be dealt with in the first place.[70] Moreover, an assessment of the corporation's involvement with the actual or potential adverse impact should be conducted, in order to determine the appropriate response.[71] In addition, due diligence demands that corporations stop any operations which are causing or contributing to an adverse impact and provide for or cooperate to their remediation.[72] Alongside identification, objectives should be set, in order to have goals to reach , among others, in relation to the protection of the environment.[73]

Third, due diligence is measured in terms of likelihood and severity. In other words, the responses that corporations adopt to address an adverse impact should be proportionate to the severity of and the likelihood of the adverse impact.[74] Consequently, the higher the severity and likelihood of an adverse impact, the more extensive the due diligence must be.[75]

Fourth, due diligence is a dynamic process.[76] It includes a constant mechanism of feedback and ongoing communication. An enterprise should be able to adapt its responses to adverse impacts within the changing society in which they operate. Moreover, enterprises should demonstrate good faith by accounting for how they carry out the different processes of due diligence and communicate them accordingly. It goes without saying that transparency of due diligence is a must, therefore information should be accessible to the public and contain the sufficient information to demonstrate the capability of the corporation in its responses to adverse impacts.[77]

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[69] Ibid.

[70] Ibid.

[71] OECD 2018, p. 25.

[72] OECD 2018, p. 17.

[73] Ibid.

[74] Ibid.

[75] Ibid.

[76] Ibid.

[77] OECD 2018, p. 19.

Finally, although the Guidance states that no matter the size, nature, or location of a corporation, due diligence must be exercised, it is important to keep in mind that the nature and extent of due diligence must be appropriate to a corporation's circumstances and context.[78] A corporation which contains 100 employees and does not own any supply chains will have different due diligence obligations compared to a corporation which employs 10,000 persons and possesses multiple supply chains and operates in various countries.[79]

2.4 Emergence of climate due diligence

With the growing awareness and undeniable scientific proof of climate change and its consequences, the concept of due diligence has slowly started to embed the notion of climate change. First, it is important to remind the reader that for the purpose of the thesis, the climate dimension of due diligence obligations that is going to be analyzed in this section applies to corporate actors, and not to States. According to the climate change regime which comprises the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol and the Paris Agreement, there is indeed an existing due diligence in international climate law that applies to States which has manifested itself through the procedural turn made in 2015 with the adoption of the Paris Agreement.[80] However, in the case of corporate activity, it is relevant to understand whether a corporate climate change due diligence exists, and if so, how it manifests itself.

Doctor Ivano Alogna argues that the rationale behind the need for due diligence in relation to climate change is threefold.[81] Firstly, it is based on scientific considerations. Despite the existing toolbox of instruments to fight against climate change which is in constant evolution since the adoption of the UNFCCC, the amount of fossil fuels used in the energy sector amounts to 80% in the year 2020.[82] This clearly indicates that the existing instruments are not efficient or insufficient to effectively reduce greenhouse gas emissions, especially from corporations.[83] Secondly, corporate due diligence is needed from a geopolitical point of view. Global

[78] Ibid.

[79] Ibid.

[80] Rajamani 2020, p. 164.

[81] Alogna 2021.

[82] Ibid.

[83] Ibid.

cooperation is necessary and unavoidable to remedy climate change and achieve the climate targets set, whether at the international level, regional level, or even national level. In order to push for more actions from states, especially their corporations, and global cooperation there is a need for new legal instruments, for example increased due diligence measures directly related to climate change.[84] Thirdly and finally, from a legal point of view, corporate climate due diligence serves the purpose to engage more directly with the principal actors behind climate change, in other words, corporations.

Another line of argumentation in relation to the existence of a notion of climate due diligence is put forward by Chiara Macchi. The author argues that climate due diligence is increasingly developing as a dimension of human rights due diligence obligations.[85] This conclusion is drawn from the analysis of several European and international cases. To begin with, the verdict of the case Milieudefensie v Royal Dutch Shell (RDS) played an important role in strengthening due diligence in relation to climate change.[86] Milieudefensie argued that the total amount of emissions produced by RDS constituted a violation of the unwritten standard of care which can be interpreted using human rights and international soft law instruments endorsed by RDS.[87] In light of the standards set in the UNGPs and OECD Guidelines for Multinational Enterprises, the Dutch Court affirmed that corporations have a responsibility to respect human which corresponds to a global standard of expected conduct.[88] The court further stated that "*it can be deduced from the UNGPs and other soft law instruments that are universally endorsed that companies must respect human rights*".[89] It is well established that the enjoyment of human rights, particularly the right to life and the right to respect for private and family life, provide protection against the adverse impacts of climate change. Through this well-established correlation, the Court imposed on Shell the obligation to reduce its emissions of greenhouse gases (obligation of result) with the aim of protecting the environment and preserving the inhabitants of the Netherlands. In reaching that conclusion, the Court affirmed that the UNGPs

[84] Ibid.

[85] Macchi (2021), p. 95.

[86] Ibid.

[87] *Milieudefensie et al. v. Royal Dutch Shell plc*, §3.2.

[88] *Milieudefensie et al. v. Royal Dutch Shell plc*, §4.4.16.

[89] *Milieudefensie et al. v. Royal Dutch Shell plc*, §4.4.14.

are capable of defining the standard of care to which companies must adhere to.[90] It also stressed the need for mandatory due diligence legislation that further defines the obligations of corporations in relation to the protection of human rights and the particularly, the protection of the environment. Importantly, the argumentation of the Court makes it clear that preventing adverse impacts from climate change is a fully fledge element of responsible business conduct as defined by the UNGPs and the OECD Guidelines for Multinational Enterprises.[91]

Additionally, Chiara Macchi and Nadia Bernaz, in their paper entitled 'Business, Human Rights and Climate Due Diligence: Understanding the Responsibility of Banks', argue that excluding human threats arising from anthropological global warming from the concept of due diligence as highlighted in the UNGPs, would be contradictory to the UNGPs' founding purpose.[92] Consequently, they assert that a principle of systemic integration as defined in the Vienna Convention on the Law of Treaties should be applied to the second pillar of the UNGPs which provides a blueprint for the prevention and addressing of negative human rights impacts.[93] The application of the principle of systemic integration would imply that the reading of the second pillar of the UNGPs would be done in light of other relevant rules of international law, including environmental and climate law.[94] As a result, this entails recognizing a climate change dimension of due diligence processes contained in the second pillar of the UNGPs. Finally, the authors highlight a difference between human rights due diligence and climate change due diligence. Both concepts share the same main features, however, while human rights due diligence concentrates on the risks to the human rights of stakeholders, climate due diligence focusses on a corporation's direct and indirect impacts on the climate.[95]

Another very relevant example to show the development of corporate due diligence in light of human rights obligations is the Carbon Major Report released by the Philippines Commission on Human Rights. In 2015, petitioners filed their Petition, asking the Commission to look into the responsibility of the world's largest investor-owned fossil fuel and cement producers for

[90] Wilde-Ramsing et al. (2021).

[91] Ibid.

[92] Macchi and Bernaz 2021, p. 7.

[93] Shift Website 2023.

[94] Macchi and Bernaz 2021, p. 7..

[95] Ibid.

human rights violations resulting from the impacts of climate change.[96] Based on human rights due diligence obligations arising out of the UNGPs, the petitioners claimed that companies such as ExxonMobil, BP, Shell and Chevron – referred to as the Carbon Majors – which are "*making long-term investments based on a scenario in which global consumption of fossil fuel continues to grow*" is inconsistent with the requirement of due diligence in corporate responsibility.[97] In a Joint Summary of *Amicus Curiae* briefs, it was argued that the UNGPs provides for the obligation of corporations to assess and address the climate change impacts of their operations, in other words, corporations have the responsibility to reduce their greenhouse gas emissions in line with international targets.[98] In its final findings, the Commission stated that the Carbon Majors have to disclose due diligence and climate human rights impacts assessment results and the measures taken to address these.[99] Although the Commission has no legally binding powers and its findings do not create any legal obligations, it stated that the Carbon Majors could be held accountable for violating the rights of citizens for the damage caused by global warming.[100]

To conclude, it is clear from these argumentations and analysis of international instruments, that a notion of climate due diligence is making itself a place at the international level. The best case-scenario, according to Doctor Ivano Alogna, would be that the internationally defined concept of climate due diligence is used by national legislation, to make climate change a mandatory aspect of corporate due diligence management. The extent of its precision and clarity remains blurry, however some concrete conclusions can be drawn. First, through the lens of human rights, climate change cannot be overlooked. The adverse impacts of climate change affect the enjoyment of different human rights. The term climate change has made itself a safe place in the human rights discourse and therefore must be comprised in human right due diligence processes. Second, it is stressed in both cases seen above that there is a need for further mandatory due diligence legislation in relation to the protection of human rights and the environment, thus striving for climate due diligence. Third, it can be seen from the UNGPs, the OECD Guidance on Due Diligence that climate due diligence has a broad scope. Notably that due diligence obligations extend to supply chains of corporations, giving climate due diligence

[96]Commission on Human Rights of the Philippines 2022, p. 12.

[97] Petition 2016, p. 36.

[98] Macchi 2021, p. 97; Joint Summary of the Amicus Curiae 2018, p. 64.

[99] Savaresi and Wewerinke-Singh 2022; Commission on Human Rights of the Philippines 2022, p. 130.

[100] Kaminsky 2019.

a transboundary aspect. This can only make sense considering that climate change is not an isolated phenomenon. Finally, in its inquiry, the Commission underlined that there are two elements of due diligence when applied to the Carbon Majors.[101] First, a global share of greenhouse gas emission is attributed to the Carbon Majors.[102] Second, it highlights that corporations have long known of the devastating effects that their operations and products would have on the well-being of the environment and the climate. These two elements reflect the accountability and responsibility aspects of due diligence. With that in mind, Carbon Majors purposefully mislead their consumers to cast a shadow upon the correlation between climate change and fossil fuels. Thus, as the *Amicus Curiae* brief argues, three statements can be made: corporate actors have an obligation of due diligence; this obligation is not being respected by the corporate actors; and thus, the breach leads to a contribution to climate related human rights violations in the Philippines but also beyond.[103] The findings from the Commission sheds light on the content of climate due diligence as well as the link between human right due diligence and climate due diligence.[104]

[101]Savaresi and Hartmann 2019, p. 11; Joint Summary of the Amicus Curiae 2018, p. 50-60.

[102] Ibid.

[103] Ibid.

[104] [104] Macchi 2021, p. 98.

3 French Duty of Vigilance

The French Duty of Vigilance (DoV) was adopted the 21st of February 2017 by the National Assembly. The dispositions accepted entered into force on the 29th of March 2017 as part of the French Commercial Code.[105] The French DoV is a general obligation of conduct and aims at preventing catastrophes such as the one in 2013 of the Rana Plaza.[106] The DoV obliges large companies to publish a policy of vigilance to prevent serious violations of human rights and environmental harms resulting from the activities of a group and its value chain.[107]

3.1 Long path of adoption of the French Duty of Vigilance Law

The adoption of the French DoV emerged as a result of the collaboration between civil society organizations, trade unions, academics, lawyers, and member of the French Parliament which gradually modified and watered down its content.[108] Since 2009, several NGOs identified the legal issue concerning the accountability of corporations and the actions occurring in their supply chains.[109] At that time in the law, the headquarter of a company based in France was deemed separate from its subsidiary, sub-contractors, or suppliers located outside of France since they were considered autonomous and independent entities.[110] Thus, even though the headquarters organized the logistics, the production, gave the orders and collected the profits, they were not deemed to liable for any of the actions taken by its subcontractors and subsidiaries. [111] Emerging from this issue came the question of recognition of legal responsibility of a multinational on all the actors present in its chain value. A text for a law which would provide remedy to the legal issue identified above was proposed by the end of 2012.[112] The socialist group – who held majority in the French parliament at that time – did not support the initiative. The Ministry of Economy and Finance did not provide support to the initiative either which might be a consequence of the frequent communications with the French

[105] LOI n°2017-399 of 27 March 2017 on the duty of care of parent companies and ordering companies.

[106] Clerc 2021, p. 1.

[107] Sherpa 2019, p. 23.

[108] Bright 2020, p. 4.

[109] Amnesty International Podcast 2021, 3’50s

[110] Ibid.

[111] Ibid.

[112] Ibid.

Association of Private Enterprises which defends the interests of companies such as TotalEnergies and BNP Paribas.[113] Then in May 2013, the collapse of the Rana Plaza building occurred in Dhaka, Bangladesh, killing thousands of people, mostly girls and women exposing the extreme forms of production that lie behind globalization. Clothing brands such as Benetton, Primark, and fashion groups like Inditex, parent company of Zara, had part of their production realized in buildings such as the Rana Plaza.[114] Several actors share responsibility for the occurrence of this tragedy. Among them figures the Bangladeshi authorities, who failed to their obligation to protect workers, the owners of the Rana Plaza and the agreements factories it held within the building, as well as the multinational corporations which sourced from those garment factories.[115] Ultimately, the owners of the Rana Plaza, the owners of the five garment factories withing the Rana Plaza and the responsible engineers of the relevant municipality are deemed to be directly responsible of the tragedy.[116]

Despite this event shedding light to the production of clothing, and thus on the fashion industry, the core of the problem applies to all sorts of multinationals, fossil fuel included. The essence of the problem lies in the fact that liability did not fall upon the parent company which is responsible for producing its products in such conditions, thus some multinationals get away with human right violations and environmental damage overseas. Legal responsibility needs to be attributed to an organization in order to provide remedies to victims and adopt prevention measures and mitigation measures, as well as remediation measures in relation to environmental damage. After the event of the Rana Plaza, civil society put more pressure on the government for the acceleration of the process of adoption of the law. In 2015, the first version of the law is rejected twice, once by the National Assembly and once by the Senate. Once again, in 2016, it is rejected by the Senate. But in spite of all the pitfalls, the civil mobilization bears its fruits, and the French DoV was adopted.

Initially, the French legislation contained a powerful enforcement mechanism in the form of a civil fine up to €10 million, which could be imposed by a judge in case of non-compliance by

[113] Amnesty International Podcast 2021; Bright 2020, p. 4.

[114] O'Connor 2014.

[115] FIDH Report, p. 2.

[116]Ibid.

a company concerned by the obligations in the DoV.[117] In 2017, the validity of the law was challenged by the Constitutional Council.[118] More specifically, the Constitutional Council challenged the constitutionality of articles 1, 2 and 4 of the Law on the Duty of Vigilance.[119] The Council argued that imposing such fine in relation to obligations which lacked clarity was unconstitutional, by stating that "*while is it open to the legislature to subject companies* […] *to various obligations designed to ensure* […] *respect* [of] *various rights and freedoms, it is nevertheless incumbent on the legislature, insofar as it attached to the obligation* […] *a sanction having the nature of a punishment, to define those obligations in sufficiently clear and precise terms".*[120] Indeed, as civil fine provisions constitute criminal sanctions under French law, specific principles apply, namely the principle of criminal liability and legality of offences, which require the law to be clear, precise and specific to ensure legal predictability.[121] As a result, the Council determined that legislating such a fine for breaches of requirements defined so inadequately would violate Article 8 of the French Declaration of the Rights of Man and of the Citizen and thus removed it from the text of the law.[122]

3.2 Content and purpose of the French Duty of Vigilance Law

The French DoV aims at preventing the risks that led to the disaster of the Rana Plaza and requires the implementation of a vigilance system. To this end, it places a duty of vigilance on large French corporations through a threefold obligation to (1) put in place, (2) disclose and (3) implement a vigilance plan. These obligations are set forth in the first article of the legislation which introduces article L. 225-102-4 I and II in the French Commercial Code. Article L.225-102-4 I provides for the content and purpose of the law whereas Article L.225-102-4 II provides for the enforcement mechanism. The vigilance plan '*shall include the reasonable vigilance measures to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls* […] *as well as from the operations of the subcontractors or suppliers whom it*

[117] Bright 2020, p. 6.

[118] Constitutional Council Decision 2017.

[119] Constitutional Council Decision 2017, §1

[120] Constitutional Council Decision 2017, §8.

[121] Ibid.

[122] Constitutional Council Decision 2017, §6 and §3; Bright 2020, p. 6-7.

maintains an established commercial relationship, when such operations derive from this relationship'.[123] The legal duty of the company not only includes the parent company's activities, but also the activities of their subsidiaries and companies that it controls directly or indirectly, as well as the activities of subcontractors and suppliers with whom the parent company maintains an established business relationship. Therefore, the scope of the activities covered by the DoV is quite large as it comprises a transnational element. However, the scope of the DoV in relation to the companies targeted by the obligations of vigilance is limited. Specifically, the legislation applies to companies incorporated or registered in France for two consecutive finance years which employs at least 5,000 people in France – either directly or through their French subsidiaries, or at least 10,000 people worldwide (through their subsidiary located in France and abroad). It is estimated that around 260 companies fall under the scope of the DoV, which is rather a small number.[124] The subsidiaries and subcontractors targeted by the DoV are only the ones who maintain a commercial relationship with the parent company. The term 'commercial relationship' was previously defined and used in French law as a relationship which is continuous, stable, and habitual and where parties can reasonably anticipate a certain continuity of business flow with its partner.[125] In contrast, some other terms in the DoV are not that clear. For instance, the legislators have not clarified the threshold of the term '*severe´* and '*serious'* when referring to violations of fundamental freedoms and environmental damage. Furthermore, the term '*fundamental freedom*' itself is not defined. The lack of definition behind these terms provokes a lack of legal certainty behind the obligations in the DoV and hence diminishes the scope of the law.

The vigilance plan must include five elements[126]:

(1) A risk mapping intended to identify, analyze, and prioritize risks;
(2) Procedures for regularly assessing the situations of subsidiaries, subcontractors, or suppliers, with whom and established commercial relationship is maintained, according to risk mapping;

[123] Article L.225-105-4 of the French Trade and Industry Code.

[124] Duty of vigilance radar 2023..

[125] Articles L.420-2 and 442-6 of the French Commercial Code.

[126] LOI n°2017-399, Article 1 of 27 March 2017 on the duty of care of parent companies and ordering companies.

(3) Appropriate actions to mitigate risks or prevent serious harm;
(4) A mechanism for alerting and collecting reports relating to the existence or occurrence of risks, jointly established with the representative trade unions in the said company, and
(5) A system for monitoring the actions implemented and evaluating their effectiveness.

Two years after the duty of vigilance law was adopted – in 2019 – the French NGO Sherpa published a new legal analysis and guide on the law. Sherpa's Vigilance Plans Reference Guidance provides a legal analysis of the content and scope of the law.[127] Additionally, it proposes some legislative improvement and aims at providing stakeholders with tools and support in the implementation of the obligations arising from the duty of vigilance.[128] Consequently, this Guidance does not have any legal implications for companies falling under the scope of the duty of vigilance, it is merely an advisory document aimed at helping companies to implement the duty of vigilance in light of Sherpa's interpretation of the law. Although not legally binding, this Guidance remains important as it contributes to reach a common understanding of the law.

The measures set by the law are not restrictive nor exclusive, companies are welcome to put in place any additional measures that enable to meet its general obligation of vigilance.[129]

A methodology for identifying risks and the tools used or planned to be used by the company should be contained in the Vigilance Plan. It is important to note that the risks highlighted should concern third parties and the environment, and not the company itself.[130] Additionally, a methodology for risk analysis, assessment and prioritization should be included in the Vigilance Plan.[131]

Obligation of means forms an integral part of due diligence. Thus, the highest level of technical, human, and financial resources should be invested according to the seriousness of each risk, in other words, the method to address a certain risk should be proportional to its severity.[132] The

[127] Sherpa 2019.

[128] Business & Human Rights Resource Center 2019.

[129] Sherpa 2019, p. 17.

[130] Sherpa 2019, pp. 15 and 33.

[131] Ibid.

[132] Sherpa 2019, p. 55.

usage of the term 'appropriate' within the text of the law refers to the concept of reasonableness and thus implies that the principle of proportionality should be applied in relation to risk mitigation and prevention in order to satisfy the requirement of reasonableness.[133] However, all risks from a company's operations need to be addressed.[134] Only temporal exclusion of certain risks from being treated are accepted, but they must remain the exception and not the rule. To prioritize resources and means to address certain risks, a company will have to demonstrate that it does not possess the resources to deal with everything directly.[135]

The parent company must indicate the measures – multiple and complementary – used in relation to the situation of their subsidiaries, suppliers, and subcontractors.[136] If the company is unable to identify this scope or this information, it should clearly indicate it in their Plan, and if not able to do so within a reasonable amount of time, they should consider reorganization.[137]

Once the identification and prioritization of risks is completed, the company must put in place preventive, mitigation, and remediation measures.[138] It is required from the company that for each risk identified a summary of the prevention, mitigation, and remediation measures to be implemented is published.[139]

Finally, the company will have to put in place a global monitoring system of the Plan itself but also a monitoring system for each risk, violation, and corresponding measure.[140] The monitoring systems should be able to assess the effectiveness and efficiency of the measures for each severe risk or violation.[141] In line with the constant need for vigilance, the monitoring tools should be regularly updated according to the evolution of risks, violation, and their treatment, as well as any occurring event happening during implementation of the Plan.[142]

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[133] Sherpa 2019, p. 60.

[134] Sherpa 2019, p. 55.

[135] Ibid.

[136] Sherpa 2019, p. 18.

[137] Sherpa 2019, p. 15.

[138] Sherpa 2019, p, 18.

[139] Ibid.

[140] Ibid.

[141] Ibid.

[142] Ibid.

Some measures required by the law are not well defined. The interpretation of the 'reasonableness' of the vigilance plan, is left to the discretion of the judges, who will assess whether the measures put in place by the company qualify as reasonable.[143] According to Guillaume Delalieux and Anne-Catherine Moquet, the discretion left to the judges for the term 'reasonableness' opens up several distinctions.[144] The authors present two option of factors on which an assessment of the term 'reasonableness' could be made. On the one hand, the judges could assess the reasonableness according to the financial and organizational resources available to one company. On the other hand, the judges could assess the 'reasonableness' in terms on the seriousness of risks identified by a company in its vigilance plan.[145] This leads also to questions in relation to the assessment of proportionality of the measures taken by a company in relation to prioritization of risks. These questions do not have answers yet. A ruling on the merits of the case could potentially provide answers, but it remains to happen.

Despite the censure by the Constitutional Council discussed earlier,[146] the Duty of Vigilance does contain enforcement mechanisms. First, Article L.225-102-4 II, (introduced by article 1 of the French Law on the Duty of Vigilance) provides that anyone with standing can file a complaint with the competent French Court to oblige a company to respect its duties and obligations under the first paragraph of the law on the duty of vigilance. In order to trigger that process, 'anyone with standing' must send a formal notice to a company, provided that the company falls under the scope of the duty of vigilance. Once the formal notice has been sent, the addressed company disposes of a period of three months to comply with the duty of vigilance, otherwise, legal proceedings may be initiated.[147] Second, Article L. 225-102-5 (introduced by article 2 of the French Law on the Duty of Vigilance) provides the introduction of an associated liability regime, namely the civil liability regime.[148] Article 2 of the DoV establishes that, on the basis of the relevant articles of the French Civil Code, if a company fails to comply with the obligations set forth in Article L. 225.102-4 paragraph I, it shall give rise to liability on the part of the party who failed to comply with such obligations and shall require

[143] Delalieux and Moquet 2020, p. 130.

[144] Ibid.

[145] Ibid.

[146] Pages 2 and 3 of this thesis.

[147] LOI n°2017-399 of 27 March 2017, Article L.225-102-4, II.

[148] Bright 2020, p. 7.

that party to compensate for the loss that could have been avoided by complying with such obligations.[149] In other words, this article allows for the company's civil liability to be engaged in by any interested parties seeking compensation when the company does not abide by its obligations under the DoV and causes damage. By way of reference to the French Civil Code, the DoV Article 2 provides that the general rules found in articles 1240 and 1241 apply. In particular, article 1240 provides that '*any act of a man that causes damage to another, shall oblige the person by whose fault it occurred to repair it*'. Additionally, article 1241 states that '*one shall be liable not only by reason of one's own act, but also by reason of one's own negligence*'.[150] According to these two articles, three different elements are necessary before civil liability can be imposed on a company, (1) fault, whether it is an omission or a commission, (2) a damage and (3) a causal link between the damage and the fault.[151] Taking into account that the DoV is an obligation of conduct, a company may escape liability despite the happening of environmental damage or violations of human rights, provided that a robust vigilance plan has been put in place and implemented. As noted above, there are no direct sanctions provided for in the law as the French Constitutional Council stroke out the proposed fines. Nonetheless, there is a possibility for judges to demand a reasonable application of certain measures within the vigilance plan, as well as make decision on penalty payments imposed on companies per day of delay to produce the plan.[152]

In case of a judicial process, the burden of proof will lie with the claimant, who will need to prove that they suffered damage as a consequence of a fault on the part of the parent company.[153] Through this civil liability enforcement mechanism, stakeholders, such as environmental non-governmental organizations (NGOs), have a decisive role to play in ensuring an effective compliance of the DoV.[154]

[149] LOI n°2017-399 of 27 March 2017, Article L. 225-102-5.

[150] Articles 1420 and 1241 French Civil Code.

[151] Bright 2020, p. 7.

[152] Delalieux, and Moquet 2020.

[153] Bright 2020, p. 7.

[154] Ibid.

3.3 Implementation of the French Duty of Vigilance Law

The first battle within civil society was in relation to the adoption of the DoV, now the battle turns towards the rightful implementation of the law, and concrete results in terms of respect of human rights and protection of the environment. A year following the adoption of the DoV, a handful of NGOs, both environmental and social, have conducted a study to assess some of the vigilance plans published.[155] The study was divided into different sectors such as the extractive sector, the arms sector, agro-food sector, banking sector and garment sector and 40 vigilance plans were analyzed. The general conclusion of the study stated that considering the content of some vigilance plans, it does not appear that French multinational recognize their legal responsibility emerging from the DoV.[156] For example, in relation to the extractive industry, the vigilance plans of Eramet, Orano (ex-Areva) and Total, three of the largest French extractive corporations, were reviewed. The vigilance plan of Orano is an example of what should not be done, according to the responsible NGOs of the study.[157] First, it contains the information required by the law together with financial information and thus is not presented in a readable and accessible manner. Second, the company has not mapped out the risks that its activities, like mining for example, have for the enjoyment of human rights and on the environment but rather the risks that could affect the company. Third, the measures presented only concern on the part of the company's activities.[158] When it comes to the vigilance plan from TotalEnergies, the study deemed it to be too vague.[159] It contained a weak mapping out of the risks which did not include its activities in other countries where the company operates. The issue of greenhouse gases is absent from TotalEnergies' vigilance plan. To put that into context, the word 'pollution' only appears once in the plan.[160] Finally, the vigilance plan of the company Eramet appears to be the most accomplished. It is much more detailed than the average plan and is easily accessible. Nonetheless, the study highlights the insufficiency of the system for monitoring the implemented measures. All in all, these plans are not what the law strives for. Corporations such as TotalEnergies need to take due account of all the risks, whether social or environmental,

[155] The Law on Duty of Vigilance of Parent and Outsourcing Companies (2018).

[156] The Law on Duty of Vigilance of Parent and Outsourcing Companies (2018), p. 46.

[157] The Law on Duty of Vigilance of Parent and Outsourcing Companies (2018), p. 22.

[158] Ibid.

[159] Ibid.

[160] TotalEnergies 2018, p. 93.

that their activities pose, and include them in their plan. But not only that, the measures to react to these risks, whether preventive or mitigation, need to be implemented correctly and updated as such.

Additionally, an official French governmental document was published in 2020 in which an evaluation of the implementation of the DoV law was conducted.[161] The evaluation based itself on the different studies carried out by NGOs, notably the one discussed above. The document pinpoints on relevant findings of NGOs and associations, for example it was revealed by the Association Companies for Human Rights that 5% of the companies surveyed in its study are only at the stage of deploying and monitoring risk mapping, which is a crucial element of the plan of vigilance because it is considered the starting point.[162] Moreover, the document clearly states that certain companies did not publish a plan at all. These companies are not identified in the governmental paper; however, NGOs and associations have identified a handful of them which are Zara (mainly clothing), H&M (mainly clothing), Crédit Agricole (bank) or even Lactalis (dairy industry).[163]

In sum, there are certain recurring issues in the existing vigilance plans adopted by companies so far. These issues rest on three different areas, namely: the identification of the risks of violations, their location and the measures implemented to prevent them.[164]

3.4 Room for improvement

Following the adoption of the law and the studies carried out on its implementation a lot of recommendations were presented on how to make sure that the law reaches the expectations which civil society had set for it. For example, propositions have been made in relation to monitoring the compliance of vigilance plans. It is important to note first that the duty of vigilance was construed on the basis of an already existing French law named SAPIN II.[165] This law places an obligation on certain companies to implement a specific internal compliance program to fight corruption.[166] To supervise the correct implementation of SAPIN II, the law

[161] Conseil Général de l'Economie de l'industrie, de l'énergie et des technologies (2020), p. 28.

[162] Ibid.

[163] Conseil Général de l'Economie de l'industrie, de l'énergie et des technologies (2020), p.30.

[164] Radar on duty of vigilance (2023).

[165] The new French anti-corruption law SAPIN II: what is the impact for companies operating in France?, p. 1.

[166] Ibid.

established a new national agency in charge of preventing and detecting corruption. This agency is empowered to carry out formal investigations, such as conducting interviews, requesting the disclosure of certain information or relevant documentation, with the aim of verifying that the addressees of SAPIN II comply with their obligations.[167] With that in mind, in addition to the overlook by 'any legitimate person' on the correct implementation of the DoV, some legal academics and members of the civil society suggest that an agency that resembles the one acting under the law SAPIN II is necessary for the supervision of the DoV. Indeed, attorney Hélène Berion said that '*such an agency would be very useful*' provided that it can '*issue recommendations*' which would enable targeted corporations '*to refer to a precise framework*', and additionally '*that potential agency would need to have the means of control and the ability to impose fines*'.[168] Not only would this agency be able to provide for more clarity as regards the content of the law, but also a means to supervise the vigilance plans issued by corporations and ensure their compliance with the law.

As stated above, stakeholders have a very important role to play in the implementation of the DoV. Legal proceedings have been initiated against different companies based on the DoV and the putting into practice of the law has sparked discussions around the content of the law, its clarity, and its application. This year is a landmark year for the DoV as it marks the first judgment rendered on a case against a multinational initiated by an NGOs based on the DoV.

[167] The new French anti-corruption law SAPIN II: what is the impact for companies operating in France? p. 2.

[168] Parlons Ethique & Affaires Podcast 2021.

4 Lawsuits initiated on the basis of the French duty of Vigilance.

Civil society has the power to ensure that the law is being enforced through its actions. In this case, NGOs are the main actors. According to the Sabin Center for Climate Change Law, only fifteen cases have been brought against corporations on the basis of the French duty of vigilance, and only one of these cases resulted in a final judgment by the Judicial Court of Paris.[169] However, a large number of formal notices have been sent to several large companies, indicating the development of cases to follow in the coming years.[170]

As a matter of example, the first two lawsuits against companies based on the duty of vigilance were filed in 2019, both against the major fossil fuel company, TotalEnergies. Two years later, the non-governmental organization Envol Vert files a lawsuit against the Casino Group, and in 2023, three lawsuits are filled, two of which are against the bank BNP Paribas and one against the agri-food company Danone.[171]

In September 2020, eleven claimants sent the group Casino a formal notice demanding it to respect its obligations under the duty of vigilance by adopting appropriate measures to ensure the prevention of risks of serious attacks on human rights and the environment. More specifically, a survey on the beef industry in Brazil was conducted which indicated that the Casino Group was supplied by four different Brazilian farms involved in deforestation activities.[172] The NGOs claim that the Casino Group has no excuse for not ensuring that all the meat, even the meat provided from indirect farms, sold in its stores is not linked to deforestation practices.[173] The claimants have requested Casino Group to publicly engage itself against deforestation; put into place objectives with deadlines and common well-defined monitoring indicators; detail the main commitment related to stopping deforestation, the protection of all natural ecosystems and respecting human rights.[174] The Casino Group replied to the demands from the NGOs three months later stating that contrary to what the demands entail, the Group,

[169] Sabin Center for Climate Change Law 2023; Sherpa, Terre Solidaire and Business & Human Rights Resource Center 2023.

[170] Ibid.

[171] Ibid.

[172] Envol Vert 2020, p. 59-65.

[173] Ibid.

[174] Ibid.

through its subsidiary, has been actively fighting deforestation linked to cattle breeding in Brazil. Additionally, the Group declares that suppliers who do not adhere to its policy on systematic and rigorous control on the origin of beef, have their contracts suspended until they are in good standing and prove that they are effectively applying the policy.[175] On that note, Sandra Cossart said that '*the mere fact that Casino declares in its vigilance plan that 100% of its suppliers have adhered to its policy on deforestation, while the involvement of these same suppliers in deforestation is regularly denounced, demonstrated that this policy is either inadequate, or not implemented, or both*'.[176] Consequently, the response of the Casino Group was deemed unsatisfactory by the NGO coalition and in March 2021, the Casino Group was summoned to appear before the judicial court of Saint-Etienne.[177]

Another pending case concerns the food giant Danone. Alongside ClientEarth and Zero Waste France, Surfrider Foundation Europe is taking Danone to court. Initially the three NGOs had sent letters making demands to nine different companies including Nestlé, Auchan, Carrefour and Danone. Unlike some of the corporations which reacted fast and with concrete measures to the interpellations, Danone responded very late and remain inactive.[178] The corporation Danone is one of the world's leading companies in the food industry and considered to be one of the largest users of plastic packaging worldwide.[179] With the environmental, sanitary, and human crises linked to plastic, deplastifying cannot wait. However, the word plastic did not appear once in the vigilance plan of Danone. A formal notice was sent to Danone in which the NGOs demanded the corporation to publish a new compliance plan that includes a 'deplastification' trajectory in order to comply with the duty of vigilance.[180] Otherwise, the three NGOs demand that the group be sentenced to a fine of €100,000 per say of delay beyond a period of six months.[181] In their response, Danone claimed to be '*very surprised*' by the critics advanced by the NGOs. The corporation affirms that it is examining '*with the utmost attention*' the risks associated with the use of plastics.[182] Unsatisfied with the responses of Danone to the formal

[175] Business & Human Rights Resource Center 2020.

[176] Sherpa and Terre Solidaire 2021, page 16.

[177] Assignation Devant le Tribunal Judiciaire de Saint-Etienne (2021), p. 20-21.

[178] Novethic 2023.

[179] Ellen MacArthur Foundation 2023.

[180] ClientEarth Press Release, 2022.

[181] Le Monde 2023.

[182] Novethic 2023.

notice, the NGOs brough the matter to the Court, and as a result, the French food giant was summoned in January of 2023.[183]

Two additional cases have been filed, against the bank BNP Paribas, Europe's first and the world's fifth largest funder of fossil fuel expansion.[184] In both cases, BNP Paribas was summoned earlier this year.

On the one hand, the NGOs Notre Affaire à Tous, Les Amis de la Terre and Oxfam France sent an intention to sue the bank due to several violations of the duty of vigilance.[185] Firstly, the climate commitments of BNP Paribas are included in documents outside of the vigilance plan itself, whereas the law provides that they should be published within the plan, as part of the management report.[186] Secondly, the NGOs claim that the mapping of risks is incomplete, vague, and imprecise in the sense that it does not analyze nor prioritize climate risks, which are only mentioned as environmental issues.[187] The climate risk mapping does not identify the climate and environmental risks which are associated with its fossil fuel activities, for projects in which it is directly involved as well as for the companies in the sector that it supports through its financing and investments; and the risks associated with its clients' new projects and expansion plan.[188] Thirdly, the vigilance plan does not contain any exhaustive information concerning the stocks and flows of financing investments towards companies active in the fossil fuel sectors, specifically the ones developing new projects.[189] Finally, the procedures for regular evaluation of the activities of the value chain in relation to risk mapping are considered inadequate by the NGOs. For these reasons, the NGOs sent a formal notice to the bank demanding it to comply with the obligations found in the duty of vigilance and their recommendations, and if failing to do so, the matter will be brought before the competent court.[190] In its response the bank announced that it will reduce its financing for oil extraction

[183] Le Monde 2023.

[184] Rainforest Action Network, BankTrack and others (2022).

[185] Mabile et al. 2022.

[186] Article L225-102-4 I, § 5 French Commercial Code.

[187] BNP Paribas Universal Registration Document and Annual Financial Report 2021, pp. 642-645.

[188] Mabile et al. 2022, p. 6.

[189] Mabile et al. 2022, p. 7.

[190] Mabile et al. 2022, pp. 14-16.

and production by 80% by 2030, and by 30% for gas.[191] This response was deemed unsatisfactory for the NGOs as this commitment does not cover all of its activities in support of fossil fuels and does not put an end to the financing of new oil and gas projects.[192]

On the other hand, the NGOs Comissão Pastoral da Terra, and Notre Affaire à Tous filed a notice of intent to sue after sending BNP Paribas a formal notice. In this case, the lawsuit related to the bank's financing of companies allegedly responsible for amazon deforestation and human rights abuses. The summons sent by both NGOs cited multiple breaches of the duty of vigilance, noting that BNP Paribas' vigilance plan was insufficient to prevent human rights violations.[193] In both cases, BNP Paribas must appear before the Judicial Court of Paris mid-June of this year.[194]

In summary, these cases may be few in number, but they target the most important issues related to climate change, namely the meat industry, plastic pollution, fossil fuels, and funding for the expansion of fossil fuel projects. The cases discussed above are still pending, and no ruling has yet been issued by a French Court. In only one case has the Judicial Court of Paris issued a final judgement and another cases are awaiting trial.[195] Due to the uncertainties around the duty of vigilance, a judgement by a court on the content of the law was most awaited both by civil society and corporations themselves. In the case *Friends of the Earth et al. v. TotalEnergies*, the Court dismissed the NGOs claim on procedural grounds. Although the content of the complaint was not addressed by the Court, it did make an analysis of the duty of vigilance itself and made important conclusions useful for following lawsuits. The case *Notre Affaire à Tous and Others v. TotalEnergies* shares similarities with the case initiated by Les Amis de la Terre and could potentially succeed taking into account the interpretation of the court of the duty of vigilance.

[191] BNP Paribas 2023.

[192] Friends of the Earth 2023.

[193] Assignation de la Tribunal Judicial de Paris (2023).

[194] Assignation de la Tribunal Judicial de Paris, p. 2.

[195] Respectively, *Friends of the Earth et al. v. TotalEnergies* and *Notre Affaire à Tous and Others v. TotalEnergies*.

4.1 Les Amis de la Terre v. TotalEnergies

Earlier this year, on the 28th of February, the Judicial Court of Paris issued an interim order in the context of a judicial dispute opposing six NGOs on one side and the multinational company TotalEnergies on the other side. The case *Friends of the Earth et al. v. TotalEnergies* is the first case based on the French DoV which has received a final judgement (the Order) from the Judicial Court of Paris. In a nutshell, the Order considered that an essential procedural requirement had not been complied with by the NGOs, namely that the plaintiff must issue a formal notice to the concerned company urging it to comply with its obligation of vigilance before summoning the concerned company before a Court.[196]

Although the case was decided on admissibility and concerned a request for an interim measure, the Order adopted by the Court remains ground-breaking as it consists of the first of its kind in France, with potential implications for future litigation based on the French duty of vigilance. Several lessons with regards the French duty of vigilance can be drawn from the Order of the court.

The plaintiffs in this case are a group of six different NGOs namely, Les Amis de Terre (Friends of Earth France), Survie, Civic response to Environment and Development (CRED), Navigators of development association (NAVODA), the National Association of Professional Environment (NAPE) and Africa Institute for Energy Governance (AFIEGO).[197] The NGO Friends of the Earth France is part of the larger international network from Friends of the Earth International composed of 73 national member groups.[198] The NGO advocates for a transition to sustainable societies in the North and the South and their approach integrates social, economic, and environmental issues.[199]

The defendant of this case is the multinational TotalEnergies SE. The company was founded in 1924 and possesses 1140 subsidiaries located on five continents and in more than 130 countries. It employs approximately one hundred thousand people and is active in the exploration, production, and distribution of energy.[200] The global multi-energy company generates energy

[196] Vasseur et al. 2023.

[197] Judicial Tribunal of Paris Judgement 2023.

[198] Friends of the Earth International 2023.

[199] Friends of the Earth France 2023..

[200] Judicial Tribunal of Paris Judgement 2023, p. 2.

from natural gas and green gases, oil and biofuels, and renewables. The activities that it carries out include drilling, oil and gas production, processing, transportation, refining and petrochemical production and storage and distribution of petroleum products.[201] The company operates in Asia-Pacific, Europe, the Middle East and North and South America. The activities of TotalEnergies are considered to provoke a huge amount of greenhouse gases. TotalEnergies was ranked 19th among the industrial companies that have contributed the most to climate change according to the Carbon Majors report published in 2017.[202]

Due to the nature of its activities and the impacts on the environment thereof, all eyes are turned on the measures that TotalEnergies will adopt to mitigate and prevent environmental risks, as required by the DoV since 2017, especially environmental NGOs. TotalEnergies claims to abide by the OECD Guidelines for Multinational Enterprises as well as the UNGPs and is committed to respect internationally recognized human rights wherever it operates.[203] Among other, it publishes yearly a Sustainability & Climate Progress Report.[204] In their 2023 report, TotalEnergies reiterates its ambition to become a net zero company by the year 2050. Despite TotalEnergies' goal of becoming a net zero company in the space of 27 years, it has recently announced projects in Uganda and Tanzania which are referred to as 'climate bombs'. These projects are referred to as Tilenga and East African Crude Oil Pipeline projects.

4.1.1 Tilenga and East African Crude Oil Pipeline

Uganda is known as an area where natural oil seepages occur. Oil was first discovered by drilling in the Lake Albert area of Uganda in 2006. This initial discovery led to an extended period of further exploration and appraisal which was completed in 2014.[205] TotalEnergies, through its wholly owned subsidiary, Total Exploration & Production Uganda B.V (Total Uganda), is active in Uganda in a petroleum project called Tilenga, which is being developed on the shores of Lake Albert.[206] The project involves developing six fields and drilling 426

[201] Global Data 2023.

[202] Carbon Majors Database (2017), p. 8.

[203] TotalEnergies 2023.

[204] Total Energies 2023.

[205] East African Crude Oil Pipeline 2023.

[206] Friends of the Earth France and Survie 2019, p. 6.

wells at 31 different locations with the goal of producing 200.000 barrels of oil per day.[207] TotalEnergies is the main operator of this project with a 33.33% share. The project also involves the Chinese multinational CNOOC and the British company Tullow Oil.[208] The Tilenga project is part of a bigger project in which TotalEnergies is also involved which provides for the construction of a giant buried heated oil pipeline of 1.443 kilometers, East African Crude Oil Pipeline (EACOP) through Uganda and Tanzania to transport the oil extracted in Lake Albert.[209] A heat tracing system will be incorporated to the pipeline that will heat the oil up to 50°Celsius to make it transportable.[210] A loading terminal will be constructed at sea in order to boats to load on the oil and transport it from the Indian Ocean across the world.[211]

Given their nature, oil projects carry very serious environmental risks. The Tilenga and EACOP projects are no exceptions. The Tilenga project is located for a large part of the Murchison Falls National Park which is bisected by the Victoria Nile.[212] Consequently, the Tilenga project will be divided into two sections causing the need to construct a pipeline under the Victoria Nile.[213] The Park is the largest national park and the second one most visited in Uganda, and it is one of the region's foremost centers of biodiversity. Many families will have to be relocated as a result of the Tilenga project which will consequently provoke and influx of population which will inevitably have consequences on the fauna, flora, and biodiversity.[214]

As the activities carried out to make Tilenga and EACOP operational have human rights and environmental consequences, the risks must be mapped out and identified in a vigilance plan according to the French DoV. In order to assess the risks of both projects and eventually receive a permit for the constructions from the relevant Ugandan authority, environmental and social impact assessment (ESIA) have been conducted by Total Uganda, according to Ugandan

[207] TotalEnergies Report 2023, p.3.

[208] Ibid.

[209] East African Crude Oil Pipeline 2023.

[210] TotalEnergies Report 2023, p. 3.

[211] Judicial Tribunal of Paris Judgement, p. 2.

[212] Friends of the Earth France and Survie (2019), p. 32; WCSNewsroom 2015.

[213] Ibid.

[214] Friends of the Earth France and Survie 2019, p. 34.

Law.[215] The ESIA conducted for both the Tilenga and EACOP projects have been critically reviewed by the NGO Friends of the Earth as well as others.

Despite the ESIA produced by Total Uganda to map the environmental risks generated by the Tilenga Project and the EACOP project to plan mitigation measures for the forecasted negative effects resulting from it, analysis from Friends of the Earth themselves as well as other various partners and the Netherland Commission for Environmental Assessment (NCEA) have shown through analysis[216] that the ESIA has serious shortcomings in terms of identification of risks and specifically in relation to mitigation measures in relation to these risks.[217] In their report, Friends of the Earth highlights several points that have been neglected in the ESIA.

4.1.2 Critical Analysis of the environment and social impact assessment of the Tilenga and EACOP projects

First, in relation to the Tilenga project, the ESIA has been qualified as a generally good piece of work by the NCEA as it provides a comprehensive overview of potential impacts and contains high-quality information.[218] Nonetheless, the ESIA does not provide a whole picture and thus, makes it hard to highlight the essential issues.[219] The summary provided by the ESIA is not helpful as it does not pinpoint clearly to what are the main issues and how these will be mitigated, as well as the measures taken in relation to the residual impacts.[220] Additionally, the ESIA remains incomplete as some choices in project design have not yet been taken, for example the well pad design as well as waste management design, which the choice of could have considerable differences in impacts.[221] Furthermore, a list of mitigation measures in relation to the risks caused by the Tilenga project remain to be handed to the Uganda authority for the approval of a certificate. In the opinion of the NCEA working group, the ESIA realized by Total Uganda contains a number of serious shortcomings that need to be addressed.

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[215] Ugandan Statutory Instruments Supplement No. 44 2020..

[216] Netherlands Commission for Environmental Assessment 2018; Netherlands Commission for Environmental Assessment 2019.

[217] Friends of the Earth France and Survie 2019, p. 30.

[218] Netherlands Commission for Environmental Assessment 2018, p. 6.

[219] Ibid.

[220] TotalEnergies Report Summary 2018.

[221] Ibid.

For instance, in relation to wildlife and ecosystems, the review from NCEA has highlighted that the management strategies for the total influx of people and its consequences on wildlife are not detailed enough and does do not represent solutions. Also, there is no concrete alternative proposed for animal migration corridors and places frequently visited by animals and does not contain any insight on the potential behavioral reactions of animals to the changing landscape and resources.[222] The ESIA report states that oil activities can cause numerous risks for the environment such as poisoning of the fauna and flora but does not provide with any information on how to address these risks effectively.

In relation to the impacts on the climate, the ESIA briefly mentions the risks linked to greenhouse gas emissions. In the summary of the ESIA, it is stated that '*the estimated project GHG emissions are considered to present impacts with insignificant to moderate adverse residual significance*'.[223] The evaluation of the GHG emissions was made taking into account vehicle and machine emissions, the carbon incorporated into construction materials, the loss of carbon stock sources during site clearance activities and the emission produced during the operations of the project.[224]

Secondly, in relation to the EACOP project, concerns have been raised. The quantities of emissions for the construction and commissioning phases of the project are uncertain, pending further definition of the precise methods and quantities involved in constructing the pipeline. However, estimates have been calculated and the total GHG emissions from the construction phase are estimated at 242 ktCO2e. In turn, the main source of GHG emission from the operational phase will emerge from the crude-oil fired heaters, which are estimated to produce 18 ktCO2e per year. Despite these calculations, different analysis conducted by different organizations came to the conclusion that the EACOP ESIA contained analytical and emissions gaps.[225] For instance, the Climate Accountability Institute which was requested to calculate total amount of carbon emissions arising from the end use of crude oil, as well as to assess reliability and completeness of EACOP's emissions estimates attributable to pipeline

[222] TotalEnergies Report Summary 2018, p. 10.

[223] TotalEnergies Report Summary 2018, pp. 38 and 108.

[224] TotalEnergies Report Summary 2018, p. 38.

[225] Richard Heede 2022; Africa Institute for Energy Governance, Inclusive Development International and Bantrack 2022.

construction and its 25-year operational life,[226] affirmed that EACOP ESIA reports focus on the narrow and limited emissions and climate impacts of construction and pipeline operations, while ignoring the broader and far more significant climate impacts such as subsequent marine shipping of the oil from the port in Tanzania and the refining of the transported oil.[227] Simply put, the EACOP ESIA reports omit the emissions from consumption of the petroleum product by end use consumers, and thus this results greenhouse gas emissions which exceed by far the emissions produced during the construction and operational phase.[228]

It is appropriate to remind in this context that the obligations deriving from the duty of vigilance, such as the identification of risks and prevent these risks through mitigation measures, apply not only to the activities of TotalEnergies itself, but also to the activities of its subsidiaries, notably Total Uganda and its subcontractors.[229] Therefore, the legal relevance of the ESIA reports prepared by Total Uganda with respect to the Tilenga and EACOP project is very high as the arguments made by – amongst others – Friends of the Earth, will be used in the judicial file against Total Energies.

4.1.3 Allegations made against TotalEnergies and its response

On the 20th of May 2019, TotalEnergies published its universal registration document[230] containing its plan of vigilance for the year 2018.[231] TotalEnergies employs more than hundred thousand employees within the company and in its direct and indirect subsidies and therefore falls under the scope of the French duty of vigilance.[232]

The duty of vigilance states that the vigilance plan that must be drafted by the companies falling under the scope of the law shall include the risks '*resulting directly or indirectly from the*

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[226] Richard Heede 2022, p. 7.

[227] Richard Heede 2022, p. 33.

[228] Ibid.

[229] Friends of the Earth France and Survie (2019), p. 31.

[230] Document published yearly by public companies that serves as a communication tool to provide the public with all the information they need to form an opinion about the issuer's business, financial situation, results, and outlooks. Contains all the legal, economic, financial accounting, and non-financial information contributing an exhaustive presentation of the group for a given financial year.

[231] Judicial Tribunal of Paris Judgement 2023, p. 3.

[232] Statista 2023; Article L. 225-102-4. I. French Commercial Code.

operations of company and of the companies it controls within the meaning of article L.233-16 II, as well as from the operations of the subcontractors or suppliers with whom it maintains an established commercial relationship, when such operations derive from this relationship'.[233] According to the French Commercial Code, a subsidiary is a company whose capital is more than 50% owned by another company, known as the parent company.[234] Taking into account that TotalEnergies is active within the Tilenga and EACOP projects through its wholly-owned subsidiary Total Exploration & Production Uganda B.V., and argued by the plaintiffs that the activities of TotalEnergies in Uganda should be included in the plan of vigilance.

Consequently, the group of six different NGOs argued that according to the French DoV, TotalEnergies should contain a vigilance plan which includes elements such as effective measures to identify risks and prevent severe impacts on the environment resulting from the activities it carries out in Uganda. Such measures include risk mapping, customized actions to mitigation risks or avoid serious impacts, warning mechanism and a system to monitor the effectiveness of the measures implemented.[235] Following analysis carried out by NGOs, they issued a formal notice to TotalEnergies together with the report in which they conducted their analysis on the ESIA in Uganda, which was qualified as *'new evidence to be added to* [the] *judicial file'*.[236]

In the formal notice the NGOs demanded TotalEnergies to "meet its due diligence obligations with regard to both the inadequacies of its due diligence plan and its effective implementation and publication".[237] Following the formal notice, TotalEnergies replied to the allegations made by the NGOs by defending its vigilance plan arguing that it contained all the necessary elements to adequately inform, address and identify the risks of serious environmental harm and that adequate prevention and mitigation measures has been deployed.[238] Based on the response of the company, the NGOs took the decision to summon TotalEnergies in Front of the French Civil Court.

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[233].Article L. 225-102-4. I. French Commercial Code.

[234] Article L. 233-1 French Commercial Code.

[235] Business & Human Rights Resource Center 2023.

[236] YouTube Interview Friends of the Earth 2022.

[237] Formal Notice to TotalEnergies 2019.

[238] Judicial Tribunal of Paris Judgement 2023, p. 3.

However, TotalEnergies, on the 20th of June 2020, raised a plea of lack of jurisdiction in favor of the Commercial Court of Nanterre.[239] TotalEnergies contended that actions relating to the vigilance plan of commercial companies fall within the jurisdiction of the commercial tribunal as it directly relates to the management of a commercial company.[240] The Versailles Appeal Court ruled in favor or TotalEnergies and referred the matter to the Nanterre Commercial Court. As a response the NGOs appealed the decision arguing that the dispute falls within the exclusive jurisdiction of the civil court as they consider that the dispute is not an objectively commercial dispute and that the obligation arising from the duty of vigilance are not directly related to the management and operation of a commercial company but are of a purely civil nature liable to engage the civil liability of the commercial company.[241] Eventually, the Court of Cassation ruled in favor of the NGOs, stating that all civil and commercial matters for which jurisdiction is not provided for in the law, leaves a right of option between the judicial court and the commercial court[242]. However, a law passed in 2021 on confidence in the judicial institution, gave the Judicial Court exclusive jurisdiction to hear actions brough on the basis of the 2017 duty of vigilance.[243] Ultimately, by order of 21st April 2022, the commercial court of Nanterre declared itself incompetent in favor of the Paris Judicial Court.[244]

The first demand made by the NGOs concerned the second and fifth points of the law containing the content of a vigilance plan. That is to say, the NGOs demand that TotalEnergies include procedures for regular assessment of the situation of subsidiaries, subcontractors, or suppliers with whom there is an established business relationship, in light of the mapping of risks and a system for monitoring the measures implemented and evaluating their effectiveness in relation to the Tilenga and EACOP projects.[245] More precisely, they demand the adoption of a risk mapping including a prioritized risk analysis resulting from the activities carried out by the affiliates of TotalEnergies especially in relation to the risks of infringement to the right to a healthy environment of the populations in and around oil-producing areas, the risks to

[239] Judicial Court of Nanterre 2020, p. 6.

[240] Judicial Court of Nanterre 2020, p. 6; Article L. 721-3 2 French Commercial Code.

[241] Judicial Court of Nanterre 2020, pp. 6 and 7; Article L.211-3 Code de l'Organisation Judiciaire.

[242] Judicial Tribunal of Paris Judgement 2023, p. 4.

[243] Ibid.

[244] Ibid.

[245] Article L. 225-102-4 I, 2° and 5° of the Commercial Code.

ecosystem, fauna, flora, water, air and soil, including marine system, the risks of oil leaks and spills as well as including accurate identification of risks resulting from tsunamis and earthquakes and risks to the air and atmosphere including the identification of the total amount of greenhouse gas emissions from the projects and their impacts on global warming.[246] In other words, based on the 2018 plan of vigilance from TotalEnergies, the NGOs concluded that the risk mapping is incomplete because the risks caused by the activities of the parent company, the subsidiaries, sub-contractors and suppliers have not been identified or have been insufficiently identified, analyzed and prioritized, especially in regards to the project Tilenga and EACOP.[247]

The second demand concerned the establishment of a procedure for the supervision of TotalEnergies subsidies' in accordance with the duty of vigilance, in light of the Tilenga and EACOP projects. Furthermore, they demand that the prevention and mitigation measures which need to be adopted in accordance with the duty of vigilance should be elaborated after an effective public consultation including the concerned parties and experts, which should be rendered public.[248] Moreover, NGOs claimed that for TotalEnergies to be in line with its obligation under the duty of vigilance it must include in its plan of vigilance the implementation of a temporary suspension on the development of the Tilenga and EACOP projects, until the risks listed in its first demand have been properly identified and all appropriate preventive and/or mitigating measures have been effectively identified and effectively implemented.[249]

In their third demand, the NGOs call for the suspension of the works on Tilenga and EACOP project, if necessary, through an order addressed to their subsidiaries and their subcontractors involved in the projects until measures defined in the demands and their implementation are respected.[250]

It is essential to mention that in their legal argumentations, the NGOs did not only refer to the vigilance plan adopted in 2019 for the year 2018, but also to the vigilance plan published for

[246] Judicial Tribunal of Paris Judgement 2023, p. 5.

[247] Judicial Tribunal of Paris Judgement 2023, p. 22.

[248] Judicial Tribunal of Paris Judgement 2023, p. 6.

[249] Ibid.

[250] Judicial Tribunal of Paris Judgement 2023 p. 8.

the years 2019, 2020 and 2021.[251] In relation to the vigilance for the year 2021, the NGOs argued that the section on the implementation of the plan, while more extensive in the 2021 plan than the 2018 plan, still remains incomplete since it only includes quantified indicators for some risks only.[252]

Another important aspect of the case relates to the nature of the judges for the case. The law on the duty of vigilance offers the option between 'trial judge' (juge du fond) and 'interim relief judges' (juge des référés). In the case at hand, the trial is conducted by 'interim relief judges', this implies that a rapid examination of the litigation will be conducted. Interim relief judges are responsible for providing urgent responses to a dispute by pronouncing waiting measures in order to preserve the rights of the parties before their assessment by the trial judge.[253]

On other hand, TotalEnergies demanded to the Court to declare inadmissible the actions of the plaintiffs in relation to the publication of the vigilance plan of 2018 due to the disappearance of its purpose and three successive vigilance plans having been published, thus making its legal argumentation ineffective.[254] It also demanded that the court declare inadmissible the actions against the vigilance plan of 2019, 2020 and 2021 since new legal arguments had been developed by the NGOs compared to the initial ones and the lack of formal notice concerning the vigilance plans posterior to 2018.[255] It also adds that the claims made by the NGOs should be declared inadmissible on the grounds of their lack of interests to act. It argues that the social objective of the NGOs concerned is insufficiently precise and does not allow them, according to the law, to take legal action.[256] As regards the second demand made by the NGOs, namely establishment of a procedure for the supervision of TotalEnergies subsidies' activities, TotalEnergies declared that it is impossible to publish, within the vigilance plan, information on the identity of subsidiaries, subcontractors or suppliers presenting particular risks without revealing to the public the business strategies of these companies.[257] In relation to the third demand from NGOs, TotalEnergies claims that the law on the duty of vigilance is only binding

[251] Judicial Tribunal of Paris Judgement 2023 p. 12.

[252] Judicial Tribunal of Paris Judgement 2023, p. 11.

[253] Judicial Tribunal of Paris Judgement 2023 p. 20.

[254] Judicial Tribunal of Paris Judgement 2023, p. 11.

[255] Judicial Tribunal of Paris Judgement 2023, p. 12.

[256] Ibid.

[257] Judicial Tribunal of Paris Judgement 2023, p. 13.

on the parent companies and does not create any obligations towards third companies, even if the plan must be implemented withing the group's subsidiaries.[258]

4.2 Judgment of the court

The Court does not rule on the content of the complaints made by the NGO, but rather on admissibility of the complaint. Despite the content of the complaints not being addressed by the judges, the judgement provides important clarifications as to the procedural boundaries of the duty of vigilance, as well to the procedural requirements for actions to be admissible under the duty of vigilance.[259] Throughout the judgement the Court made some statements which are worth diving into to further understand the French duty of vigilance.

Following a brief introduction of the 2017 law on duty of vigilance, the Court immediately declares that the content of the measures contained in the duty of vigilance remain general. The Court states that the reason for the generality of the law remains in the fact that no decree providing clarification on the provisions has been issued yet.[260] Additionally, the Court reminds that the law on the duty of vigilance does not refer directly to any guiding principle or international standards, nor does it impose a nomenclature or classification of due diligence obligations to be imposed on the companies concerned. It also reminds that there is no independent control body or performance indicators which are provided for by the law in order to evaluate *ex ante* the adoption of vigilance plans or to evaluate the implementation of the plan *ex post*.[261] The only control arising out of the duty of vigilance is attributed to the judge who will have to carry out this control relying on the notion of 'reasonableness' of the vigilance measures contained in a company's vigilance plan. The Court describes the reasonableness notion as '*imprecise, vague and flexible notion*'.[262] Thus it concludes that the Law of the duty of vigilance '*assigns monumental goals of protection of human rights and the environment to certain categories of companies specifying to a minimum the means that must be put in place to achieve them*'.[263]

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[258] Ibid.

[259] Vasseur et al. 2023.

[260] Judicial Tribunal of Paris Judgement 2023, p. 17.

[261] Judicial Tribunal of Paris Judgement 2023, p. 18.

[262] Ibid.

[263] Ibid.

However, the Court dives into the intention of legislators towards procedural requirements in relation to the duty of vigilance. The Court submits that the legislator of the duty of vigilance has '*expressly manifested its intention*' for the elaboration of the plan of vigilance in co-operation between stakeholders and companies. The purpose of jointly developing the vigilance plan is twofold: first, taking into account the multitude of stakeholders and involving them in the development of the plan, a better definition of the scope of vigilance is ensured. Second, collaboration between stakeholders and companies would significantly reduce the risks of litigation regarding the relevance of the plan if the plan has been coordinated with the stakeholders.[264] The intent to encourage collaboration between stakeholders and companies in the development of vigilance plans is manifested in the mechanism of formal notice. The Court further argues based on the preparatory work for the law on the duty of vigilance that the formal notice can have as only purpose to allow the company to align with the law through dialogues and consequently must be regarded as a necessary requirement prior to the issuance of an injunction by a judge.[265]

On the matters of the formal notice as a requirement under the duty of vigilance, the Court concludes that the action of sending a formal notice is a '*mandatory phase of dialogue and amicable exchange*' during which the company will have the chance to respond to critics and if necessary, modify its plan of vigilance in accordance.[266] Furthermore, the Court gives precision on the nature of the formal notice by stating that it needs to be '*firm and precise enough*' in order to clearly identify the gaps to a vigilance plan and provide the start to amicable negotiations prior to the referral to the judge. Thus, a lack of formal notice will automatically result in the inadmissibility of a request for an injunction based on the duty of vigilance.[267]

Following the formal notice and the injection to the judge, TotalEnergies published new plans of vigilance for the years 2019, 2020, and 2021, bringing numerous modifications to their first

[264] Ibid.

[265] Judicial Tribunal of Paris Judgement 2023, p. 19.

[266] Ibid.

[267] Ibid.

plan of vigilance.[268] The Court observed that during debates in courts, the NGOs enunciated criticism towards the 2021 vigilance plan of TotalEnergies.[269]

The Court stated that as a consequence of lack of formal notice concerning the vigilance plans other than the 2018, resulted in the inadmissibility of the NGOs complaint. The Court further argued that the demands made in 2019 were substantially different than the ones made during the debates in courts, being that the latest applications from NGOs are based on more than two hundred new pieces of evidence compared to those annexed to the case file in 2019.[270] Although the content of the complaints made by the NGOs is declared inadmissible, the Court superficially comments on the plan of vigilance of TotalEnergies stating that the company has '*formally established a vigilance plan comprising the five items provided for by the law*' in a way that is detailed enough to not be considered perfunctory.[271] The Court added that as a result of the non-existence of regulations specifying the contours of a '*standard company normally vigilant*', the demands made against TotalEnergies must be made subject of an in-depth examination of the elements of the case, exceeding the powers of the judges in charge of rendering the judgement.[272] It is inferred that it belongs only the 'trial judges' to reach a conclusion on whether the complaints made against TotalEnergies are well-founded or if the latter has provided proof of compliance of its duty of vigilance, and to proceed with the control of the tools planned and implemented in the framework of the disputed vigilance plan by assessing their effectiveness and efficiency in relation to the monumental goals provided for in the French law on the duty of vigilance.[273]

4.3 Lessons learned from the judgement

The case *Friends of the Earth et al. v. TotalEnergies* is the first of its kind and thus allowed the Court to pronounce itself on the law of the duty of vigilance for the first time. Several lessons can be drawn from the judgement, which will influence following litigation of that sort.

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[268] Judicial Tribunal of Paris Judgement 2023, p. 22.

[269] Ibid.

[270] Judicial Tribunal of Paris Judgement 2023, p. 23.

[271] Ibid.

[272] Ibid.

[273] Ibid.

4.3.1 Assessment on the content of the duty of vigilance

Although the case was decided based on admissibility only, some considerations on the nature of the obligation to establish a plan of vigilance have been made by the Court.[274] First, the Court noted that the measures imposed by the law on the duty of vigilance are general in nature due to the absence of a decree containing details on their content.[275] Second, the Court reiterated that the law on the duty of vigilance does not mention any texts, whether regional or international, which could serve as a guiding tool on the assessment of conformity with the law. Additionally, positive law does not provide tools such as measuring instruments, a *modus operandi*, or even a reference framework.[276] Thirdly, the judge highlights the lack of a control body, entailing that, the judge alone needs to assess vigilance plans, content and efficiency, in light of the duty of vigilance based solely on the 'reasonableness' of the vigilance measures.

The first lesson to learn from this case is that the absence of a reference framework for the application of the law on the duty of vigilance results in a complicated task.

4.3.2 Need for prior dialogue between stakeholders and companies

In the three months available for a company to reply to a formal notice, the law on the duty of vigilance intends to spark a '*mandatory*' dialogue between stakeholders and the company. That dialogue, according to the Court, is a means to ensure a better understanding and definition of the perimeter of vigilance that a company must exercise.[277] Thus, it is of utmost importance that NGOs which are concerned by lack of certain elements in a company's vigilance plan, initiate an amicable dialogue in order to abide by the intent of the legislator. More specifically, future plaintiffs should make sure that the formal notice and the dialogue with the company address all the aspects of each vigilance plan(s) which will be used in their legal argumentation against a company. Additionally, future plaintiffs will need to ensure that the content of the formal notice is aligned with its complaints.[278] Consequently, the requirements of a formal

[274] Dombreval and Trochon 2023.

[275] Ibid.

[276] Ibid.

[277] Judicial Tribunal of Paris Judgement 2023, p. 18.

[278] Vasseur 2023.

notice containing the same content of the complaints becomes indispensable to the intervention of the judge.[279]

The NGOs in the case at hand raised in point with regard this matter. In their opinion, due diligence obligations are ongoing and do not require a new formal notice with each new plan published by TotalEnergies. Given that TotalEnergies is under the obligation of issuing a vigilance plan each year, the prior obligation to send a formal notice on the basis of the last published plan could, in some instances, make it virtually impossible to obtain a decision on the merits within a reasonable period of time.[280] That argument was not followed by the judge and therefore remains uncertain.

Nevertheless, the second lesson to learn from this case is the importance of respecting the phase of dialogue following a formal notice, with the purpose of establishing a true adversarial debate between the parties rather than only through press releases and indirect communications.[281]

4.3.3 Lack of power from the 'interim relief judge' to rule on the substance of due diligence plans.

The NGOs aimed at putting a halt to the Tilenga and EACOP projects due to their imminence of serious damage to human rights and the environment.[282] For that reason, an interim relief judge was called upon. However, it is not within the power of an interim relief judge to assess the reasonableness of the measure adopted by TotalEnergies in its vigilance plan when this assessment requires an in-depth examination of the case.[283]

The third lesson to reach from the judgement is that the recourse to an interim relief judge can only be justified, and useful, in cases where there is a clear absence of the one of the elements of the vigilance plan, as provided for in the law on the duty of vigilance.[284]

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[279] Ibid.

[280] Dombreval and Trochon 2023.

[281] Ibid.

[282] Ibid.

[283] Judicial Tribunal of Paris Judgement 2023, p. 21.

[284] Dombreval and Trochon 2023.

5 Future litigation based on the law of the duty of vigilance

The French NGO Notre Affaire à Tous, is currently involved in a lawsuit based on the duty of vigilance against TotalEnergies along with a few other NGOs. Evidently, the judgement from 28th of February this year was awaited by these NGOs as it would shed some light on the future of their own litigation.

The legal action was initiated in October 2018 when a group of NGOs, comprising Notre Affaire à Tous, questioned the company TotalEnergies on the absence of any reference to climate change in its first vigilance plan, despite its legal obligation under the duty of vigilance to take measures to prevent human rights and environmental abuses. Neither the publication of TotalEnergies' second plan of vigilance nor the exchanges with TotalEnergies' management including a meeting with its chairman have led to any substantial change in TotalEnergies' climate commitments.[285] Thus the NGOs decided to put Total on formal notice in June 2019 based on the duty of vigilance and on the obligation of environmental vigilance arising from the environmental charter.

In their formal notice, the NGOs demand that Total include the objective of limiting warming to +1.5°C and to take appropriate action to achieve this.[286] The end goal of this litigation is not similar to the end goal of the litigation involving Friends of the Earth as it relates to 'climate vigilance', however the judgement of the 28th of February is highly relevant for that case as well. [287] The NGO Notre Affaire à Tous has reacted following the publication of the judgement and considered that some interpretations of the duty of vigilance seemed at first sight challengeable, in particular the court's argument that the grievances and claims formulated in the letter of formal notice differ too much from those raised in the last written and oral pleading.[288] Notre Affaire à Tous is concerned about this interpretation which could hamper the fundamental purpose of the law on the duty of vigilance, namely identify and prevent risks of serious human rights and environmental violations.[289] Within this context, Paul Mougeolle highlights that "*once litigation has been initiated, it seems absurd that the claims cannot be*

[285] Notre Affaire à Tous 2019.

[286] Notre Affaire à Tous Dossier Presse 2019.

[287] Mazeyrac 2023.

[288] Ibid.

[289] Ibid.

updated if the situation evolves and if the company still does not address the main allegations indicated in the MED. The opposite hypothesis would lead to a fundamental questioning of the role of the judge, who is responsible for controlling the application of the law."[290]

At this stage it is unclear whether future judges ruling on cases based on the duty of vigilance will uphold the judgement from the interim relief judge of the Judicial Court of Paris. Despite Friends of the Earth v. TotalEnergies being the first case of the sorts, there is a need to have a case based on the duty of vigilance with a ruling on the merits, in order to have a clearer picture of the functioning of the law.

[290] Ibid.

6 European Directive on due diligence as a solution for French Duty of Vigilance shortcomings

The shortcoming of the French Duty of Vigilance Law assessed through the judgement rendered by the Judicial Court of Paris could be remedied by the adoption of the European Proposal Directive on Corporate Sustainability Due Diligence (Directive Proposal).

An assessment of the French Vigilance Law has been conducted at the European level and lessons are retrieved and applied to the European context.[291] First, the scope of the Directive Proposal is much larger than the one applicable for the French DoV. Article 2 of the Directive Proposal states that the obligations of this Directive "*shall apply to companies which are formed accordance with the legislation of a Member State, and which fulfil one of the following conditions:*

(a) The company had more than 500 employees on average and had a worldwide turnover of more than EUR 150 million in the last financial year for which annual financial statements have been prepared.

(b) The company did not reach the threshold under (a) but had more than 250 employees on average and had a net worldwide turnover of more than EUR 40 million in the last financial year statements have been prepared, provided that at least 50% of this net turnover was generated in one or more of the following sectors:

- *Manufacture of textiles, agriculture, forestry, fisheries, extraction of mineral resources, etc...*"[292]

Second, in addition to being applicable to a larger scope of companies, non-European companies operating on the territory of the Union would also be affected.[293] Third, the Directive Proposal contains rigorous definitions which provide clarity for each article.[294] In the detailed explanations of the specific provisions of the proposal, it is stated that Member States shall ensure that certain companies adopt a vigilance in line with the limiting of global warming to 1.5°C in accordance with the Paris Agreement, thus providing a framework reference and clear

[291] Clerc 2021, p. 2.

[292] European Commission Directive Proposal, art. 2

[293] European Commission Directive Proposal, art. 2(1)(b)(iii)

[294] European Commission Directive Proposal, art. 3

goals to be achieved. Fourth, Article 17 of the Directive Proposal sets out the requirement for Member States to designate one or more national supervisory authorities to ensure compliance by companies of their due diligence obligations as provided for in the Directive Proposal. An authority shall also be set up at the European level – European Network of Supervisory Authorities – with the aim of facilitating and ensure the coordination and alignment of regulatory, investigative, sanctioning, and supervisory practices.[295] As an enforcement mechanism, rules on sanctions shall be laid down by each Member States and applicable to infringements of the national provisions adopted pursuant to this Directive. Lastly and importantly, the Directive Proposal requires mandatory stakeholder consultation.[296]

With these provisions in mind, the European Proposal Directive on Corporate Sustainability Due Diligence should make it possible to fill the gaps left within the French Duty of Vigilance Law, notably the uncertainties in relation to clear definitions and the lack of monitoring body.

[295] European Commission Directive Proposal, art. 21

[296] European Commission Directive Proposal, art. 7(2)(a).

7 Conclusions and final remarks

The examination of corporate due diligence obligations from an international perspective and national perspective reveals that these obligations entail a set of legal standards and responsibilities such as the UNGPs, or OECD Guidance, that corporations must adopt and implement to exercise reasonable care and precaution in their activities, particularly in relation to potential human rights violations and environmental degradation.

This thesis sought to isolate the environment and climate change due diligence from human rights due diligence in order to understand whether there is a climate dimension to due diligence obligations. Climate due diligence remains a blurry notion but it is present, and therefore provides an interesting tool for climate change litigation and filling the climate corporate accountability gap.

Within climate litigation, due diligence obligations have been formulated within legal frameworks such as the UNGPS. Most importantly, with the adoption of the Duty of Vigilance Law, due diligence obligation have been formulated in binding terms and accompanied by a private enforcement mechanism. Nevertheless, due diligence obligations, within the French Law, remain general and unprecise, as it lacks clear and well-defined defintions as well as a reference framework.

The adoption of due diligence standards application to coporations at the international level has turned into the adoption of binding national legislation imposing due diligence obligations specifically on a set of corporations in relation to human rights and the envrionment. The legal consequences of due diligence legislation demonstrates, through the case Friends of the Earth et al. v. TotalEnergies, that stakeholders can hold entities accountable for their actions or omissions, leading to potential legal liability.

Currently, due diligence legislation is a new tool for corporate climate change litigation. It enables stakeholders to get involved without imposing heavy admissibility criteria. Modifying or stretching the existing laws does not seem necessary, however clarifications of legal standards, ongoing evaluatuon, clear definitions and adequate support and enforcing mechanisms to enable the correct implementation and enhance the efficiency of due diligence obligations is rather necessary.

Further research is needed, specifically for the potential adoption of the European Directive on Corporate Due Diligence Sustainability and its impacts as corporate climate change litigation. Furthrmore, other due diligence national legislation such as the German on remain to be examined in detailed and be compared to others due diligence national legislation.

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