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Discussion paper

EU Climate Change Due Diligence

Addressing climate change in
the Corporate Sustainability
Due Diligence proposal

Institute for European Environmental Policy



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The arguments expressed in this report are solely those of the authors, and do not reflect the opinion of any other party.

This is a discussion paper intended to facilitate discussion among stakeholders – we welcome feedback to the corresponding authors.

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1. WHY SHOULD DUE DILIGENCE FRAMEWORKS EXPLICITLY ADDRESS CLIMATE CHANGE?

This discussion paper starts from the premise that human rights and environmental due diligence should entail explicit and unambiguous duties for companies to identify and address adverse climate change-related impacts in their operations and supply chains.

We explore three big questions concerning why and how climate change should be explicitly considered in human rights and environmental due diligence frameworks in general and in the EU Corporate Sustainability Due Diligence (CSDD) proposal in particular, as follows:

- 1. Why should due diligence frameworks explicitly address climate change?**
- 2. What should climate change due diligence entail?**
- 3. Does the CSDD proposal require companies to conduct climate change due diligence?**

We offer initial recommendations for amendments to the proposal that would strengthen its requirements of companies to undertake climate due diligence in relation to both adverse human rights and adverse environmental impacts. As a discussion paper intended to facilitate dialogue with stakeholders, we welcome feedback and comments with a view to furthering the development and operationalisation of the concept of climate change due diligence.

It was clear during the preparation of the European Commission (EC)'s CSDD proposal that the directive's implications regarding climate change were contested¹. In this section we set out five reasons why climate change should be explicitly addressed in human rights and environmental due diligence (HREDD) frameworks in general, and the CSDD in particular, which we summarise as: severity, liability, siloes, stakeholders and coherence.

¹ Politico Pro (2022) Climate Due Diligence Becomes Hot Topic [Newsletter] restricted access only. For example, MEP Lara Wolters, rapporteur of the file, was quoted saying "It is very concerning to hear that climate impacts may be missing from the due diligence proposal. A lot of detailed work is currently being carried out on sustainability reporting and on transparency around companies' sustainability strategies. But reporting only goes so far and I think companies want more clarity on what is expected from them in terms of actions, when it comes to emissions and climate."

1. Severity

Climate change is an unprecedented, *sui generis* threat to very large-scale and irremediable human rights impacts. The UNGPs' requirement to prioritise the most severe adverse human rights impacts means that climate change should be unambiguously identified as an area of particular concern for corporate sustainability due diligence.

The grave human rights consequences of climate change have been widely established.² UN High Commissioner for Human Rights Bachelet has noted that "the world has never seen a threat to human rights of this scope"³. The OCHR has also been clear that climate change-related human rights impacts are a necessary dimension of HRDD processes required of businesses in relation to their responsibility to respect human rights under the UN Guiding Principles on Business and Human Rights (UNGPs).⁴

Given the UNGPs' requirement to prioritise human rights risks according to their severity, this means that the CSDD should elaborate on this unprecedented human rights risk, identifying it as a clear and unambiguous priority in corporate due diligence processes. Given the very likely irremediability of climate-related risks if climate tipping-points are surpassed, and the very short timeframe remaining to avert such risks, there should be no legal ambiguity created as to whether companies should consider climate-related risks in their due diligence processes.⁵ Companies should be clearly directed to do so as a matter of utmost urgency.

2. Liability

National and international case law increasingly demonstrates climate due diligence responsibilities of states and companies. A failure to set clear requirements for companies to undertake climate due diligence increases the risk to companies of being subject to complex climate litigation in the coming years.

² Burger, M. and Wentz, J. (2015) Climate Change and Human Rights, UNEP. <<http://columbiaclimate.com/files/2016/06/Burger-and-Wentz-2015-12-Climate-Change-and-Human-Rights.pdf>>.

³ The Guardian (2019) Climate crisis is greatest ever threat to human rights, UN warns. <<https://www.theguardian.com/law/2019/sep/09/climate-crisis-human-rights-un-michelle-bachelet-united-nations>>.

⁴ OHCHR (2020) Climate Change and the UNGPs. <<https://www.ohchr.org/EN/Issues/Business/Pages/Climate-Change-and-the-UNGPs.aspx>>.

⁵ This may happen for example if more generic human rights or environmental provisions are relied on. In short, there is no time to test such generic provisions through test cases, such as is the in the case of *Notre Affaire à Tous and Others v. Total in France* – instead companies should have absolute clarity as to their obligations from the entry into force of the directive.

The landmark Urgenda case showed that the Netherlands' insufficient targets to reduce its GHG emissions constitute a violation of human rights. The ruling effectively confirmed the key role of climate and environmental law principles in states' due diligence obligations and confirmed that the Paris Agreement is an applicable international standard in this regard⁶.

Several new examples of cases before judicial and non-judicial bodies are now contributing to defining standards of due diligence for corporations in respect of climate change, often also entailing an integrated interpretation of corporate HRDD based on both human rights law and climate law standards.⁷ Notably:

- In **Mileiudensie et al vs Shell** in the Netherlands, the summons argued *inter alia* that climate change impacts must be accounted for in the HRDD processes of corporations;
- In the action against **Total** under the French Duty of Vigilance Law filed by 14 French cities and 4 NGOs, the plaintiffs argue *inter alia* that identifying the risk of contributing to climate change and taking measures to reduce emissions are an integral part of the corporation's duty of vigilance;
- In the petition filed with the **Philippines Commission on Human Rights** by NGOs, the petitioners successfully argued that corporations under the UNGPs are responsible for assessing and addressing the climate change impacts of their operations;
- In a complaint under the **Netherlands National Contact Point for the OECD Guidelines for Multinational Enterprises**, 4 NGOs successfully argued that ING bank's policies did not align with the guidelines and should include disclosure of the bank's GHG emissions and setting reduction targets in line with the Paris Agreement.

A failure to specify climate change-related obligations in relation to CSDD would entail risks to companies in relation to similar future climate litigation cases, if they are unable to demonstrate adequate climate-related due diligence measures were undertaken. By contrast, embedding climate due diligence in the CSDD would actually strengthen companies' ability to anticipate any potential reviews in climate litigation processes.

⁶ Macchi, C. (2021) The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of 'Climate Due Diligence'. *Business and Human Rights Journal*, 6(1) doi:10.1017/bhj.2020.25

⁷ Ibid. and Macchi, C. (2021) Business, Human Rights and Climate Due Diligence: Understanding the Responsibility of Banks. *Sustainability*, 13(15) <https://doi.org/10.3390/su13158391>

Moreover, if ongoing or new cases like that against Total in France find that the French Duty of Vigilance law requires companies to consider climate change in their due diligence processes, but there remains ambiguity about whether the proposed EU CSDD does, then this would at best create legal uncertainty for companies with regard to the EU law and could at worst represent a regression from the French law.

3. Siloes

A failure to specify climate change-related obligations in relation to CSDD risks entrenching a siloed approach to social and climate-related sustainability policies and processes within companies.

There is already a tendency within many companies to approach environmental, social and governance issues in siloes.⁸ While many companies have increasingly developed their climate policies and processes in recent years, establishing separate processes and structures for addressing human rights risks from climate risks is highly inefficient, entailing increased costs for firms, and likely far less effective implementation.

4. Stakeholders

The stakeholders surveyed for the 'Study on due diligence requirements through the supply chain'⁹ commissioned by the EC demonstrated their expectation that human rights due diligence should include consideration of climate change.

Stakeholders representing a variety of sectors, such as civil society and industry organisations, as reported in the background study for the EC, agreed that environmental and climate change impacts such as greenhouse gas emissions, fall within the scope of due diligence requirements.¹⁰ This demonstrates a cross-

⁸ See for example: Clifford Chance (2022) Business and Human Rights: Navigating A Changing Legal Landscape. <<https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2022/01/gbi-cc-briefing-final.pdf>>

⁹ British Institute of International and Comparative Law, Civic Consulting and LSE Consulting for the European Commission (2020) Study on due diligence requirements through the supply chain. <<https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>>.

¹⁰ See p186: "However, overall, stakeholders across business and other groups agreed that environmental, climate change and other sustainability impacts are understood to be within scope of a company's existing due diligence requirements. Business survey respondents indicated that environmental impacts, including air pollution, greenhouse emissions and climate change aspects, are frequently viewed as included in their due diligence processes, either expressly or implied." British

sectoral expectation that climate change should be included in the due diligence processes such as those governed by CSDD.

Particular groups of stakeholders have further demonstrated their expectations in this regard. **Investors** have shown that climate change impacts must be addressed in due diligence processes, including those caused, contributed by and linked to the corporations. For example:

- In 2020 the **Norwegian Government Pension Fund Global** divested from four companies due to the “unacceptable level of greenhouse gas emissions”, critical to this decision was the fact that the corporations had no specific plans to reduce these emissions within a specific period of time¹¹.
- In 2019 a group of investors committed to eliminate deforestation from their supply chains and operations in a statement issued via the **UN Principles for Responsible Investment** and called for companies to take steps to address deforestation risks which clearly echo the language and key elements of a due diligence approach¹².

The **European Parliament’s** resolution on corporate due diligence and corporate accountability is clear that HREDD must explicitly include obligations in relation to climate change.

- The EP highlighted their expectation that any due diligence legislation should align with the EU’s climate commitments, in particular the Paris Agreement and the EU commitment to reduce greenhouse gas emissions by at least 55% by 2030¹³.
- Moreover, the resolution emphasizes the impacts of climate change, greenhouse emissions and other environmental impacts of business operations in due diligence processes¹⁴.

Institute of International and Comparative Law, Civic Consulting and LSE Consulting for the European Commission (2020) Study on due diligence requirements through the supply chain. <<https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>>

¹¹ NBIM (2020) Exclusion Decisions and Decisions to Revoke Exclusion <<https://www.nbim.no/en/the-fund/news-list/2020/exclusion-decisions-and-decisions-to-revoke-exclusion/>>

¹² UN PRI (2019) Investor statement on deforestation and forest fires in the Amazon <https://d8g8t13e9vf2o.cloudfront.net/Uploads/g/i/u/investorstatementondeforestationandforest-firesintheamazon_76915.pdf>.

¹³ European Parliament (2021) Resolution on corporate due diligence and corporate accountability. 2020/2129(INL), art. 12.

¹⁴ Ibid. Annex art. 20 and 23.

Several **civil society organisations** have similarly expanded on their expectations in this regard.

- Global Witness called for including mandatory climate due diligence in the proposal¹⁵.
- The European Coalition for Corporate Justice highlighted that climate impacts to be explicitly included among the impacts that companies must identify, prevent and mitigate through their due diligence processes¹⁶.
- Numerous international and national civil society organisations and trade unions expressed their deep concern over the lack of climate due diligence and emphasized the importance of companies addressing climate change risks and impacts in their value chains¹⁷.

5. Coherence

Clarification of climate-related due diligence obligations would ensure coherence with existing EU-level measures, including the overall coherence of the European Green Deal.

Clarifying the climate change-related due diligence requirements of corporations under the CSDD proposal will ensure it is fully coherent with the Corporate Sustainability Reporting Directive (CSRD) proposal and the non-binding guidelines on reporting climate-related information,¹⁸ not to mention with the wider European Green Deal (EGD) agenda. Given the very high political, social and media interest in climate change, any failure to clarify that the CSDD proposal is fully aligned with the EU's EGD vision would likely raise significant questions and concerns from stakeholders.

¹⁵ Global Witness (2022) A Chance at a Sustainable Future Strengthening the EU's New Law. <<https://www.globalwitness.org/en/campaigns/holding-corporates-account/can-eu-hold-companies-account/>>

¹⁶ European Coalition for Corporate Justice (2022) Comprehensive analysis of EU Commission's proposal for a directive on due diligence. <<https://corporatejustice.org/wp-content/uploads/2022/04/ECCJ-analysis-CSDDD-proposal-2022.pdf>>

¹⁷ Various organisations (2022) Civil society statement on the proposed EU Corporate Sustainability Due Diligence Directive. <https://friendsoftheearth.eu/wp-content/uploads/2022/05/CSO_statement_CSDDD_EN.pdf>

¹⁸ European Commission (2019) Guidelines on reporting climate-related information. <https://ec.europa.eu/finance/docs/policy/190618-climate-related-information-reporting-guidelines_en.pdf>

2. WHAT SHOULD CLIMATE CHANGE DUE DILIGENCE ENTAIL?

The key elements of climate change due diligence processes for companies can be identified in relation to those highlighted by the International Bar Association¹⁹ reflecting the UNGPs, including:

- adoption of an explicit **policy** that stipulates measures designed to prevent or mitigate adverse climate change impacts linked to the company's operations and/or supply chains;
- a **due diligence process** to identify, prevent, mitigate and account for its actual and potential climate change impacts;
- **remediation processes** that allow for open communication with stakeholders most affected by the corporation's operations and/or supply chains.

Box 1: Climate change due diligence in relation to human rights and/or environmental due diligence

Climate change due diligence may in theory be understood as a sub-set of either human rights or environmental due diligence, or both.

Macchi²⁰, for example, discusses the development of the concept of climate due diligence in relation to climate litigation and case law. She argues that a holistic understanding of human rights obligations embedded in the UNGPs is crucial, and they therefore should be interpreted not only in light of international human rights, but also environmental and climate law, such as the Paris Agreement.

Bright and Buhmann²¹ similarly derive climate obligations of corporations in relation to human rights via a concept of risk-based due diligence. Furthermore, both the judgement of the Philippines Commission on Human

¹⁹ International Bar Association (2015) Achieving Justice and Human Rights in an Era of Climate Disruption: Climate Change Justice and Human Rights Task Force Report. <<https://www.ibanet.org/MediaHandler?id=0f8cee12-ee56-4452-bf43-cfcab196cc04>>

²⁰ Macchi, C. (2021) The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of 'Climate Due Diligence'. *Business and Human Rights Journal*, 6(1) doi:10.1017/bhj.2020.25

²¹ Bright, C., Buhmann, K., (2021) Risk-Based Due Diligence, Climate Change, Human Rights and the Just Transition. *Sustainability*, 13(18). <https://doi.org/10.3390/su131810454>.

Rights and the decision of the Netherlands National Contact Point for the OECD Guidelines referred to in Section 1 are based on this interpretation of corporate duties to act on climate change in relation to human rights due diligence.

However, many stakeholders place climate change either instead or in addition as a category of adverse environmental impacts, alongside issues like biodiversity loss, water pollution or deforestation. These include scholars such as Mackie²², Schilling-Vacaflor²³ and various companies²⁴.

In the case of *Notre Affaires A Tous et al vs Total*, also referred to in Section 1, the plaintiffs argue that the company's contribution to climate change entails risks to *both* the environment *and* to human rights and fundamental freedoms (as well as to human health and safety), which they claim have not been adequately addressed in the company's vigilance plan under the French Duty of Vigilance law.²⁵

Some of the strengths and weaknesses of each approach are assessed in relation to the CSDD proposal in section 3 below.

In order to unpack further what a climate change due diligence process and remediation processes could look like in practice, it is necessary to reflect further on the nature of climate-related adverse impacts and the channels through which companies may contribute to them.

²² Mackie, C. (2021). Due diligence in global value chains: Conceptualizing 'adverse environmental impact'. *RECIEL*, 30(3), 297-312. Source: <https://doi.org/10.1111/reel.12406>.

²³ Schilling-Vacaflor, A. (2021). Integrating Human Rights and the Environment in Supply Chain Regulations. *Sustainability*, 13(17), 9666. Source: <https://doi.org/10.3390/su13179666>.

²⁴ Various private companies, (2022). Making EU legislation on mandatory human rights and environmental due diligence effective. Source: https://media.business-humanrights.org/media/documents/EU_business_statement_Feb_2022.pdf.

²⁵ *Notre Affaire à Tous and Others v. Total* (2020) Summons. <http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2020/20200128_NA_complaint-2.pdf>

2.1 Understanding climate-related adverse impacts: Exposure and vulnerability

As identified in Section 1 above, climate change entails risks of severe and often irreparable adverse impacts to both human rights and the environment. Some examples are given in Table 1 below.

Table 1: Examples of physical climate impacts and corresponding climate-related adverse human rights and environmental impacts

Examples of physical climate impacts	Examples of corresponding climate-related adverse human rights impacts	Examples of corresponding climate-related adverse environmental impacts
Increased frequency and/or severity of droughts ²⁶	The right to adequate standard of living, including food ²⁷ is disrupted due to e.g. disrupted crop production and depletion of freshwater ²⁸	Loss of biodiversity and animal migration; soil erosion; land degradation ²⁹
Increased frequency and/or severity of floods ³⁰	The right to adequate standard of living,	Soil pollution; biodiversity loss ³³

²⁶ Intergovernmental Panel on Climate Change (2022) Climate Change 2022: Impacts, Adaptation and Vulnerability. <https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FinalDraft_FullReport.pdf>

²⁷ International Covenant on Economic, Social and Cultural Rights, article 11.

²⁸ De Schutter, O. (2010) Climate change and the human right to adequate food - Contribution of the Special Rapporteur on the right to food, Mr Olivier De Schutter, to the meeting convened by the Friedrich-Ebert-Stiftung with the Committee on Economic, Social and Cultural Rights. <<https://www2.ohchr.org/english/issues/food/docs/climate-change-and-hr-adequate-food.pdf>>

²⁹ Intergovernmental Panel on Climate Change (2022) Climate Change 2022: Impacts, Adaptation and Vulnerability. <https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FinalDraft_FullReport.pdf>

³⁰ Intergovernmental Panel on Climate Change (2022) Climate Change 2022: Impacts, Adaptation and Vulnerability. <https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FinalDraft_FullReport.pdf>

³³ Intergovernmental Panel on Climate Change (2022) Climate Change 2022: Impacts, Adaptation and Vulnerability. <https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FinalDraft_FullReport.pdf>

	including housing ³¹ is disrupted due to e.g. disaster-related displacement and loss of homes ³²	
Rising temperatures and heat stress ³⁴	The right to health ³⁵ is disrupted due to e.g. the increase in heat-related health issues particularly among more vulnerable communities ³⁶	Damage to wildlife, flora, natural habitats and ecosystems; depletion of freshwater ³⁷
Ocean acidification ³⁸	The right to adequate standard of living, including food ³⁹ is disrupted due to e.g. reduction of human food resources ⁴⁰	Biodiversity loss ⁴² ; damage to wildlife, flora, natural habitats and ecosystems ⁴³

³¹ International Covenant on Economic, Social and Cultural Rights, article 11.

³² UNHCR (2022) Climate change and disaster displacement. <<https://www.unhcr.org/climate-change-and-disasters.html>>

³⁴ Intergovernmental Panel on Climate Change (2022) Climate Change 2022: Impacts, Adaptation and Vulnerability. <https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FinalDraft_FullReport.pdf>

³⁵ International Covenant on Economic, Social and Cultural Rights, article 12.

³⁶ World Health Organisation (2018) Heat and Health. <<https://www.who.int/news-room/fact-sheets/detail/climate-change-heat-and-health>>

³⁷ Intergovernmental Panel on Climate Change (2022) Climate Change 2022: Impacts, Adaptation and Vulnerability. <https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FinalDraft_FullReport.pdf>

³⁸ Intergovernmental Panel on Climate Change (2022) Climate Change 2022: Impacts, Adaptation and Vulnerability. <https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FinalDraft_FullReport.pdf>

³⁹ International Covenant on Economic, Social and Cultural Rights, article 11.

⁴⁰ UN Environment (2018) Revisiting ocean acidification, food security and our earth system. <https://wedocs.unep.org/bitstream/handle/20.500.11822/25797/Foresight_Brief_009_July.pdf?sequence=1&isAllowed=y>

⁴² UN Environment (2018) Revisiting ocean acidification, food security and our earth system. <https://wedocs.unep.org/bitstream/handle/20.500.11822/25797/Foresight_Brief_009_July.pdf?sequence=1&isAllowed=y>

⁴³ Secretariat of the Convention on Biological Diversity (2009). Scientific Synthesis of the Impacts of Ocean Acidification on Marine Biodiversity. Montreal, Technical Series No. 46. <https://wedocs.unep.org/bitstream/handle/20.500.11822/8884/Scientific_synthesis_impacts_ocean_acidification_marine_biodiversity.pdf?sequence=3&isAllowed=y>

	The right to health is disrupted due to e.g. increase in respiratory and mental health issues ⁴¹	
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However, it is important to recognise that the nature and extent of these climate-related adverse human rights and environmental impacts are a consequence of two things:

- The level of **exposure to physical climate impacts**; and
- The level of **vulnerability** to those impacts⁴⁴.

Evidently physical climate impacts do not affect all people or ecosystems in the same way – rather the inequality of how climate change is experienced is driven to a large degree by differential levels of preparedness and the underlying resilience or adaptive capacity among rights-holders and/or ecosystems⁴⁵. Companies' actions and omissions can in turn contribute to improving or worsening both the exposure and the vulnerability of rights-holders and/or ecosystems connected to their operations and supply chains. For example:

- A company's greenhouse gas (GHG) emissions can be seen to contribute to increasing the exposure of rights-holders and ecosystems to increasingly severe physical climate impacts.
- A company's purchasing practices with regard to suppliers, or depletion of groundwater, for example, may impact on the level of resilience or adaptive capacity of rights-holders or ecosystems.

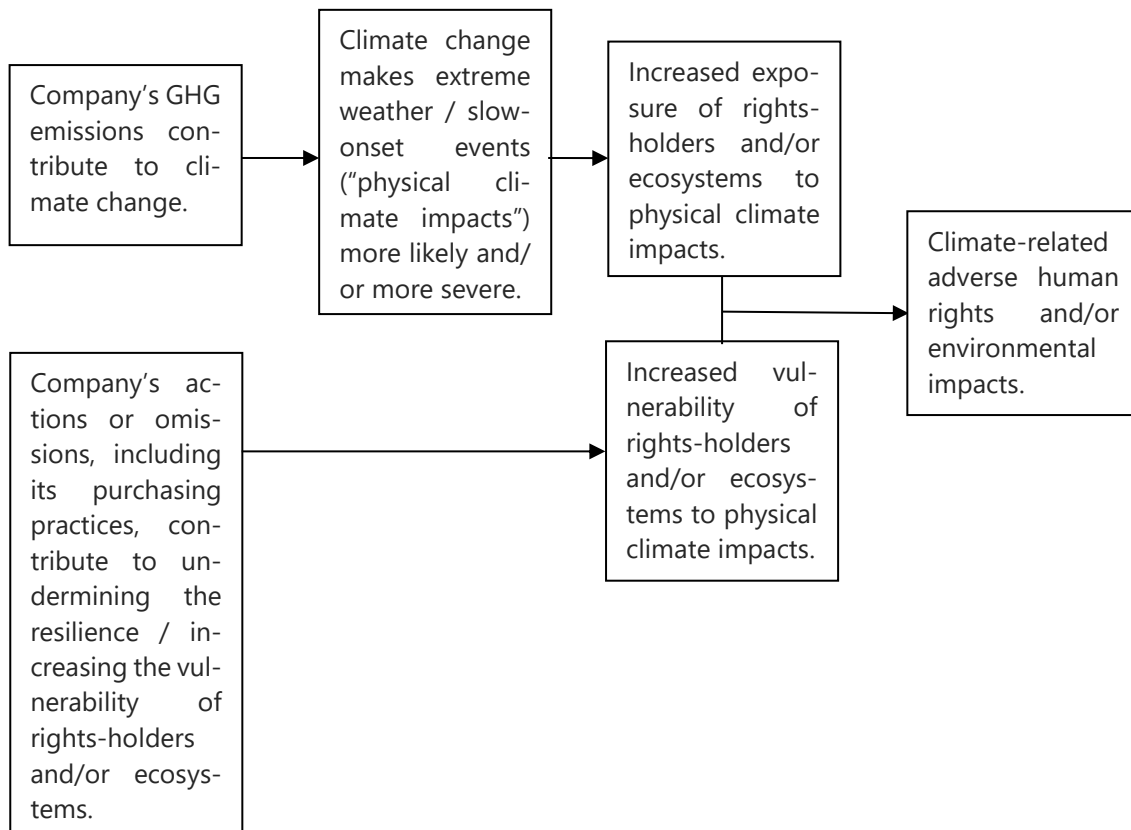
These two channels through which companies may be considered to contribute to climate-related adverse human rights and/or environmental impacts are depicted in Figure 1 and further explored below.

⁴¹ Falkenberg, L. J., Bellerby, R., Connell, S. D., Fleming, L. E., Maycock, B., Russell, B. D., Sullivan, F. J., and Dupont, S. (2020). Ocean Acidification and Human Health. *International journal of environmental research and public health*, 17(12), 4563. <https://doi.org/10.3390/ijerph17124563>

⁴⁴ Intergovernmental Panel on Climate Change (2022) *Climate Change 2022: Impacts, Adaptation and Vulnerability*. <https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FinalDraft_FullReport.pdf>

⁴⁵ In this paper we use the terms "resilience" and "adaptive capacity" interchangeably and as antonyms of "vulnerability". Further work to define such terms more precisely in the context of climate change due diligence is necessary.

Figure 1: Two channels through which companies may contribute to climate-related adverse human rights and/or environmental impacts



These are key questions given that, under the UNGPs, consideration of whether a company “causes”, “contributes to” or is “directly linked to” an adverse impact determines the scope of the company’s responsibilities to act. In short:

- where companies are considered to have “caused” or “contributed” to an actual adverse impact, they are required to actively engage in remediation;
- where it is considered they may “cause” or “contribute” to a potential adverse impact, they are required to cease, prevent and/or mitigate their cause or contribution;
- While companies that are considered only to be “directly linked” to adverse impacts, are required to exercise their leverage in order to seek to prevent or mitigate the impact⁴⁶.

⁴⁶ United Nations (2011) Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework. <https://shiftproject.org/wp-content/uploads/2020/01/GuidingPrinciplesBusinessHR_EN.pdf>

2.2 Assessing contribution to physical climate risks: Major emitters only?

A company's GHG emissions are the primary means⁴⁷ through which a company may be considered to contribute to increasing the exposure of rights-holders in their operations or supply chains and/or ecosystems on which their operations or supply chains depend to physical climate risks.

Indeed, this has been the basis for many of the climate litigation cases referred to in Section 1 above, which have established (or seek to establish) a link between a company's emissions and adverse human-rights impacts. Such cases have tended to focus on the role of so-called "major emitters" or "carbon majors" to make this case. In *Milieudefensie et al. v Royal Dutch Shell*, for example, the plaintiffs argued that '1.6% of measured rises in temperature and 1.4% of measured rises in sea level can be traced back to Shell's activities'.⁴⁸

But while this approach offers a relatively clear basis on which to identify these companies' contributions to climate-related impacts, it may also have short-comings. Not least that such an approach would be limited to consideration of only a very small number of companies that could be considered to be "major" emitters in this regard. Such an approach also seems to be at odds with the guidance in the UNGPs to companies to prioritise actions in relation to the severity of the adverse impact rather than to the size of the company's contribution to that impact.⁴⁹

This point is well made by Macchi, who gives the example of the banking sector, where even minor shareholders in companies where adverse human rights impacts are identified can be considered as contributing to those adverse human rights impacts if they fail to take adequate steps to prevent or mitigate them⁵⁰. Limiting the responsibility to solely the largest corporations might in fact, Macchi

⁴⁷ Choices over the location of new infrastructure could also be considered in relation to contribution to exposure. For example, choosing to relocate a factory and its workers to an area prone to flood risks.

⁴⁸ *Milieudefensie et al. v Royal Dutch Shell* (2021) 'Summons' C/09/571932 / HA ZA 19-379. <http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2019/20190405_8918_summons.pdf>

⁴⁹ United Nations (2012), *Guiding Principles on Business and Human Rights*, articles 19 and 24.

⁵⁰ Macchi, C. (2021) *The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of 'Climate Due Diligence'*. *Business and Human Rights Journal*, 6(1) doi:10.1017/bhj.2020.25

notes, create a ‘responsibility void’ whereby multiple actors exercise cumulative negligence regarding their adverse human rights impacts⁵¹.

In this light, all companies with GHG emissions, no matter how small, could be seen to be contributing to actual or potential climate-related adverse impacts, and would therefore be required to act to prevent or mitigate those impacts. The most appropriate way to do so would be through reducing their GHG emissions as urgently as possible in line with the scientific guidance on avoiding the worst impacts of climate change and international best-practice.

There is a mature debate about how companies should establish emissions reduction targets in line with the 1.5C goal of the Paris Agreement, to which companies can refer⁵². In practice this is likely to mean the establishment of both near- and long-term, science-based emissions reductions commitments across scope 1, 2 and 3; adequate plans to achieve them; and regular disclosure of progress in this regard.⁵³

2.3 Assessing contribution to vulnerability to physical climate impacts

Vulnerability to physical climate impacts may be considered in various ways, and it is beyond the scope of this paper to explore them to any significant degree. However, Business for Social Responsibility (BSR) reviewed 20 frameworks on climate risk and resilience and concluded that six forms of “capital assets” determine the extent of resilience to physical climate impacts, which gives some initial insight into the various elements that should be considered. These are:

- Human capital
- Political capital
- Financial capital
- Physical capital
- Social capital

⁵¹ Macci, C. (2021) The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of ‘Climate Due Diligence’. *Business and Human Rights Journal*, 6(1) doi:10.1017/bhj.2020.25.

⁵² See for example the establishment of the United Nations Secretary General’s Expert Group on the Net Zero Emissions Commitments of Non-State Entities: United Nations Secretary General (2022) Expert Group on the Net-Zero Emissions Commitments of Non-State Entities. <<https://www.un.org/sg/en/content/sg/personnel-appointments/2022-03-31/expert-group-the-net-zero-emissions-commitments-of-non-state-entities%C2%A0>>

⁵³ See also: European Coalition for Corporate Justice (2022) European Commission’s proposal for a directive on Corporate Sustainability Due Diligence: A comprehensive analysis. <<https://corporatejustice.org/wp-content/uploads/2022/04/ECCJ-analysis-CSDDD-proposal-2022.pdf>>

- Natural capital

Evidently further work is required to explore in depth how companies may be considered to contribute to both strengthening and/or undermining these different forms of capital assets, and to identify the appropriate action that may therefore be required of companies to cease, prevent or mitigate their contribution.

Importantly, often such steps will align with the company's wider commitments to respect human rights, such as through ensuring the conditions in which workers or small-scale farmers in their supply chains earn living wages or living incomes.⁵⁴ But suffice to say here that assessing such questions should be considered an essential element of climate change due diligence, of equal importance to assessing a company's contribution to GHG emissions.

Indeed, given the small contributions of most companies to emissions in global terms, many companies will likely more directly contribute to increasing the risk of adverse climate-related human rights impacts via their acts and omissions with regard to the resilience and adaptive capacity of rights-holders in their businesses and/or supply chains.

2.4 Towards remediation for climate-related adverse impacts

Finally, where companies are considered to have caused or contributed to severe climate-related adverse impacts that have already occurred, they should also be required to engage with appropriate remediation processes.

In the language of the UNFCCC, climate impacts that can no longer be avoided are referred to as "loss and damage", and there is a growing academic literature and policy debate elaborating the concept and possible approaches to address it⁵⁵. This is a rapidly developing field, and one which might offer several avenues through which corporate remediation processes could be pursued.

⁵⁴ V. Nelson, O. Martin-Ortega and M. Flint (2020) 'Making Human Rights Due Diligence Work: An Analysis of Impact and Legal Options'. University of Greenwich Report Commissioned by the Fair Trade Advocacy Office and Brot fur die Welt; Chatham: UK. <<https://fairtrade-advocacy.org/wp-content/uploads/2020/06/UoG-HRDD-Full-Report-60pp-FINAL-SECURED.pdf>>

⁵⁵ See for example: McNamara, K.E. and Jackson, G.. (2018) Loss and damage: A review of the literature and directions for future research, *WIREs Climate Change*, 10(2). <https://doi.org/10.1002/wcc.564>

One option proposed by Birchall⁵⁶ that could offer a practical means through which companies may address their responsibilities for climate-related remediation is through the establishment of a **climate remediation trust fund**. The fund would provide remedy to the victims and could be structured around specific types of impacts.

The establishment of a trust fund for victims would require all companies contributing to human rights impacts via their services, operations, effects on the environment or other means to provide resources towards the fund remedy broadly in line with their share of contributions to climate-related impacts. Birchall proposes that the fund could be established as a collaboration between corporations and non-governmental organisations or states and international organisations. The latter would also be in line with the UNGPs requirement for States to provide access to remedy for victims harmed by corporations⁵⁷.

A number of trusts have been established in connection with specific events or entities that could serve as a form of precedent in this regard. For example, the Rana Plaza Donors Trust launched in 2014 by the International Labour Organisation following the collapse of the Rana Plaza garment factory in Bangladesh. The funds collected under the trust originated from various sources, including international clothing brands, governmental actors and civil society organisations⁵⁸.

An alternative or complementary approach could see plaintiffs bring litigation cases for climate-related damages against specific companies. One such example is an ongoing case of a Peruvian farmer against RWE in Germany. The farmer alleges his home is being exposed to climate change to which RWE has contributed and asks for compensation proportional to the RWE's share of greenhouse gas emissions⁵⁹.

Table 2 below summarises the core elements of a climate due diligence and remediation processes as discussed in this section.

⁵⁶ Birchall, D. (2019) Irremediable impacts and unaccountable contributors: the possibility of a trust fund for victims to remedy large-scale human rights impacts, *Australian Journal of Human Rights*, 25:3, 428-447, DOI: 10.1080/1323238X.2019.1687191.

⁵⁷ UNGPs, principle 25 as stated in Birchall, D. (2019) Irremediable impacts and unaccountable contributors: the possibility of a trust fund for victims to remedy large-scale human rights impacts, *Australian Journal of Human Rights*, 25:3, 428-447, DOI: 10.1080/1323238X.2019.1687191.

⁵⁸ The Rana Plaza Arrangement (2014) The Rana Plaza Donors Trust Fund. <<https://ranaplaza-arrangement.org/trustfund/>>

⁵⁹ Business & Human Rights Resource Centre (2015) RWE lawsuit (re climate change). <<https://www.business-humanrights.org/en/latest-news/rwe-lawsuit-re-climate-change/>>

Table 2: Summary of core requirements and practical implications of climate change due diligence for companies

Core requirements of a climate change due diligence and remediation process	Practical implications for companies
<p>A due diligence process to identify, prevent, mitigate and account for the company's climate change-related adverse human rights and/or environmental impacts</p>	<p>A) In relation to exposure of rights-holders and/or ecosystems to physical climate risks Establishing science-based near- and long-term greenhouse gas emissions reductions targets for the company's operations and supply chains (scopes 1, 2 and 3) in line with the requirements of the Paris Agreement (including supporting and not undermining the capacity of suppliers to meet scope 3 targets); and/or</p> <p>B) In relation to vulnerability of rights-holders and/or ecosystems to physical climate risks</p> <p>Ensuring that the company's business model, including its purchasing practices, supports and does not undermine the resilience of rights-holders in the company's operations and supply chains - and/or the resilience of ecosystems on which the company's operations and supply chains depend - with regard to climate-related adverse human rights and/or environmental impacts.</p>
<p>Take appropriate steps to remediate victims for those impacts which have already occurred</p>	<p>Different options could be explored, which might include:</p> <p>A) Compensation for specific climate-related damages to which that company has clearly contributed; and/or</p> <p>B) Company contributions to a climate remediation trust fund.</p>

Box 2: Examples of companies currently conducting aspects of climate change due diligence

While many companies have made science-based commitments to reduce GHG emissions – one critical component of conducting climate change due diligence as outlined in this paper – examples of companies engaging proactively to address their contribution to climate change adaptive capacity to reduce risks of climate-related human rights or environmental harms in their supply chains are to date less common.

While companies complying with the Taskforce on Climate-related Financial Disclosures (TCFD) are becoming more familiar with the identification of business risks in supply chains from physical climate impacts, this does not necessarily entail further assessing and addressing the company's own contributions to such risks.⁶⁰ Nonetheless, such steps are starting to enter the mainstream, for example:

Patagonia announced a pilot scheme to assess the risks to supply chain workers from climate change, and support them to become more climate resilient. As the company notes: "Patagonia is working to develop and roll out our first pilot program with key suppliers to help factory workers become more climate resilient so they can efficiently and safely contend with the physical, mental and financial stresses of the crisis,"⁶¹

- Ahead of COP26, Ben & Jerry's, Tony's Chocolonely, Co-op, M&S and others committed to protect and invest in the resilience of global food supply chains in the face of the climate crisis. The companies pledged to "pay fair prices to producers – [because] farmers and workers should not have to choose between tackling poverty

⁶⁰ For example, H&M identifies in the company's TCFD disclosure business risks linked to extreme weather hitting cotton suppliers, but lists contingency plans to switch suppliers at short notice as a risk mitigation measure. By contrast, a climate change due diligence approach, in line with the UNGPs, would suggest H&M should also identify the company's own contributions to exacerbating climate-related risks to cotton suppliers - for example through purchasing practices that may undermine cotton farmers' resilience to changing weather patterns – and address these, before looking to switch suppliers. See <https://hmgroupp.com/wp-content/uploads/2022/03/HM-Group-Annual-and-Sustainability-Report-2021.pdf>, page 73.

⁶¹ See <https://www.patagonia.com/stories/its-time-we-prepare-our-workers/story-74427.html>

and building resilience to the climate crisis” and to invest in food production systems that are “resilient to the changing climate”.⁶²

- The forthcoming joint position paper of the OECD, UNEP and the UNFCCC secretariat on Responsible Business Conduct in relation to climate change action, is due to outline expectations of companies with regard not only to emissions reductions, but also *inter alia* climate adaptation and resilience.⁶³

⁶² Confectionery (2021) Ben & Jerry’s joins Tony’s Chocolonely uniting behind Fairtrade’s call for climate justice <<https://www.confectioneryproduction.com/news/37103/ben-jerrys-joins-tonys-chocolonely-uniting-behind-fairtrades-call-for-climate-justice/>>

⁶³ See <https://mneguidelines.oecd.org/responsible-business-conduct-and-climate-change.pdf>

3. DOES THE CORPORATE SUSTAINABILITY DUE DILIGENCE PROPOSAL REQUIRE COMPANIES TO UNDERTAKE CLIMATE CHANGE DUE DILIGENCE?

3.1 What are the major provisions of the CSDD proposal?

In February 2022, the EC released the CSDD proposal which aims to “ensure that companies active in the internal market contribute to sustainable development and the sustainability transition of economies and societies through the identification, prevention and mitigation, bringing to an end and minimisation of potential or actual adverse human rights and environmental impacts connected with companies’ own operations, subsidiaries and value chains.”⁶⁴

With the proposal, the EC focuses on improving corporate governance practices, avoiding fragmentation of due diligence requirements in the single market and increasing corporate accountability and improving access to remedies for those affected by adverse human rights and environmental impacts of corporate behaviour.⁶⁵

Nevertheless, the proposal has been criticised by various stakeholders, most notably regarding its scope⁶⁶, the notion of established business relationships⁶⁷,

⁶⁴ European Commission (2022) Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937. Preamble point 14. <https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF>

⁶⁵ European Commission (2022) Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937. Explanatory memorandum point 1. <https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF>

⁶⁶ See for example: Shift (2022) The EU Commission’s Proposal for a Corporate Sustainability Due Diligence Directive: Shift’s Analysis. <https://shiftproject.org/wp-content/uploads/2022/03/Shift_Analysis_EU_CSDDProposal_vMarch01.pdf>; European Coalition for Corporate Justice (2022) European Commission’s proposal for a directive on Corporate Sustainability Due Diligence: A comprehensive analysis. <<https://corporatejustice.org/wp-content/uploads/2022/04/ECCJ-analysis-CSDDD-proposal-2022.pdf>>

⁶⁷ See for example: Anti-Slavery International (2022) The EU proposal for mandatory due diligence: our initial review <<https://www.antislavery.org/the-eu-proposal-for-mandatory-due-diligence-our-initial-review/>>

access to justice⁶⁸, impacts on women, marginalised groups⁶⁹ and indigenous peoples⁷⁰, and weak stakeholder engagement⁷¹. These are all critical – and interconnected – issues, but a full discussion of them is beyond the scope of this paper. This section focuses instead on the specific assessment of the proposal's provisions with regard to climate change in light of the concept of climate due diligence set out in section 2.

3.2 Is Article 15 a red herring in relation to climate change due diligence?

The most explicit reference to climate change comes in Article 15, reproduced in Figure 2, which sets out responsibilities of companies with regard to the establishment of transition plans aligned with the 1.5C goal of the Paris Agreement. However, it is very limited and far from embedding climate due diligence into the proposal. We discuss its principal provisions and short-comings below, before turning to explore whether there are other – more promising – provisions related to climate change due diligence elsewhere in the proposal.

Firstly, the **scope of companies** covered by this article is even more limited than the scope of companies covered by the general provisions of the directive. The Article applies only to EU companies with more than 500 employees and a net worldwide turnover of more than EUR 150 million (Article 2(1)(a)) and third country companies with a net worldwide turnover of more than EUR 150 million (Article 2(2)(a)).

⁶⁸ See for example: Investor Alliance for Human Rights (2022) Investor Alliance for Human Rights Responds to EU Directive on Corporate Sustainability Due Diligence. <<https://investorsforhumanrights.org/news/investor-alliance-human-rights-responds-eu-directive-corporate-sustainability-due-diligence>>

⁶⁹ See for example: Actionaid (2022) EU's gender-blind corporate due diligence proposal risks leaving women behind. <<https://actionaid.org/news/2022/eus-gender-blind-corporate-due-diligence-proposal-risks-leaving-women-behind>>

⁷⁰ See for example: ProDESC (2022) PRODESC'S perspective on the publication of the proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence <<https://prodesc.org.mx/en/prodescs-perspective-on-the-publication-of-the-proposal-for-a-directive-of-the-european-parliament-and-of-the-council-on-corporate-sustainability-due-diligence/>>

⁷¹ See for example: Shift (2022) The EU Commission's Proposal for a Corporate Sustainability Due Diligence Directive: Shift's Analysis. <https://shiftproject.org/wp-content/uploads/2022/03/Shift_Analysis_EU_CSDDProposal_vMarch01.pdf>

Figure 2: Article 15 from the CSDD proposal*Article 15***Combating climate change**

1. Member States shall ensure that companies referred to in Article 2(1), point (a), and Article 2(2), point (a), shall adopt a plan to ensure that the business model and strategy of the company are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement. This plan shall, in particular, identify, on the basis of information reasonably available to the company, the extent to which climate change is a risk for, or an impact of, the company's operations.
2. Member States shall ensure that, in case climate change is or should have been identified as a principal risk for, or a principal impact of, the company's operations, the company includes emission reduction objectives in its plan.
3. Member States shall ensure that companies duly take into account the fulfilment of the obligations referred to in paragraphs 1 and 2 when setting variable remuneration, if variable remuneration is linked to the contribution of a director to the company's business strategy and long-term interests and sustainability.

Secondly, the **requirements for these companies** are extremely limited. They are obliged to adopt a transition plan aligned with the 1.5C goal of the Paris Agreement, but there are significant shortcomings with the requirements of these plans. For example:

- The plans should identify "in particular" the extent to which climate change is a **risk to the company**. This is a concept drawn from the Taskforce on Climate-related Financial Disclosures (TCFD) with a strong business case, but one that is unrelated to the company's impacts on either human rights or the environment, which should be the principal focus of CSDD.
- While the transition plans are also required to address the company's impact on climate change, this – and the consideration of business risks from climate change – is limited only to the **company's operations**, and not their supply chains. This is a major shortcoming because in many sectors the majority of the company's GHG emissions are in scope three, and the most significant business risks from climate change tend to relate to supply chain disruption.
- Only where the business risks from climate change or the company impacts on climate change are considered "principal" – itself an ambiguous standard – should the plan include "emissions reduction objectives", but no further guidance is given with regard to the **adequacy** of these "objectives", such as whether they should include both near-term and long-term goals. Furthermore there is no indication that company objectives are required at all in relation to climate adaptation or resilience.

Thirdly, the language of Article 15(3) surrounding the impact of obligations on **variable remuneration** is very weak. It stipulates that the fulfilment of those obligations should only be taken into account for the evaluation of variable remuneration if variable remuneration “is linked to the contribution of a director to the company’s business strategy and long-term interests and sustainability”. This precondition once again restricts the number of companies that it factually applies to.

Finally, it should be noted that none of the provisions in Article 15 are proposed to be subject to the **civil liability** provisions of the CSDD as set out in Article 22, which refers only to the failure of a company to comply with the provisions in Articles 7 and 8 (on preventing and addressing adverse impacts as part of the core due diligence provisions of the Directive.)

Given this strictly limited scope of companies, and the very weak requirements of these companies, it is doubtful whether the article as currently drafted will actually require any significant change in business practice across the EU market at all. Certainly, the article would not require companies to undertake comprehensive climate change due diligence as set out in section 2. Indeed, it could even be seen as a “red herring” – a distraction from the need to fully embed climate change due diligence in the CSDD.

3.2.1 What are the options for strengthening Article 15?

But while Article 15 may not offer a strong basis for defining the requirements of climate change due diligence, so long as such a basis is provided elsewhere in the Directive (see below) there are nonetheless a number of options through which it could be strengthened in order to make a more meaningful contribution to driving corporate climate action. Some of these options are set out in Table 3.

Table 3. Potential options for strengthening Article 15

Section	Subject	Options to strengthen
Article 15(1)	Scope of companies	At a minimum, the provision should be extended to include all companies covered by the scope of the overall directive, as defined in Article 2.

		As several stakeholders have noted, there is a good case for extending the scope of Article 2, irrespective of Article 15 ⁷² .
Article 15(1)	Operations and the whole supply chain	It is vital to extend the provisions beyond just the company's operations to cover the entire supply chain, given that: in most sectors the majority of company GHG emissions are in Scope 3 ⁷³ ; and that the highest vulnerability of rights-holders to climate change – and therefore the greatest climate-related business as well as human rights risks – is likely found upstream in supply chains rather than in company operations (particularly where supply chains extend to regions where exposure to physical climate impacts may be higher than in Europe and levels of resilience to those impacts lower, such as in sub-Saharan Africa or South-East Asia for example) ⁷⁴
Article 15(2)	Mitigation and adaptation	The word “principle” should be deleted or at a minimum could be replaced with “material”, to align more closely with corporate risk assessment exercises. This would broaden the scope of companies to which the provisions would apply, given that climate risks are highly likely to be material to most companies, even if they may face other “principle” risks. Additional detail should be given regarding the adequacy of “emissions reduction objectives”. These should entail

⁷² See for example: European Coalition for Corporate Justice (2022) Dangerous gaps undermine EU Commission's new legislation on sustainable supply chains. <<https://corporatejustice.org/news/dangerous-gaps-undermine-eu-commissions-new-legislation-on-sustainable-supply-chains/>>; Human Rights Watch (2022) EU: Disappointing Draft on Corporate Due Diligence. <<https://www.hrw.org/news/2022/02/28/eu-disappointing-draft-corporate-due-diligence>>; ShareAction (2022) EU presents watered-down rules on Corporate Sustainability Due Diligence. <<https://shareaction.org/news/eu-presents-watered-down-rules-on-corporate-sustainability-due-diligence>>

⁷³ Labutong, N. and Hoen, V. (2018) How can companies address their scope 3 greenhouse gas emissions?. <<https://www.cdp.net/en/articles/companies/how-can-companies-address-their-scope-3-greenhouse-gas-emissions>>

⁷⁴ Intergovernmental Panel on Climate Change (2022) Climate Change 2022: Impacts, Adaptation and Vulnerability. <https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_FinalDraft_FullReport.pdf>

		<p>science-based, near, medium and long-term emissions reduction targets for Scope 1, 2 and 3.</p> <p>Furthermore, the transition plans should include timebound commitments to address identified areas of vulnerability to climate-related business, human rights and environmental risks.</p>
Article 15(3)	Remuneration	<p>At a minimum, the final clause – “<i>if variable remuneration is linked...</i>” – should be deleted. This would broaden the scope to all companies with variable remuneration approaches, getting closer to the intent of the original directors’ duties proposal to ensure that directors are required to take sustainability considerations into account.</p> <p>By contrast, it is hard to imagine any company that <i>does already</i> link variable remuneration to a company’s long-term sustainability <i>not</i> taking into account the fulfilment of the obligations outlined in Article 15, which means that the provision as currently drafted may in many cases be redundant.</p>

It should be stressed, however, that while amending Article 15 can strengthen the obligations for corporate climate action, it would still not provide the basis for comprehensive corporate climate change due diligence duties as described in Section 2 and should not be seen as an alternative. Any amendments to Article 15 should therefore be seen as additional or complementary to ensuring climate change is embedded in the core due diligence provisions of the Directive, as discussed below.

3.3 Does the CSDD proposal provide a basis for climate change due diligence?

3.3.1 Does the CSDD proposal provide for climate change due diligence in relation to human rights and/or environmental due diligence?

As discussed in Box 1 above, climate change due diligence may in theory be understood as a sub-set of human rights due diligence, of environmental due diligence or both. The CSDD proposal includes (in Article 3) definitions of ‘adverse environmental impact’ and of ‘adverse human rights impact’ that effectively determine which issues should be included in company due diligence processes. These are defined in relation to the violation of provisions in international

environmental or human rights conventions listed in the Directive's Annex (part I concerning human rights, and part II concerning the environment).

With regard to the **environment**, it is notable that the Paris Agreement is not included in the proposed Annex part II. This would imply that the CSDD proposal does not provide the basis for a corporate duty to conduct climate change due diligence, at least not in relation to adverse environmental impacts.

There are a number of shortcomings with the proposed approach to defining adverse environmental impacts only in relation to a select list of environmental conventions. As noted by Sherpa⁷⁵ and others, international environmental law is a fragmented patchwork that by no means covers all environmental impacts of concern. There is no convention covering, for example, soil pollution or degradation, among many other blind spots. Building environmental due diligence only in relation to existing conventions would therefore mean that major areas of environmental damage would be missed.

Furthermore, as Sherpa notes, there is uncertainty about the extent to which international environmental conventions have "horizontal" effects that can be applied to companies. Indeed, this appears to have been part of the EC's rationale for the exclusion of the Paris Agreement from the list⁷⁶. But the same concern would apply to the other conventions too.

Sherpa and others argue that the CSDD should instead define adverse environmental impacts in relation to a general clause, and not in relation to specific international conventions only. This would mirror the approach taken to define environmental harm in the French Duty of Vigilance law and that adopted by the European Parliament in its Resolution on Corporate Due Diligence in March 2021. The latter defined adverse environmental impacts more broadly as "any violation of internationally recognised and Union environmental standards, as set out in Annex XXX to this Directive".⁷⁷

With regard to **human rights**, part I of the Annex does however include in Article 18 reference to the "prohibition of causing any measurable environmental

⁷⁵ Sherpa (2022) Commission's proposal for a Directive on "corporate sustainability due diligence": Initial analysis of Environmental issues. Forthcoming.

⁷⁶ Private correspondence with the authors.

⁷⁷ European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)). Article 3. <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html>

degradation, such as...harmful emissions” that may have an impact on certain human rights or “affects ecological integrity, such as deforestation” (see Figure 2).

Figure 2: Annex I part I Article 18

18. Violation of the prohibition of causing any measurable environmental degradation, such as harmful soil change, water or air pollution, harmful emissions or excessive water consumption or other impact on natural resources, that
- (a) impairs the natural bases for the preservation and production of food or
 - (b) denies a person access to safe and clean drinking water or
 - (c) makes it difficult for a person to access sanitary facilities or destroys them or
 - (d) harms the health, safety, the normal use of property or land or the normal conduct of economic activity of a person or
 - (e) affects ecological integrity, such as deforestation,
- in accordance with Article 3 of the Universal Declaration of Human Rights, Article 5 of the International Covenant on Civil and Political Rights and Article 12 of the International Covenant on Economic, Social and Cultural Rights;

While the scope of the human rights provisions referred to in Article 18 are somewhat limited, given the “rights-turn” in recent climate litigation cases noted by Macchi⁷⁸, this seems to offer a significant basis for company duties to address climate change-related (and other environmentally related) adverse human rights impacts. That said, approaching climate change due diligence solely in relation to adverse human rights impacts can be criticised as “anthropocentric” and risks missing other “pure” environmental harms that may occur even where clear human rights impacts are not discernible⁷⁹.

3.3.2 What are the options for strengthening climate change due diligence obligations in the CSDD proposal?

As discussed above, while Article 15 may offer opportunities – if amended appropriately – to strengthen some aspects of corporate climate action, it is imperative, for the reasons set out in Section 1, first and foremost to ensure that climate change is embedded in the core due diligence provisions of the proposal.

The options for doing so are mapped in Table 4 below, covering amendments in relation to either adverse human rights impacts and/or adverse environmental

⁷⁸ Macchi, C. (2021) The Climate Change Dimension of Business and Human Rights: The Gradual Consolidation of a Concept of ‘Climate Due Diligence’. *Business and Human Rights Journal*, 6(1) doi:10.1017/bhj.2020.25

⁷⁹ Sherpa (2022) Commission’s proposal for a Directive on “corporate sustainability due diligence”: Initial analysis of Environmental issues. Forthcoming.

impacts, and amendments to either the Annex and/or the main body of the Directive. Some of the strengths and weaknesses in relation to these options are then discussed below.

Table 4. Options for ensuring climate change is embedded in the core due diligence provisions of the CSDD proposal

	Options related to adverse human rights impacts	Options related to adverse environmental impacts
Options related to the Annexes	Defend Article 18, Part I as the basis for climate change due diligence.	Add the Paris Agreement to the list of applicable international environmental conventions.
	Amend Article 18 to add additional human rights provisions of international conventions that have been successfully cited in climate litigation.	Add a catch-all environmental impacts clause in Annex part II, similar to that provided in Annex part I Article 21.
Options related to definitions in Article 3	Amend the definition of adverse human rights impacts to include an explicit reference to climate change.	Amend the definition of adverse environmental impacts to include a non-exhaustive list of types of environmental harm, including climate change (mitigation and adaptation).

At a minimum, the existing provision in **Annex I Article 18** for the prohibition of “causing any measurable harmful environmental degradation, such as... harmful emissions...” must be retained. Given the slightly limited scope of human rights provisions referred to in this Article, however, it could also be broadened to include more references to human rights that have been successfully cited in climate litigation, such as in the Urgenda or Milieudefensie et al cases referred to in Section 1.

The proposal currently lists Article 3 of the Universal Declaration of Human Rights, Article 5 of the International Covenant on Civil and Political Rights and Article 12

of the International Covenant on Economic, Social and Cultural Rights. However, the State of the Netherlands v Urgenda Foundation case refers to Articles 2 and 8 of the European Convention on Human Rights and extends their interpretation to encompass human rights violations caused by the consequences of climate change⁸⁰. Moreover, Milieudefensie et al. v Royal Dutch Shell case stated that this interpretation shall be extended to Articles 6 and 17 of the International Covenant on Civil and Political Rights⁸¹.

However, as noted above, if this remains the sole basis for corporate climate change due diligence duties, it would limit the scope of types of environmental harm related to the climate crisis to be considered. Seemingly the most straightforward amendment to address this would therefore be to **add the Paris Agreement** to the Annex part II, notwithstanding the EC's seeming reluctance to do so. However, given the short-comings with the overall approach to defining adverse environmental impacts solely in relation to specific environmental conventions or agreements⁸², as outlined above, this would still be a sub-optimal approach.

As discussed above, it would be preferable to instead or in addition insert a new **general definition of adverse environmental impact**, either in a new general article in the Annex part II (similar to Article 21 in Annex part I) or ideally in Article 3(b). Different approaches could be used in this regard. For example, the Directive could simply refer to "severe impacts on the environment" in a generic sense, similar to the approach in the French Duty of Vigilance law.

Given that climate change is widely understood to be among the gravest environmental risks, it would be hard for any company to credibly avoid addressing climate change impacts in its due diligence processes if this approach were pursued. However, such an approach may also fail to give sufficient clarity about the importance of considering both climate change mitigation (emissions reductions) *and* adaptation as set out in Section 2. In this sense, an approach with greater granularity would be preferable.

Alternatively, the article could include a non-exhaustive list of more specific examples of severe environmental impacts that should be considered as part of

⁸⁰ The state of the Netherlands v the Urgenda Foundation (2018) 200.178.245/01. <http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2018/20181009_2015-HAZA-C0900456689_decision-4.pdf>

⁸¹ Milieudefensie et al. v Royal Dutch Shell (2021) C/09/571932 / HA ZA 19-379. <http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210526_8918_judgment-2.pdf>

⁸² It is worth noting in this regard that the Paris Agreement is not an international treaty, but rather a decision of the Conference of the Parties of the UNFCCC.

environmental due diligence processes. Such a list could, for example, be drawn from the EP proposed amendments of the **Batteries and Waste Batteries Regulation**⁸³ – which includes “climate, including greenhouse gas emissions”⁸⁴. Although while this may help ensure other types of environmental impacts are duly covered, here too the language in relation to climate change would be unlikely to provide sufficient specificity to guide companies to consider their impacts in relation to both climate adaptation as well as mitigation (of greenhouse gas emissions).

The most promising option in this regard would therefore be to refer to adverse environmental impacts as any which negatively affect one or more of the environmental objectives of the EU, as set-out in the **Taxonomy Regulation**⁸⁵, which includes both climate change mitigation (ie emissions reductions) and climate change adaptation. Arguably a similar approach could be taken with regard to the definition of adverse human rights impacts in Article 3(c) also, with amendments adding non-exhaustive, specific examples of severe adverse impacts, including climate change-related impacts.

It is important to note that in principle the clarity that would be sought with regard to climate change due diligence through these amendments could also be secured via **delegated acts or other processes** (including test cases or multi-stakeholder initiatives, such as in OECD working groups) after the adoption of the Directive. However, such an approach should ideally be avoided in favour of providing clarity and removing ambiguity as far as possible in the Directive itself.

Delegated Acts have less public scrutiny, while test cases take time. While such processes will inevitably be required to further elaborate on the practical implementation of climate change due diligence processes, they should not be relied on to define whether or not climate change mitigation and adaptation should be considered as part of a company’s core due diligence duties under the Directive.

⁸³ European Commission (2020) Proposal for a regulation of the European Parliament and of the Council concerning batteries and waste batteries, repealing Directive 2006/66/EC and amending Regulation (EU) No 2019/1020. COM/2020/798 final. <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0798&qid=1613426366165>>

⁸⁴ European Parliament (2022) Amendments adopted by the European Parliament on 10 March 2022 on the proposal for a regulation of the European Parliament and of the Council concerning batteries and waste batteries, repealing Directive 2006/66/EC and amending Regulation (EU) 2019/1020 (COM(2020)0798 – C9-0400/2020 – 2020/0353(COD)). Amendment 466. <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0077_EN.html>

⁸⁵ European Commission (2020) Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (Text with EEA relevance). PE/20/2020/INIT. <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32020R0852>>

As discussed in Section 1, the risks of very severe and irremediable adverse climate-related human rights and/or environmental impacts are too high to allow for any further ambiguity or delay in this regard.

3.3.3 What other aspects of the CSDD proposal should be amended to strengthen provisions on climate change due diligence?

There are many other aspects of the CSDD proposal that require strengthening, some of which noted in Section 3.1, which are beyond the scope of this paper but are well set out by others.⁸⁶ One further aspect is, however, worth noting: the absence of any reference to **remediation** in the proposal.

As discussed in Section 2, remediation should be seen as a core element of climate change due diligence. Given the urgency with which climate change loss and damage is being negotiated at the UNFCCC, it is imperative that the directive offers new avenues for remediation of severe climate impacts to which adaptation is no longer possible.

⁸⁶ See for example: Shift (2022) The EU Commission's Proposal for a Corporate Sustainability Due Diligence Directive: Shift's Analysis. <https://shiftproject.org/wp-content/uploads/2022/03/Shift_Analysis_EU_CSDDProposal_vMarch01.pdf>; European Coalition for Corporate Justice (2022) European Commission's proposal for a directive on Corporate Sustainability Due Diligence: A comprehensive analysis. <<https://corporatejustice.org/wp-content/uploads/2022/04/ECCJ-analysis-CSDDD-proposal-2022.pdf>>

4. CONCLUSION

Consideration of climate change-related adverse human rights and environmental impacts should be central to due diligence frameworks in general and to the CSDD in particular. Given the severity and irremediability of climate-related impacts, there should be no ambiguity as to whether companies are required to consider climate change in their corporate sustainability due diligence processes – they should be clearly directed to do so.

Such climate change due diligence processes should entail efforts by companies to identify and address their contributions to climate-related adverse human rights and environmental impacts *both* in relation to their greenhouse gas emissions (across scopes 1, 2 and 3) *and* in relation to the adaptive capacity or resilience of rights-holders and ecosystems connected to their operations and supply chains. Furthermore, companies should undertake remediation processes where such climate-related impacts to which they have contributed cannot be avoided, which could, for example, include contributions to climate loss and damage trust funds.

The CSDD proposal's clearest consideration of climate change is given in Article 15, requiring a sub-set of companies covered by the general provisions of the Directive to produce climate transition plans if they consider climate change to be a "principle" risk to or a "principle" impact of their company's operations. While there are a number of options that would significantly strengthen the currently very weak and ineffectual requirements of companies in relation to this article, it falls far short of the requirements of comprehensive climate change due diligence as set out in this paper.

Much more significant is the question of whether or not the core due diligence provisions of the directive encompass climate-related impacts. Notably there is currently no basis for considering climate change in relation to adverse environmental impacts, although there is a basis for doing so in relation to adverse human rights impacts. The EU legislators should ensure that climate change is unambiguously considered in relation to both.

The most promising approach to doing so is likely to further strengthen the existing provision in relation to human rights in Annex part I Article 18, while adding a new definition of adverse environmental impacts – either in the Annex or in

Article 3 of the Directive – based on a non-exhaustive list of examples that includes harm to both climate mitigation and climate adaptation, for example on the basis of the environmental objectives of the EU detailed in the Taxonomy Regulation.

The issues discussed in this paper are only a sub-set of those that should be addressed in the CSDD proposal to ensure companies in the EU market conduct the robust due diligence practices needed to avoid, mitigate and remediate the most severe human rights and environmental impacts. But one thing is clear, no such framework can be effective unless climate change is unambiguously considered at its heart.



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