

The Commission's Proposal for a Directive on Corporate Sustainability Due Diligence:

A restatement of the status quo or a new Nordic
Contracts Act § 36?



På Erik Henningsens populære maleri fra 1892 er en hel arbejderfamilie blevet sat på gaden, med al det indbo, familien ejer. Når det kommer til modgang og social nød, kan mange kunstnerfamilier godt konkurrere med arbejderne. Den største forskel er, at det at være og leve som kunstner er et frit erhverv. Maleriet 'Sat ud' tilhører Statens Museum for Kunst.

Peter Michael Hornung i Politiken

19.2.2021

Det fortæller om en tid i så voldsom forandring, at den sociale lovgivning slet ikke kunne følge med. For i anden halvdel af 1800-tallet var et gammelt landbrugsland ved at forvandle sig til et moderne industrisamfund. Som følge af indflytningen fra land til by var København blevet meget tættere befolket, og boligbyggeriet kunne slet ikke holde trit med en industri i voksenalderen. En fjerdedel af landets samlede befolkning (på lidt over to millioner) havde nu bolig i hovedstaden, og den fattigste fjerdedel af denne fjerdedel måtte slå sig til tåls med usunde boligforhold. Ydermere var der endnu ikke spundet et socialt sikkerhedsnet under de arbejderfamilier, som uventet blev ramt af sygdom, arbejdsløshed o.l. Hvis man faldt, kunne man falde dybt.

I 1891 var der vedtaget en lov om aldersunderstøttelse, men ældreforsorg og alderdomshjem var i praksis stadig overladt til privat velgørenhed.

Nordic Contracts Act § 36 (Finland, 956/1982)

(1) If a contract term is unfair or its application would lead to an unfair result, the term may be adjusted or set aside. In determining what is unfair, regard shall be had to the entire contents of the contract, the positions of the parties, the circumstances prevailing at and after the conclusion of the contract, and to other factors.

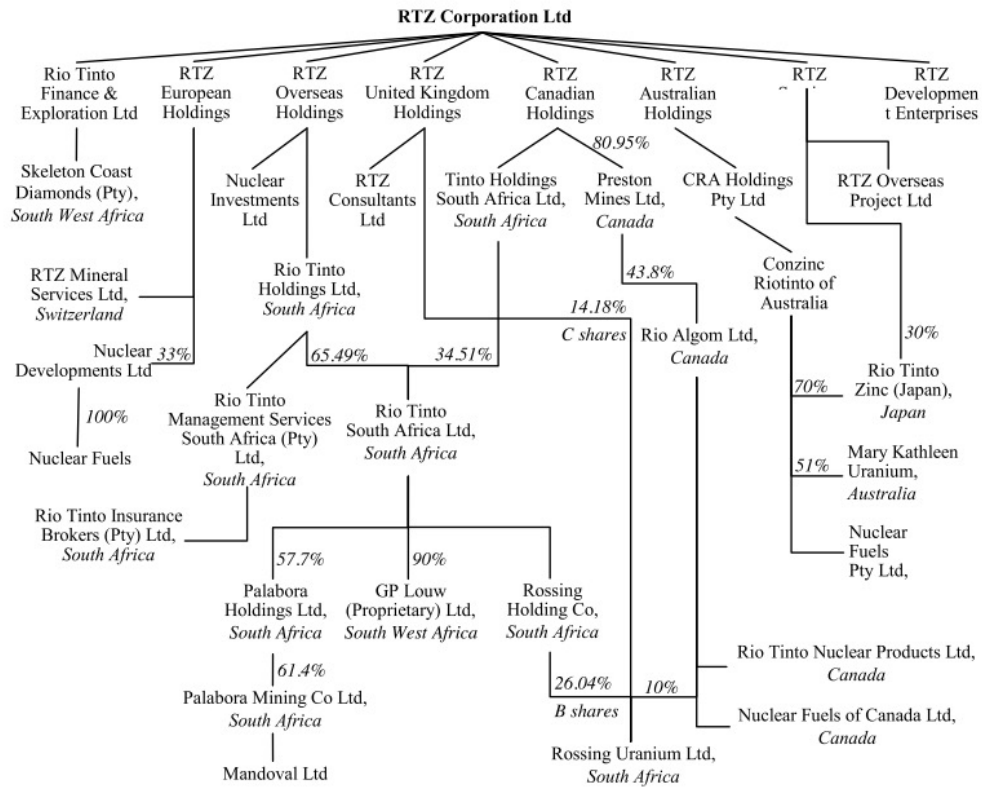
(2) If a term referred to in paragraph (1) is such that it would be unfair to enforce the rest of the contract after the adjustment of the term, the rest of the contract may also be adjusted or declared terminated.

(3) A provision relating to the amount of consideration shall also be deemed a contract term.

”Jos oikeustoimen ehto on kohtuuton tai sen soveltaminen johtaisi kohtuuttomuuteen, ehtoa voidaan joko sovitella tai jättää se huomioon ottamatta...”

Challenges for private law in the 2020s

- Fragmentation / Sirpaloituminen
- Contextualization / Kontekstualisoituminen
- Transnationalization / Ylikansallistuminen
- Increasing ubiquity of contracts / Sopimisen jokapaikkaistuminen



UNCTAD World Investment Report (2013):

Global investment and trade are inextricably intertwined through the international production networks of firms investing in productive assets worldwide and trading inputs and outputs in cross-border value chains of various degrees of complexity. Such value chains (intra-firm or inter-firm, regional or global in nature, and commonly referred to as Global Value Chains or GVCs) shaped by TNCs [transnational corporations] account for some 80% of global trade.

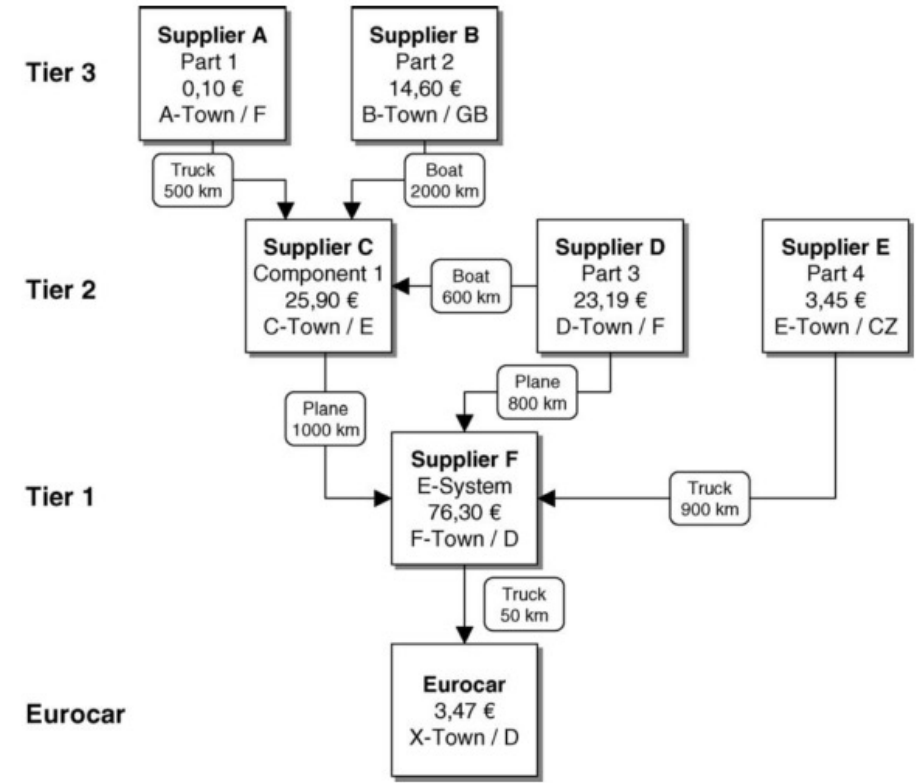


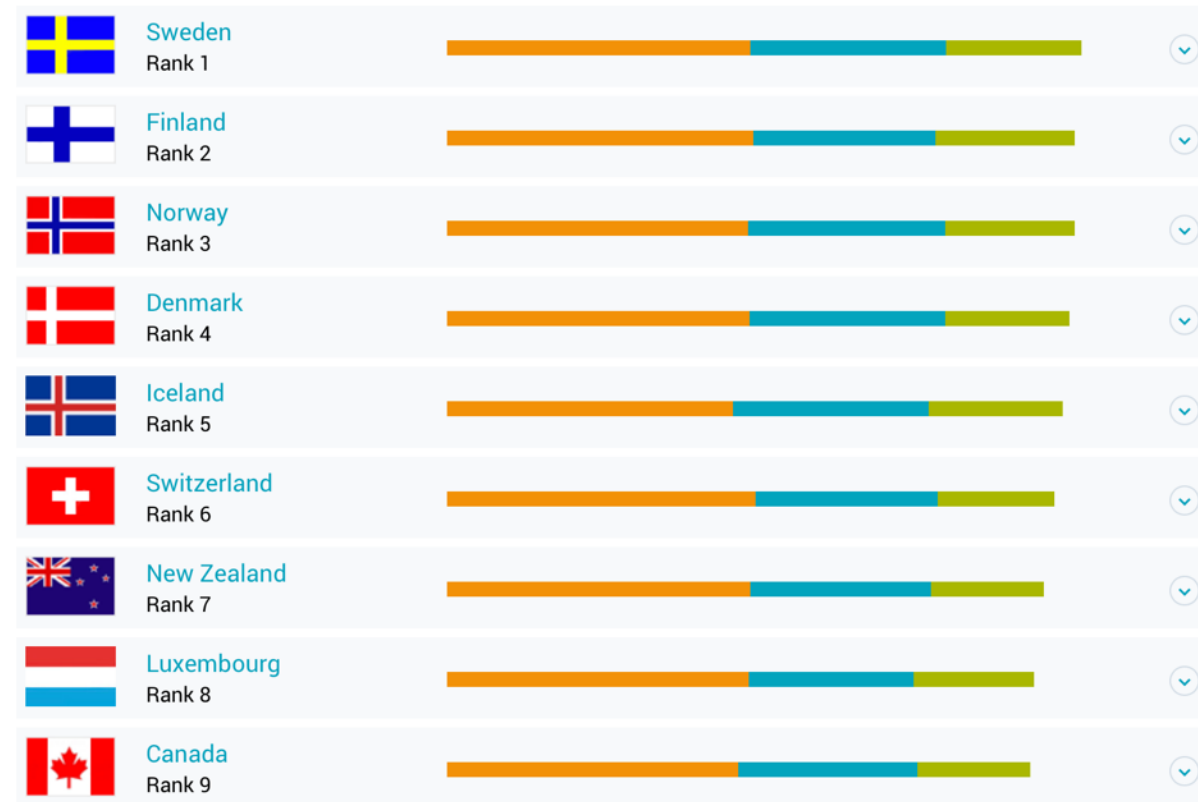
Fig. 3. Value chain flow chart.

Sustainability, with focus on nation states...

Last updated: October, 2020





















■ Governance ■ Social ■ Environmental

Highest 20

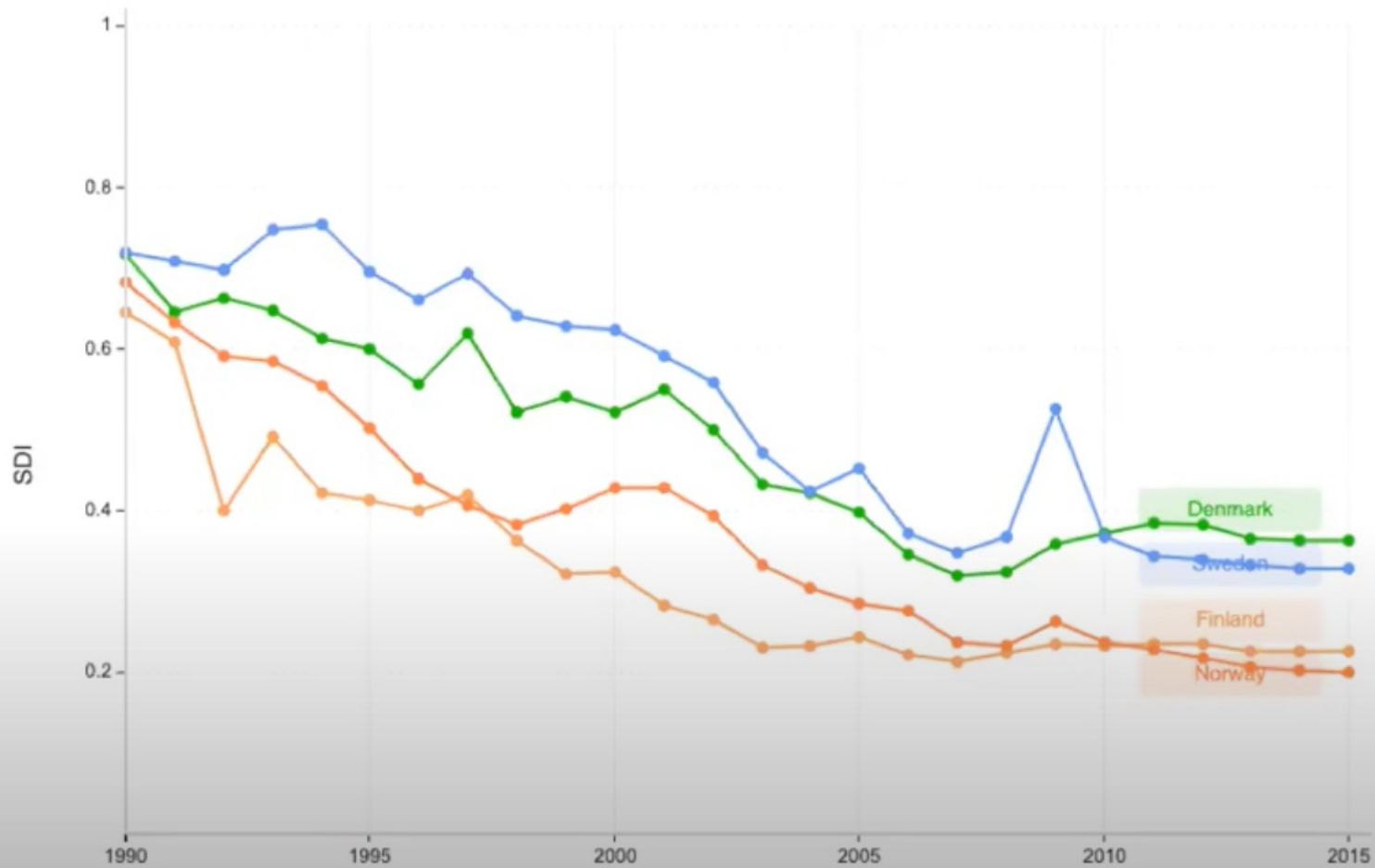


<https://www.robeco.com/en/key-strengths/sustainable-investing/country-ranking/>

Sustainability, with focus on GVCs...

	139	Denmark	0.363	80.6	19.2	12.5	47,000	10.39	24.27
	140	Brunei Darussalam	0.355	77	14.5	9	78,611	11.54	19.81
	141	Botswana	0.351	65.8	12.6	9.2	15,109	5.97	34.40
	142	Cyprus	0.347	80.3	14.3	11.9	30,744	9.38	26.68
	143	Greece	0.332	81	17.3	10.6	24,251	10.16	26.50
	144	Sweden	0.328	82.3	17.6	12.4	46,380	8.97	31.72
	145	Japan	0.319	83.6	15.2	12.5	39,322	11.57	24.91
	146	Lithuania	0.310	74.5	16.1	13	25,922	8.27	34.55
	147	Netherlands	0.309	81.7	18.1	12.1	46,239	11.41	26.73
	148	Korea	0.286	81.9	16.5	12.1	34,276	12.11	27.11
	149	Bahamas	0.284	75.5	12.8	11.1	27,602	14.13	20.96
	150	Turkmenistan	0.263	67.7	10.8	9.8	14,293	13.56	20.68
	151	Switzerland	0.263	83.1	16.2	13.4	58,280	11.83	31.73
	152	Austria	0.258	81.4	15.9	12.1	43,984	11.59	32.02
	153	Qatar	0.251	78	13.4	9.8	117,896	25.91	13.35
	154	Slovakia	0.238	76.7	15	12.5	27,851	11.48	34.42
	155	Iceland	0.233	82.6	19.3	12.2	42,425	12.97	33.94
	156	Finland	0.227	81.1	17.6	12.4	39,248	12.74	35.39
	157	Estonia	0.209	77.4	16.1	12.7	26,985	17.27	27.93
	158	Norway	0.200	82	17.7	12.5	67,028	14.38	37.71

The downward slide...



Rankings:

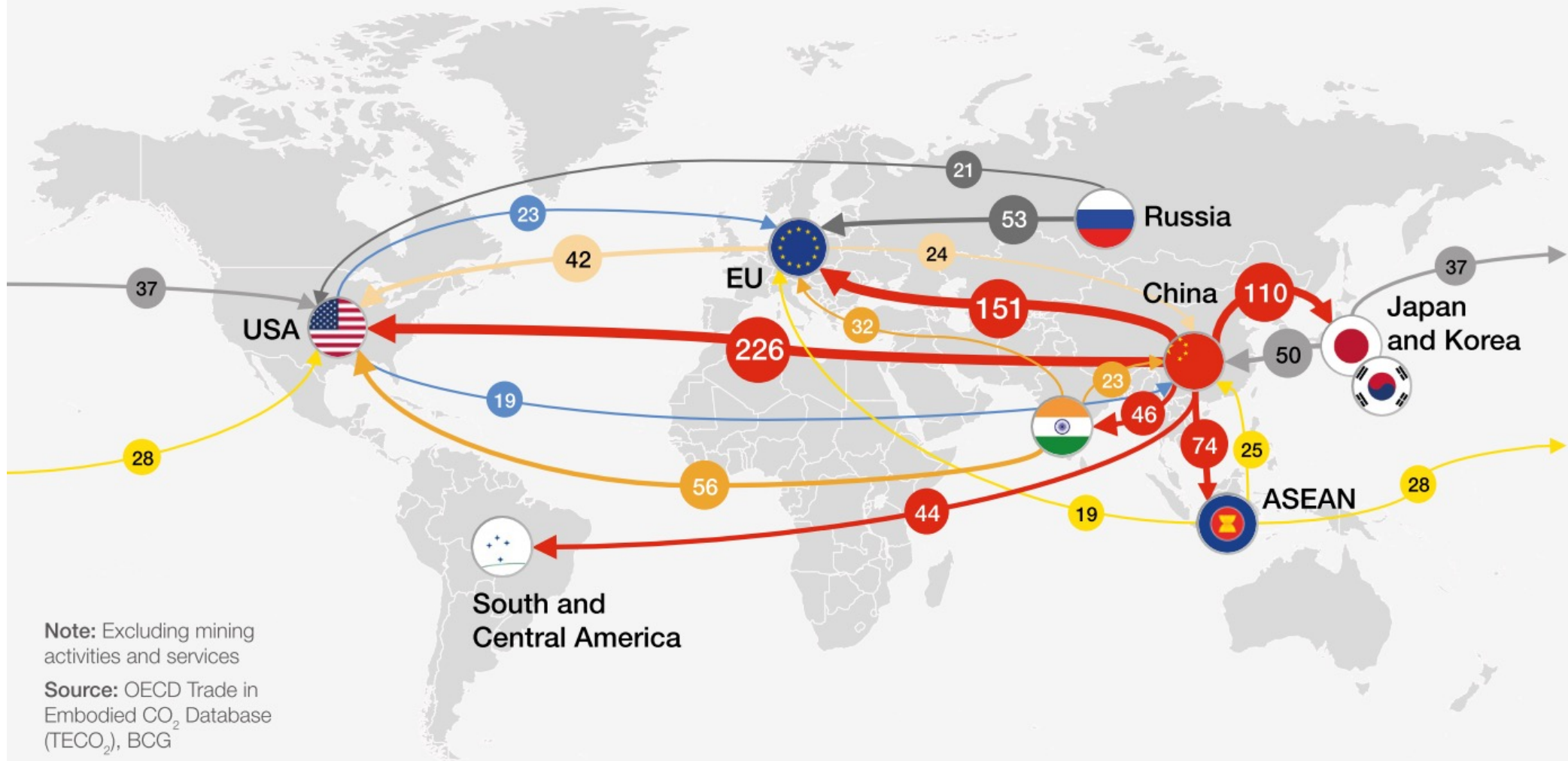
Sweden: 7 → 143

Iceland: 155

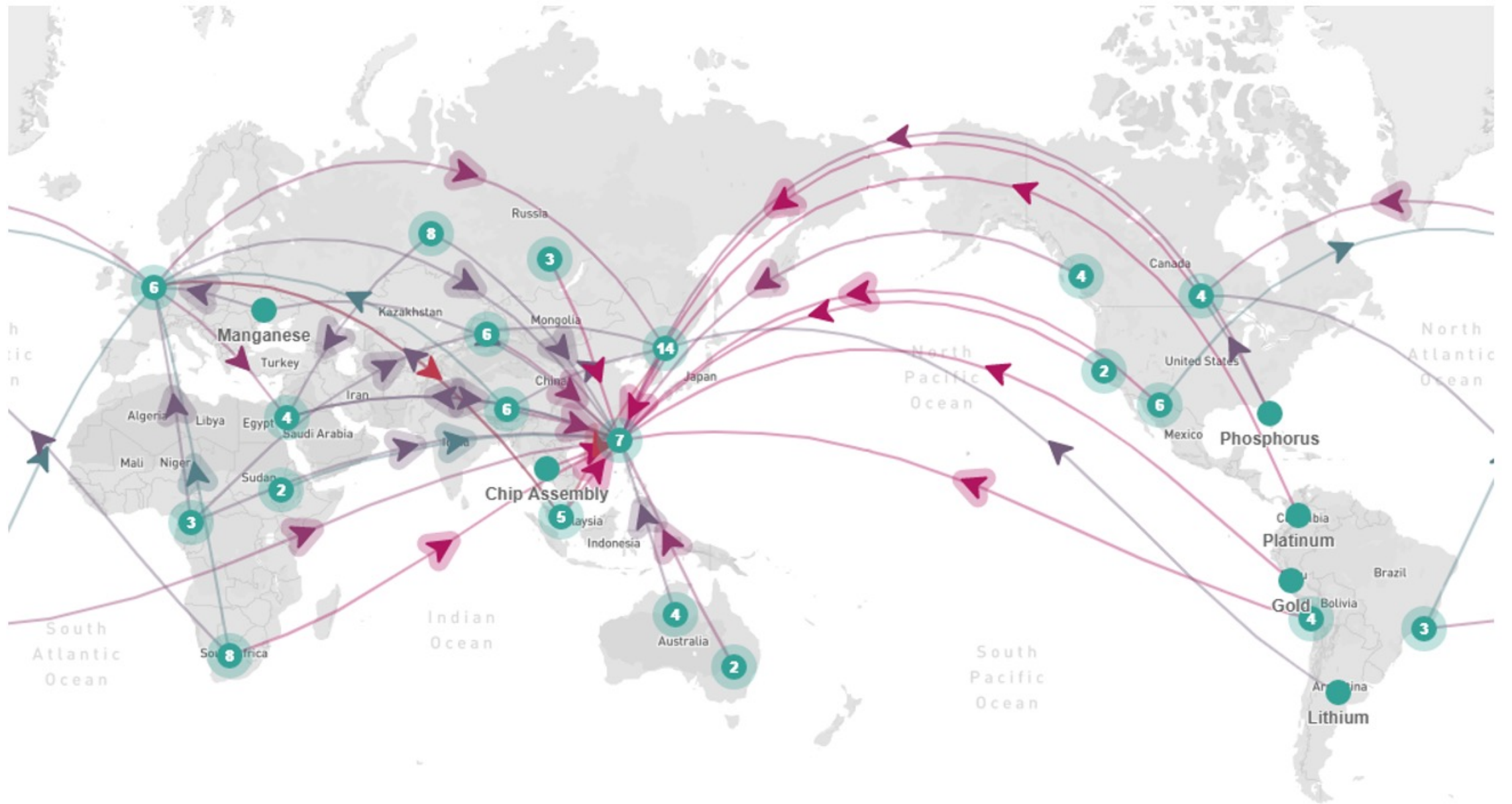
Finland: 156

Norway: 158

Top 20 global CO₂ export flows (Mt CO₂, 2015)



Note: Excluding mining activities and services
Source: OECD Trade in Embodied CO₂ Database (TECO₂), BCG

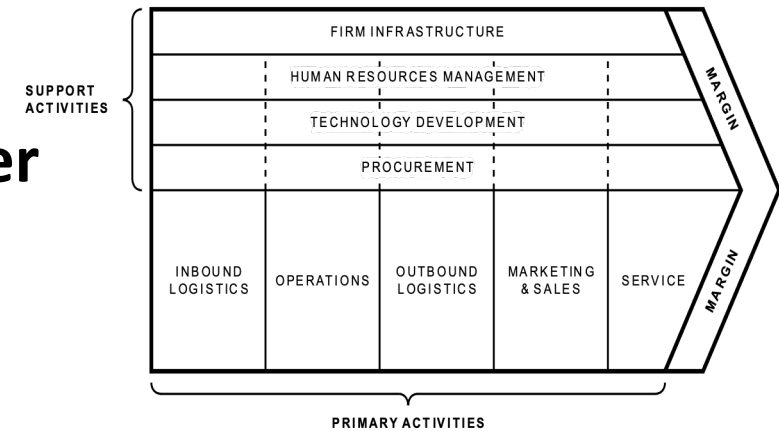


A global value chain?

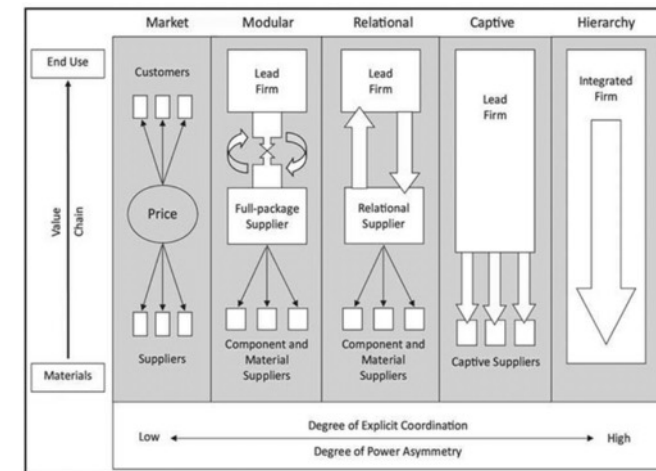
...by analyzing the full range of activities that firms and workers perform to bring a specific product from its conception to its end use and beyond, the GVC approach provides a holistic view of global industries... (Gereffi 2014)

A focus on how key actors, lead firms, govern fragmented and globalized production practices.

**Michael Porter
(1985)**



**Gary Gereffi et al
(2005)**



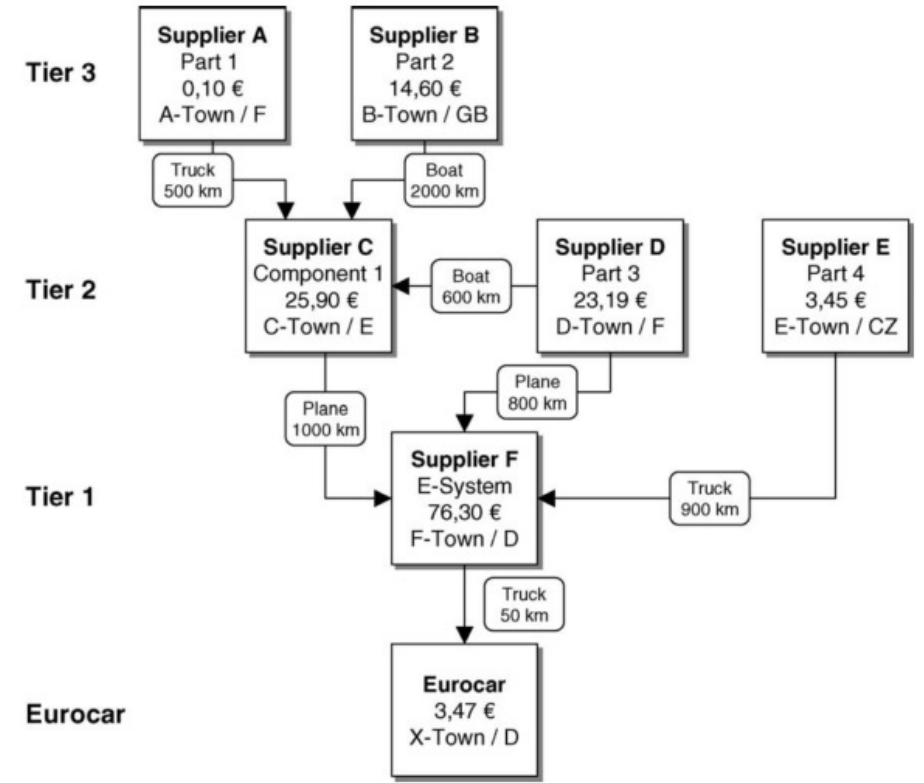
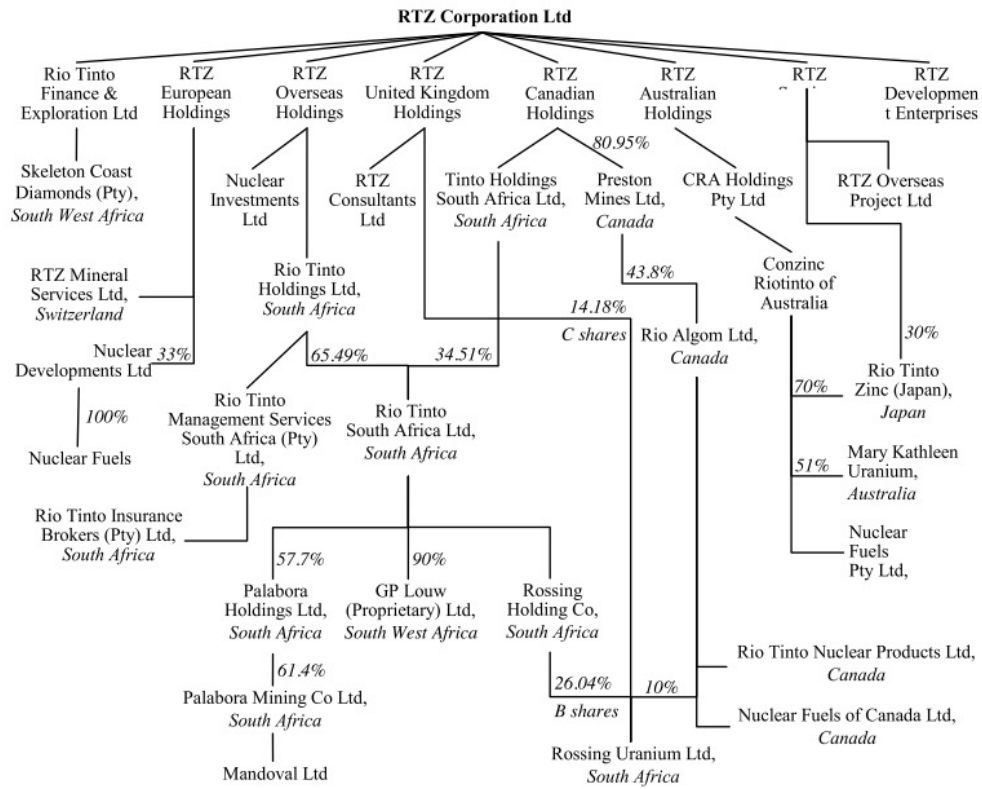


Fig. 3. Value chain flow chart.

Lord Briggs in *Lungowe v Vedanta*, [2019] UKSC 20

There is no limit to the models of management and control which may be put in place within a multinational group of companies. At one end, the parent may be no more than a passive investor in separate businesses carried out by its various direct and indirect subsidiaries. At the other extreme, the parent may carry out a thoroughgoing vertical reorganisation of the group's businesses so that they are, in management terms, carried on as if they were a single commercial undertaking, with boundaries of legal personality and ownership within the group becoming irrelevant, until the onset of insolvency, as happened within the Lehman Brothers group.

The climate, Maersk, and coordinating BMW's 12000 suppliers in 70 countries in 2014



188

P. Kajüter, H.I. Kulmala / Management Accounting Research 16 (2005) 179–204

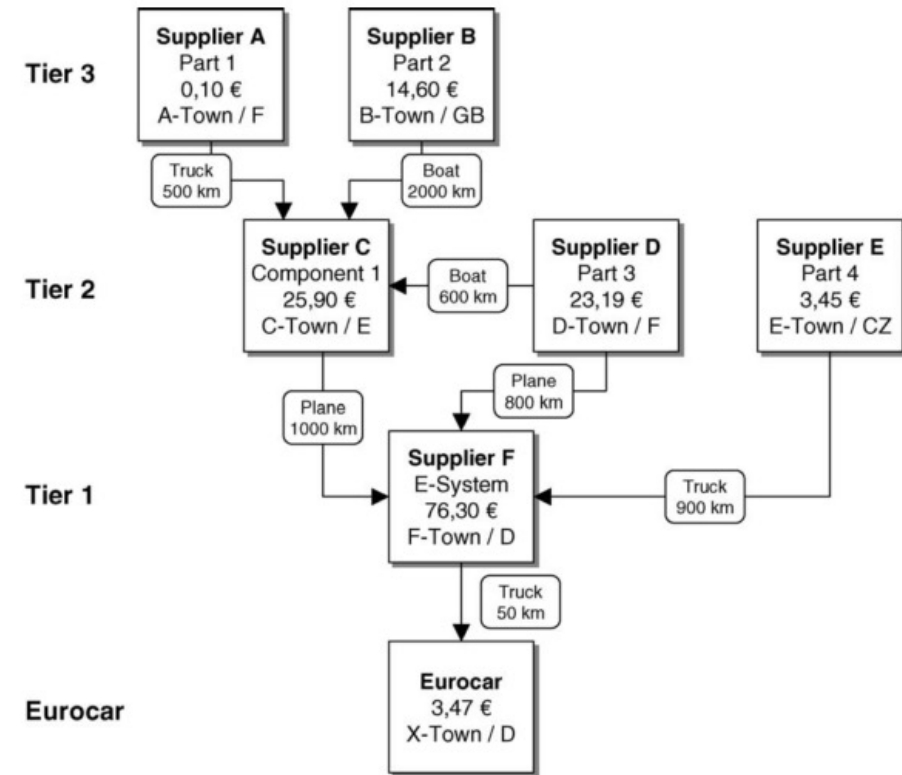


Fig. 3. Value chain flow chart.

ALLTID
K KJØTT

erer bare
orfekjøtt og
kylling.



VI KOMPENSERER FOR
ALL VÅR MILJØPÅVIRKNING
- FRA BONDENS JORD TIL
RESTAURANTENS BORD -
VED Å PLANTE TRÆR
I AFRIKA.

VÅR P

Vi lever for å finne nye smaker,
spennende kombinasjoner og de beste
råvarene. Og ambisjonen er den samme
som i 1968 - å kunne servere deg
Norges beste hamburgere.
Velkommen til Max!



6148

1920

1917



Vi lager hamburgeren
din på bestilling.

Dip

Kettle's Best
Coffee

Kettle's Best
Coffee



Governing global value chains: why?

Why govern an organizationally and globally fragmented production entity?

- 1. Logistical operation and functioning of fragmented entities**
- 2. Marketing (end-user focus)**
- 3. Quality, adherence to standards**
- 4. Research and development**
- 5. Cost-management**

- 6. Sustainability?**
- 7. Geopolitics, security of supply?**

Balancing the freedom to outsource for efficiency with sustainability and public policy?

Jurisdictional 'market' boundaries: if production would take place within our own jurisdictions, the debate would be rather different.

Governing global value chains: how?

Contract Paradigm	Macneil 1978	Williamson 1979	Gereffi, Humphrey, and Sturgeon 2005	Locke 2013
Classic Privity	Classical Contract Law	Market Governance	Market Governance	Market Governance
3rd Party Inclusivity	Neo-Classical Contract Law	Trilateral Governance	Modular Governance	Private Compliance
Special Relationship	Relational Contract Law	Bilateral Governance	Relational Governance	Capability Building
Increased Intensity of SR	–	–	Captive Governance	Partnering
(Firm)	(Firm)	(Unilateral Governance)	(Hierarchy)	(Firm)

Salminen, Towards a Genealogy and Typology of Governance Through Contract Beyond Privity, 16 *European Review of Contract Law* 1 (2020), 25–43, <https://doi.org/10.1515/ercl-2020-0003>

Governing global value chains: how?

1. **Market governance = classic arm's length contracting**

E.g. Nike's outsourcing of shoe manufacturing to South Korea in the 80s, focus on market-price, not 'externalities' such as sustainability.

2. **Modular governance = cascading standards and monitoring**

E.g. outsourcing garment manufacturing to Bangladesh prior to the Bangladesh Accord with focus on different levels of sustainability standards audited by actors such as Bureau Veritas.

3. **Relational governance = establishing transparency mechanisms to understand stakeholder relationships and capability building mechanisms to ensure adherence to mutually agreed standards**

E.g. outsourcing garment manufacturing to Bangladesh under the sector-wide, territorially focused Accord on Fire and Building Safety in Bangladesh governance contract that ties together all ends of the value chain.

Similarly applicable to corporate group governance.

Relevance for contract/tort liability constellations.

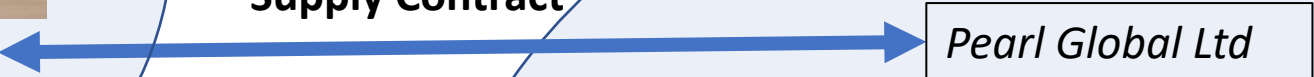
Market governance over different markets

Canada



Loblaws Ltd

Supply Contract



Bangladesh

Pearl Global Ltd

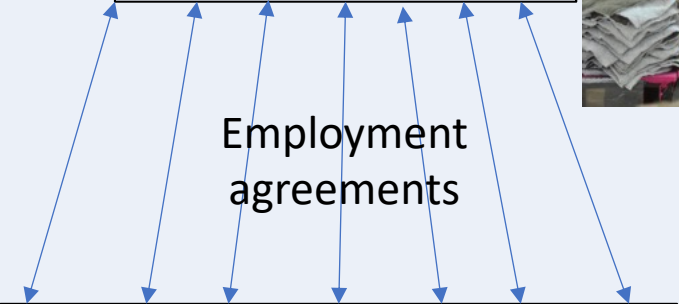


New Wave Limited

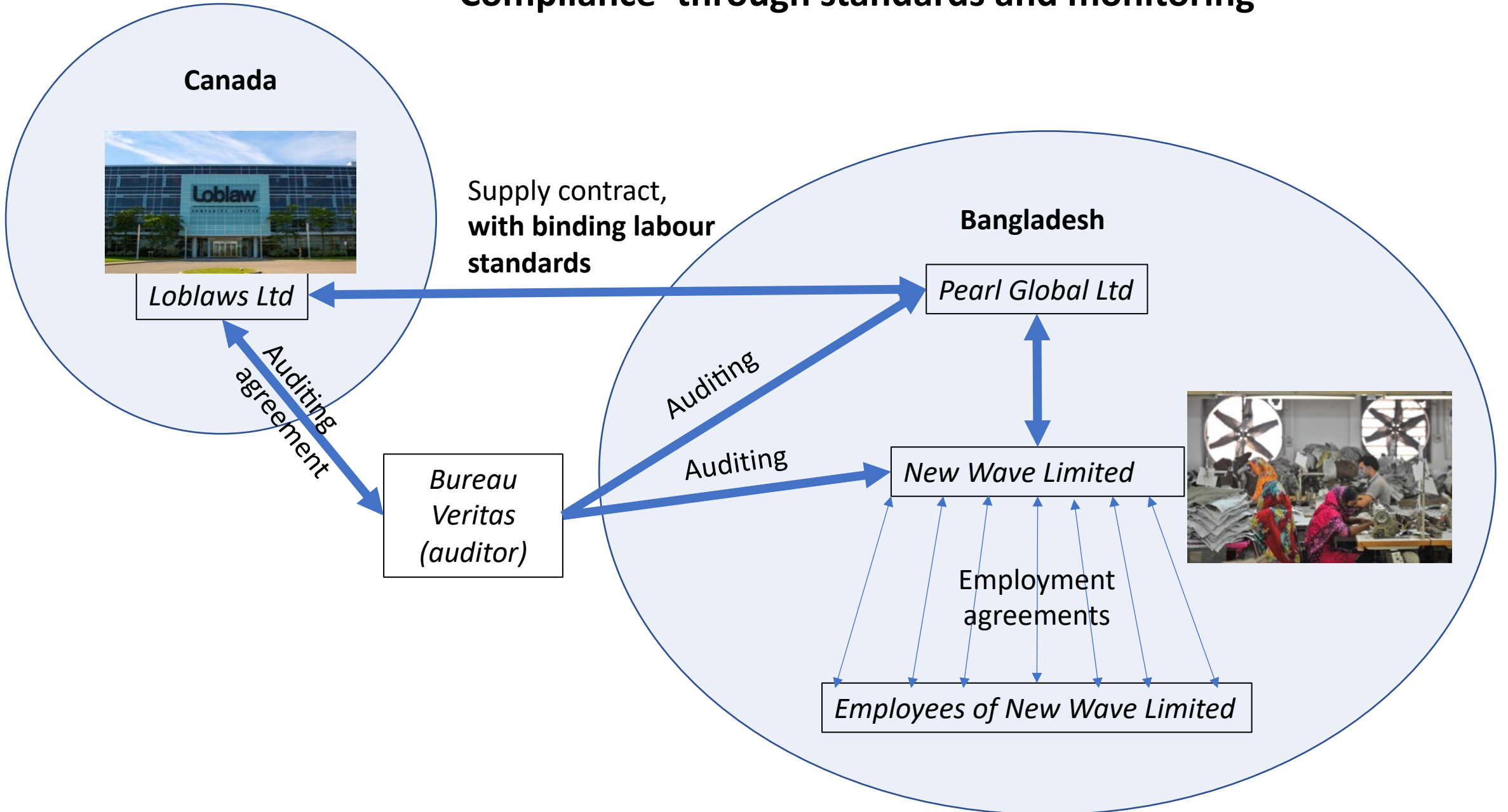


Employment agreements

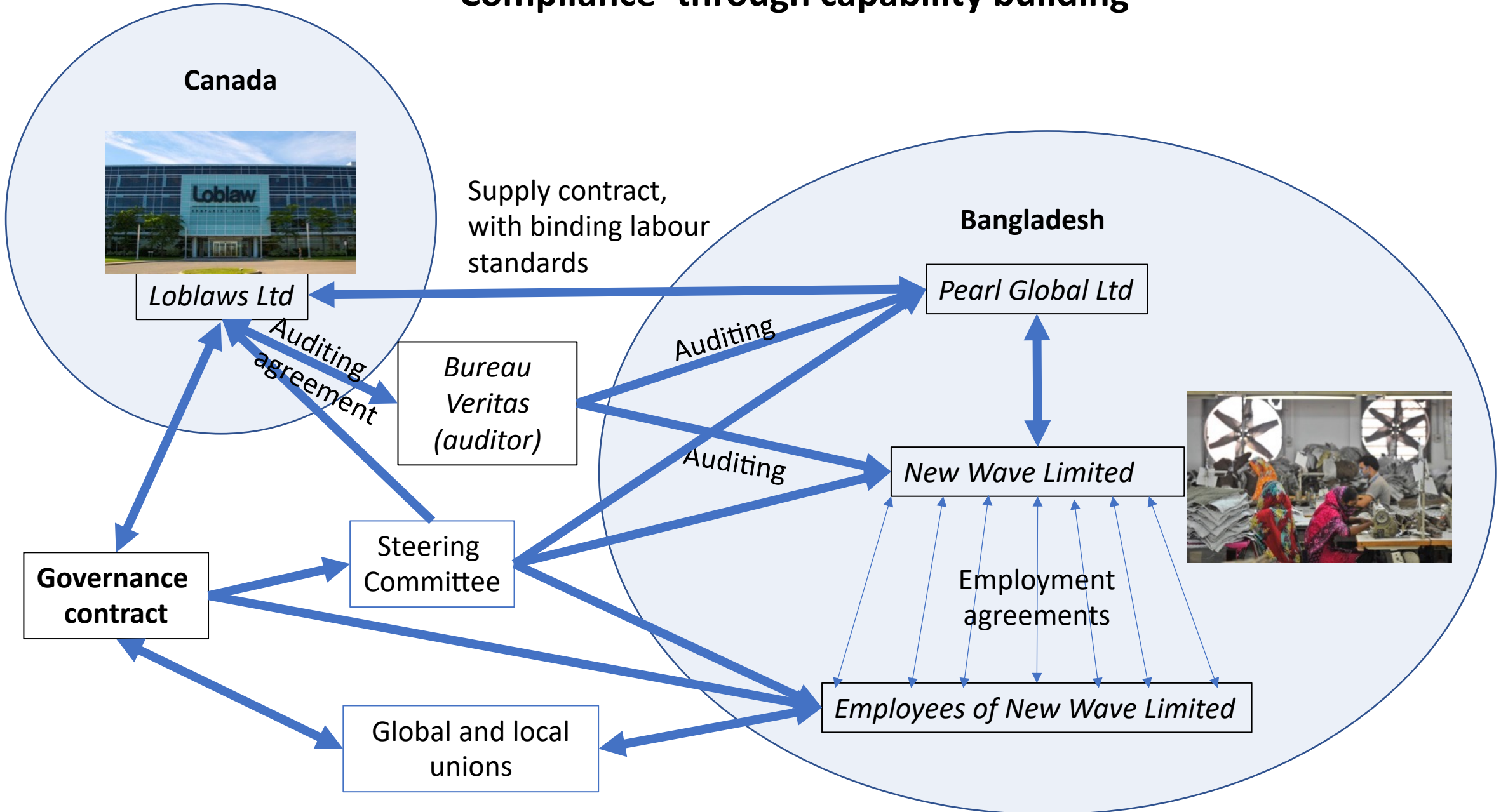
Employees of New Wave Limited



'Compliance' through standards and monitoring



'Compliance' through capability building



Total and climate due diligence



Regulating global value chains: why?

Traditionally focus on internal regulation, e.g. functionality of internal market.

An increasing awareness of the flow-effects of local regulation is leading their outright operationalization ('Brussels effect') and debate between legitimate interests v protectionism.

Newer focuses with explicit transnational extension of regulation:

- 1. Sustainability: justified through global complicity?**
- 2. Geosecurity: justified through public policy concerns?**

Regulating global value chains: how?

Table I. Comparison of transnational sustainability laws.

	Type	Material Scope	Personal Scope	Definition of the Value Chain	Statutory duty	Statutory repercussion for breach of duty	Impact on other forms of liability
California Transparency in Supply Chains Act 2010	Ad hoc disclosure	Slavery Human trafficking	Retail sellers and manufacturers doing business in California with global gross receipts over 100 M USD	Product supply chains Focuses especially on direct supply chain and direct suppliers	Annual disclosure on supply chains and the company's internal accountability mechanisms	Injunctive relief	Does not limit remedies available for a violation of any other state or federal law
Dodd-Frank Act, Section 1502 2010	Securities	Conflict minerals	Companies filing with the SEC that use tantalum, tin, gold or tungsten originating in the DRC or adjoining areas	Extremely wide definition of 'mineral supply chain'	Annual disclosure on use and tracing of conflict minerals	Liability for fraudulent or false reporting	No liability if reporting in good faith
UK Bribery Act 2010	Criminal	Bribery Corruption	Any commercial organisation carrying on a business in the UK	Any associated person, including at least employees, agents and subsidiaries Covers contractors when they perform services for a commercial organisation	Required to prevent bribery by their associated persons	Fine	Adequate procedures to prevent bribery are a defence against criminal liability
EU Non-Financial Reporting Directive 2014	Securities	Human rights Environment Corruption	Large public-interest companies with at least 500 employees	Company's operations and, where relevant and proportionate, its business relationships	Annual non-financial statement e.g. on human rights impacts and due diligence policies (comply-or-explain)	Member States determine penalties	Unspecified in statute
UK Modern Slavery Act 2015	Ad hoc disclosure	Modern slavery	Any commercial organisation which carries on a business in the UK with a total annual turnover of 36 M GBD or more	Supply chains and any part of its own business Supply chain understood in its everyday meaning	Annual slavery and human trafficking statement on measures identifying modern slavery in supply chains, or a statement that no measures are taken	Injunctive relief Fine	Unspecified in statute
French 'loi vigilance' (loi no. 2017-399) 2017	Due diligence	Human rights Environment	French companies with at least 5 000 employees in France or at least 10 000 employees globally	Operations of the company, the companies it controls and suppliers with whom it maintains an established commercial relationship	Vigilance plan on environmental and human rights risks, their mitigation and monitoring	Injunctive relief Fine	Standard delictual liability
EU Conflict Mineral Regulation 2017	Due diligence	Health risks Conflict minerals	Union importers of tin, tantalum, tungsten and gold originating from conflict-affected and high-risk areas whose imports exceed certain volume	Extensive definition of mineral supply chain Covers both upstream and downstream supply chain	Extensive due diligence obligations including internal and external risk management systems, auditing and disclosure	Member States develop rules applicable to infringements	Unspecified in statute
New South Wales	Ad hoc	Modern	Any organisation having	Organisation's structure, its	Annual modern slavery	Fine	Whistleblowers

Salminen and Rajavuori, Transnational sustainability laws and the regulation of global value chains: comparison and a framework for analysis, 26 *Maastricht Journal of European and Comparative Law* 5 (2019), 602–627, open access:

<https://journals.sagepub.com/doi/full/10.1177/1023263X19871025>

Regulating global value chains: how?

Utilizing different policy levers to ensure that companies within a jurisdiction effectively govern their global value chains without the jurisdiction.

In a nutshell:

1. Which lead firms are covered?

E.g. large enterprises? SMEs? Extraterritorial platforms?

2. How is 'value chain' operationalized from a legal perspective?

*E.g. all or nothing? Solely production-side focus or also consumption-side?
Differences in value chain operationalization between due diligence and liability/sanction schemes?*

3. How is 'adequate value chain governance' operationalized from a legal perspective?

E.g. what kinds of governance or other obligations are required from lead firms?

World-Systems Theory (1977)

...take an ultimate consumable item and trace back the set of inputs that culminated in this item – the prior transformations, the raw materials, the transportation mechanisms, the labor input into each of the material processes, the food inputs into the labor. This linked set of processes we call a commodity chain. If the ultimate consumable were, say, clothing, the chain would include the manufacture of the cloth, the yarn, etc., the cultivation of the cotton, as well as the reproduction of the labor forces involved in these productive activities.

Reduced to ‘supply side’ instead of ‘consumption side’? Reduced further to ‘controlled subsidiaries’ or ‘established commercial relationships’?

Regulating global value chains: how?

No dearth of issues:

Enforcement; liability v defences; locus of liability (company v directors?); burdens of proof; tweaking contractual obligations (right to terminate for human rights breach?); effective remedies beyond damages (insurance, remediation schemes?); reconfiguring private international law; develop SME and consumer capabilities...

- ***A due diligence industry and its relationship to liability, as under the US FCPA?***
- ***A global market for sustainability where ‘social cost’ is internalized in ‘market-price’?***
- ***From product liability to production liability, history of ‘quantifying’ product safety?***

⇒ **Both law and society at large are changing to adapt to the new globally fragmented operating environment.**

⇒ **Need for embedding, *institutionalizing* global production into local legal frameworks.**

Regulating global value chains: how?

Different perspectives on governance lead to different perspective on 'transnational extension' when translating approaches to governance to approaches to regulation:

- 1. Market governance = focus on market entry via border controls**
E.g. EU VAT MOSS Scheme, carbon tolls, Product Safety, Product Liability...
- 2. Modular governance = focus on deriving audited information from beyond borders through reporting regulations**
E.g. Non-Financial Reporting Directive, Sustainability Reporting Directive, Taxonomies
- 3. Relational governance = focus on coordinating and requiring hands on action beyond borders ('mandatory due diligence')**
EU Conflict Mineral Regulation, Deforestation Regulation, Corporate Sustainability Reporting Directive, CER Directive...

Regulating global value chains: why?

	REACH (2006)	CBAM (2021)	NFRD (2014)	CSRD (2021)	Conflict Mineral Regulation (2017)	Deforestation Regulation (2021)
Typology Existing/Future Type/Sector	BOUNDARIES (BROAD MARKET ACCESS TECHNIQUES THAT INFLUENCE VALUE CHAIN INDIRECTLY)		MAPPING (DISCLOSURE OBLIGATIONS THAT PROVIDE INFORMATION ON THE IMPACTS OF EU-EXTERNAL VALUE CHAINS)		ACTING (DUE DILIGENCE & OTHER CONCRETE OBLIGATIONS TOWARDS EXTERNAL VALUE CHAIN)	
	Existing	Future	Existing	Future	Existing	Future
	Use and Import / Chemical safety	Import / Carbon leakage	Reporting / Sustainability	Reporting / Sustainability	Due diligence / Conflict minerals	Due diligence / Deforestation
Material Scope	Chemical substances.	Goods in certain sectors (cement, iron and steel, aluminium, fertilizers and electricity)	Human Rights, Environment, Corruption	Sustainability, explicitly viz Paris Agreement	Conflict minerals (tin, tantalum, tungsten, gold)	Cattle, cocoa, coffee, oil palm, soya and wood and products that contain, have been fed with or have been made using these
Personal Scope	Manufacturers, importers and downstream users of chemical substances within EU . Obligations vary according to role in supply chain and substance (e.g. Art 37).	Declarants of goods (initially planned focus on iron, steel, cement, fertilizers, aluminum, electricity).	Large public-interest companies with at least 500 employees	Large undertakings SME undertakings with lighter obligations (expanded from NFRD)	Union importers of tin, tantalum, tungsten and gold originating from conflict-affected and high-risk areas whose imports exceed certain volume thresholds	Operators and traders placing or making available relevant commodities and products on the Union market or exporting them from the Union market (specific SME regulation).
Stated primary aim (beyond developing internal market)	High level of protection of human health and the environment, promotion of alternative methods for assessment of hazards of substances, free circulation of substances on the internal market, enhancing competitiveness and innovation..	Addressing greenhouse gas emissions embedded in the goods in order to prevent the risk of carbon leakage.	Enhancing the consistency and comparability of non-financial information relating to e.g. human rights, environment, and bribery.	Ensuring that there is adequate publicly available information about the risks that sustainability issues present for companies and the impacts of companies on people and the environment.	Providing transparency and certainty on supply chain due diligence in order to curtail opportunities for armed groups and security forces to trade in conflict minerals	Minimising EU contribution to global deforestation and forest degradation and reducing EU contribution to greenhouse gas emissions and global biodiversity loss by way of minimising consumption of products coming from supply chains associated with deforestation or forest degradation.
Other stated aims	Not explicit, but global impact re hazardous substances.	Encouraging use of more emissions-efficient technologies by producers from third countries.	Developing sustainability.	Developing sustainability, security of supply.	Security of supply	Influencing global market, not only EU supply chains. Security of supply
Transnational effectivity mechanism	Import restrictions.	Import restrictions.	Mapping of value chains	Mapping of value chains	Mapping and governing value chains through e.g. contractual partnerships	Mapping and governing value chain through e.g. contractual partnerships. Operator Responsibility.
Value Chain Definition	All manufacturers and/or importers and/or downstream users in a supply chain (Art 3.17). However, de facto focus more expansive in practice as it covers all instances of substances, no matter what actor they originate from.	Expansive: Focus on emissions embedded directly in goods. Also a view to extending the scope to indirect emissions and other goods, with a focus on developing methods of calculating embedded emissions based on environmental footprint methods.	Company's operations and, where relevant and proportionate, its business relationships.	Undertaking's value chain, including its own operations, its products and services, its business relationships and its supply chain.	Covers both upstream and downstream supply chain.	Due diligence with regard to all relevant commodities and products supplied by each particular supplier. Focus on tracking whole value chain with a view to origin of logging.
Duty	Duty to ensure that substances manufactured, placed on the market or used do not adversely affect human health or the environment. General obligation to register substances; carry out safety assessments; and communicate information up and down the supply chain.	CBAM declaration; calculation of embedded emissions; verification; purchase of CBAM certificates.	Annual non-financial statement on human rights impacts and due diligence policies (comply-or-explain).	Annual report where "management report information necessary to understand the undertaking's impacts on sustainability matters, and information necessary to understand how sustainability matters affect the undertaking's development, performance and position".	Due diligence obligations including internal and external risk management systems, auditing and disclosure.	Due diligence procedure, including information requirements, risk assessment and risk mitigation measures.
Due Diligence/Risk Assessment	Risk management responsibility (precautionary principle, reasonably foreseeable conditions) on manufacturers, importers and downstream users.	Calculation and verification of embedded emissions.	Wide-ranging but light-touch reporting on sustainability.	Wide-ranging sustainability disclosures, including description of "due diligence processes implemented with regard to sustainability matters".	Extensive and precise due diligence obligations, including contract-based measures with suppliers.	Extensive and precise due diligence obligations, including "geo-localisation coordinates, latitude and longitude of all plots of land". Risk management obligations in particular for large traders with significant influence over supply chains, more focus on certification for SMEs, simplified procedure for low-risk countries.

Salminen, Rajavuori, Eller: Global Value Chains as Regulatory Proxy: A New Paradigm for Transnationalizing the Internal Market? 2022 Working Paper

Brussels, 23.2.2022
COM(2022) 71 final

2022/0051 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937

(Text with EEA relevance)

{SEC(2022) 95 final} - {SWD(2022) 38 final} - {SWD(2022) 39 final} -
{SWD(2022) 42 final} - {SWD(2022) 43 final}



EUROPEAN COMMISSION

Brussels, 16.12.2020

COM(2020) 829 final

2020/0365(COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the resilience of critical entities

{SEC(2020) 433 final} - {SWD(2020) 358 final} - {SWD(2020) 359 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

- Reasons for and objectives of the proposal

To effectively protect Europeans, the European Union needs to continue to reduce vulnerabilities, including for the critical infrastructures that are essential for the functioning of our societies and economy. The livelihoods of European citizens and the good functioning of the internal market depend on different infrastructures for the reliable provision of services needed to maintain critical societal and economic activities. These services, vital under normal circumstances, are all the more important as Europe manages the effects of and looks towards recovering from the COVID-19 pandemic. It follows that entities providing essential services must be resilient, i.e. able to resist, absorb, accommodate to and recover from incidents that can lead to serious, potentially cross-sectoral and cross-border disruptions.

Begum v Maran (UK) Ltd [2021] EWCA Civ 326



Governing global value chains: Liability

1. **Market governance = Liability for reckless outsourcing**

Trafigura (settled), [Begum v Maran \(UK\) Ltd](#) [2021] EWCA Civ 326

2. **Modular governance = Liability for claimed governance practices**

Lungowe v Vedanta [2019] UKSC 20, *Okpabi v Shell* [2021] UKSC 3

3. **Relational governance = Liability for actual value chain governance**

Chandler v Cape plc [2012] EWCA Civ 525

Convergence

- Private governance:
 - A 'Bangladesh Accord' for the effective governance of value chains?
- Public regulation:
 - A 'loi de vigilance' requiring the effective governance of value chains?
- Private law liability:
 - An effective liability regime for damage caused by inadequate value chain governance?

The message?

Economic efficiency, sustainability, geosecurity and other interests related to globally fragmented production are very much intertwined. The mechanisms of organization and governance used for each are in principle the same.

Mechanisms of value chain governance can be translated into regulations requiring such governance, thus extending a regulator's transnational reach along value chains, and this has happened historically in previous transformations of production.

The transnational extension of regulation forces us to rethink the national/international divide on a legal-political plane. What is the new political reality of transnational regulation: How does the global political order, and along with it legal concepts such as jurisdiction and comity, adapt to the new reality of global production?

These regulations are just part and parcel in a more profound change in legal and social systems towards embedding global sustainability into the core paradigms of societal organization, including contract.