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# Hardening foreign corporate accountability through mandatory due diligence in the European Union? New trends and persisting challenges

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## Abstract

The negative externalities of global commodity chains and existing governance gaps have received wide scholarly attention. Indeed, many sectors including forest-risk commodities (FRCs) like soy and beef from Brazil remain largely unregulated. This article analyzes ongoing policy-making processes at European Union level to adopt new regulations for reducing accountability gaps: one regulation of FRCs and one general, cross-sectoral directive on human rights and environmental due diligence. This article draws on and aims to contribute to previous research into foreign corporate accountability, therein analytically distinguishing between *input*, *output*, and *surrogate accountability*. This study shows that new policies will likely be more comprehensive than previous supply chain regulations, while their specific institutional design and stringency are highly contested. More in general, we argue that for hardening corporate accountability, due diligence politics will need to confront important governance challenges that have limited the potential of previous regulations, such as a lack of consequentiality of reporting obligations, weak state monitoring, limited stakeholder involvement, and difficulties to establish legal liability.

**Keywords:** Brazil, commodity chain, deforestation, European Union (EU), human rights.

## 1. Introduction

The negative externalities of global commodity chains have come to the forefront in global policy discourses and in environmental governance arrangements. It has become common practice to measure ecological, water, and carbon footprints of importing countries in distant regions. In the past few decades, private sustainability standards have played a prominent role in filling the institutional void of international or domestic public policies to govern transnational companies and global trade. However, evidence of fundamental shortcomings of these private governance schemes abounds (see, for instance, Dauvergne & Lister 2012; Grabs 2020; Van der Ven *et al.* 2018). Against this background, scholars and policymakers have argued alike that new public approaches are needed for assessing and addressing the adverse impacts associated with global commodity chains (Lenschow *et al.* 2016; Moser & Leipold 2020).

The European Union (EU) is the largest trading block in the world, and imports more from developing countries than the United States, Canada, Japan, and China put together.<sup>i</sup> Due to its relatively low domestic production but high consumption levels of forest-risk commodities (FRCs) such as soybeans, palm oil, coffee, and cocoa, the EU emerged as a leading international consumer of deforestation embodied in trade (IDH 2020). In this article, we mainly refer to the soy and beef supply chains from Brazil to Europe, which have together with palm oil from Indonesia accounted for the large majority of “imported deforestation,” that is, deforestation associated with imported products (Pendrill *et al.* 2019). Between 2010 and 2018, the EU imported on average 14.5 megatons of soy products from Brazil, which are mainly used for livestock feeding,<sup>ii</sup> and have contributed to deforestation, biodiversity loss, and land use change as well as to the expansion of the cattle frontier (Strassburg

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*et al.* 2017; COWI, Ecofys, Milieu 2018). The human rights' implications of the growing soy and beef sectors in Brazil have also been severe, including the loss of access of indigenous peoples and local communities to land, water, and livelihoods; pesticide poisoning; the violation of workers' rights; and violence against the defenders of land and the environment (Garrett & Rausch 2016; Bombardi 2017; Comissão Pastoral da Terra (CPT) 2020; Russo Lopes *et al.* 2021). Given the lack of domestic policies to better regulate Brazil's agribusiness in defense of environmental sustainability and social justice – a situation that has clearly worsened under President Bolsonaro's government (Sauer *et al.* 2019a; Sauer *et al.* 2019b; Rajão *et al.* 2020a; Rajão *et al.* 2020b) – the question of how demand-side public policies can harden foreign accountability is of outstanding relevance.

The soy and beef supply chains have previously been largely unregulated from the demand side. This situation is beginning to change. In 2017, France adopted a comprehensive law on human rights and environmental due diligence, which applies to large companies importing and/or processing Brazilian soy and beef, such as Carrefour, Danone, Lactalis, Savencia, and Casino Group (Gustafsson & Schilling-Vacaflor 2021). Motivated strongly by the aim to address problems in Brazil, the EU also intends to adopt a new regulation on FRCs and a directive on human rights and environmental due diligence in the near future. The European Parliament (EP) has already voted in favor of concrete proposals for these mandatory measures and the European Commission (EC) announced that it will present draft proposals building on a due diligence approach in 2021. The ongoing COVID pandemic might even accelerate the process of adopting a regulation on FRCs. Policymakers pointed to the link between the spread of zoonotic diseases and deforestation and argued that the protection of forests can help to avoid the outbreak of future pandemics (EP 2020b). This article traces and discusses ongoing debates and negotiations about these future policies at EU level and points to important governance challenges facing new mandatory measures to harden foreign corporate accountability.

Both regulations have co-evolved in a cross-referential manner and amount to “frontrunner” initiatives to address empirically closely related fields, which are nevertheless often treated as separate policy fields ranging from climate change mitigation to human rights protection. Our study draws on and aims to contribute to previous research into foreign corporate accountability, which has been advanced by scholars of global environmental governance (e.g. Park & Kramarz 2019; Moser & Leipold 2020; Partzsch 2020a, 2020b) and business and human rights (e.g. Simons 2012; Ruggie 2018; Evans 2019). These strands of research have previously largely developed separately. While building on previous research, we aim to extend it in two respects. First, here we analyze new trends to regulate global supply chains from the demand side. Second, while advocates of human rights and the environment have celebrated mandatory due diligence as a particularly promising solution for tackling the severe problems associated with global commodity chains, our research sheds light on persisting challenges that merit further attention by scholars and policymakers. Notably, governance challenges like a lack of consequentiality of reporting obligations, weak state monitoring, limited stakeholder involvement, and difficulties to establish legal liability need yet to be resolved to realize the full potential of the future regulations.

Evidence presented in this article is based on a triangulation of data, such as the qualitative analysis of a large volume of primary documents (e.g. documents published or commissioned by the EC and the EP, NGO reports, policy briefs), a review of previous literature on supply chain regulations from the EU and European countries, semi-structured interviews with key state and non-state actors from Europe and Brazil conducted between July 2017 and February 2021, and important policy debates between state and non-state actors in diverse webinars organized in 2020 and 2021. Our online appendix provides a list of the interviews that have been particularly important for enriching our study. We anonymized interviews and translated interviews cited in this article to English. We coded our data with the software ATLAS.ti according to our coding scheme that builds on the main analytical concepts used in this study (e.g. input, output, and surrogate accountability; accountability relationships, answerability, and enforceability; Mashaw's standard questions for analyzing accountability regimes) and was applied inductively for identifying enabling and hindering conditions for hardening foreign corporate accountability.

Our discussion proceeds as follows. The next section offers the theoretical background for our study. Thereafter, we highlight the negative socio-environmental impacts of Brazil's soy and beef sectors and the respective governance gaps. Section 4 chronologically traces the policy-making processes at the EU level for drafting a regulation on FRCs and a directive on human rights and environmental due diligence. In Section 5, we develop our argument that governance challenges persist, which need to be addressed in order to overcome “accountability traps” that have already plagued previous supply chain regulations. The conclusions follow.

## 2. Foreign corporate accountability, the “accountability trap” and supply chain regulations

Transnational corporations (TNCs) nowadays account for half of global exports, almost one-third of GDP and about one-fourth of global employment (Organisation for Economic Co-operation and Development (OECD) 2018). Furthermore, many small and medium enterprises are involved in global production networks. However, according to international law, enterprises enjoy a limited legal liability for negative environmental or social impacts caused by their subsidiaries or suppliers (Ruggie 2018). In addition, as outlined by Dauvergne (2017, p. 138), “[t]he long, complex supply chains of the world’s leading multinational companies hide environmental and social costs in hundreds of thousands of locations all around the world,” which hampers transparency and accountability.

We share Grant and Keohane’s (2005, p. 29) understanding of accountability as a governance arrangement in which “[s]ome actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these standards have not been met.” Corporate accountability generally has been much stronger for the operations of an enterprise within a state’s border than for negative externalities in global commodity chains. We understand foreign corporate accountability as the accountability of companies for negative environmental or social impacts caused abroad by their subsidiaries or suppliers, through the establishment of clear accountability relationships, processes of answerability, and enforceability (Bovens 2010). Park and Kramarz (2019) in their edited volume cover different instruments of accountability, such as auditing, transparency and public reporting, multi-stakeholder initiatives, and compliance assessments, and distinguish between first-tier accountability (the “design tier” or input accountability) and second-tier accountability (the “execution tier” or output accountability). Both tiers of accountability are intrinsically linked as the first-tier focuses in particular on the scope and institutional design of a supply chain regulation and, depending on the policy’s design choices, enables or hinders enforceability in the execution phase. Therefore, both tiers are decisive for the extent to which a policy might contribute to harden accountability (see Park & Kramarz 2019).

Previous literature on accountability has largely focused on “standard accountability,” wherein “the rulers are accountable to their citizens who can participate in rule-making through representation and can punish the rulers by voting them out of office” (Risse 2006, p. 185). However, in many producing countries located in the Global South, a lack of state capacity, poor regulation, lax enforcement, corruption, or a too-close relationship between business and government have hindered the protection of human rights and the environment (see Boyle 2012). In such contexts, particularly vulnerable actors lack the capacity to systematically hold powerful actors like export-oriented agribusinesses accountable (see Grant & Keohane 2005; Rubenstein 2007). Attempts to create binding international regimes or conventions for holding TNCs accountable for their human rights and environmental records abroad have previously failed, largely due to the fierce lobbying by TNCs and powerful business associations (Clapp 2005; Simons 2012; Ruggie 2018). In turn, also many states have resisted the adoption of binding international rules for enhancing corporate accountability. Ruggie (2018) explained the relative weakness of public international law in the ambit of business and human rights with the fact that states are economic actors themselves, for instance by promoting and attracting foreign investments. Marques and Eberlein (2019) suggested that governments have deliberately left “governance gaps” and allowed or invited private actors to fill these gaps.

As private governance has gained increasing importance in the past few decades, a growing volume of literature has focused on accountability in private modes of governance or on the interrelations between public and private forms of accountability. Although private governance has often gone beyond mere window dressing, the limitations of voluntary approaches are well known. Certification standards and auditing have been criticized as being corporate-dominated and imposed by actors from the Global North, and scholars have discussed existing legitimacy problems, ineffective auditing processes, liability loopholes, limited uptake, and shortcomings in the traceability of commodity chains (Fuchs *et al.* 2011; Mol & Oosterveer 2015; Le Baron *et al.* 2017; Schleifer *et al.* 2019; Schilling-Vacaflor *et al.* 2021). Transparency and reporting have also been critical features in private and voluntary sustainability governance. Scholars of “critical transparency studies” conceive of disclosure as a site of political conflict and have problematized the assumption that information disclosure necessarily enhances accountability (Gupta & Mason 2014; see also Gardner *et al.* 2019). Mason (2020) reviewed recent academic

**Table 1** Overview of supply chain regulations from the European Union (EU) and European countries (authors' elaboration)

Year of adoption	Environmental regulations	Year of adoption	Human rights regulations
2008	EU Council Regulation to eliminate illegal, unreported, and unregulated fishing (IUU regulation)	2015	UK Modern Slavery Act
Adopted in 2009, revised in 2018	EU Renewable Energy Directive (EU-RED)	2017	EU Conflict Minerals Regulation
2010	EU Timber Regulation (EUTR)	2017	French Duty of Vigilance law (also covers environmental damages)
		2019	Dutch Child Labor Due Diligence law

literature on the disclosure of sustainability information and found that it reduced information asymmetries and enhanced the capacity of accountability claimants to evaluate justifications by relevant power wielders. However, transparency has often failed to alter the behavior of those responsible and to foster wider political interrogation of the configurations of authority producing environmental harm (Mason 2020).

In response to mounting evidence of the limitations of the private and voluntary governance of global commodity chains, calls for “bringing the state back” into global governance have become louder in the recent past (Bartley 2014; Gulbrandsen 2014; Moser & Leipold, 2020; Partzsch 2020a). Scholars have argued that public policies are needed for hardening corporate accountability, by coercing companies into complying (see Moser & Leipold, 2020). In response to such demands, new supply chain regulations have emerged in countries from the Global North, a trend described as a “cascade of a new norm on foreign accountability” by Partzsch and Vlaskamp (2016). In Europe, starting with the EU’s regulation to eliminate illegal, unreported, and unregulated fishing in 2008, we witness the adoption of a range of legal measures with the declared objective of holding companies accountable for environmental and human rights impacts along their supply chains (Table 1).

While scholars of environmental governance and business and human rights have widely perceived supply chain regulations as necessary measures for hardening corporate accountability, the adoption and implementation of these measures has been highly contested and the adopted laws have been criticized for their lack of stringency, comprehensiveness, and enforcement (Moser & Leipold, 2020; Partzsch 2020a). Opposition from business associations and conservative and liberal political parties contributed to a watering down of public policies and limited their enforceability (see, for instance, LeBaron & Rühmkorf 2019; Schilling-Vacaflor 2021). With the exception of the French Duty of Vigilance law, previous laws selectively target specific sectors and issue areas, resulting in a patchy and fragmented regulatory framework. Previous research also revealed that the adopted laws continue to delegate much authority to private actors, by accepting measures like corporate reports, private certification and auditing as evidence of companies’ duty of care (Moser & Leipold 2020; Gustafsson & Schilling-Vacaflor 2021). In this context, scholars have criticized that state monitoring of the implementation and meaningful compliance of corporations has been weak and that the possibility of sanctions has either been missing at all (e.g. UK Modern Slavery Act; EU Renewable Energy Directive [EU-RED]) or very few and disproportionately low fines have been imposed (e.g. EUTR) (Moser & Leipold, 2020; Partzsch 2020a). In the vocabulary of Kramarz and Park (2019) adopted in this article, existing studies expose persistent accountability gaps and traps at both, the *design* and the *execution tiers*, also after public policy stepped back in.

Moreover, authors reflect on the specific form of accountability implied in supply chain regulations from the demand-side, which they characterize as “surrogate accountability” (Rubenstein 2007) or “accountability-by-proxy” (Partzsch 2020b). Arguably, such constellations are normatively inferior to ‘standard accountability’, because surrogates (in this case the EU) are independent from the accountability holders (often from the Global South), who cannot sanction them (Rubenstein 2007). To compensate for such deficits, surrogates should, if possible, deliberate with accountability holders and seek their authorization to act on their behalf and be receptive to their concerns (Rubenstein 2007). Building on this literature, we assume that the meaningful involvement of

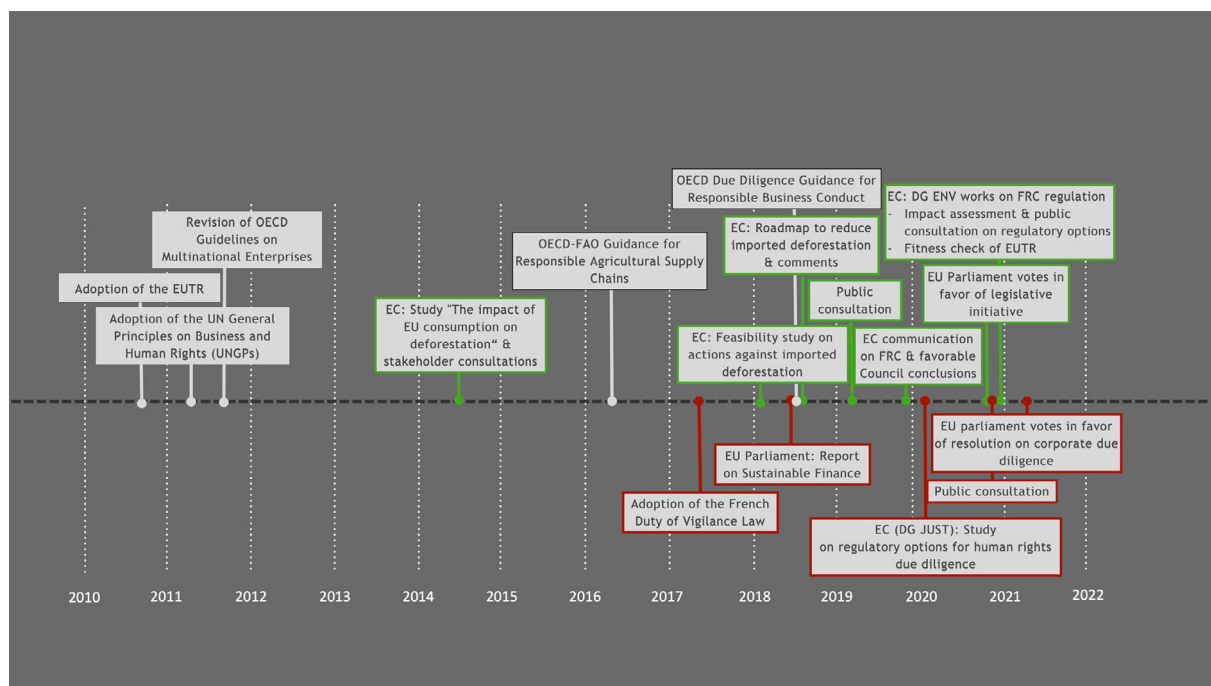
rightsholders and stakeholders from the supply side is likely to enhance both input and output accountability, for instance by increasing the legitimacy of adopted measures or by providing reliable knowledge on the impacts of global supply chains. Empirical evidence from previous supply chain regulations, like EU-RED or the French Duty of Vigilance law, suggests that the EU and member states have so far not sufficiently included stakeholders from the Global South (Partzsch 2020b; Gustafsson & Schilling-Vacaflor 2021). Distinguishing between *design or input accountability*, the quality of *surrogate accountability*, and *output accountability*, we ask in this study to what extent similar governance challenges are likely to hinder the contribution of emerging EU regulations for hardening foreign corporate accountability. For organizing our analysis, we find Mashaw's six questions particularly useful: (1) Who is being held to account? (2) To whom is accountability owed? (3) For what are they accountable? (4) What standards does an agent use to demonstrate accountability? (5) What process demonstrates accountability? (6) What happens when the agent fails to meet these standards? (Mashaw 2006). Questions 1, 3, and 4 relate to input, question 6 to output, and question 2 to surrogate accountability; question 5 may speak to all three accountability criteria.

Before turning to this assessment, some background is needed on our empirical case, a case chosen due to its impact and relevance, which has only been covered rudimentarily by existing supply chain regulations. Merely soybeans used as biofuels (a very minor share of imported soy) and selected issue areas (modern slavery in UK supply chains, child labor in Dutch supply chains) are covered by existing regulation. The French Duty of Vigilance law has a broader scope and covers both, human rights violations and environmental damages, but it only applies to large firms headquartered in France (see Cossart *et al* 2017 and Section 4). Hence, the negative social and environmental impacts caused by the Brazilian soy and beef sectors have largely been unregulated from the demand side, while domestic policies in Brazil have been insufficient for protecting the environment and human rights. New EU policies might make a difference, by holding companies importing products from Brazil accountable for their negative externalities.

### 3. The unaddressed negative externalities of Brazil's soy and beef sectors

In 2019, Brazil produced 114 megatons of soybeans, which is over one-third of global production (334 megatons).<sup>iii</sup> Brazil exports the majority of its soy meal to the EU, while China is by far the largest importer of Brazilian soybeans.<sup>iv</sup> The EU also imported over 180,000 tons of beef in 2017.<sup>v</sup> According to Rajão *et al.* (2020a), approximately 48% of Brazilian beef exports and at least 18% of Brazil's soy exports to European countries are likely linked to illegal deforestation. In addition, the soy and beef supply chains have contributed to biodiversity loss; the loss of access of local communities and indigenous peoples to land, water, and livelihoods; the violation of labor rights; and pesticide contamination and poisoning (Garrett & Rausch 2016; Bombardi 2017; CPT 2020; Russo Lopes *et al.* 2021). Since Brazil's economic recession and its political crisis, which has escalated in 2015 and led to the impeachment of former president Dilma Rousseff, there has been a further downward trend regarding environmental and human rights protection. Under the administrations of presidents Temer (2016–2018) and Bolsonaro (2019–present), labor rights have been weakened and the Ministry of Labor and Social Welfare was dissolved on 1 January 2019. Social policies and spaces for public participation, both of which have enhanced standard accountability, have been dismantled in the past few years (Sauer *et al.* 2019a; Sauer *et al.* 2019b). Furthermore, financial and human resources for environmental agencies have been cut and environmental policies disrupted (Rajão *et al.* 2020a). Deforestation rates in the Brazilian Amazon have been alarmingly high in 2019 and 2020.

To date, the soy and beef supply chains have been governed mainly by private initiatives. After an influential campaign by Greenpeace (Greenpeace International 2006) that shed light on the close connections between consumption of dairy and meat products in the EU and Amazon deforestation, a "Soy Moratorium" and a "Cattle Agreement" have been initiated by corporations and business associations together with environmental NGOs. These private initiatives have been backed by the Brazilian state and developed into hybrid governance instruments. The effectiveness of the Cattle Agreement has been lower than the Soy Moratorium (in particular due to the difficulties to trace indirect beef suppliers) and has in the meantime been largely abandoned. Both initiatives exclusively focus on the Amazon, wherefore they have contributed to the leakage of negative impacts to other regions like the Cerrado – a region that has been strongly affected by a loss of native vegetation due to the



**Figure 1** Timeline of milestones in the policy-making processes on new due diligence regulations (green: FRC regulation; red: legislation on human rights and environmental due diligence). FRC, forest-risk commodities.

massive expansion of soy production since the start of this century (Strassburg *et al.* 2017; Bastos Lima & Persson 2020). To respond to these negative impacts, a multi-stakeholder “Working Group on the Cerrado” to expand the Soy Moratorium to the Cerrado biome was created in 2017. However, in spring 2020, Brazilian soy producers and business actors withdrew from this initiative, as they felt reassured by the current pro-agrobusiness government that concessions in favor of sustainable development would no longer be needed (interview with staff from a Brazilian NGO 12 March 2020).

There has been almost no certified beef produced in Brazil, while 25–33% of the soybeans exported from Brazil to the EU are estimated to be from certified production (Schilling-Vacaflor *et al.* 2021). However, the shortcomings of certification and auditing to protect human rights and the environment in the Brazilian soy sector, even of comparably stringent multi-stakeholder standards like the Round Table on Responsible Soy (RTRS), have been discussed in previous research (Schilling-Vacaflor *et al.* 2021). Against the background of serious shortcomings of Brazilian domestic policies and private governance initiatives to guarantee human rights and environmental protection, the call for mandatory due diligence policies from importing countries has become louder (see later). Civil society organizations from both sides of the Atlantic have strongly advocated for the adoption of stringent EU regulations to govern supply chains from Brazil, conceiving the enhancement of standard accountability on the supply side and regulatory measures from the demand side as complementary (interviews with Brazilian and European NGOs 6 March 2020, 21 August 2019, and 10 February 2021).

#### 4. Mandatory due diligence regulations in the making at the EU level

Although the soy and beef supply chains have been largely unregulated to date, this is likely to change in the near future. Not only the French Duty of Vigilance law has established mandatory due diligence obligations for large companies headquartered in France, but the EC has announced its plans to push for the adoption of a human rights and environmental due diligence directive and a regulation on FRCs in 2021 (for a timeline summarizing milestones in these processes see Fig. 1). These policies draw on the concept and principles of due diligence as outlined in international soft norms such as the United Nations Guiding Principles on Business and Human Rights (UNGPs 2011), the OECD Guidelines on Multinational Enterprises (updated in 2011), and the OECD

Due Diligence Guidance for Responsible Business Conduct (2018), as well as sector-specific guidelines like the OECD-FAO Guidance for Responsible Agricultural Supply Chains (2016). According to the UNGPs, a due diligence process “should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed” (United Nations Human Rights Office of the High Commissioner 2011). In addition, previous supply chain regulations – in particular the EUTR; the illegal, unreported, and unregulated fishing (IUU) regulation; and the French Duty of Vigilance law – have provided important lessons learned for debates about new regulations (see Pritchard 2016). In the following, we will focus on the drafting and design of new regulations (*input accountability*), on stakeholder involvement (*surrogate accountability*), and on debates regarding implementation and enforceability (*output accountability*).

#### 4.1. The drafting process of a regulation on FRCs

Deforestation constitutes the second-largest source of global greenhouse gas emissions and has been a major driver of biodiversity loss. Already in 2008, the EU pledged, as part of its climate change policy, to halve tropical deforestation by 2020 and eliminate it by 2030 (EC 2008). At the 2014 United Nations Climate Summit, the EU signed up to an almost identical target in the New York Declaration on Forests. One year later, seven European governments – among them the two major consumer countries of imported soy, France and Germany – positioned themselves as frontrunners by signing the Amsterdam Declaration entitled “Towards Eliminating Deforestation from Agricultural Commodity Chains with European Countries.”

In 2013, a comprehensive study on “The impact of EU consumption on deforestation,” funded by the EC, was released, followed by extensive stakeholder consultations (Cuyper *et al.* 2013). In 2018, a “Feasibility study on options to step up EU action against deforestation,” commissioned by the EC, was published. This study analyzed the EU’s imported deforestation in detail and assessed different regulatory options to address this problem (COWI, Ecofys, Milieu 2018). The study considered three regulatory options: (a) improving the implementation of existing measures and legislation, (b) the introduction of new measures not requiring new legislation, and (c) combining the first two options and adopting new legislation. It was concluded that option C would be most effective and that a mandatory due diligence regulation would provide the highest contribution to the objective (COWI, Ecofys, Milieu 2018). The problem of particularly high deforestation rates in Brazil and their association with EU imports of soy and beef was highlighted throughout the study, which mentioned “Brazil” 145 times.

In disregard of the feasibility study’s conclusions, in December 2018, the EC published a Roadmap for stepping up action against tropical deforestation and forest degradation, which did not include regulatory measures (EC 2018). The EC allowed for the submission of comments to this Roadmap and received 202 responses. The large majority of respondents, among them one Brazilian citizen, suggested the need to adopt binding regulation.<sup>vi</sup>

Thereafter, from 14 January to 25 February 2019, the EC organized a public consultation about perceptions regarding deforestation and preferred governance responses to address this problem. Overall, 995 actors submitted their opinions, five of them being Brazilian citizens. A large majority of respondents (73%) found the current EU policy and legislative framework against deforestation and forest degradation to be inadequate (Rademaekers *et al.* 2019). The majority of stakeholders also seemed quite skeptical of the value of voluntary measures and instead expressed their preference for the adoption of a new regulation. In July 2019, the EC published a communication wherein it called on the incoming EC to consider the adoption of regulatory and nonregulatory measures for tackling the problem of imported deforestation (EC 2019). The Council and the governments of the member states welcomed this initiative and expressed their support to adopt a new framework that includes due diligence obligations (European Council 2019).

On 22 October 2020, the EP voted in favor of the adoption of a new legislation on FRCs to be proposed by the EC. The own initiative report, led by the German social-democratic MEP Delara Burkhardt, emphasized the devastating deforestation and land use change as well as severe human rights violations driven by the soy and beef sectors in Brazil and highlighted the relevance of the Brazilian case to motivate the urgent need for a new regulatory framework (EP 2020b). The new regulation shall build on a mandatory due diligence approach that covers both environmental and human rights issues, in particular land tenure and the principle of free, prior and informed consent (FPIC) (EP 2020b). Brazilian NGOs hope that the inclusion of human rights principles into a



new regulation on FRC will lead to increased pressure to resolve unclear or contested land tenure in the Amazon and the Cerrado and to reduce the dispossession of local communities from their lands (interviews with Brazilian NGOs on 5 March 2020 and 12 March 2020).

The EP's own legislative initiative and other EU documents expressed the view that the EU Timber Regulation (EUTR) provides important lessons learned for a new regulation to be adopted. The EUTR is part of the EU's action plan on Forest Law Enforcement, Governance and Trade (FLEGT). It prohibits placing timber harvested in contravention to the laws of the country of origin on the EU market and requires companies to exercise due diligence. Yet, the implementation of the EUTR in Brazil is flawed, as acknowledged and discussed by scholars, policymakers, and activists (Brack & Ozinga 2020; Moser & Leipold 2020; see presentation by official from the Competent Authority for the EU Timber Regulation in Czech Republic in Webinar (2021)). An interviewee from the competent German authority for overseeing the compliance of the EUTR explained:

*The EUTR [...] is actually not working very well. A major problem is that the EUTR only examines legality. This is a serious problem in countries like Brazil. In Brazil, the environmental authority IBAMA has the task to check the legality of wood. [...] However, ever more irregular documents are issued from Brazil and there have been clear cases of misconduct. There is a lot of pressure from above, from the government, to make everything look legal. People from IBAMA are prevented from doing their job properly and if they do so, they get replaced. (Interview 17 June 2020)*

Due to such serious gaps in standard accountability resulting in shortcomings to meaningfully implement the EUTR regulation in Brazil, activists and policymakers have argued that international sustainability standards like the Paris Agreement and the sustainable development goals (SDGs) as well as international human rights should guide future regulations rather than the legality of producing countries (FERN 2018; EP 2020b). Sanctions shall be used more effectively and the possibility to combine a due diligence approach with a scorecard system, similar to the one used in the IUU regulation, has been considered (COWI, Ecofys, Milieu 2018; Brack & Ozinga 2020; Interview with European NGO 2 July 2019). In the case of the IUU regulation, the EU can impose a ban on exports on countries that do not cooperate to eliminate illegal fishing.

From September 2020 to 10 December 2020, the EC organized a public consultation process and in parallel it carried out an impact assessment of diverse regulatory options as well as a "fitness check" of the EUTR. This fitness check aims to contribute to improve the implementation of the EUTR and to draw lessons learned for the design and implementation of the new FRC regulation. The EC's Directorate General for Environment (DG ENV) announced that it will present a proposal for a new FRC regulation in 2021 (presentation by EC official from DG ENV, in Webinar 2021).

#### **4.2. The drafting process of a directive on mandatory human rights and environmental due diligence**

In 2011, the UN Human Rights Council adopted the UNGPs with human rights due diligence as their central concept. Upon the adoption of the UNGPs, the OECD revised its Guidelines for Multinational Enterprises to incorporate new principles that align with the UNGPs. By requesting states to use a "smart mix" of voluntary and obligatory regulations for creating a level playing field for all corporations, these principles moved the arena for contestations about binding versus voluntary rules on business and human rights to the domestic scale. The EC called on all Member States to adopt a national action plan for the implementation of the UNGPs by 2012.

To date, most EU states adopted such plans, but they are largely declaratory of existing measures and commitments, with few concrete measures to take effective action (Rivera 2019). The 2019 Corporate Human Rights Benchmark, which assessed and ranked 200 of the largest listed companies from high-risk sectors (e.g. agricultural products), found that "most companies are scoring poorly and the UN Guiding Principles on Business and Human Rights are clearly not being implemented" (Corporate Human Rights Benchmark 2019, p. 4).

In response to such shortcomings, in 2018 an EP Report on Sustainable Finance called for a legislative proposal for an overarching, mandatory due diligence framework based on the model of the French Duty of Vigilance law. On 2 December 2019, over 100 civil society organizations released a statement that called on the EC to present a legislative proposal to establish a mandatory human rights and environmental due diligence framework.

Heidi Hautala, the Vice President of the EP, supported this demand by stressing that “there is more and more understanding that the smart mix prescribed by the UNGPs means that there needs to be legislation in order to reach the stated aims.”<sup>vii</sup>

The EC commissioned a comprehensive study on “Due diligence requirements through the supply chains”, which was published in January 2020 (Smit *et al.* 2020). This study assessed the effectiveness of different regulatory options to put due diligence in place and carried out a survey with over 600 respondents (among them 334 business respondents) to assess their policy preferences. The study found that the introduction of a mandatory due diligence framework would have the largest positive human rights and environmental impacts, if properly monitored and enforced. Interestingly, also the majority of single business respondents expressed a preference for this option in order to create legal certainty by establishing a harmonized legal framework at EU level. Respondents from industry organizations, however, conveyed more critical attitudes toward mandatory due diligence and tended to prefer voluntary measures.

In April 2020, the Commissioner for Justice, Didier Reynders, surprisingly announced the EC’s plan to adopt a cross-sectoral legislation on mandatory human rights and environmental due diligence (Webinar 2020a). The new rules shall apply to the entire production process and be part of a sustainable corporate governance initiative to be presented in 2021 (Webinar 2020a). According to Reynders, for being enforceable, this legislation shall establish duties of state supervision, civil liability of corporations, and measures to guarantee the victims’ access to remedy (Webinar 2020a). From 26 October 2020 to 8 February 2021, the EC organized a public consultation on its sustainable corporate governance initiative, including questions about a new directive on mandatory human rights and environmental due diligence. On 10 March 2021, the EP voted in favor of a resolution on corporate due diligence and corporate accountability, which supports the adoption of a stringent mandatory environmental and human rights due diligence framework in the EU (EP 2021). The new directive shall complement the EU’s plans to support a process of “just recovery” following the COVID crisis (EP 2021).

In contrast to the ongoing debates on the FRC regulation, the case of Brazil has not been stressed in discussions on the planned EU directive on human rights and environmental due diligence. However, links to our Brazilian case exist when focusing on the implementation of the French Duty of Vigilance law. This law served as a model in policy discourses surrounding the EU due diligence policy (see Smit *et al.* 2020). It applies to companies headquartered in France that employ at least 5,000 employees in France, or at least 10,000 employees worldwide. These companies must establish mechanisms to prevent and mitigate human rights violations and environmental impacts throughout their chain of production and report on these measures as part of yearly “vigilance plans.” Companies that fail to publish or implement vigilance plans are subject to sanctions (“periodic penalty payments”) and the parent company will be held liable if harm is proven to have been caused by failure to properly implement an adequate plan (“civil liability action”) (Brabant & Savourey 2017). Among the most influential companies trading with soy and beef from Brazil are 10 companies headquartered in France.<sup>viii</sup> Thus, to the extent that the EU will follow the French example with regard to institutional design, we may infer lessons from French implementation practice.

So far, implementation has been sobering. Only four of the 10 companies (Carrefour, Danone, Casino Group, and Savencia) have complied with the law by submitting their vigilance plans, while due to a lack of transparency on the number of companies’ employees, it has been unclear which of the other companies pass the established thresholds and are subject to the law. A closer look at the vigilance plans of the four companies reveals many shortcomings. Some plans identify risks to the company rather than risks to potential victims of its impacts; some exclusively focus on deforestation in soy and beef supply chains from Brazil neglecting human rights impacts; generally there has been a lack of clear indicators and deadlines for progress tracking and a lack of stakeholder involvement in all stages of the due diligence process.<sup>ix</sup> On 3 March 2021, Brazilian and Colombian indigenous organizations, together with French environmental NGOs, filed a lawsuit against the company Casino group, because of alleged violations of human rights and environmental laws caused by its beef suppliers. Considering the burden of proof and other practical obstacles for establishing legal liability that characterize such transnational lawsuits (Schilling-Vacaflor 2021), it remains to be seen how French courts will decide on this and other legal cases that build on the Duty of Vigilance law. Given that until now the French law served as a positive model case in the EU policy discourses, we can hypothesize shortcomings in institutional design and enforcement of the forthcoming EU legislation unless important lessons will be learned in time (see later).

## 5. Discussion: New trends and persisting governance challenges

### 5.1. Toward new accountability regimes

New supply chain policies are in the making at the EU level that propose to regulate the soy and beef supply chains from Brazil in a comprehensive manner. The analysis of ongoing policy discourses suggests that both, the regulation on FRC and the due diligence directive, will build on existing mandatory due diligence, probably coupled with other policy measures that due to space restrictions have not been discussed here in detail (e.g. mandatory reporting, mandatory labeling, supply side measures). The policy-making process of the FRC regulation is more advanced than the one on mandatory human rights and environmental due diligence and it has enjoyed particularly broad support, as it has been framed as a measure for mitigating climate change and for preventing future pandemics. Although previous supply chain policies have focused on the protection of either the environment or human rights (see Table 1), the proposed measures promise to integrate both, which is of crucial importance for advancing the SDGs in their different dimensions. Relatedly, pointing toward attempts to establish policy coherence, policymakers from the EP and the EC have reported that for drafting the legislations analyzed here, different directorate generals and parliamentary committees have worked “closer together than ever before” (Heidi Hautala at Webinar 2020b). The analysis of the policy-making processes also revealed that efforts are being made to draw lessons from previous experiences, in particular from the EUTR and the French Duty of Vigilance law. Nevertheless, in the following, we will discuss important challenges that remain to be addressed to avoid the (re-)production of accountability traps that have already limited the effectiveness of previous supply chain regulations.

### 5.2. Overcoming or reproducing accountability traps?

Although our data presented earlier suggest that there has been a broad acceptance to establish mandatory due diligence regulations at the EU level, a closer look at these processes reveals that under the surface of a general agreement, many important institutional design features and enforcement measures need yet to be defined. Several issues in particular concrete obligations of companies and their legal liability are highly contested. While civil society actors, leftist, and green parties have supported more comprehensive and stringent regulation, business actors and conservative and liberal parties have pushed for less stringency and enforceability (EP 2020a; EP 2020b; interviews with European NGOs on 2 July 2019 and 21 August 2019; Smit *et al.* 2020). It remains to be seen whether the gathered knowledge regarding the effectiveness of stringent regulatory measures in the studies commissioned by EU institutions and the broad civil society support for mandatory due diligence will lead toward stringent legislation or whether – like in the case of previous EU policies – future policies will be weakened in the course of their adoption processes (see for instance Kinderman 2020). Hinting at compromises to be made with respect to the EU’s proposal on FRCs, an EC official from DG ENV announced that when having to decide between ambition and implementability, the EC is going for the latter (Webinar 2021).

In the following, we will apply Mashaw’s questions for analyzing accountability regimes to our case study in order to discuss related governance challenges and whether or how they could be overcome for hardening foreign corporate accountability. These questions touch upon input, surrogate, and output accountability.

#### 5.2.1. *Who is being held to account?*

Although there has been a relatively broad consensus in the policy-making processes that new regulations shall be cross-sectoral, details regarding the question of who exactly will be held to account need to be defined. The UNGPs stipulate that they apply to all types of companies, while clarifying that due diligence systems shall be appropriate to their size and circumstances. The exact scope of future regulations, for instance, regarding the questions of which commodities will be included in the FRC regulation and whether there will be any thresholds for companies subject to the new regulations (like in the French Duty of Vigilance law) still need to be specified. In addition, an important question to clarify is whether new regulations will only apply to companies domiciled in an EU Member State or also to those companies placing products or providing services in the internal market. Such details regarding the scope of due diligence regulations are of crucial importance for supply chains from Brazil, as for instance, the largest traders of soy from Brazil to the EU – Archer Daniels Midland, Bunge, and Cargill – are all headquartered in the United States. The scope of the new regulations will be decisive for their actual contribution to reduce governance gaps (or to create new loopholes) and to create a level playing field across different sectors and companies.

### 5.2.2. *To whom is accountability owed?*

In principle, accountability will be owed to the EU and respective Member States as well as to civil society. The UNGPs and the diverse OECD guidelines as well as the EP's own legislative initiative reports also emphasize that stakeholders such as affected communities should be included in all stages of a due diligence process. As discussed in the literature, this important principle of "proxy" or *surrogate accountability* had not been implemented in a satisfactory way in previous supply chain regulations (Partzsch 2020b). While mandatory due diligence should help to address the impacts of global supply chains in the sites of production, there is the risk that companies mainly communicate with and disclose information for actors in the Global North, such as consumers, policymakers, and NGOs.

In light of previous experience, new EU regulations would need to pay special attention to ensure that they will be implemented in a manner that gives an influential voice to stakeholders from the Global South, such as local communities and smallholders from Brazil. Indeed, as mentioned earlier, French companies have to date largely failed to meaningfully include stakeholders in their due diligence systems. However, since the adoption of the Duty of Vigilance law, French NGOs have strengthened their alliances with human rights and environmental organizations in the Global South and some lawsuits have already been filed by such transnational alliances, among them the litigation case against Casino Group mentioned earlier (interviews with French and Brazilian NGOs on 21 August 2019 and 6 March 2020; Schilling-Vacaflor 2021). Our analysis of the drafting process of the FRC regulation shows that while Brazil has been an important reference, very few Brazilian actors submitted comments to the Roadmap presented by the EC or participated in the EC's public consultation. More efforts are needed to include stakeholders from the Global South in new accountability arrangements, to enable regulations that are legitimate, context-sensitive, effective, and follow the "do-no-harm" principle.

At the same time, future research is needed to gain nuanced insights into the developmental implications of new laws for different actor groups in producer countries, especially on vulnerable groups of society such as smallholders or local communities (see for instance Maryudi *et al.* 2020). Therein, particular attention should be paid to potential trade-offs between the interests of large and small or medium enterprises; the needs and interests of producers and workers involved in global supply chains and of broader local populations; as well as between environmental and social impacts.

### 5.2.3. *For what are they accountable? and What standards demonstrate accountability?*

Interestingly, while the UNPGs have originally only focused on human rights due diligence, the future EU regulations will likely cover both, human rights and environmental concerns. According to ongoing discussions and law proposals, it is another important advance of the FRC regulation, as compared to the EUTR, that it will go beyond the legality of the producer country as the relevant standard to be complied with (which has been very problematic in cases like Brazil) and rather will apply international sustainability criteria. The question which human rights will be included in the FRC regulation (rights to land, rights of indigenous principles, the principle of FPIC, a broad range of international human rights?) still requires specification, however. In the final drafting stages in the Commission it looks likely that the proposal will include a more narrow range of human rights than proposed by the EP and rather focus mainly on the problem of deforestation (DG ENV official in Webinar 2021).

Importantly, the recognition of human rights in future legislation may not suffice to guarantee their effective protection. While mandatory measures might cover all or a broad range of human rights violations and environmental damages, because of differences in the availability of data on certain impacts or the focus of public attention on selected issues like deforestation, companies will probably address some problems more than others (see Gardner *et al.* 2019). For instance, analyses of the performance of the EUTR highlight that apart from general shortcomings, the assessment and exclusion of timber associated with land grabbing was particularly weak (Brack & Ozinga 2020). The link between deforestation and land grabbing has been very strong in the Brazilian Amazon and Cerrado regions, where land tenure is insecure and contested. Domestic policies have further incentivized land grabbing and land speculation through deforestation, instead of sanctioning such crimes (Oliveira 2013; Sauer *et al.* 2019b). The expansive soy and cattle frontiers have contributed to processes of land and water grabbing in Brazil, processes largely overlooked in the due diligence systems of transnational or European companies. Apart from regulatory design features, the enhancement of stakeholder involvement, in particular of rightsholders and grassroots organizations, could help to make such local impacts more visible.

#### 5.2.4. *What process demonstrates accountability?*

Although the policy discourses surrounding future EU regulatory measures provide insights into their cornerstones, the concrete obligations of corporations need yet to be established. For instance, due diligence obligations include communication and formal reporting duties of corporations, but the specific reporting requirements that companies will need to fulfill are unclear. Critical scholarship on transparency and accountability has shown that corporate reporting does not necessarily lead to empowerment and more sustainable corporate practices and elaborated conditions under which transparency can contribute to accountability and empowerment (Mason 2020). In line with Mason's findings, the cases of the French Duty of Vigilance law and the UK Modern Slavery Act illustrate that reporting duties without stringent formal requirements (e.g. the inclusion of measurable goals and deadlines, transparency about suppliers) usually do not lead to substantial changes of corporate practices (LeBaron & Rühmkorf 2017; Gustafsson & Schilling-Vacaflor 2021).

In the case of the Brazilian soy and beef supply chains, it will also be necessary to take additional measures for reducing knowledge gaps and improving traceability. Technological tools for establishing complete traceability of soy and beef supply chains are already available and their activation now depends on the political will to use them and to pay for minor extra costs (interviews with staff from Brazil's public prosecutor 12 March 2020; Webinar 2020c). However, the establishment of clear links between concrete supply chains and environmental and social impacts on the ground will remain challenging tasks. Given the shortcomings of certification standards and problems related to documents provided by operators in producing countries in the framework of the EUTR, scholars and civil society organizations argued that new digital technologies such as satellite data on deforestation open up opportunities for improved monitoring (Brack & Ozinga 2020; Rajão *et al.* 2020b). However, such new data tools can only help to monitor certain impacts, while, for instance, data about the loss of access of local communities and family farmers to land, water, and livelihoods due to the expansion of cattle ranching and soy production in Brazil have been scarce (Schilling-Vacaflor *et al.* 2021). Efforts to produce data on impacts that have not yet been rigorously assessed need to be increased, for example, by supporting related civil society or state initiatives in the field of knowledge production and by increased stakeholder involvement in due diligence politics.

#### 5.2.5. *What happens when the agent fails to meet these standards?*

The question of the actual enforcement of future regulations and the legal liability of corporations has been the most contested one in the ongoing policy-making processes (see Rademaekers *et al.* 2019; Smit *et al.* 2020). There are different paths toward increased enforceability, such as the "naming and shaming" of companies by civil society, systems of rigorous state supervision that monitor company practices and sanction non-compliance, and/or legal liability for corporations that do not fulfill their due diligence obligations.

Although studies assessing different regulatory options for FRCs and human rights and environmental due diligence have concluded that mandatory due diligence would likely be most effective for addressing negative impacts, they have also clarified that the effectiveness of such measures depends on the existence of adequate state monitoring and sanctions for non-compliance (COWI, Ecofys, Milieu 2018; Smit *et al.* 2020). Research into previous supply chain regulations points to shortcomings in state supervision, however. Competent authorities often lack the necessary human and financial resources, political will as well as knowledge on supply chains, and their impacts to allow for rigorous state monitoring systems (Moser & Leipold 2020; Schilling-Vacaflor 2021; Partzsch 2020a). The negotiations at the EU and member state level for securing budget to build up enhanced monitoring capacities will likely be very difficult, in particular in a context where many resources will be needed to attenuate the aftermaths of the COVID crisis. In the absence of plans to build adequate institutional structures for monitoring the extraterritorial impacts of companies headquartered or working in Europe so far, it has been left largely to the discretion of business actors to tackle sustainability problems with private measures and to report upon their activities, an opportunity that has previously been particularly well used by large corporations (see Maryudi *et al.* 2020). In other words, the lack of state supervision has contributed to a *de facto* outsourcing of authority to private actors.

The existence of legal liability and access to remedy are crucial for enforcing future EU legislation (Smit *et al.* 2020). A failure of companies to publish complete and timely reports on their due diligence efforts should be penalized and ultimately lead to the suspension of authorization to place products on the Union's internal market. If legal liability is established by the new regulations, it will be possible to bring cases against companies

breaching their due diligence obligations to European courts. However, previous research into court cases on extraterritorial human rights duties of corporations (“tort action claims”) has comprehensively discussed the practical challenges emerging in such complex transnational cases. Mainly covering lawsuits from the United States and the United Kingdom, this literature points to structural asymmetries in information placing the claimants from countries in the Global South, often belonging to marginalized groups, at a disadvantage in proving their cases (Schilling-Vacaflor 2021).

Human rights scholars thus suggest the adoption of measures for addressing such problems when designing and implementing future regulations, in order to improve the access to courts and to ease the burden of proof of victims (Smit *et al.* 2020). It remains to be seen whether such recommendations will be implemented and how courts will apply mandatory due diligence requirements with respect to human rights and environmental impacts. For the time being, it remains doubtful that the new EU legislations will overcome the deficits in *output accountability* of previous regulations.

To sum up, we find that a stringent institutional design of mandatory due diligence measures is a necessary condition for hardening foreign corporate accountability, while transparency is key for enhancing answerability, that is, in our case the capacity of accountability claimants to evaluate the adequacy of due diligence systems. Furthermore, we assume that there can be different paths contributing to enforceability, among them (1) strong surrogate and social forms of accountability; (2) rigorous state supervision; and (3) legal liability to sanction any breaches of due diligence obligations. Evidence from past regulations and from the ongoing drafting of EU legislation suggests that demands for institutional stringency will not be fully met. Future research will need to reveal how transparency rules and legal avenues will unfold in practice in diverse contexts and sectors and how they interact with each other.

## 6. Conclusions

This study has directed attention to the impressive dynamism regarding the adoption of supply chain regulations in the EU and its member states. Therein, we centered our analysis on ongoing policy-making processes at the EU level to adopt cross-sectoral regulations that build on mandatory human rights and environmental due diligence. Such regulations would comprehensively regulate global commodity chains with severe negative impacts, like the soy and beef supply chains from Brazil, for the first time, thereby reducing important accountability gaps linked to fragmented and incoherent regulatory design. Given the existence of other global markets and the possibility of displacement effects, in the longer term an upscaling of foreign corporate accountability norms to the global level would be necessary, however.

Furthermore, drawing on previous research from the fields of global environmental governance and business and human rights as well as on our empirical insights from the soy and beef supply chains from Brazil, we argue that important governance challenges still remain to be addressed for hardening foreign corporate accountability. While important advances seem on the agenda with regard to the so-called *design or input accountability*, issues on procedures and scope of corporate reporting point to persistent loopholes. Progress of *execution or output accountability* partly depends on technological advances and the production of better data on impacts like the access of local communities to land, water, and livelihoods. It also calls for substantial structural changes like enhanced state capacities for monitoring the functioning of due diligence systems and legal reforms easing the burden of proof for the victims of corporate misdemeanor. Such reforms are likely to encounter serious opposition in the decision-making phase and institutional path dependence in implementation. Finally, positive rhetoric to include stakeholders from the Global South in the drafting and implementation of new due diligence regulations needs to be turned into action if *surrogate accountability* and, in consequence, foreign corporate accountability shall be strengthened.

The question of whether and under which conditions new corporate duties to implement due diligence systems will actually lead to concrete improvements in terms of human rights and environmental protection and the question of who will benefit and who will lose in the process of implementing new mandatory measures remain to be studied empirically in different sectors and places. The specific enabling and hindering conditions and mechanisms for hardening foreign corporate accountability, including the complex interactions between mandatory and voluntary as well as public, corporate, and social forms of accountability require further empirical and theoretical research.

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## Data availability statement

The data that support the findings of this study are available on request from the corresponding author. The data are not publicly available due to privacy or ethical restrictions.

## Endnotes

- <sup>i</sup> European Commission. EU position in world trade. <https://ec.europa.eu/trade/policy/eu-position-in-world-trade/> (accessed 9 July 2020).
- <sup>ii</sup> Data from <https://trase.earth> (accessed 20 December 2020).
- <sup>iii</sup> Faostat: <http://www.fao.org/faostat> (accessed 17 March 2021).
- <sup>iv</sup> See <https://trase.earth> (accessed 10 June 2020).
- <sup>v</sup> Data from TRASE: <https://trase.earth> (accessed 6 December 2020).
- <sup>vi</sup> See: [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/2027-Stepping-up-EU-Action-against-Deforestation-and-Forest-Degradation/feedback?p\\_id=343654&page=1](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/2027-Stepping-up-EU-Action-against-Deforestation-and-Forest-Degradation/feedback?p_id=343654&page=1) (accessed 10 December 2020).
- <sup>vii</sup> Statement from Heidi Hautala, cit. After the Business & Human Rights Resource Center. <https://www.business-humanrights.org/en/big-issues/mandatory-due-diligence/> (accessed 18 December 2020).
- <sup>viii</sup> Company data from FOREST 500. At: <https://forest500.org/data> (accessed 18 December 2020).
- <sup>ix</sup> Authors' analysis of companies' vigilance plans available at: <https://vigilance-plan.org> (accessed 15 April 2021).

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### **Supporting information**

Additional Supporting Information may be found in the online version of this article at the publisher's web-site:

**Appendix S1:** List of relevant interviews for this study. The interviews were carried out by the first author in English, German, and Portuguese.