

**Statement of the "Treaty Alliance  
Germany" on the draft for a legally  
binding UN Treaty on Business and  
Human Rights (*»Zero Draft«*)**

UN  
TREATY

# Towards Global Regulation on Business and Human Rights

## Statement of the "Treaty Alliance Germany" on the draft for a legally binding UN Treaty on Business and Human Rights (»Zero Draft«)

The Treaty Alliance Germany, an association of German non-governmental organisations (NGOs), welcomes the draft for a UN Human Rights Treaty to regulate transnational corporations and other business enterprises with respect to human rights ("Zero Draft")<sup>1</sup>. The chairmanship of the intergovernmental working group has thus created an important basis for the negotiations during the forthcoming fourth working session from 15 to 19 October 2018 in Geneva. The Zero Draft clarifies the elements for the draft legally binding instrument ("Elements")<sup>2</sup> published in September 2017 and has gained consistency and clarity on many points.

The draft builds on international developments in the field of business and human rights in recent years and takes up the basic principles of the UN Guiding Principles on Business and Human Rights, such as human rights due diligence and access to remedy for affected parties. With regard to the proposed obligations of states, the Zero Draft contains numerous proposals, which can also be found in the General Comment No. 24 by the UN Committee on Economic, Social and Cultural Rights. The draft is also aligned with national developments on human rights due diligence in France and Switzerland. Against this background, the EU and the German Federal Government should from now on participate actively and constructively in the negotiations on the content of the agreement instead of questioning the process at a formal level. In view of the forthcoming negotiations of the open-ended intergovernmental working group from 15 to 19 October, they should also comment on the current Zero Draft. The Treaty Alliance Germany recommends that the Federal Government and the EU take up the following comments and suggestions in their considerations.

### 1. Holding business enterprises accountable

The draft for a UN Treaty on Business and Human Rights obliges signatory states to enshrine the human rights due diligence obligations of companies in national laws, also with regard to their foreign business activities (Article 9). In designing its due diligence obligations, the Zero Draft closely follows the UN Guiding Principles for Business and Human Rights (UNGPs). The draft stipulates that companies should monitor, identify, assess, prevent and report on actual and potential human rights violations – including the activities of its subsidiaries and that of entities under its direct or indirect control or directly linked to its operations, products or services (Article 9.2a-d)<sup>3</sup>. Only the establishment of internal complaint mechanisms, as laid out by the UNGP, is missing and should be added. If companies fail to comply with their human rights due diligence, it is possible to hold companies liable in the event of human rights violations (Article 9.4 in conjunction with Article 10). Both the clarification of the human rights due diligence and the link with corresponding liability are to be welcomed. The Zero Draft enables the contracting states to exempt small and medium-sized enterprises (SMEs) from the due diligence laws to be established (Article 9.5). However, despite their small size, some companies pose considerable human rights risks. Thus, SMEs from high-risk sectors should be supplemented to the draft. A corresponding solution is about to be agreed in Switzerland.

In addition, the restriction of the scope to transnational transactions in Art. 3 must be viewed critically. According to Art. 4, this includes all transactions in which people from two or more countries are involved in or which affect two or more countries. This broad definition covers many transactions such as the cross-

<sup>1</sup> See <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>

<sup>2</sup> See [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs\\_OBEs.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf)

<sup>3</sup> More concretely, environmental and human rights impact assessments should be carried out before and after business projects and the results should be presented and integrated in relevant internal functions and processes. Furthermore, appropriate countermeasures should be taken (Article 9.2e). All of this should be part of the contractual relations of a transnational nature (Article 9.2f). In addition, companies will be obliged to consult meaningfully with potentially affected groups (Article 9.2g).

border sale of goods. Focusing on transnational transactions is justified because there are particular regulatory gaps in this area. Nevertheless, in purely domestic situations, the persons concerned may be placed in a worse position if human rights due diligence obligations do not apply to the national company involved or procedural rights arising from this treaty are not applicable. For this reason, appropriate catch-all clauses are to be recommended, requiring the states to extend corporate obligations and procedural rights to national situations as far as they are applicable.

## **2. Liability**

The draft UN Treaty on Business and Human Rights obliges states to hold companies legally accountable for breaching their due diligence in case of human rights violations (Article 10). According to Art. 9 in conjunction with Art. 10, civil liability should be limited and only affect an indirectly involved company if it had control over or a close relationship with the subsidiary or supplier or at least could have foreseen the damage. We welcome this clarification, which should be spelled out further in the coming rounds of negotiations. With regard to the criminal liability of companies, the draft is cautious. The draft does not prescribe corporate criminal law, but also enables the contracting states to impose alternative sanctions (Article 10.12). It is regrettable that here the opportunity was not seized to oblige states to reorganise their national criminal law systems in such a way that criminal acts by companies can also be punished. After all, corporate criminal law has an important signal function, making it clear that criminal behaviour by companies is no longer tolerated, but consistently prosecuted and sanctioned. This would also deter other companies from similar behaviour. Despite considerable corporate misconduct, for example in the case of the emissions scandal concerning German car manufacturers, there is still no comprehensive corporate criminal law in Germany. In addition to financial penalties, dissolving the legal entity in particularly serious cases should also be considered. Public law sanctions are completely absent in the draft. Effective administrative sanctions could include, for example, exclusion from public procurement, government subsidies or the granting of export credits and public guarantees for investments.

## **3. Access to remedy for affected parties**

We welcome that this Zero Draft focuses on access to remedy for those affected by human rights violations (Article 8, see also Article 7.2) as well as on judicial cooperation (Article 11) and international cooperation (Article 12). In particular, it should be emphasised that states should ensure that those affected have access to information on relevant corporate decision-making processes (Article 8.4) and create possibilities in order to collectively seek compensation for those affected (Article 8.2). Another positive aspect to be emphasised is that obstacles for affected subjects, such as procedural costs, are to be reduced (Articles 8.5 and 8.6). The corresponding articles should be designed in such a way that gaps in protection for affected subjects are closed. It is particularly important for effective legal protection of the persons concerned that they can also appeal to the courts in the home country of the companies involved. Therefore, the provisions on jurisdiction in Art. 5 are to be welcomed, according to which actions can be filed both at the place of the harmful event and at the registered office of the company.

## **4. Primacy over obligations of trade and investment agreements**

In many cases, trade and investment agreements restrict the possibility for states to implement human rights – for example, when they allow investors to sue states before so-called investor-state arbitration tribunals against minimum wages and other social and environmental standards. In order to prevent this in the future, the Elements had very clearly formulated the primacy of human rights obligations over obligations under investment protection and trade agreements. The Zero Draft, on the other hand, refrains from formulating a primacy clause, although concrete proposals have already been made.<sup>4</sup> It is true that future trade and investment protection agreements should not contain provisions that conflict with the implementation of a UN Treaty on Business and Human Rights (Article 13.6). However, this does not apply to current agreements, since a future UN Treaty should not affect existing rights and obligations under national and international law (Article 13.3). This is further mitigated by the fact that all current and future agreements are only to be interpreted in such a way that they are “least restrictive” on the ability to respect a future UN Treaty (Article 13.7). However, a restriction of human rights by trade and investment provisions is

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<sup>4</sup> Markus Krajewski (2017): Ensuring the Primacy of Human Rights and Investment Policies: Model Clauses for a UN Treaty on transnational corporations, other businesses and human rights, published by Coopération Internationale pour le Développement et la Solidarité (CIDSE), Brussels, March.

<sup>5</sup> See <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/ZeroDraftOPLegally.PDF>

not ruled out. Thus, implicitly a precedence of the trade and investment provisions over human rights obligations is formulated. Art. 13.7 must therefore be urgently reformulated and ensure that trade and investment protection treaties are interpreted in such a way that they do not limit human rights obligations. The primacy clause for human rights proposed in the Elements should be reintroduced.

### **5. Monitoring the implementation of the treaty**

The Zero Draft provides for the establishment of an independent Committee of experts. This committee will be responsible for interpreting the provisions of the treaty and for receiving and evaluating regular state reports on the implementation of contractual obligations (Article 14). However, the establishment of an international court before

which those affected can sue the participating companies and/or states in the event of infringements should be pursued further. Although national legal redress is best available to those affected and can often provide more effective and faster remedy than international actions and complaints, in many countries the national legal system does not provide sufficient protection. The competence to investigate specific cases and receive complaints from individuals to the state can only be found in the draft Optional Protocol<sup>5</sup>, which was published in September 2018. In order to strengthen the rights of those affected, the Committee should be given far-reaching powers such as the investigation of individual cases in the main treaty (like in the UN Convention against Torture and the UN Migrant Workers Convention).

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The detailed position paper "Towards a Global Regulation on Business and Human Rights" of the Treaty Alliance Germany of 2017 is available at:

[https://www.cora-netz.de/wp-content/uploads/2018/03/2017-12\\_TreatyAlliance-D\\_Positionspapier.pdf](https://www.cora-netz.de/wp-content/uploads/2018/03/2017-12_TreatyAlliance-D_Positionspapier.pdf)

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*The following civil society organisations have joined forces in the Treaty Alliance Germany ([www.cora-netz.de/treaty](http://www.cora-netz.de/treaty)) in order to support the process towards a global human rights treaty on transnational corporations and other business enterprises. The present statement is supported by the member organisations within the scope of their mandate.*

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Attac Deutschland | Brot für die Welt – Evangelischer Entwicklungsdienst | BUND – Bund für Umwelt und Naturschutz Deutschland | CIR – Christliche Initiative Romero | CorA-Netzwerk für Unternehmensverantwortung | FEMNET | FIAN- Deutschland, FoodFirst Informations- & Aktions- Netzwerk | Forschungs- und Dokumentationszentrum Chile- Lateinamerika (FDCL) | Forum Fairer Handel | Forum Umwelt und Entwicklung | Germanwatch | Global Policy Forum Europe | Goliathwatch | INKOTA | Medico International | MISEREOR | Mission EineWelt. Centrum für Partnerschaft, Entwicklung und Mission der Evangelisch-Lutherischen Kirche in Bayern | PowerShift | SÜDWIND – Institut für Ökonomie und Ökumene | WEED – Weltwirtschaft | Ökologie & Entwicklung

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