

Toward global Regulation on Human Rights and Business

Position paper of the Treaty Alliance Germany
on the UN treaty process on transnational corporations
and other business enterprises

UN
TREATY

Imprint

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Berlin, October 2017 (updated version, December 2017)

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Layout: peerneumann.com
Printing: dieUmweltdruckerei.de



Executive Summary

Trade and investment protection agreements facilitate business enterprises' access to markets and raw materials, and protect investor interests with enforceable rights. Although human rights are a cornerstone of international law, so far there are only voluntary guidelines to safeguard them within the activities of global enterprises. This needs to change; human rights need a mandatory commitment. This is where the "UN treaty process" comes in. It offers the chance for binding international regulation of global business: Since 2015, an intergovernmental working group has been negotiating an international human rights treaty that is binding for the contractual parties, outlines clear rules for business enterprises and strengthens access to justice for affected parties.

The signatory organizations of this position paper welcome this initiative and call for a treaty that:

- ▶ compels states to legally obligate its corporations to respect human rights, including within their extraterritorial activities, subsidiaries, and supply chains;
- ▶ grants effective legal protection to affected parties, also at the courts of the companies' home states;
- ▶ regulates how states co-operate in transnational cases to hold business enterprises to account;
- ▶ determines that the obligations of the treaty on business and human rights have primacy over the obligations of trade and investment protection agreements;
- ▶ provides for a committee of independent experts to receive state reports on the progress of the implementation of the treaty and review individual complaints against states;
- ▶ initiates a process to create an international human rights court at which affected parties can bring legal action against transnational corporations over human rights abuses.

The Treaty Alliance

The Treaty Alliance (www.treatymovement.com) is an international association of more than 1000 civil society organizations and individuals formed with the aim of supporting progress toward an international human rights treaty on transnational corporations and other business enterprises. This position paper was compiled by the following member organizations of the Treaty Alliance Germany (www.cora-netz.de/treaty): Attac Deutschland, Brot für die Welt, Bund für Umwelt- und Naturschutz Deutschland, Christliche Initiative Romero, CorA-Netzwerk für Unternehmensverantwortung, FEMNET, FIAN Deutschland, Forschungs- und Dokumentationszentrum Chile-Lateinamerika, Forum Fairer Handel, Forum Umwelt und Entwicklung, Global Policy Forum, INKOTA-netzwerk, medico international, MISEREOR, PowerShift, SÜDWIND and WEED. The positions published here are supported by the network's member organizations.

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1. What is the UN treaty process about?

Human rights abuses are hardly an exception in the global economic system. Often, corporate profits are systematically fed by poor working conditions and low environmental standards. When business enterprises violate labor rights, drive local populations from their homelands or cause damage to the environment and people's health, they often face no consequences for their actions. Those affected have little access to legal protection or redress—neither locally nor in the enterprises' home countries. In order to address this problem, the Human Rights Council of the United Nations (UN) has launched a new initiative toward an international treaty (known as the “UN Treaty”) that creates binding rules for business enterprises, and strengthens access to remedies for affected parties, regardless of national borders.¹

The need for a binding treaty

In the course of globalization, the power and influence wielded by transnational enterprises have grown continuously. Their access to markets and the protection of their investments have been increased considerably. International investment and free trade agreements have increased their access to markets and protect their investments through investor rights and arbitration courts.

If a state's new laws or regulations to protect the environment and human rights interfere with the investment climate or the profit forecasts of foreign investors, the latter can sue that state for damages. Yet, at the same time, there are no corresponding instruments that would oblige these same enterprises to respect human rights, and would provide those affected by human rights abuses with access to courts.

Through the UN Guiding Principles on Business and Human Rights, the UN member states were able to agree on a catalogue of recommendations for states and corporations in 2011. However, the Guiding Principles are not binding under international law and specifications on regulatory measures remain vague. Therefore, the National Action Plans at state level that are designed to implement the UN Guiding Principles focus on voluntary approaches and ultimately stay toothless. The UN treaty process now offers the chance to expand upon the UN Guiding Principles and create a mandatory agreement with more self-assertive clout. A binding treaty can define states' obligations to regulate enterprises and create a level playing field. In particular, a binding treaty can support affected parties and states in holding enterprises accountable for human rights abuses.

Process toward a binding treaty

In 2014, following a resolution drafted by Ecuador and South Africa, a majority in the UN Human Rights Council spoke out in favor of a human rights treaty to regulate business activity. Since then, two sessions of an intergovernmental working group have taken place in Geneva.² The European Union (EU), the US, Australia and other industrialized countries blocked the process at first. However, the EU and its member states, as well as Switzerland, Norway, Japan and Australia, finally decided to take part in the sessions. While 60 countries participated in

¹ See Resolution of the UN Human Rights Council (A/HRC/RES/26/9).

² The official title of the working group is: *Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG)*.

the first session of the working group, by the third session in October 2017, 101 countries were represented, including Germany. However, in order to make further progress, it will be crucial that prosperous countries, such as EU member states, move away from their fundamental skepticism, and start to actively work together with other nations with the aim of developing a binding treaty.

Alongside current and former UN special rapporteurs, as well as multiple experts in international law, a broad coalition of over 1000 civil society organizations worldwide supports the process toward a binding international treaty. On March 16, 2017, the European Parliament called once again upon the EU and its member states to actively and constructively take part in the formulation of a binding legal instrument.³

Between October 23 and 27, 2017, the working group convened in Geneva for the third time. Governments and representatives from academia, civil society, and business discussed draft elements of the prospective treaty presented by the Ecuadorian Chair-Rapporteur of the working group. The Chair-Rapporteur will now hold informal consultations on the way forward on the elaboration of the treaty.

It is welcome that key issues are considered within the proposed elements – namely, human rights due diligence processes, civil, criminal and administrative sanctions, access to justice, and primacy of human rights over trade and investment agreements. The elements presented therefore build upon the UN Guiding Principles on Business and Human Rights. Another chapter mentions different mechanisms for implementation including an international human rights court on transnational corporations. As regards the scope of application, the draft elements propose that the treaty should cover all human rights abuses resulting from business activities of transnational corporations and other business enterprises that have a transnational character, regardless of the size or structure of the business enterprise. It is welcome that the scope is no longer limited to transnational corporations but focuses on transnational activities. The term “transnational character” of business activities, however, has to be defined more precisely. It should be clarified that all business enterprises have to respect human rights in all their business relationships. The prospective treaty should specify the liability reasons and clarify that non-compliance with human rights due diligence standards leads to liability. Finally, the prospective treaty should cover all areas of the State-business nexus. They should explicitly cover State-owned enterprises, external trade promotion, public procurement and subsidies.

The draft elements present a good basis for further negotiations. Throughout the process, the elements should be specified and improved. The German government should accept the invitation of the Chair-Rapporteur to comment on the draft elements and it should submit constructive proposals for their further elaboration.

³ See Resolution of the EU Parliament (2017/2598(RSP)).

2. What the future treaty must include

The prospective treaty will be an agreement between governments and thus obligates the contracting states once they have ratified it. Nevertheless, the treaty must define the duties of business enterprises and oblige the states to ensure that the rules are followed. In particular, the treaty must obligate the states to grant legal protection to individuals and groups affected by human rights abuses. A special focus of the treaty is aimed toward closing the significant legal loopholes that have arisen through transnational business activities. This means that the treaty must regulate the responsibility business enterprises have for their subsidiaries and global supply chains, and facilitate international co-operation in transnational cases.

For the concrete formulation of the treaty, states can build upon existing international standards and recommendations. The recommendations of the UN treaty bodies and special rapporteurs provide an informative basis for state obligations to regulate business and provide access to justice. Especially helpful signposts can be found in the UN Guiding Principles for Business and Human Rights and General Comment No. 24 of the UN Committee on Economic, Social and Cultural Rights.⁴

Holding business enterprises accountable

Business activities can directly impact on human rights—for example, when a company does not respect the rights of its workers or in cases where water, soil, and air are contaminated during the extraction of raw materials.

Business enterprises can also be indirectly involved in human rights abuses, for example, as a parent corporation of a foreign subsidiary, as a purchaser from textile or electronics factories that abuse labor rights, as a supplier of toxic pesticides or surveillance technology, or as a processor of raw materials whose extraction process leads to severe rights abuses. The UN Guiding Principles for Business and Human Rights and the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development (OECD) both make clear that enterprises must take responsibility for the negative human rights impacts of their business activities—not only within their own enterprises, but also in relation to their subsidiaries and throughout their entire supply chain. The UN Guiding Principles describe this responsibility as human rights due diligence. The OECD has since outlined these due diligence requirements in more concrete terms in the form of general and sector-specific due diligence guidances. However, until now, these standards have not been mandatory for business, and to date only a few enterprises have begun to implement meaningful human rights due diligence.

The prospective treaty must build upon these developments and obligate states to enshrine the human rights due diligence requirements for business enterprise within their legal systems. Due diligence can reduce the risk of human rights abuses committed by corporations and make it easier to hold enterprises accountable for damages. It can also create clarity and lead to more legal security for businesses that implement the standards.

⁴ See General Comment No. 24 of the UN Committee on Economic, Social and Cultural Rights (E/C.12/GC/24).

▣ The prospective treaty must obligate states to introduce mandatory human rights due diligence requirements for business enterprises within their national laws. The treaty should specify that national laws on human rights due diligence must, at a minimum, contain the following elements:

- Business enterprises must carry out regular human rights risk assessments, also in relation to their subsidiaries and throughout the value chain. Should these assessments or external indicators result in signs of concrete risks to human rights, the business enterprise must (based on the specific circumstances of the individual case) expand its impact analysis and consult with local actors (such as affected parties, labor unions, and non-governmental organizations) as well as with external experts.
- Business enterprises must integrate the outcomes of their risk and impact assessments into their internal processes and undertake remedy with the involvement of local actors. The suitability of the intended corrective measures is determined by the probability and severity of possible human rights abuses, the risks specific to the country and the sector, and the size and position of the enterprise.
- Business enterprises must communicate the human rights risk and impact assessments and the countermeasures transparently and publicly in a way that allows affected people and other interested parties to judge the adequacy of any actions taken.
- Business enterprises must establish a system to handle complaints that is accessible, transparent, legally grounded, and appropriate to those affected in order to enable remedy and reparation.

Liability

The treaty must obligate states to hold business enterprises liable for human rights abuses.

Liability under civil law:

▣ The prospective treaty must obligate states to ensure civil liability for human rights abuses committed by business enterprises. To this end the human rights due diligence requirements described above must be defined as the applicable duty of care. An enterprise must be liable for damages including those caused by subsidiary companies and business partners if these could have been prevented through reasonable human rights due diligence measures. The burden of proof that appropriate due diligence measures were undertaken must lie with the enterprise.

Liability under criminal law:

While many states now recognize the criminal liability of business enterprises, at least for some severe offences, in other countries, such as Germany, there is still no comprehensive criminal liability for business enterprises. Such liability sets a crucial example, making explicit that criminal behavior by business enterprises will no longer be tolerated, but rather systematically prosecuted and sanctioned, thus deterring other enterprises from criminal practices.

- ▶ A prospective treaty must obligate states to ensure the criminal liability of business enterprises.
- ▶ As a minimum, the treaty must compile a list of serious crimes which are to be nationally listed as criminal offences for business enterprises; for example: homicide, modern forms of slavery, exploitative child labor, forced labor, forced displacement, sexualized violence, torture, severe environmental pollution, and war crimes.
- ▶ In addition to financial penalties, the dissolution of legal entities must be included in the catalogue of sanctions.
- ▶ States must ensure that law enforcement authorities are trained in the implementation of the new regulations and are placed in a position to prosecute criminal acts that have led to damages in other countries.

Regulations under administrative law:

Liability under civil and criminal law should be supplemented by public law sanctions, such as administrative orders, fines, and the withholding of state benefits. Through such regulations, the observance of standards can be encouraged from the outset so that damages are less likely to occur.

- ▶ A prospective treaty must obligate states to use existing structures or create new monitoring structures to supervise the observance of human rights due diligence requirements.
- ▶ States must impose fines on those business enterprises that fail to present plans for due diligence upon request.
- ▶ States must ensure that the observance of human rights due diligence is a prerequisite for awarding public contracts, as well as granting subsidies and incentives for foreign business practices.

▶ CASE

Human rights abuses in the textile industry

Pay well below a living wage, abuses and discrimination in the workplace, suppression of union organization, and serious occupational accidents occurring on a regular basis—this is the sad reality for millions of workers in South and East Asia who produce textiles for European markets. In April 2013, more than a thousand workers died when the Rana Plaza factory complex in Bangladesh collapsed; over 2,500 were injured, some severely. In September 2012, 260 people perished in a fire at the Ali Enterprises factory in Pakistan because the windows were barred and the emergency exits barricaded. The many European clothing enterprises whose textiles were produced in these buildings, including some German companies, still refuse to acknowledge responsibility for such conditions. They refer to casual contractual relations with the suppliers, which supposedly exclude them from taking direct responsibility, and thereby from paying compensation.

German discount clothing brand KiK was one of Ali Enterprises' main customers (70 percent of its production was sold to the German company) and, as such, would have had the opportunity to influence labor conditions through its purchasing terms.⁵ The UN Guiding Principles for Business and Human Rights also consider that enterprises are responsible for preventing and remediating labor rights abuses committed by their suppliers. However, currently, the Guiding Principles are not legally binding and do not lend affected people any rights.

The chances of legal action pursued by affected parties and demands for reparation, e.g. from German enterprises whose products are made in these factories, being successful are therefore extremely slim. A further difficulty is the fact that affected parties cannot provide evidence of misconduct, since they have no insight into complex corporate structures. Finally, due to a lack of collective redress or class action, no suitable representation for the affected parties exists. Those affected by the fire at the Ali

Enterprises factory, who founded the *Baldia Factory Fire Affected Association*, thus had to choose among four plaintiffs for the prosecution against KiK.

How could the treaty have helped those affected?

Human rights abuses in textile production for the European market are a clear sign that it is not enough to simply ask enterprises to meet their human rights responsibilities voluntarily. If comprehensive protection of human rights is to be ensured throughout the entire value chain, mandatory provisions are essential. Only then can a change in mindset occur. The treaty would help those affected by ensuring that the contracted states are obligated to standardize clearly outlined and mandatory human rights due diligence requirements for enterprises and ensure this defines the applicable duty of care in liability claims. In the case of damages, affected parties could refer directly to this duty of care in court and demand reparation. Since a lack of insight into enterprise decisions typically makes it impossible to provide evidence of violations of due diligence, the treaty should stipulate that the burden of proof for adherence to due diligence requirements falls on the enterprises. This is appropriate, since enterprises are better positioned to offer insight into their own decision-making measures. Finally, the introduction of collective action procedures for large groups of affected parties, as in the KiK case, would make it possible for these groups to bring their claims effectively and cost efficiently without the risk of a statute of limitation.

⁵ ECCHR, Paying the price for clothing factory disasters in south Asia, available at: https://www.ecchr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik.html (last accessed: September 27, 2017).

Access to remedy for affected parties

Providing effective access to remedy for affected parties has long been part of a state's duty to protect human rights. Until now, however, implementation has been lacking. In many countries, there is no sufficiently independent judicial system as economic interests often outweigh social concerns. Compounding this are high costs and the often-exceedingly long duration of legal procedures. If affected parties decide to bring a case against a corporation in the latter's home state, further problems may arise. In many countries the judicial system declares the case to be out of its jurisdiction when damages occur abroad. Rather than co-operating on transnational cases and supporting each other in taking evidence and enforcing judgement, serious human rights abuses by transnational corporations go unpunished. Along with the previously described changes to legislation concerning the liability of business enterprises, additional measures will also be needed to fortify the procedural rights of affected parties.

The prospective treaty must obligate states to grant effective and independent legal protection to affected parties in cases of human rights abuses by business enterprises. A prospective treaty must therefore include minimum requirements for states' domestic judicial mechanisms as well as the facilitation of transnational procedures:

- ▶ States must create collective action procedures which also allow large groups of affected parties to seek remedy.
- ▶ States must strengthen the possibilities for affected parties to halt harmful projects through court injunctions or other provisional measures before the harm occurs.
- ▶ States must ensure that affected parties can gain access to information on any relevant internal decision-making processes that an enterprise has in place. For this, corporations must be obliged to disclose information.
- ▶ States must be obligated to instruct their courts to grant jurisdiction for prosecutions against business enterprises who have headquarters or significant business activities located within their countries. Subsidiaries under their control, along with the parent companies, must be liable for prosecution in the home state where the parent company is headquartered.
- ▶ A prospective treaty must obligate states to judicial co-operation, and thereby ensure that all required information related to such procedures be exchanged and all court decisions enforced unless they are irreconcilable with international human rights.

The Danzer Case

The Danzer Group is a German-Swiss enterprise that harvested timber in the Democratic Republic of Congo (DRC) through a wholly owned subsidiary, Siforco. Its actions repeatedly led to clashes with local residents, some of which ended in violent attacks by the military and the police. The most dramatic incidence occurred early on the morning of May 2, 2011, when 60 armed members of the military and the police raided a village and committed multiple human rights violations. They subjected village residents to beatings and arbitrary arrest, destroyed their property and raped many women and girls. Witnesses later said that Siforco had provided vehicles and drivers for the attack, and had paid for them afterwards.⁶ The incident was allegedly provoked by village residents stealing two batteries, a solar cell and a radio. Contrary to its obligation under Congolese law to implement social projects, the enterprise did not hold to its agreement to build a school and a health-care center in the village, and residents responded by protesting. When this began to frequently result in violent attacks, both the subsidiary and the corporate managers in Europe were repeatedly advised by nongovernmental organizations against co-operating with local security forces. The companies were thus aware of the risk of taking such action. In spite of this, on May 2, 2011, instead of seeking to resolve the conflict by peaceful means, Siforco brought in security forces.

In their efforts to address the incident, village residents first attempted to file a lawsuit in the DRC. In March 2012, aided by a Congolese attorney in the provincial capital of Mbandaka, they brought criminal complaints against the police and military forces, and the two Siforco employees involved, as well as claims for damage compensation under civil law. Although the attorney received anonymous phone calls demanding that he drop the complaints, he decided to make the incidents public. As a result, investigations were eventually carried out and the case was heard by the local military court from July

to December 2015. In the end, many members of the security forces were sentenced to minor prison terms of two to three years for crimes against humanity. The Siforco employees, on the other hand, were acquitted. The greatest hurdle the trial faced was the chronic underfunding of the Congolese judicial system. This led to constant delays; witnesses could not be examined and their protection could not be guaranteed.⁷

Parallel to the trial in the DRC, criminal complaint were filed against a German manager of the Danzer Group in April 2013 at the Tübingen public prosecutor's office in Germany. He was accused of a breach of duty of care in having failed to prevent the wrongful acts committed by the security forces against the villagers, since he had neglected to instruct Siforco not to co-operate with them should conflicts arise. In order to provide evidence of the manager's responsibility, it was necessary to find out what influence he held over Siforco's activities. This information was almost impossible to obtain, as Danzer is a family-run business and thus not obligated to make its annual reports public. Communication problems caused additional complications, as is common to most transnational procedures. Witness statements had to be translated, which drove up expenses and caused delays. After two years of investigations advancing at a sluggish pace, the public prosecutor's office abandoned the case. One of the many reasons given was that mutual judicial assistance procedures and investigation requests "in African states" were apparently excessively difficult and that the case did not merit such expense. Since the dismissal of the affected parties' complaints in 2015, no further investigations have been forthcoming.⁸ Danzer's responsibility has not been clarified, and those affected have never been granted redress either in the DRC or in the country where the corporation is based.

⁶ Skinner, Gwynne/McCorquodale, Robert/De Schutter, Olivier (2013): *The Third Pillar, Access to Judicial Remedies for Human Rights Violations by Transnational Business*, p. 84, available at: http://corporatejustice.org/documents/publications/eccj/the_third_pillar_-_access_to_judicial_remedies_for_human_rights_violation.-1-2.pdf (last accessed: July 27, 2017).

⁷ MONUSCO, *Accountability for Human Rights Violations and Abuses in the DRC: Achievements, Challenges and Way forward* (1 January 2014 – 31 March 2016), p. 33, available at: www.ohchr.org/Documents/Countries/CD/UNJHROAccountabiliteReport2016_en.pdf (last accessed: July 27, 2017).

How could the treaty have helped those affected?

The binding treaty would obligate the contracted states to introduce mandatory human rights due diligence for business enterprises. Through more rigorous regulations on human rights due diligence, many abuses could be prevented in their early stages. Should they occur, transparency requirements would facilitate both access to business enterprises' internal decision-making processes and to evidence of misconduct. Clarifying the extent of the obligation a parent corporation has to carry out due diligence concerning human rights abuses committed by its subsidiaries is also relevant in criminal law. Only through these means is it possible to prove whether evidence of criminal neglect exists. The treaty could oblige the contracted states to introduce criminal liability for business enterprise. It would thereby have been possible to bring criminal complaints against the Danzer enterprise instead of only against the manager. The prosecution of individual managers is insufficient, since it is extremely difficult to prove their misconduct, and such acts are often the result of enterprises' internal policies. Furthermore, the treaty would strengthen national legal procedures and facilitate complaints in the state where the human rights abuses occur. In cases where this is not possible (for example, due to safety concerns), the treaty would still give those affected the opportunity to prosecute the enterprise in its home state.

In such transnational procedures, the treaty would obligate the states to co-operate within the legal process and thereby facilitate the presentation of evidence, such as the questioning of witnesses abroad. Public prosecutor's offices could no longer drop investigations due to states' lack of co-operation. If legal procedures falter due to inadequate judicial systems, the recommended international human rights court on transnational corporations could still function as a supervisory body.

⁸ ECCHR, No investigations against Danzer manager over human rights abuses against community in DRC, available at: https://www.ecchr.eu/en/our_work/business-and-human-rights/danzer.html (last accessed: September 27, 2017)

Primacy over obligations of trade and investment agreements

Investment protection and trade agreements are often designed purely to serve the economic interests of transnationally active business enterprises and limit the regulatory capacities of the contracting states to respect, protect and fulfill human rights. Principle 9 of the UN Guiding Principles on Business and Human Rights thus requires that when entering into such agreements, states must ensure that the domestic political capacities to protect human rights are maintained. The UN Committee for Economic, Social and Cultural Rights makes clear in its General Comment No. 24 that states must also thereby ensure that they do not prevent other states from fulfilling their human rights obligations (Paragraph 29). Previous human rights clauses in trade and investment agreements have only been applied in rare cases and do not make adequately clear that trade and investment regulations may not limit the regulatory spaces of states to meet their human rights obligations. A prospective treaty on business and human rights must therefore clearly establish the primacy of human rights over trade and investment agreements.

- ▣ The prospective treaty on business and human rights must clearly define the relationship between trade and investment agreements and human rights through a special supremacy clause. The regulations of the prospective human rights treaty must have primacy for the contracted parties over contradictory obligations of trade and investment agreements.
- ▣ The prospective treaty must oblige states to carry out human rights impact assessments before the start of negotiations and periodically during implementation of agreements to protect trade and investment. In cases where negative human rights impacts have been identified, states must be obligated—both prior to and after ratification—to amend any regulations that have negative impact on human rights in a transparent and democratic manner.
- ▣ The prospective treaty must oblige states to incorporate mandatory exception clauses on human rights into all trade and investment protection agreements. These clauses must make clear that trade and investment obligations may never be interpreted so as to limit a state's regulatory ability to respect, protect and fulfil human rights both domestically and abroad. The implementation of these clauses must also be guaranteed through effective complaint mechanisms for civil society actors.

Chevron-Texaco vs. Ecuador

In the case of Chevron-Texaco vs. Ecuador the US corporation Chevron brought an arbitration case against the state of Ecuador. The case was filed by Chevron-Texaco in order to avoid paying compensation for damages which were ordered by Ecuadorian courts due to the company's use of improper methods of petroleum extraction. From 1964 to 1992, Texaco, which was taken over by Chevron in 2001, extracted oil in the Lago Agrio region of the Amazonian area of Ecuador. After Texaco had ended its oil extraction, 30,000 affected individuals who had come together to form the *Unión de Afectados por las Operaciones de Texaco* (UDAPT) filed multiple class actions against the corporation in courts both in the US and in Ecuador. For the past 23 years they have been fighting for redress. The claimants accuse the corporation of having been grossly negligent from the outset with regard to their petroleum extraction processes. Driven by the goal of generating maximum profits from the smallest possible investment, essential safety standards were apparently ignored. Water mixed with toxic by-products from oil production was said to have been dumped into rivers, and large areas of the region were polluted by oil leaks. This has apparently resulted in the destruction of 4,500 square kilometers of tropical rainforest. The apparent contamination of the water supply with toxins has led to an increased rate of cancer. These were the complaints raised when the union association filed a lawsuit at a New York federal court in 1993. After nine years of legal disputes, the court rejected the suit on the grounds that Ecuadorian courts were more appropriately placed to handle the claim. In 2011, an Ecuadorian court finally ordered Chevron/Texaco to pay 18 billion US dollars. In response, the corporation withdrew its entire assets from Ecuador so that the judgement could not be enforced. At the same time, it called upon the Permanent Court of Arbitration in The Hague and accused Ecuador of having violated multiple regulations of a bilat-

eral investment agreement with the US through its unauthorized influencing of the Ecuadorian court. In February 2011, the court of arbitration issued an injunction prohibiting Ecuador's enforcement of the sentence against Texaco/Chevron.⁹ To counter this, the plaintiffs turned to the Inter-American Commission on Human Rights, but were unsuccessful. They claimed that the enjoyment of their rights to life, physical integrity, and health was threatened as a result of the investor-state's procedural halt to payments of compensation for damages.¹⁰ In 2013, the Supreme Court of Ecuador upheld the judgement of the Ecuadorian court and merely reduced the sum of compensation to 9.5 billion US dollars. However, a revision of the decision by the Permanent Court of Arbitration in The Hague is not possible.

How could the treaty have helped those affected?

The treaty should establish that those affected by human rights abuses committed by business enterprises can take legal action both in the country where the damages occur as well as in the country where enterprise is based. The affected parties in this case would thereby have avoided having to take their lawsuit back to the Ecuadorian court after many years of litigation in the US. Regulations on judicial co-operation would have guaranteed the cross-border recognition and enforcement of the court judgement that sentenced Chevron to pay compensation for damages. Finally, the treaty would have ensured that human rights were taken into consideration within investment disputes. National court decisions that award legal protections to those affected by human rights abuses should no longer be considered to be in violation of trade and investment agreements.

⁹ Permanent Court of Arbitration (2011): Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador, Order of Interim Measures dated February 9, 2011, available at: <https://www.italaw.com/sites/default/files/case-documents/ita0167.pdf> (last accessed: July 26, 2017).

¹⁰ Krajewski, Markus (2017): Ensuring the primacy of human rights in trade and investment policies: Model clauses for a UN Treaty on transnational corporations, other businesses and human rights, p. 10, available at: www.cidse.org/publications/business-and-human-rights/business-and-human-rights-frameworks/ensuring-the-primacy-of-human-rights-in-trade-and-investment-policies.html (last accessed: July 27, 2007).

Monitoring the implementation of the treaty

States should agree that the treaty takes effect as soon as it has been signed and ratified by a minimum number of states.

To ensure that the treaty does not become a toothless tiger, effective procedures for its implementation and further development need to accompany the regulations it sets out. Such measures include the creation of an administrative secretariat, procedures for the amendment or tightening of the standards, and an effective system of monitoring and review.

Committee of independent experts

International human rights treaties are usually monitored by a committee of independent experts that interprets the treaty regulations, receives and reviews state reports on the status of implementation, and also reviews individual complaints. Although these committees of experts do not have the mandate to pronounce enforceable judgements, the recommendations they offer to states receive widespread recognition.

► The prospective treaty on business and human rights must provide for such an independent committee of international experts and grant this committee *inter alia* the following mandate:

- Interpretation of the treaty provisions;
- Receipt and assessment of regular state reports on the implementation of the treaty's obligations;
- Receipt of individual complaints against states in cases of business-related human rights abuses;
- In specific cases, on-site investigations (country visits, right to access information).

International court for transnational business enterprises and human rights

A domestic legal process is the path most accessible to affected parties and can often lead to more effective and faster remedies than international prosecution and complaints processes. Therefore, the treaty must primarily aim to strengthen national legal systems as described above. However, in many countries, domestic legal systems do not offer sufficient protection. This is why investment protection agreements offer transnational enterprises special provisions, e.g. enterprises need not resort to the national judicial system, but can instead file action against the state at an international court of arbitration. These special provisions for enterprises, allowing them to take action through non-transparent and democratically non-legitimized arbitration courts, must be abolished.

Instead, there should be an international court of human rights where those affected by human rights abuses can take legal action against transnational business enterprises. The international court must have jurisdiction over civil lawsuits seeking compensation for damages or omissions against transnational enterprises, as well as over criminal complaints. The notion of an

international legal proceeding against non-state actors is not new. As historical guideposts, we may look to the international courts established in the 19th century against the slave trade, which heard 600 cases and freed 80,000 slaves from illegal trade ships. In 1998, during negotiations over the statute of the International Criminal Court, there was a debate over whether to admit criminal proceedings also against business enterprises. The main reason this was overruled was that some national legal regulations did not allow for prosecution against enterprises. In recent years, further recommendations have been developed that could serve as the foundation to establish an international court for transnational business enterprises and human rights.¹¹

National monitoring institutions

▶ The prospective treaty must oblige states to establish independent national monitoring institutions and/or to commission existing institutions, such as national human rights institutes, to carry out relevant tasks. These national institutions must monitor the implementation of the treaty at the national level using an approach similar to the national monitoring bodies tasked with monitoring the implementation of the Convention on the Rights of Persons with Disabilities. Tasks should include the following:

- Investigations/studies on the status of implementation;
- Consultations with experts;
- Advisory opinions and recommendations;
- If necessary, submitting a formal notice to the government.

¹¹ Jackson, Kevin T. (1998): A Cosmopolitan Court for Transnational Corporate Wrongdoing: Why Its Time has Come, 17 J. of Bus. Ethics 759; Scheinin, Martin (2012): International Organizations and Transnational Corporations at a World Court of Human Rights, Global Policy, 2012, 3, 4, 488-49.

3. Germany's responsibility

As a prosperous and influential industrialized nation, and a country that is home to multiple transnational business enterprises, Germany bears particular responsibility for the development of an economic system that protects the climate and the environment, and is aligned with human rights.

During its presidency of the G7 and G20, Germany declared “sustainable supply chains” to be a political priority. Germany’s global advocacy for human rights and sustainable business practices would lose significant credibility if the country were to oppose international human rights regulations for business enterprises.

The organizations in support of the Treaty Alliance Germany demand that:

- ▶ the German government participate constructively at the UN working group meetings and actively support the formulation of an ambitious treaty.
- ▶ the German government should accept the invitation of the Chair-Rapporteur to comment on the draft elements and it should submit constructive proposals for their further elaboration.
- ▶ the German government play a part in equipping the UN working group with better financial and human resources in order to ensure that the UN working group is able to fulfil its given mandate.
- ▶ the German government promote the active and constructive co-operation of all EU member states toward developing an ambitious treaty.

Further information and resources

Blackburn, Daniel (2017): Removing Barriers to Justice. How a treaty on business and human rights could improve access to remedy for victims. Commissioned by: ActionAid Netherlands, Brot für die Welt, SOMO, CIDSE, Friends of the Earth Europe, ITUC, ITF, ForUM. Amsterdam: SOMO.
<https://info.brot-fuer-die-welt.de/sites/default/files/blog-downloads/removing-barriers-web.pdf>

Brot für die Welt/SOMO/CIDSE/Friends of the Earth (2016): UN Treaty on transnational corporations, other business enterprises & human rights: Options for justice. Amsterdam/Berlin/Brussels.
https://www.somo.nl/wp-content/uploads/2016/09/UN_Treaty-Legal_Seminar_Report.pdf

CIDSE et al. (2017): Contribution to the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human right. Brüssel.
www.cidse.org/publications/business-and-human-rights/business-and-human-rights-frameworks/download/1476_6c-1c88a8416aaf66c26af25854c0f503.html

Chairmanship of the OEIGWG (2017): Elements for a draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights.
www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf

ESCR-Net/FIDH (2016): Ten Key Proposals for the Treaty: A Legal Resource for Advocates and Diplomats Engaging with the UN Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises. New York/Paris.
https://www.escr-net.org/sites/default/files/attachments/tenkeyproposals_final.pdf

ICJ (2016): Proposals for Elements of a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises. Geneva.
<https://www.icj.org/wp-content/uploads/2016/10/Universal-OEWG-session-2-ICJ-submission-Advocacy-Analysis-brief-2016-ENG.pdf>

Krajewski, Markus (2017): Ensuring the primacy of human rights in trade and investment policies: Model clauses for a UN Treaty on transnational corporations, other businesses and human rights. Aachen/Brussels/Dublin/London/Vienna: CIDSE, CAFOD, Entraide et Fraternité, Dreikönigsaktion, MISEREOR, Trocaire.
www.cidse.org/publications/business-and-human-rights/business-and-human-rights-frameworks/ensuring-the-primacy-of-human-rights-in-trade-and-investment-policies.html

Martens, Jens/Seitz, Karolin (2016): The Struggle for a UN Treaty. Towards global regulation on human rights and business. Bonn/New York: Global Policy Forum and Rosa-Luxemburg-Stiftung–New York Office.
https://www.globalpolicy.org/images/pdfs/UN_Treaty_online.pdf

Treaty Alliance (2017): 3rd Statement.
www.treatymovement.com/statement

United Nations General Assembly (2014): Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights. Resolution A/HRC/RES/26/9.
http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9

Website of the UN working group:
<http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntnc.aspx>

Website of the Treaty Alliance:
www.treatymovement.com

Website of the CorA-Network on the treaty (in German):
www.cora-netz.de/treaty

Website of the CorA-Netzwerks on the treaty (in German):
www.cora-netz.de/treaty



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