

From the Supply Chain Act towards an international Level Playing Field

Statement of the Treaty Alliance Germany on the Third Revised Draft for a legally binding Treaty on Business and Human Rights („Third Revised Draft“)

UN
TREATY

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I. Introduction

In 2014, the Human Rights Council of the United Nations (UN) mandated an intergovernmental working group to draft an international treaty for the protection of human rights in the global economy. Since then, the intergovernmental working group, which consists of governments, representatives of civil societies and business, has been meeting annually to negotiate the current status of the draft. The third revised draft¹ constitutes the basis for negotiations during the seventh meeting of the working group from October 25 to 29, 2021, in Geneva.

Since last year's meeting, there has been a lot of movement in the area of business and human rights, particularly the European Union (EU). After EU Justice Commissioner Didier Reynders announced a proposal for mandatory human rights and environmental due diligence obligations in 2020, the EU Parliament presented its recommendations for a directive on corporate due diligence and accountability in March 2021 (2020/2129 (INL)). Based on this proposal, the EU Commission will present its draft by the end of this year. Another milestone in the area of business and human rights was the adoption of the German Supply Chain Act this summer (Lieferkettensorgfaltspflichtengesetz).

So far the German government has not actively participated in the UN Treaty process, arguing that it cannot advocate international rules as long as there is no decision on the national level. With the adoption of the German Supply Chain Act, the German government should take an active part in the process to establish equal conditions of competition on a global scale in terms of human rights and the environment - the so-called *level playing field*.

While the Second Revised Draft in 2020 contained significant changes to the treaty, the third draft contains only small changes and builds on the previous system: State Parties must oblige companies to exercise due diligence and effectively sanction human rights abuses. We welcome the fact that from now on, companies will no longer bear the mere responsibility to respect human rights but shall be obliged to do so. Furthermore, the third revised draft contains important clarifications and specifications, in particular with regard to scope, prevention and liability, which are essentially based on the UN Guiding Principles on Business and Human Rights (UNGPs). This statement offers an analysis of the current draft and evaluates the main changes compared to the last draft. At the same time, the statement contains recommendations that the German government should take into consideration in the upcoming negotiations within the EU and the intergovernmental working group at the UN Human Rights Council. The aim of the seventh meeting should be to swiftly move the agreement forward and, in particular, to work towards acceptance of the agreement by as many states as possible.

II. Scope

The third draft of the treaty refers to all Human Rights Declarations and all relevant Conventions of the International Labour Organization (ILO). The general reference to all Human Rights Declarations instead of individual Conventions ensures that all scenarios of human rights abuses are covered. In addition, the agreement recognizes the complementary role of the UNGPs. The draft also strengthens the gender dimension by referring to ILO Convention No. 190 on Violence and Harassment in the World of Work and the Gender guidance for the UNGPs.

¹ OEIGWG Chairmanship Third Revised Draft 17.08.21, Legally Binding Instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, online: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>

The treaty refers to "business activities" of companies, which Article 1.3 defines as "any economic or other activity [...] undertaken by a natural or legal person". Article 1.3 gives specific examples of business activities, such as production, transportation, distribution, marketing, and retailing of goods and services. The treaty therefore also applies to supply chains that follow the production of goods - the so-called *downstream supply chain*. This clarification is important because numerous abuses of human rights and environmental standards do not occur during the production of goods, but in the subsequent stages. Furthermore, Article 1.3 states that the business activity no longer has to be "for profit" in order to fall under the provisions of the treaty. This takes account of the fact that even without making a profit, there can be considerable risks to people and the environment arising from business activities. Like in the previous draft, the agreement shall apply to all companies regardless of their size. This is consistent, as companies can abuse human rights and environmental standards regardless of their size. A special focus of the treaty is the protection of human rights in business activities of a transnational character. This focus is important, as such cases can be better regulated by international treaties than by national laws. However, in line with the UNGPs, the treaty is not only applicable to business activities of a transnational character but includes nationally limited business activities as well.

In addition to business activities, the treaty also covers the "business relationships" of companies. These are relationships between natural and legal persons to conduct business activities. The definition now entails relationships between state and private actors, thereby taking greater account of the state-business nexus and in line with UNGP No. 4-6. In addition, the treaty now explicitly covers the activities of financial institutions and investment funds.

A "human rights abuse" as defined in Article 1.2 is now any direct or indirect harm in the context of business activities that impedes the full enjoyment of human rights and fundamental freedoms. The treaty thus clarifies that damages indirectly influenced by a business activity of the company are also covered. This takes account of the fact that business activities can also indirectly lead to a human

rights abuse, e.g. excessively low purchase prices indirectly lead to employees not receiving living wages. The fundamental freedoms protected by Article 1.2 now explicitly include the right to a safe, clean, healthy and sustainable environment. On 6th of October 2021, the UN Human Rights Council has recognized this right as a human right. Moreover, it is already enshrined in law in a large number of UN member states.

In order to ensure uniform and effective application of the above-mentioned standards by national courts and authorities, a reference to the interpretation of the treaty should be added to the General Comments of the Technical Committees, and it should be specified that these should be used to determine the normative content.

The scope of the treaty goes beyond the German Supply Chain Act in parts: The German law is applicable to downstream supply chains only to a very limited extent. It will initially only apply to companies with more than 3,000 employees, and from 2024 on, with more than 1,000. Regarding business relationships, the German law, unlike the treaty, differentiates between direct and indirect suppliers, the due diligence obligations depend on the degree of the relationship. However, the European Parliament's proposal stipulates that the EU supply chain regulation should apply to all large companies (generally with 250 or more employees) as well as to small and medium-sized companies that operate in risk sectors. Furthermore, the European Parliament holds that due diligence obligations are to apply to the entire supply and value chain without restriction. In this respect, the current draft of the UN treaty is in line with the current state of the European debate. It is expected that the German law will also have to be improved in this respect in the coming years.

III. Prevention and Liability

In order to prevent human rights abuses, states are to oblige companies to comply with human rights due diligence (Article 6.2). The treaty stipulates that companies must regularly prepare impact assessments, take appropriate preventive measures, regularly review these measures and communicate with the affected parties. First of all, it is to be welcomed that the wording in Article 6 has

been adapted to the UNGPs, so that it no longer refers to "operations" but to "business activities and relationships". In addition, in accordance with UNGP No. 17, companies are required to take appropriate measures to prevent or reduce human rights abuses, including those with which they are associated through business relationships.

However, the requirements for prevention should be more closely aligned with the UNGPs in some aspects. This applies in particular to the aspect of remedies, which plays a central role in the UNGPs, e.g. as the purpose of grievance mechanisms. In the treaty, however, there is no obligation for companies to establish or participate in grievance mechanisms, nor to provide reparations as long as no civil proceedings have established a company's guilt (Article 8.4). Instead, the proposed due diligence measures are exclusively steps that companies should take to prevent human rights abuses. Not all human rights abuses and environmental damages can be prevented through good precaution, however, and in this respect the agreement must also regulate, in accordance with the UNGP standards, what companies should do to end and redress abuses that have already occurred. Instead of a detailed regulation, the agreement could also refer to the UNGP due diligence standard. This would also prevent important aspects from being omitted or regulations from being created that tempt companies to only fulfill the listed requirements as a minimum standard (tick box approach). In addition, contrary to the UNGPs, the German law does not oblige companies to make amends. This has been strongly criticized by civil society. The German government should work to bring the draft into line with the standards of the UNGPs and close the gaps in the German Supply Chain Act in this regard.

If companies fail to comply with their due diligence obligations, they must be sanctioned appropriately (Article 6.7). In order to ensure that companies exhaust all possible means of influence during their business relations, it should be added that as a last resort, a termination of the business relationship may be necessary if further breaches cannot be prevented. This would be coherent with UNGP No. 19 and therefore, the German government should also advocate this.

According to Article 8, states must continue to provide effective, proportionate and dissuasive sanctions for due diligence violations. They must ensure that their legal system provides adequate and effective ways for affected parties to obtain compensation from the offending companies. It is to be welcomed that Article 8.3 now explicitly mentions civil liability in addition to criminal and administrative sanctions. Another positive aspect of this article is that the misleading limitation of liability to criminal acts contained in the second draft has been deleted and explicitly extended to all human rights abuses. It remains problematic, however, that according to the current wording, administrative sanctions should also only be imposed if a company causes or contributes to human rights abuses. In the German Supply Chain Act, non-compliance with due diligence obligations is sanctioned even if no damage is caused as a result. This is coherent with the preventive concept of human rights due diligence, which is laid down in the UNGPs.

Article 8.6 of the agreement also provides for corporate liability in so-called triangular cases. If an actor with whom the company has a business relationship causes a human rights abuse, the company is liable for this if it has failed to prevent the abuse even though it controls, manages or supervises the actor. Alternatively, the company is also liable for the human rights abuse of a business partner if the risk of a human rights abuse was foreseeable within the business activity and the company did not take adequate measures to prevent the abuse. The liability in Article 8.6 is linked to the existing liability system in the United Kingdom. For example, the Supreme Court in the UK has ruled that a parent company may be liable for breach of its own duty of care if a foreign subsidiary that is controlled or supervised by the parent abuses human rights.²

IV. Protection of the environment

The agreement now defines the right to a safe, clean, healthy and sustainable environment as a fundamental freedom, the violation of which constitutes a human rights violation under the agreement. In addition, companies must include in their regular impact assessments not only the effects on human rights and labour rights, but also on the environment and now also on the climate. Compa-

²<https://www.business-humanrights.org/en/latest-news/uk-supreme-court-in-okpabi-clarifies-parent-company-duty-of-care-toward-persons-allegedly-harmed-by-subidiaries/>

nies are only liable if they violate the right to a safe, clean, healthy and sustainable environment. The disregard of environmental due diligence, on the other hand, does not give rise to liability. In order to ensure effective enforcement of due diligence obligations, it should be expressly stipulated that non-compliance with environmental due diligence obligations must also be sanctioned. Environmental damage such as contaminated water or soil often leads to the destruction of habitats and large-scale human rights violations in the medium and long term. However, this damage usually does not occur directly, so that the responsibility of the damaging companies is difficult to prove beyond doubt. A mere link to the occurrence of human rights violations is therefore not sufficient to effectively enforce environmental due diligence. Their importance should be clearly emphasized in the agreement and the liability regulations should be supplemented accordingly.

The current discussions at the level of the Organisation for Economic Cooperation and Development (OECD) and the EU also refer to sustainable supply chains and supply chain regulation which takes environmental aspects into account. Likewise, the German Supply Chain Act provides for environmental due diligence obligations in relation to three environmental agreements ratified by Germany, which companies must comply with along their supply chain. At a time when environmental and climate protection are at the top of the political agenda worldwide, the UN agreement must not fall behind these debates.

V. Legal protection of affected persons

In order to make it easier for affected persons to enforce their rights, Article 9 offers as many jurisdictions as possible in which legal action can be brought. Among other things, this is now again possible at the place of residence or domicile of the affected person. This is appropriate, as the persons concerned may no longer be able to live in the country of the event of damage and regularly have fewer resources than the damaging company. Proceedings outside their place of residence or domicile can represent a considerable burden that is likely to deter them from filing a lawsuit. The defendant companies, on the other hand,

usually operate internationally and can effectively manage proceedings abroad without major disadvantages.

In addition, the subsidiary jurisdiction has been clarified in Article 9.5. According to this, a court has jurisdiction if no other effective forum is available in which a fair trial would be guaranteed and a connection to the forum state exists. The connection is now specified in Article 9.5 and exists if the plaintiff or defendant is present in the territory of the forum state, if assets of the defendant are located in the state or if substantial activities of the defendant take place in the territory of the forum state. This wording is intended to avoid ambiguities about jurisdiction.

Article 7.5 now obliges states to allow judges to shift the burden of proof by law. There is an information gap between the victims and the damaging companies, which usually makes it impossible for the victims to prove all the conditions for liability. They lack access to internal company information, which would be necessary to reconstruct fault or the imputability of the violation. The companies, on the other hand, are obliged to document the due diligence measures taken, so that it is easier for them to prove the opposite. The adaptation of Article 7.5 does justice to the challenges that the agreement poses for national legal systems, as the question of the burden of proof depends strongly on the respective legal system. The open wording serves to facilitate implementation in national law and is therefore to be welcomed.

Article 7 also obliges states to facilitate access to legal remedies for those affected. It is to be welcomed that the particular difficulties that arise due to gender or membership of a vulnerable or marginalized group are now to be taken into account. How this legal support can be further developed is left up to the parties themselves. In the German Supply Chain Act, for example, a new form of legal representation on another's behalf was created that enables German non-governmental organizations and trade unions to sue in their own name for the claims of those affected, thus facilitating the enforcement of rights (§ 11 LkSG).

Those affected by a human rights violation have the right to seek redress from companies. However, Articles 7 and

8.4 only contain the duty of states to provide effective access to reparation. The agreement should include a provision to require companies to provide redress. This is in line with UNGP No. 22 and serves to speed up redress for affected persons.

VI. International Cooperation

The little additions that were made in the provisions on international cooperation benefit the effective enforcement of the treaty. States Parties are to provide mutual legal assistance and strengthen international cooperation through technical and financial assistance and capacity building.

VII. Relation to other international standards

By strengthening the treaty in relation to international law, its paramount importance has been taken into account, and it has been ensured that the rules cannot be undermined by reference to other standards. Thus, Article 14.4 states that, in accordance with Article 30 of the Vienna Convention on the Law of Treaties, previous international agreements relating to the same subject matter as this treaty shall apply only to the extent that their provisions are compatible with this treaty. According to Article 14.5.a existing international agreements, including trade and investment protection agreements, shall be interpreted and applied in such a way as not to undermine or restrict the ability of States to fulfil their obligations under the treaty on business and human rights and other relevant human rights instruments. Any future trade and investment agreements should, according to Article 14.5.b, be compatible with obligations under the treaty and other relevant human rights instruments. However, it would be necessary to specify how this compatibility is to be ensured. The revision of the draft should therefore include a state commitment to carry out human rights and environmental impact assessments before and during the negotiations. In addition, trade agreements should include a human rights exception clause to clarify that trade rules must not undermine or restrict the respect, protection and fulfilment of human rights at the domestic or foreign level.

VIII. Monitoring and implementation of the treaty

The provisions on monitoring and implementation of the treaty set out in Section 3 have not substantially

changed in the revised text. According to Article 15.4., the Committee is to be responsible for the interpretation of the treaty in the form of general comments and recommendations in the same way as the specialized bodies of other human rights treaties. The Committee is also expected to provide concluding remarks and recommendations on the national reports. In order to ensure uniform and effective implementation of the treaty and to give the parties concerned the widest possible means of redress, the functions of the Committee should be supplemented by a competence for individual complaints. The possibility of individual complaints is also opened for other UN human rights treaties, either directly or through optional protocols. An anchoring in the treaty text would be preferable to an optional protocol, as a delay should be avoided in the interest of the persons concerned. In order not to jeopardize acceptance of the treaty, a contractual arrangement could also be made optional. As in Article 14 of the Convention on the Elimination of All Forms of Racial Discrimination, for example, jurisdiction for individual complaints could be made dependent on a corresponding declaration by the states. The establishment of an international court of justice, before which those affected can sue the companies and/or states involved in the case of infringements and the exhaustion of national legal protection possibilities, should be pursued further.



The Statement of the Treaty Alliance Germany on the Second Revised Draft for a legally binding UN Treaty on Business and Human Rights („Second Revised Draft“) of October 2020 is available at

https://www.globalpolicy.org/images/pdfs/TreatyAllianceGermany_Statement_2ndREvisedDraft_2020.pdf

The Statement of the Treaty Alliance Germany on the Revised Draft for a legally binding UN Treaty on Business and Human Rights („Revised Draft“) of October 2019 is available at

https://www.globalpolicy.org/sites/default/files/Treaty_Alliance_Germany_Statement_Revised_Draft.pdf

The Statement of the Treaty Alliance Germany on the Zero Draft for a legally binding UN Treaty on Business and Human Rights („Zero Draft“) of September 2018 is available at

https://www.globalpolicy.org/sites/default/files/TreatyAllianceGermany_StatementZeroDraft_10-2018.pdf

The detailed position paper „Toward 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_Treaty-Alliance-Germany_position-paper.pdf

The following civil society organizations have joined forces in the Treaty Alliance Germany (www.cora-netz.de/themen/un-treaty/treaty-alliance/) 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 organizations within the scope of their mandate.

aktion /. arbeitsunrecht | Aktionsgemeinschaft Solidarische Welt | Attac Deutschland | Berliner Wassertisch | Brot für die Welt | BUND | CIR - Christliche Initiative Romero | CorA-Netzwerk für Unternehmensverantwortung | FEMNET | FIAN Deutschland | Forschungs-und Dokumentationszentrum Chile-Lateinamerika (FDCL) | Forum Fairer Handel | Forum Umwelt und Entwicklung | Germanwatch | Global Policy Forum | Goliathwatch | INKOTA-netzwerk | Institut für Ökologie und Aktions-Ethnologie (INFOE) | Mission EineWelt | medico international | MISEREOR | PowerShift | SÜDWIND – e.V. | terre des hommes | WEED – Weltwirtschaft, Ökologie Entwicklung | Weltladen Dachverband | Werkstatt Ökonomie | Women Engage for a Common Future

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