

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 (*»Revised Draft«*)

**UN
TREATY**

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In June 2014, the United Nations Human Rights Council (UNHRC) mandated an intergovernmental working group (Resolution 26/9) to develop an international treaty to regulate the activities of transnational and other corporations. The need for such an instrument arose from the inadequate protection of human rights in the global economy. On the basis of in-depth consultations with governments, researchers and civil society, the Ecuadorian Chairman Emilio Rafael Izquierdo Miño published a consolidated draft agreement (»Revised Draft«) in July 2019. This document will serve as the basis for "substantive negotiations" during the upcoming fifth meeting of the working group, to be held in Geneva from 14 to 18 October 2019.

The Revised Draft further clarifies some of the contentious questions identified in the draft published in July 2018 (»Zero Draft«) and many points have gained in stringency and clarity. It is based explicitly and conceptually on the UN Guiding Principles for Business and Human Rights (UNGPs) and the concept of human rights due diligence. It places a special focus on improved access to justice and remedies for those affected by human rights violations, thereby strengthening the third pillar of the UNGPs. The draft agreement addresses the concerns expressed by the European Union (EU) and the Federal Government of Germany. The scope of the new draft treaty is no longer limited to transnational companies or transactions of a transnational nature. Furthermore, it was refrained from incorporating any direct obligations under international law for companies. The liability regime in the case of human rights violations has been clearly defined and is formulated with a sense of proportion.

Against this background, the EU and the German government should from now on participate actively and constructively in the negotiations on the content of the

agreement. As a first step, in preparation for the forthcoming round of negotiations of the responsible UN working group on 14 to 18 October 2019, the EU should comment in writing on the draft treaty. The Treaty Alliance Germany calls on the German government and the EU to consider the following comments and suggestions for improvement.

1. Contribution to sustainable development

As the preamble correctly states, companies can contribute to sustainable development, including the realisation of human rights. However, it should be clarified that economic activities are often accompanied by considerable resource consumption and CO₂ emissions. Therefore, economic growth can pose a risk to sustainable development, particularly for climate protection and biodiversity.

2. Closing legal gaps in the global economy

The scope of the Revised Draft has been appropriately extended. Unlike the Zero Draft, the draft is no longer limited to transnational corporations or businesses with a transnational character. Instead, the agreement will apply to all enterprises, including state-owned enterprises and small and medium-sized enterprises (SMEs). In addition, business activities are no longer defined as necessarily "profitable" (Article 1(3)), which means that activities with no declared purpose of profit are also included. This is an important innovation, as national or state-owned enterprises can have a negative impact on human rights and the environment. SMEs can pose significant human rights risks if, for example, they are active in a high-risk sector or region. We therefore welcome that such companies are not excluded in principle. At the same time, the Revised Draft stipulates that undue additional burdens should be avoided, especially for SMEs (Article 5, paragraph 6).

Simultaneously, the draft provides for regulations to close the legal loopholes that exist in the context of transnational economic activities. These include the establishment of an international fund to provide legal and financial assistance to those affected (Article 13, paragraph 7) and the removal of major obstacles to access to justice and redress for those affected by human rights violations (Article 4). According to the draft, affected persons must be given the choice of appealing to the courts in the country in which (a) the human rights violation occurred, (b) the affected person has their residence or (c) the allegedly responsible company is established (Article 7).

However, in cases of human rights violations abroad, the draft should provide for court actions against subsidiaries in the country of the parent company, as is already the case in e.g. the Netherlands. Such jurisdiction by necessity should be established for cases in which (a) the dispute has a domestic connection; and (b) the persons concerned run the risk of not finding adequate redress abroad. In order to establish a domestic dimension for an action in a country of the parent company, it should suffice to show that there have been business relations between the foreign subsidiaries or subcontractors.

The Revised Draft clarifies that the contracting states must protect affected parties from unlawful interference and intimidations in connection with legal proceedings and guarantee their right to security, privacy, physical and psychological integrity (Article 4). Additionally, a provision on access to documents and the taking of evidence relevant to the trial has been included in the draft.

It also contains proposals for improved judicial cooperation between States (Article 10) and international cooperation in the implementation of the agreement (Article 11). The Treaty Alliance Germany welcomes

that the preamble of the revised draft explicitly mentions the disproportionate negative impact of business-related human rights violations on women and girls, children, indigenous peoples, persons with disabilities, migrants and refugees. We also welcome that it calls for the appropriate consideration of their specific circumstances and vulnerabilities in the implementation of the agreement (cf. also Article 5, paragraph 3b and Article 14, paragraph 4).

3. Holding companies accountable and sanctioning violations of the law

The Revised Draft for a UN Treaty on Business and Human Rights does not impose any direct obligations on companies under international law. According to the conventional international law doctrine, the agreement would primarily bind the signatory states. They must ensure that their domestic legislation requires all persons conducting business activities within their territory or jurisdiction, including those of a transnational nature, to respect human rights and to prevent violations or human rights abuses (Article 5, paragraph 1). In concrete terms, companies should be obliged to exercise human rights due diligence - i.e. carry out impact assessments in accordance with the UNGPs, take countermeasures, report transparently and set up complaint mechanisms (Article 5, paragraphs 2 and 3). Explicit reference is made to the importance of meaningful consultations with stakeholders. In the context of indigenous groups, the international standard of free, prior and informed consent must be observed. Human rights due diligence should take into account adequacy criteria such as the likelihood and extent of human rights violations, company size and specific industry risks (Article 5, paragraph 4).

It is problematic that the Revised Draft is not clear on the scope of the due diligence procedures to be

established (Article 5). The Revised Draft refers to the company's business activities and contractual relationships. However, it is unclear whether only the company's direct contractors - and thus only the first link in the value chain - are included, or whether the due diligence to be established also applies to the activities of e.g. subcontractors. By contrast, the Zero Draft and the UNGPs focus on business relationships and thus apply, in principle, to the entire value chain. To maintain coherence and clarity, the Revised Draft should follow the consensus reached with the UNGPs. Companies must neither cause nor contribute to human rights violations. In addition, they should avoid human rights violations directly linked to their products and services.

Article 6 of the draft convention provides that parties to the treaty shall ensure that their domestic law provides for effective, proportionate and dissuasive sanctions and redress for cases of business-related human rights violations (Article 6, paragraph 4). Civil liability is limited to contractual relations and is further limited by the criteria of foreseeability and avoidability of harm (Article 6, paragraph 6). Such a limitation of liability is appropriate, as otherwise no allegation of negligence can be made against a company.

In addition to civil liability, the draft agreement also provides that the contracting states must provide for criminal or public liability for a catalogue of particularly serious business-related offences as defined by domestic law (Article 6, paragraph 7). It is suitable to leave the decision on civil or criminal sanctions to the States Parties. However, criminal liability should not be limited to the provided catalogue of particularly serious criminal offences such as war crimes, torture and forced labour, since even below this threshold, regulatory law must be used as an instrument alongside individual civil law in

order to adequately sanction disregard for human rights due diligence obligations.

Since 2017, France has been the first EU member state to have passed a law obliging large French corporations to exercise human rights and environmental due diligence and providing for sanctions in the event of violations. Germany and other European countries are discussing the introduction of such laws. In Germany, the debate gained momentum with the announcement of a draft Value Chain Act from the German Federal Ministry for Economic Cooperation and Development (Bundesministerium für Wirtschaftliche Zusammenarbeit und Entwicklung, BMZ) in February 2019. The coalition agreement announces a legal regulation at national and EU level if the monitoring of the National Action Plan for Business and Human Rights (NAP) reveals that the voluntary self-commitment of companies is not sufficient. The Federal Ministers Gerd Müller and Hubertus Heil have already announced that they will work towards this during the German EU Council Presidency in the second half of 2020. It is therefore in the interest of the Federal Government and the EU, through constructive participation in the UN treaty process, to contribute to ensuring that states around the world enshrine the human rights due diligence obligations of companies in their national laws and, in this respect, to ensure that they are complied with in all cases.

4. Priority over trade and investment law

The Revised Draft is not clear as to whether existing and future international treaties may legally contradict the Convention (Article 12, paragraph 6). As the Draft Elements of September 2017 made this clear, the final version of the agreement should also require a clear primacy of the agreement in conflicting cases over the provisions of

other bilateral and multilateral agreements, such as investment and trade agreements (comparable to Article 103 of the UN Charter). In order to ensure the effective legal enforcement of this primacy, the Treaty should contain a provision that makes it also applicable to the interpretation of investment protection and trade agreements by arbitral tribunals.

5. Monitoring the implementation of the UN Treaty

The provisions on the implementation of the treaty are also more stringent in the new draft treaty than in the previous version. While the Zero Draft still envisaged various options for implementing the agreement, the Ecuadorian Chairman proposes in the Revised Draft the establishment of an independent committee of experts as a lean and sensible enforcement mechanism. As known from other UN treaty bodies, the Committee would have the task of interpreting the treaty provisions, receiving regular state reports on the implementation of treaty obligations, commenting on them and making normative recommendations (Article 13). However, in order to ensure effective monitoring of the implementation of the treaty, the Committee should also be able to receive individual complaints against states on business-related human rights violations and to conduct investigations on the ground in specific case constellations (country visits, right to information). This is an essential tool to ensure legal protection in cases where no access to justice is given at the national level.

Another element that should be pursued further is the establishment of a court before which those affected can sue the participating companies and/or states in the event of an infringement. Although national legal redress is best available to those affected and can often provide more effective and faster relief than international actions

and complaints, it is also important to ensure that the courts are able to take the necessary steps to ensure that the rights of the individual concerned are protected. In many countries, however, national legal redress does not offer sufficient protection.



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 October 2018 is available at:

https://www.globalpolicy.org/images/pdfs/TreatyAllianceGermany_StatementZeroDraft_10-2018.pdf

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

The following civil society organizations have joined forces in the Treaty Alliance Germany (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 organizations within the scope of their mandate.

aktion ./, arbeitsunrecht | Aktionsgemeinschaft Solidarische Welt | Attac Deutschland | Berliner Wassertisch | Brot für die Welt | BUND | Christliche Initiative Romero | CorA-Netzwerk für Unternehmensverantwortung | FEMNET | FIAN Deutschland | Forschungs-und Dokumentationszentrum Chile-Lateinamerika | 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 | terre des hommes | WEED | Weltladen-Dachverband | Werkstatt Ökonomie

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Berlin, October 2019