

Important step for the human rights and ecological orientation of the global economy

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«*)

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TREATY

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In June 2014, the Human Rights Council of the United Nations (UNHRC) mandated an intergovernmental working group (Resolution 26/9) to develop an international instrument to regulate the activities of transnational and other corporations. The aim of the process is to close the legal gaps in the protection of human rights in the global economy that have emerged in the course of globalization. So far, in five rounds of negotiations, governments, legal experts and representatives of civil society and business have debated the legal content of the treaty. Based on these consultations, the Ecuadorian Chair of the working group published a second revised draft treaty in August 2020¹, which has more stringency and clarity compared to previous versions. The draft constitutes the basis for substantive negotiations during the sixth meeting of the working group from October 26 to 30, 2020.

This year's round of negotiations comes at a crucial time: It was decided both at EU level and in Germany that companies should be obliged to carry out human rights and environmental due diligence through their supply chain. In April 2020, EU Justice Commissioner Reynders announced that he will present a proposal for mandatory human rights and environmental due diligence obligations at the EU level in spring 2021. In Germany, the government took a fundamental decision to prepare a supply chain law after the review of the National Action Plan on Business and Human Rights revealed clear shortcomings in companies' engagement with voluntary corporate social responsibility. The German government has also declared itself in favour of pertaining EU regulation.

Yet, the German government remains opposed to active participation in the UN treaty process, arguing that it cannot advocate for international rules as long as there is

no decision in principle at the national level in favour of a statutory regulation. As binding human rights rules for companies are now being introduced both at the EU level and in Germany, the German government - as well as the German economy - should actually have a vital stake in a UN treaty that obliges all States worldwide to protect human rights and the environment in economic activities. At present, a unique window of opportunity is opening to establish equal conditions of competition on a global scale in terms of human rights and the environment - the so-called *level playing field*.

The current draft of the treaty goes far in accommodating the concerns regarding the preceding draft expressed by the EU Commission and the German government. The draft stipulates that the contracting States must oblige their companies to exercise human rights due diligence. It underlines that the obligations must apply not only to transnationally active companies, but also to local and State-owned companies. Furthermore, the coherence of the draft treaty with the UN Guiding Principles on Business and Human Rights (UNGPs) has improved by highlighting the significance of the terms "human rights violations" and "business relations". Finally, as at the EU level and in Germany, it recommends that the disregard of due diligence obligations by companies must lead to sanctions. Overall, there is increased reference to provisions from existing international law, and the draft emphasizes that the highest possible standard, as it evolves over time, would always apply. This ensures that the treaty is open to developments in the area of human rights due diligence.

Against this background, we urge that the EU Commission and the German government participate actively and

¹OEIGWG Chairmanship Second Revised Draft 06.08.20, Legally Binding Instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises, online at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBL_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf

constructively in the coming round of negotiations, and consider the following comments and suggestions for improvement.

1. Scope

The revision of Section 1 extends the scope of the treaty in an appropriate manner. The treaty is no longer based on "contractual relationships" but instead on "business relationships". According to the definition in Article 1.5, these cover all relations between natural and legal persons which are aimed at carrying out economic activities. This includes activities conducted by subsidiaries, agents, suppliers, partnerships and joint ventures, including activities by electronic means. This is essential, as many human rights violations in global value chains do not occur through direct business partners, but further along in the value chain. This reformulation ensures consistency with the UNGP and underlines that, in principle, the entire value chain should be covered. The definition of victims in Article 1.1 has also been clarified and extended. It is now clear that human rights violations can include physical, mental, emotional and economic harm, and that the rights of the victims are considered to have been violated irrespective of the identification, prosecution and conviction of the perpetrator. In addition, the current definition also includes persons who are injured in the course of providing assistance to victims. Furthermore, the activities of State-owned companies are now explicitly covered by the draft treaty in accordance with Article 1.3. This takes account of the fact that national or State-owned enterprises can also violate human rights and damage the environment. However, business activities are now again defined as "for profit" activities. Since non-profit orientated business activities can pose significant risks to human rights and the environment, this criterion should be removed. In

order to avoid unreasonable burdens for non-profit enterprises, their situation could be considered in the context of the requirements for due diligence.

The included references to the Universal Declaration of Human Rights, Core International Human Rights Conventions, the Core Labour Standards of the International Labour Organisation (ILO) and customary international law in Article 3.3 provides more clarity concerning the human rights covered. With regard to UN conventions, the new regulation goes beyond the provisions of Article 12 of the UNGP and, in addition to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, also includes other core conventions, such as the Convention on the Rights of the Child and the Convention on the Eradication of all Forms of Discrimination against Women, ensuring a more comprehensive level of protection in favour of particular groups. In order to ensure uniform and effective application of the above 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.

2. Prevention and liability

In the section on preventive measures in Article 6.2, States are explicitly obliged to require their business enterprises to undertake human rights due diligence. According to Article 6.3.a and e, the risk analysis and reporting obligations should comprise the impact of the activity on human rights and the environment. Both in Article 6.3.b and other parts of the treaty, such as the preamble, the necessity to acknowledge gender-specific situations of threat and to

take gender-equity measures was integrated and specified. These important additions contribute to counteracting the disproportionate impact on women in terms of human rights violations, such as wage discrimination, and gender-based violence along global supply chains. In addition to the liability provisions in Article 8, Article 6.6 now also clarifies that non-compliance with due diligence obligations must be adequately sanctioned. 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.

The system of sanctions and liability, now contained in Article 8, has been substantially revised and allows a more effective enforcement of corporate due diligence obligations. Thus, article 8.4 explicitly provides that States must face effective, proportionate and dissuasive administrative or criminal sanctions for breaches of due diligence leading to human rights violations. Article 8.5 requires States to ensure that their legal systems provide adequate and effective opportunities for victims to obtain reparation from the companies causing damage. Article 8.8 makes it clear that taking due diligence measures does not automatically relieve them of liability for causing or contributing to human rights abuses. It is therefore for the court or related authority to verify whether the measures taken meet the requirements of due diligence. This will ensure that companies make real efforts to ensure the effectiveness of their due diligence measures, rather than merely prescribing them on paper.

Also, the liability regime for breach of due diligence in Article 8.7 is now based on business relationships and no longer on contractual relationships. Further, it is clarified

that liability presupposes legal or factual control or supervision of the company over the third party. This will allow to take the diversity of relationships along global supply chains better into account. It will ensure that companies cannot hide behind the fact that there is no direct contractual relationship with a damaging party whose activities they could have easily influenced.

3. Protection of the environment

We welcome that environmental risks are included as part of a due diligence analysis. Although environmental rights are associated in the new draft with human rights, they are not defined in more detail. In contrast to the regulation on preventive measures, the liability regulation does not explicitly refer to environmental due diligence.

In order to ensure their effective enforcement, it should also be explicitly stipulated that violations of environmental due diligence must also be subject to administrative sanctions. Environmental damage such as contaminated water or soil often leads in the medium to long term to the destruction of human settlements or animal habitats, and can thus constitute major human rights abuses. However, such damage is usually not immediate, and it is therefore difficult to establish beyond doubt the responsibility of the companies causing the damage. A mere link to human rights abuses that occur is therefore not suitable for effectively enforcing the duty of care with regard to the environment. The treaty should therefore clearly emphasise the independent importance of environmental due diligence, and the liability provisions should be supplemented accordingly. At the level of the OECD and the European Union, as well as in view of the French Supply Chain Law, or of debates in Switzerland, the discussion on sustainable supply chains and supply chain regulation

naturally refers to both environmental aspects and human and labour rights. This does not only address the social and environmental problems in international supply chains. The growing number of investors who want and need to apply sustainability criteria to their investments also depend on the real economy making its contribution to both the protection of human rights and the protection of the environment.

At a time when environmental and climate protection are at the top of the political agenda not only in Germany but worldwide, the UN treaty should not fall behind these debates. Environmental aspects in the form of enforceable environment-related due diligence must therefore be part of the treaty.

4. Legal protection of affected persons

Several amendments to the jurisdiction rules have improved the possibilities of legal protection for people affected. Under the new Article 9.3, the jurisdiction established under Article 9.1 is mandatory, so that lawsuits cannot be dismissed in courts of other States by reference to the *forum non-conveniens* principle. Moreover, Articles 9.4 and 9.5 create a fall-back option to ensure that an effective judicial forum is available to the people affected. Paragraph 4 provides a jurisdiction in claims brought against natural and legal persons not domiciled in the forum State, if the claim is closely connected with a claim brought against a natural or legal person domiciled there. Paragraph 5 also provides for such jurisdiction where no other effective forum guaranteeing a fair trial is available, and there is a sufficiently close link with the forum State. The jurisdiction of the State where the damaging party is domiciled, contained in the previous version of the draft, has been deleted. In order to mini-

mise the obstacles to obtaining effective legal protection for the victims, jurisdiction at the place where the injured party is domiciled should be reinstated as an additional possibility. Although jurisdiction in German civil law is also based on the defendant's domicile (§§ 12, 13 ZPO) or on the place where a tortious act was committed (§ 32 ZPO), a deviation from this rule is appropriate in the case of infringements of the law by companies. In the present constellation, the parties affected regularly have significantly fewer resources than the abusing companies. For the persons affected, proceedings away from their place of residence may represent a considerable burden which is likely to deter them from bringing legal action. The defendant companies, on the other hand, generally operate internationally, and can effectively manage proceedings abroad without major disadvantages. In order to ensure that submitted lawsuits have realistic chances of success, the provision in Article 7.6 on the shift of the burden of proof should not be made optional. The shift of the burden of proof must be directly enshrined in the treaty so that actions are not hopeless from the outset. There is an information gap between those affected and the companies causing the damage, which usually makes it impossible for those affected to prove all the conditions for liability. They lack access to internal company information that would be necessary to reconstruct the fault or the imputability of the abuse. Companies, on the other hand, are obliged to document the due diligence measures taken, so that it is easy for them to prove the contrary.

5. International cooperation

The revised treaty provides for enhanced international cooperation which will help its effective enforcement. Article 13.2 now explicitly includes financial and technical assistance and capacity building. In addition, aware-

ness raising on the rights of the victims has been included in paragraph 2.c. Furthermore, paragraph 2.e. explicitly states that States shall contribute, within their available resources, to the financing of the fund for victims, as provided for in Article 15.7.

6. Relation to other international standards

By strengthening the treaty in relation to other 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.

7. 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 recast text. According to paragraph 4, the Technical Commission provided for in Article 15 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 Technical Commission 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 jeopardise 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 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/images/pdfs/images/pdfs/Treaty_Alliance_Germany_Statement_Revised_Draft.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.globalpolicy.org/images/pdfs/Treaty_Alliance_Germany_position_paper_12-2017.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

CorA-Netzwerk for Corporate Accountability

Stresemannstr. 72, 10963 Berlin

Tel. +49 (0)30-2888 356 989 • info@cora-netz.de • www.cora-netz.de

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