



2017 Report (executive summary)

The Global Energy Sector and Human Rights

Putting German Business
and Policy to the Test



Key messages

- Since the UN Guiding Principles on Business and Human Rights were adopted in 2011, several European countries have taken important first steps to implement them. Salient developments include the French corporate duty of vigilance law, the UK Modern Slavery Act and the Dutch child labour due diligence law. The pressure on companies to pay more attention to human rights in their activities and business relationships has thus risen considerably, and will continue to do so.
- In Germany in late 2016 the German Government approved a **National Action Plan for Business and Human Rights**. In it the German Government expresses the expectation that German companies must also implement their human rights due diligence in international business. So far there is a lack of any legal obligation, however. Due diligence is non-binding even for publicly-owned companies, as well as in foreign trade promotion and the award of subsidies.
- This might change after 2020. The German Government plans to **review** the human rights due diligence of German business, and if implementation is inadequate it will consider legislating from 2020 onwards. Three parliamentary groups in the German Bundestag have already explicitly stated that they favour a **law on human rights due diligence** during the next parliament.
- Overall, we note that the German Government has so far been reluctant to make the necessary steps forward binding. In the **law to modernise public procurement** and the **law introducing CSR reporting obligations** in the reporting duties of companies, the German Government has so far neglected to make human rights provisions binding. At the international level it is expressing major reservations regarding a binding **UN human rights treaty on transnational corporations and other business enterprises**.
- Almost a third of business-related human rights grievances worldwide involve the raw materials and **energy sector**. Large-scale projects in particular often lead to evictions, the destruction of livelihoods and the suppression of protest. From a human rights perspective states must provide their populations with access to sufficient energy in order to realise human rights such as the right to food, or the right to housing. At the same time, however, they must also respect and protect human rights in energy projects. Given the enormous risks to human rights, this also includes avoiding greenhouse gas emissions, 60 per cent of which are attributable to the energy sector.

The state duty to protect against human rights violations in the German energy sector

- The ten largest German **public energy utilities owned by local authorities or federal states** pay too little attention to human rights when importing raw materials – despite the known human rights violations for instance in coal mining in Colombia, South Africa and Russia. Unlike in Finland and Sweden, Germany does not yet have any legal human rights requirements for publicly-owned companies.
- The energy sector is a growth driver for the **KfW Group**. Although renewable energy is playing a rapidly increasing role in this context, it does not account for all of the growth. Although the KfW Group has committed to human rights, there have been repeated violations, particularly in activities involving the coal sector and dams which KfW has funded. Concerning the KfW IPEX-Bank, key problems remain the continued lack of transparency and the fact that coal projects have not yet been ruled out. Only the DEG has an independent grievance mechanism, though it has not responded with sufficient rigour to its critical findings in the first case for which a study is available.
- Around half the **German Government's export credit guarantees** in 2016 involved projects in the energy sector, as well as oil and gas extraction. Just four per cent of the entire amount covered was accounted for by renewable energy. Over the last few years, human rights problems have also occurred in connection with foreign trade promotion, particularly involving coal-fired power plants and large dams. The German Government has announced that it will improve human rights monitoring in the future. This will only succeed if the review procedure is made more transparent, however, and companies are excluded from state support at least temporarily if they fail to carry out their human rights due diligence.
- While **EU trade policy** improves European companies' access to energy resources in foreign countries, it does not oblige those companies to practice human rights due diligence with respect to imports. The EU intends to permit state intervention in electricity and fuel pricing in partner countries only under very restrictive conditions. This is jeopardising appropriate access to a sufficient quantity of energy for poor sections of the population – without any provision for compensatory social policy measures. Excessive rules to protect investors can make protection of the environment and human rights in the energy sector much more expensive, and constrain it.

- Market-based mechanisms to reduce emissions also lack human rights coherence. The **Clean Development Mechanism (CDM)** defined in the Kyoto Protocol, for instance, does not explicitly require registered climate protection projects to respect human rights, nor does it demand any relevant monitoring. Human rights problems in a number of CDM-registered dams, geothermal power plants and coal-fired power plants clearly illustrate the need for fundamental reform, particularly with respect to possible future market-based mechanisms, both as part of implementing the Paris climate agreement and other planned offsetting mechanisms such as the International Civil Aviation Organization (ICAO).

Corporate responsibility to respect human rights in the energy sector

- Only seven of the 30 companies surveyed had adopted a separate **policy commitment on human rights** of their own in which they undertake to comply with human rights. A further 12 companies have a code of conduct that refers to human rights, though only six of these can be classified as basic human rights declarations of an acceptable quality according to the standards of the UN Guiding Principles.
- Almost two thirds of the surveyed companies report that they conduct **human rights risk analyses**. Yet only eight companies state that they involve potentially affected groups and individuals in these analyses. It is very difficult to assess the quality of the analyses, however, because only few companies report on the methods they use and the scope of the analysis, and so far only two companies have made their risk analyses publicly available.
- In suppliers' codes of conduct and **procurement policies** almost all companies refer to human rights, but neglect to mention key problem areas in global supply chains. Only 12 companies require suppliers to pay national legal minimum wages. A living wage is demanded by just one company. Less than a quarter of companies expect their suppliers to respect the rights of affected stakeholders in neighbouring communities.
- Only a third of companies state that they **contractually oblige** business partners to comply with codes of conduct. Although 20 companies in the event of violations also consider a contractual stipulation, only eight of them report having once made use of this possibility in order to protect human rights. Only few companies report other specific measures in response to human rights violations by business partners.

- While 13 of the studied companies only mention the importance of human rights in their **annual or sustainability reports**, nine dedicate a separate section to it. These report on human rights due diligence procedures, but do not disclose the specific effects of their activities on human rights.


- Twenty-five companies indicate that they have created **grievance mechanisms**. Yet only six of these are geared to the UN Guiding Principles on Business and Human Rights. Only few companies have also set up grievance mechanisms in foreign countries, or also make these accessible in the languages of the countries hosting their foreign operations.

- With regard to the **review** of German companies' human rights due diligence announced by the German Government, the findings of the study clearly indicate that the individual elements of due diligence need to be made more concrete. Moreover, the planned review must not be based solely on information supplied by companies themselves. At least a random sample must be taken to verify implementation of the corporate data supplied.


Access to judicial remedy and non-judicial grievance mechanisms

- If a subsidiary or business partner of a German corporation abroad contributes to human rights violations, the corporation in question usually cannot be sued before civil courts in Germany. Unlike in France, the UK and the Netherlands, the German Government has so far refused to make human rights due diligence a legal requirement, and remove the procedural obstacles faced by affected groups and individuals in other countries when seeking **access to German courts**.
- Germany's **National Contact Point for the OECD Guidelines** has rejected outright four of the five complaints received so far in the energy sector. In the fifth case the company agreed during the mediation procedure to improve its due diligence with regard to its future action, but not with regard to any improvement in the problematic case in question. One general weakness of this procedure is that it does not focus on the issue of reparation. The contact point is attached to the Directorate-General for External Trade Policy at the Federal Ministry for Economic Affairs and Energy. Although this gives it greater structural importance in the context of the National Action Plan, it raises doubts as to the neutrality of the grievance mechanism.


AROUND THE WORLD, GERMAN COMPANIES ARE INVOLVED IN ENERGY PROJECTS THAT RAISE HUMAN RIGHTS PROBLEMS.




TEHUANTEPEC (MEXICO)
Siemens is supplying (among other things) substations and power lines for wind farms.




BARRO BLANCO (PANAMA)
The DEG is co-financing the dam to the tune of USD 25 million.




HIDROSOGAMOSO (COLOMBIA)
Siemens is supplying transformers and a substation. The German branch of the Austrian company Andritz is supplying turbines, for which it is receiving an export credit guarantee from the German Government.



AGUA ZARCA (HONDURAS)
Voith Hydro, a joint Venture between Voith and Siemens, has entered into an agreement to supply turbines, generators and control systems for a hydropower plant.




DRUMMOND (COLOMBIA)
EnBW procures coal from.





HUARAZ (PERU)
As Europe's largest emitter of greenhouse gases, RWE makes a significant contribution to climate change. The rise in temperature is creating a risk of a glacial lake outburst flood that would inundate the city.




VACA MUERTA (ARGENTINA)
Wintershall is part of a consortium that extracts natural gas. Recently it also began fracking to extract more.





ÇESME WIND FARM (TURKEY)
Nordex is supplying turbines for wind power.



MEROWE (SUDAN)
Lahmeyer took control of commissioning the dam. When the reservoir was flooded, 4,700 families were displaced with no provision for resettlement.



KUSILE & MEDUPI (SOUTH AFRICA)
Many German actors are involved in the construction of the coal-fired power plants: the KfW-IPEX Bank through export credits, the German Government through export credit guarantees and 19 German companies as exporters and service providers.



OLKARIA IV (KENIA)
The KfW Development Bank is involved in financing the geothermal power plant.

THE LOCAL POPULATION WERE INVOLVED IN THE PLANNING OF THESE ENERGY PROJECTS EITHER MINIMALLY OR NOT AT ALL. ONE MORE REASON WHY MANIFOLD, SOMETIMES INTERDEPENDENT HUMAN RIGHTS VIOLATIONS ARE OCCURRING DUE TO:



Intimidation of activists, ranging from verbal threats to murder



Eviction



Environmental damage: forests destroyed, air and/or water polluted



Diseases caused by environmental pollution



Livelihoods threatened by the destruction of vital natural resources (soils, water etc.)

Summary and conclusions

Over the last three years the debate on business and human rights has reached a new level. Since 2011, the UN Guiding Principles on Business and Human Rights have called on all states to implement them at the national level. In Germany, since 2014 the focus has been on the National Action Plan (NAP). The German Government adopted its NAP in December 2016 following a two-year consultation process. At the same time, new EU directives and negotiations on a UN human rights treaty on transnational corporations and other business enterprises added further impetus. In Section 2 the authors analyse these general trends in the field of business and human rights, which then also provides the context for their assessment of the energy sector. This report is all about energy – a sector that is inextricably linked to globalisation and is associated time and time again with human rights violations. The study explores the question of whether and to what extent German business and the German Government have implemented the demands of the UN Guiding Principles to date.

Germany is resisting binding requirements at the national and international levels

It is true that in the NAP the German Government expressed its expectation that all German businesses discharge their responsibility to respect human rights. However, it has not responded to a joint call by trade unions and NGOs for legal regulation of German businesses' obligation to carry out human rights due diligence in their foreign business operations. Here Germany is falling behind France, which passed a law of this kind in 2017. The UK and the Netherlands have also both brought in legislation against child labour and modern slavery in supply chains. Nor does Germany's NAP include any measures to improve access to judicial remedy for affected persons from the Global South.

On the positive side we note that the implementation of human rights due diligence by businesses will be subject to independent scientific review from 2018 onwards. As an interim target the NAP specifies that by 2020, at least 50 per cent of all German companies with a workforce larger than 500 should have integrated the elements of human rights due diligence into their corporate processes. The German Government indicated that otherwise they would look into more far-reaching steps, possibly including legal

measures. A further positive outcome of the NAP process is that three of the four parties currently represented in the German Bundestag have now come out in favour of introducing legislation to regulate human rights due diligence during the next parliament.

In the legislative processes running parallel to the NAP process the German Government has neglected to lay down any binding human rights provisions. The procurement modernisation law that came into force in Germany in April 2016, for instance, merely allows public clients to exclude companies that violate environmental, social or labour law. Whether or not they actually do so is a matter for the discretion of the procurement offices concerned. The procurement modernisation law does not mention human rights due diligence.

Nor did the German Government, in the law introducing CSR reporting obligations of March 2017, make exhaustive use of the potential offered by the EU CSR directive on which it was based. It is true that large listed companies must now report on key human rights and environmental risks, including those associated with their business relationships, and must put forward strategies for managing these risks. However, in Germany this applies only to 'very probably serious' negative impacts, whereas the EU directive encompasses 'probably negative impacts'. It is a scandal that this legal requirement applies only to the 550 capital market-oriented companies, while family businesses of a similar size such as Aldi or Lidl are not covered by this new reporting duty.

At the level of the United Nations the German Government has for the time being indicated that it is opposed to binding rules on business and human rights. In June 2014, together with 16 other countries Germany voted in the UN Human Rights Council against a resolution on human rights and transnational corporations and other business enterprises. The German Government did not take part in the first meeting of the UN Working Group on this issue, which nevertheless sat and deliberated by majority vote. Although it took part in the second meeting, it reaffirmed to the German Bundestag its scepticism regarding a binding agreement under international law. By contrast, a broad alliance of NGOs attach to such an agreement their hope for an international economic order in which companies are also obliged to respect

human rights in their foreign business operations, in which victims of human right violations are given easier access to judicial remedy in the home countries of the corporations concerned, and in which human rights agreements under international law enjoy precedence over trade and investment agreements.

Human rights standards for energy policy and the energy sector

Section 3 describes the manifold and complex human rights obligations of states in the energy sector that form the normative framework for the present study. First of all every state is obliged to provide its population with access to energy supply, insofar as this is necessary in order to achieve an appropriate standard of living, including habitation. To discharge this obligation the state need not supply the energy itself. However, it must ensure that energy providers do not discriminate against anyone in terms of their access to energy. Some 1.2 billion people currently still lack access to electricity. The overwhelming majority of them live in sub-Saharan Africa and India. This 'energy poverty' has serious consequences for human development in many areas of life.

At the same time, states must ensure that no human rights violations take place when energy resources are extracted and energy generated. According to a comprehensive study conducted by the University of Maastricht in 2015, 29 percent of the 1,877 business-related human rights complaints registered between 2005 and 2014 involved the mineral resources and energy sectors. This is mainly due to the fact that the extraction of ores and fuels, and the production of energy, often occur as part of megaprojects that involve far-reaching environmental degradation, which in turn jeopardises the livelihoods of the local population. The forest clearance, soil destruction, water contamination, high water consumption and atmospheric pollution associated with mineral extraction make entire swathes of land uninhabitable, and often rob people of their sources of income in agriculture, fisheries or tourism. Civil and political rights such as the rights to information, self-determination, participation, freedom of opinion and physical integrity are often violated in the context of such projects.

German companies are of major importance particularly as fuel importers, but also as exporters of power plant technologies and as service providers. States are also obliged to attend to the impacts of their own energy

supply on the climate, which severely constrain the ability of other states to implement social rights.

Germany is not fully meeting its obligation to protect human rights in the energy sector

Under international law, states are obliged to protect human rights against violations – including violations by business enterprises. According to the UN Guiding Principles on Business and Human Rights this applies all the more so when business enterprises are owned or controlled by the state, or receive substantial support and services from state agencies. States are also obliged before concluding international agreements, such as agreements on trade and investment, to ensure that the policy spaces of their governments to protect human rights will not be constrained. Human rights coherence is also imperative when states act within international organisations. Section 4, however, identifies major gaps in the protection of human rights in connection with the international business of German enterprises in the energy sector.

State-owned business enterprises are not setting a good example

A large proportion of the roughly 1,000 utility companies in Germany are publicly-owned – the vast majority being in the hands of local authorities. A survey and analysis of the ten largest public energy utilities in Germany conducted for the present study reveals that too little attention has so far been paid to human rights. None of the companies surveyed has adopted a policy commitment on human rights, and only one company refers to human rights in its code of conduct. Seven companies mention human rights only in relation to suppliers, and two companies make no public commitment to human rights.

Many of these energy providers import coal, gas and other fuels, however. Some of them do report compliance with the procurement laws in force. Yet only five of the companies concerned have adopted their own code of conduct for suppliers or procurement principles. Over the last few years, NGOs have repeatedly documented serious human rights violations, for instance in coal mining in Colombia, South Africa and Russia. Only four state-owned energy providers supply any information at all on the provenance of the coal, and what information they do provide is usually vague. Only the EnBW Group in Baden-Württemberg now supplies specific data on quantities procured from individual coal suppliers. As the contin-

ued business relationship between EnBW and the highly controversial Drummond mining company in Colombia at the same time shows, although transparency is a good first step it is no guarantee of human rights due diligence.

In the course of the NAP process the German Government decided not to impose binding regulations on human rights due diligence for state-owned companies, despite initial intentions that had gone further. In the NAP it does declare that these companies are directly bound to respect basic rights. However, it does not explain in detail whether or to what extent this obligation to protect basic rights also extends to human rights violations by subsidiaries or in global supply chains. Sustainability and human rights are also not mentioned in the ‘Principles of good corporate governance and holdings management’ published by the Federal Ministry of Finance in 2009, or the Public Corporate Governance Code it contains. Although the German Sustainability Code (GSC) refers to human rights, it does so only in relation to supply chains. Moreover the GSC is a voluntary reporting framework, not a policy requirement.

To analyse federal states and local authorities the publishers of the present study also surveyed the public agencies that hold the largest shares in the ten largest publicly-owned energy providers. None of the larger shareholders have adopted human rights principles for the responsible governance of publicly-owned companies. In their responses or on their website four local authorities refer merely to voluntary obligations and their engagement for sustainable public procurement.

Overall, compared to other European countries where publicly-owned companies are being required to comply with more legal requirements, Germany is showing significantly less legislative engagement. In its State Ownership Policy of 2016 the Finnish Government, for instance, obliged state-owned companies to integrate human rights into their business principles. In Sweden too, state-owned companies are obliged to comply with the OECD Guidelines for Multinational Enterprises, the UN Guiding Principles on Business and Human Rights and the Principles of the UN Global Compact.

Kreditanstalt für Wiederaufbau – energy a growth driver with side-effects

The Kreditanstalt für Wiederaufbau (KfW) is also wholly owned by the state. While the KfW Mittelstandsbank and

the KfW Kommunal- und Privatkundenbank/Kreditinstitut confine their activities to domestic promotion business, the KfW IPEX-Bank GmbH, KfW the Development Bank and the DEG (Deutsche Investitions- und Entwicklungsgesellschaft mbH) operate internationally, albeit with different responsibilities and objectives. Whereas the KfW IPEX-Bank aims to make German companies more competitive internationally, DEG supports private sector projects in developing countries. The KfW Development Bank implements Financial Cooperation on behalf of the Federal Ministry for Economic Cooperation and Development (BMZ).

The energy sector is a driver of growth for the KfW Group as a whole. From 2006 to 2015, the KfW IPEX-Bank, KfW Development Bank and DEG for instance pledged a total of EUR 16 billion for investment in renewable energy abroad. This was used to fund wind power systems, hydropower plants and solar energy. Between 2007 and 2016, however, some further EUR 7 billion was accounted for in international business by new pledges for fossil energies for gas, coal, oil and diesel power plant projects.

The KfW Group likes to describe itself as a ‘responsible bank’. A glance at the social, environmental and human rights standards certainly appears to confirm this claim. As early as 2008 the KfW Group published its own human rights declaration. The KfW IPEX-Bank and Development Bank have also each published their own sustainability standards. These refer to the human rights declaration of the KfW Group, but word its implementation only as an aspiration rather than as a binding obligation. The DEG has also adopted environmental and social standards in which human rights are not mentioned.

Contrary to its own aspiration, the KfW Group has also co-financed several projects in the energy sector that either pose a significant risk for the environment and human rights, or have already compromised them. In 2008 and 2009, through export credits for the supply of boilers the KfW IPEX-Bank contributed to the construction of the Medupi and Kusile coal-fired power plants in South Africa. Since the installation of appropriate flue gas desulphurisation plant is not planned for Medupi until five years after the boilers in question have been commissioned, this poses a considerable threat to health in the environs. Moreover, the enormous amount of water used is jeopardising the rights to water and food. The lead ministry for the DEG and KfW Development Bank (ministry for development) has now ruled out the financing of new construction pro-

jects and the upgrading of decommissioned coal-fired power plants. The KfW IPEX-Bank, which operates on behalf of the ministries for economic affairs and finance, has merely adopted stricter environmental standards for coal mining, however. Also highly problematic is the financing of mining activities by the KfW IPEX-Bank, inter alia as part of general corporate loans extended to the oft-criticised Glencore mining group.

Having said that, human rights violations have also occurred in large-scale projects for renewable energy that the KfW Group has been involved in funding. For example, the police violently broke up a peaceful blockade by indigenous communities of the Santa Rita dam in Guatemala. Three people were killed and 50 injured. The DEG was also involved in financing the hydropower plant through a private equity fund. Rights to self-determination and land rights of the indigenous Masai were also violated during construction of the Olkaria IV geothermal power plant in Kenya. The KfW Development Bank helped finance it with a loan worth EUR 60 million.

In such cases, time and time again it emerges that the population and critical civil society are not sufficiently consulted during environmental and social impact assessments, and that considerable risks are either overlooked or neglected. Furthermore, many projects are approved even when the risks are recognised early on. The financiers have little control over compliance with the agreed environmental and social plans. One crucial weakness here also proved to be the lack of transparency. So far, the KfW has not published either impact assessments or environmental and social plans, for instance; the KfW IPEX-Bank has not even published a list of the projects it has funded. Only the DEG has an independent grievance mechanism.

Reforms in the German Government’s foreign trade promotion all too cautious

Like the KfW IPEX-Bank, the German Government’s foreign trade promotion aims to boost the international competitiveness of the German economy. Through export credit guarantees (so-called Hermes guarantees) worth EUR 20.6 billion, investment guarantees of EUR 4.3 billion and untied financial loans of EUR 246 million, in 2016 the German Government alone protected exports and investments of German companies in developing countries and emerging economies against financial and political risks. Thirty per cent of the specified coverage for export credit

guarantees involved the energy sector. A further 22.8 per cent involved cover for oil and gas extraction. Just four per cent of the Hermes guarantees was accounted for by renewable energy.

And more recently too, the German Government has protected projects in which human rights were jeopardised or violated. In 2012, for instance, the German Government provided the German branch of the Austrian company Andritz with a Hermes guarantee for supplying large turbines for the Hidrosogamoso dam in Colombia. The dam involved flooding an area of 70 square kilometres that had previously been used for livestock and crop farming. Many of the 180 families who were resettled complain that they were compensated with land of inferior soil quality. Other affected families whose income from fisheries, tourism and trade collapsed as a result of the dam were not even considered at all. Other problematic cases are the Hermes guarantees for the South African coal-fired power plants Medupi and Kusile, and the supply of three gas power plants by Siemens to Egypt – a country under an authoritarian regime – for which the KfW IPEX-Bank also provided export credits.

The export credit agencies within the OECD have agreed a joint standard for environmental and social diligence. Human rights were also mentioned for the first time in the 2012 version of these so-called common approaches. Yet even the current version of 2016 calls for a dedicated human rights assessment only in cases where there is a high probability that serious human right violations will occur. The German Government also announced in the NAP it would implement this. It also intends to increase the visibility of human rights issues and their importance in their own right in the general appraisal procedure. It remains to be seen whether this will lead to substantial improvements. One key prerequisite for this would be significantly higher transparency throughout the appraisal procedure – for both Hermes guarantees and investment guarantees, as well as so-called untied financial loans – which would allow scrutiny by stakeholders and NGOs.

Lack of human rights coherence in the EU’s trade and investment policy

According to the EU trade strategy ‘Trade for All’, access to energy and raw materials is critical for the EU’s competitiveness. This is why in this sector it is also requiring its trading partners to remove export restrictions for raw

materials, liberalise services, tighten up intellectual property rights, improve market access and protection for European foreign investment, and promote equal access to public contracts in foreign countries. Corresponding rules constrain the policy spaces of states in the energy and raw materials sectors considerably, and can negatively impact human rights either directly or indirectly.

Almost seventy per cent of the primary energy used in Germany in 2015 came from energy imports. In many of the countries from where these resources are imported – such as Nigeria (oil), and Colombia and South Africa (coal) – serious human rights violations have been documented for years. This also applies to the import of copper from Peru, which is used in renewable energy. The situation is a remarkable one: First of all, EU trade agreements prohibit or limit the raising of fees on raw materials exports in the countries where they are extracted, which gives European companies cheaper access to these resources. At the same time, European importers and industrial enterprises are not obliged to implement human rights due diligence when importing these raw materials. The EU conflict minerals regulation approved in 2016 concerns only tin, tantalum, tungsten and gold.

The liberalisation of services that the EU strives to achieve will also limit the policy space available to other states for ensuring access to affordable energy for poorer sections of the population. In the agreement with Mexico and the MERCOSUR states currently being negotiated, the European Commission intends to allow the regulation of electricity and fuel prices only under very restrictive conditions, and for a limited period of time. At the same time, no obligation is envisaged for social measures to offset the high energy prices for poor people. This means that for many people costs for heating, refrigeration, cooking and travelling to and from work every day can rise to such an extent that their right to an appropriate standard of living is threatened.

Major human rights risks are also entailed by the investment protection provisions that the EU has already negotiated in agreements with Viet Nam, Singapore and Canada, and is hoping to do so in current negotiations with at least 14 other countries. European investors would then be accorded the right to ‘prompt, appropriate and effective compensation’ not only in case of formal expropriation, but also in case of so-called ‘indirect’ expropriation. In several rulings, courts of arbitration have inferred from the standard of ‘fair and equitable treatment’ a right

of foreign investors to a stable and predictable investment climate.

Based on these standards, regulations to protect the environment and social human rights can be contested before courts of arbitration, if they curtail the profitability of an investment. Various successful actions brought by US corporations have demonstrated how concrete this risk is, including in the energy sector. Ecuador, for instance, was sentenced to pay compensation to Chevron. The rationale for this judgement was that in the opinion of the investment arbitration tribunal, an Ecuadorian court had wrongfully sentenced Chevron to pay compensation for polluting the Amazon region and damaging the health of indigenous peoples. The two actions brought by the Swedish energy group Vattenfall against the Federal Republic of Germany before an arbitration court – concerning environmental regulations under water law for the Moorburg coal-fired power plant, and Germany’s phasing out of nuclear power – sit uncomfortably alongside protection of the human rights to health and life.

The inclusion of the ‘right to regulate’ in the trade agreement with Canada (CETA) and other agreements will not resolve this dilemma. Investors’ right to compensation remains unaffected by this if regulatory measures cut their expected profits. This is why NGOs are calling for the precedence of human rights to be clarified unequivocally in a general exception clause in the trade agreements themselves, and in the UN human rights treaty for transnational corporations and other business enterprises currently being negotiated. Before negotiations even begin the EU should also conduct human rights impact assessments, in order to identify and eliminate problematic terms beforehand. So far, the EU has refused to do either. Although the German Government has advocated early impact assessments in the NAP, it has rejected human rights clauses in trade agreements.

Poor human rights coherence in the promotion of ‘clean’ energy in the climate regime

Human rights coherence is also imperative in climate policy. With regard to the energy sector, in this respect particularly the Clean Development Mechanism (CDM), which was created in 1997 under the Kyoto Protocol, raises considerable doubt. The mechanism pursues the twin objectives of supporting developing countries in their efforts for sustainable development, while at the same time supporting industrialised countries in achieving their

emission reduction pledges. For this purpose the CDM issues emission reduction certificates for climate protection projects in developing countries. These include projects in the energy sector.

The problem is that the term ‘sustainable development’ is not defined in the so-called modalities and procedures of the CDM. Nor is the need to respect human rights mentioned. Resistance from a number of states has also prevented the laying down of rules for holding consultations with the affected population. Particularly the Group of 77 (G77) and China have successfully negotiated arrangements whereby it is a matter for the discretion of the countries hosting projects to define their own sustainability criteria and procedures for consultation, and to assess compliance with these. Yet many industrialised countries were also satisfied with this outcome. Studies have shown that most host countries publish only vague and non-binding standards, and do not carefully monitor compliance with these.

NGOs and research institutions have documented several cases in which CDM projects have led to both massive environmental degradation, and human rights violations against the local population. They report, for instance, that for the Sasan coal-fired power plant in India the inhabitants of four villages were forcibly ejected and their property destroyed. They also report that the new settlements lack appropriate income-generating opportunities and schools, which has violated the right to an appropriate standard of living. Members of an indigenous community were driven out of their forest areas and their livelihoods destroyed, without them receiving any appropriate compensation.

There is also German involvement in the Olkaria IV geothermal power plant in Kenya, which was registered as a CDM project in June 2013 and supported by the KfW Development Bank. The inhabitants of four Masai villages were resettled to make way for the project. Local inhabitants complain that not all those affected were compensated, and that not enough houses were provided in the new settlements. The new, lower quality land does not enable people to secure an appropriate standard of living through livestock farming and tourism. And in this case too the rights of indigenous peoples were violated – also during the consultation process. The Barro Blanco hydropower plant co-financed by the DEG was also registered as a CDM project. It was the first project to have this registration revoked following massive human rights complaints in 2016.

The CDM is not mentioned in the Paris climate agreement, so will presumably expire in 2020. However, the climate agreement does provide for the creation of a new mechanism to prevent greenhouse gas emissions and support sustainable development. Due to the massive negative developments associated with the CDM the new market-based mechanism should be of a radically different design. The systematic inclusion of human rights must be an important criterion for this. It will also be important to use the lessons learned with the CDM for further market-based mechanisms, such as the offsetting mechanism that the international aviation organisation ICAO intends to launch. In 2016 the ICAO decided that the continued growth in emissions from air traffic should be made carbon-neutral from 2020 onwards through a new market-based mechanism.

Human rights due diligence by German companies – clear and binding requirements needed

According to the UN Guiding Principles, corporations themselves hold responsibility for respecting human rights in their activities and business relationships. They are therefore expected to adopt a policy commitment to respect human rights, integrate human rights into all areas of corporate policy, assess human rights risks and impacts, take measures to prevent these risks, remedy damage, report transparently on risks and measures, and set up grievance mechanisms. Section 5 examines whether and to what extent German companies are implementing these key demands in the energy sector. To this end 30 energy companies operating in Germany were surveyed and analysed.

Too few policy commitments – and a lack of quality among those that do exist

Only seven of the companies surveyed had adopted a policy commitment on human rights in which they undertake to comply with human rights. A further twelve commit to human rights in their own corporate codes of conduct. This means that eleven of the companies surveyed have not committed to human rights either in a policy commitment or in a code of conduct. Seven companies have made only limited public statements on human rights, or none at all.

The quality of these human rights commitments also varies widely – ranging from a mere mention to explicit

reference to relevant human rights covenants and declarations and instruments for their implementation. According to the standards of the UN Guiding Principles, only six of the twelve codes of conduct that refer to human rights can be classified as human rights commitments of an acceptable quality. On the positive side, we note that most of the policy commitments call not only on the company's own workforce to comply with human rights, but also its business partners.

Even in those cases where companies position themselves comprehensively concerning their human rights responsibility, in some cases this does not sit comfortably alongside actual corporate practice. In Vaca Muerta in Argentina, for instance, a consortium of companies led by the French company Total is extracting natural gas, of late also by means of fracking. The BASF subsidiary Wintershall is also involved. Affected local people are complaining about the environmental impacts of the gas extraction, which include numerous leaks and high water consumption. There are also problems with compensation payments, especially for those who are unable to provide any property titles despite the fact that they have been living on their land for decades.

Patchy integration of human rights into corporate policy

According to the UN Guiding Principles, human rights due diligence does not end at the factory gates, but extends along the entire value chain. Most companies are aware of this fact. As a result, 17 companies have a code of conduct for suppliers or a purchasing policy that requires suppliers to comply with human rights. A further six companies expect their suppliers to comply with their corporate code of conduct.

Although most of these codes of contact and procurement policies refer to human rights, they leave out key problematic areas in global supply chains. Only twelve explicitly demand the payment of national legal minimum wages, and only a single company demands wages that also satisfy the basic needs of employees and their families – which is imperative from a human rights perspective. At least a quarter (seven) demand – in addition to the fair treatment of staff – the prevention of possible damage to people in neighbouring communities.

First signs of progress in the assessment of human rights risks

To assess human rights risks, according to the UN Guiding Principles business enterprises should determine and evaluate the actual and potential negative impacts on human rights in which they are involved either through their own activities or through their business relationships. Although over one third of the surveyed companies do not explicitly respond to this question or have not conducted any analyses of this kind to date, no less than nineteen companies do indicate that they conduct human rights risk analyses. Six of those companies report having integrated human rights issues into their existing risk or management processes, while others also report having conducted additional human rights risk analyses for the entire company or for specific high-risk projects. Six companies focus their human rights risk management regimes on their supply and value chains. Overall things are moving in a positive direction in this field. According to an earlier study by the publishers, until 2014 not a single DAX-listed company had conducted a detailed human rights impact assessment.

It remains very difficult to assess the current situation qualitatively, however, because so far the human rights risk analyses of only two companies have been made publicly accessible. While some companies provide only very brief information on their methodology, others provide much more detail, which then permits at least rough comparisons with the aspirations of the UN Guiding Principles. A first important requirement is that a company should focus on its own key challenges. By contrast, in their risk analyses a number of companies focus on their suppliers, even though some of the surveyed companies face criticism chiefly in connection with their own projects or because they have supplied technology to large-scale projects. Evidently only very few companies also meet a second criterion, which would be the consultation of potentially affected local groups. Only eight companies reported involving potentially affected groups at all. Here too, the present study was not able to examine how appropriate these measures were. So far, the criterion of transparency is also not being met. Apart from the aforementioned risk analyses conducted by two companies, the companies studied have so far not published the results of risk analyses or detailed impact assessments.

In many case examples in this report it is clear that the impacts on the local population living close to energy projects were not considered or taken into account

appropriately. One example is wind farms in Mexico, for which Siemens is supplying amongst other things transformer substations and high-current power lines. According to available reports, many farmers consider the land lease agreements unfair. They complain that they did not receive any information concerning what was to happen to their land, or even that they were misinformed. This disinformation concerning the handover of land, and the low level of compensation and rents compared to other countries, have been causing conflict between the local population and the companies operating there for more than ten years.

Measures to prevent negative impacts

If a company discovers, either through impact assessments of its own or third-party reports, that its own activities or business relationships may possibly be negatively impacting human rights, then it must take appropriate measures to avoid or counteract those impacts. The example of a solar power plant in Morocco shows what steps were taken after extensive consultations with the local population in order to meet their expectations. One important concern for the population was that as many jobs as possible would be created for local workers. Other concerns included compensation payments for land that could no longer be used, and how much water would be needed for the power plant. One consequence was also the creation of a local grievance mechanism.

In the company survey many companies reported measures relating to the supply chain. One positive aspect is that according to the information they provide themselves, twenty-three companies ensure that potential new suppliers meet certain minimum standards before entering into business relationships with them. Ten of the surveyed companies stated explicitly that they also verify their suppliers' compliance with human rights. It remains unclear whether this verification is based merely on the information provided by the potential business partners themselves, or whether it includes more detailed research.

A next important step is to lay down human rights standards contractually. However, only one third of the surveyed companies indicate that either the code of conduct for suppliers or the purchasing policy is an integral part of the contracts that have to be signed by suppliers. A further third expect business partners to comply with the codes of conduct, but do not specify this clearly as a contractual stipulation.

If standards are to be effective, compliance with them needs to be monitored. Just under two thirds of companies (19) report monitoring their suppliers through audits or other means of verification, though only eleven companies report that these audits are also conducted externally. Yet the quantity of audits is not crucial. What is crucial is to audit those suppliers with potentially serious risks, and to include strategically important suppliers with a large volume of supply.

Beyond verification and monitoring, companies are also responsible for creating the conditions needed to enable business partners to comply with human rights standards. In the first instance this includes clear communication, but also the training of those responsible in the operations concerned. So far most companies have confined training to their own staff, while only five of the surveyed companies also offer training for suppliers.

In problematic cases where suppliers violate human rights, sustainability standards or labour standards, training and incentives are often not sufficient. Indeed 25 companies report that in such cases they also take more far-reaching measures ranging from warnings to discontinuation of the business relationship. Although 20 companies are ultimately also considering a termination of contract, only eight of them report having once made use of this possibility in order to protect human rights. Only few companies report having taken other concrete measures in response to negative impacts on human rights.

For Voith Hydro, the example of the controversial Agua Zarca hydropower plant in Honduras raised the question of when, in a concrete case, it would seem appropriate to discontinue or at least suspend the business relationship in a project that is problematic from a human rights perspective. In connection with Agua Zarca conflict with the local population has been ongoing for years, and regrettably six opponents of the power plant have been murdered. Due to public pressure, and after key donors had discontinued or suspended their participation, the joint venture between Voith and Siemens pulled out of the project temporarily.

Processes are transparent – but their results are not

Transparency is a key element in the human rights due diligence of companies. Only appropriate reporting enables states, civil societies and the financial market to judge

whether an enterprise is doing enough to protect human rights. In 2015 half the companies studied published a separate sustainability report. Eight further companies either published a combined annual and sustainability report, or integrated information on sustainability into their annual report. For two companies the authors were unable to locate either a sustainability report or an annual report.

What is crucial in reporting, however, is the quality. Only just over half the surveyed companies (16) base their reporting on the standards of the Global Reporting Initiative (GRI). While nine companies do dedicate a separate section of their report to human rights, 13 reports mention only the importance of human rights. The remaining reports do not mention them at all. Twenty-three report on the procedures they follow in response to problematic cases, although the informative value of these remarks varies widely. Barely a single company, however, publishes figures on how often problems arose. On the other hand, some companies publish data on how often problems led to withdrawal from the contract.

There is still a long way to go regarding the disclosure of the impacts of corporate governance on human rights. It is true that many companies now report on their procedures for human rights due diligence. However, the reports published by companies usually contain either only very vague information or none at all on the concrete risks and impacts of their activities and business relationships. There is virtually never any reporting of specific cases. Only two companies have published information either on a pilot project or on several risk analyses that have already been carried out. So far, only one company produces its report on the basis of the UN Guiding Principles Reporting Framework. This means that barely a single company meets the transparency requirements of the UN Guiding Principles, according to which the information provided must be such as to permit third parties to judge the appropriateness of the measures taken.

Grievance mechanisms – barely accessible in other countries

In order to be able to respond to grievances on a timely basis and remedy them immediately, companies should set up effective grievance mechanisms for individuals or local communities who might suffer lasting effects from the company's activities. In fact, 25 of the 30 energy companies surveyed report having set up a grievance mechanism. While some grievance mechanisms are designed

only for the company's own workforce or consumers, almost two thirds of the companies (19) indicate that the grievance procedures are also accessible to external actors such as contractors or affected groups and individuals. However, only few of them explicitly indicate having implemented grievance procedures abroad.

Another important criterion is the neutrality that examination of the grievances by independent experts presupposes. Yet in only 11 companies are the grievances reported to actors outside the company, such as law firms or ombudspersons. A third criterion, namely the link between grievance mechanisms and human rights, is met in only very few cases. According to information supplied by the companies, six grievance mechanisms that were set up for affected local groups and individuals are based on the UN Guiding Principles, or are currently being revised in line with the criteria defined therein. In other words, despite the fact that things are moving forwards, as far as grievance mechanisms are concerned, overall most companies are far from meeting the human rights requirements.

A similar conclusion can be drawn regarding the implementation of human rights due diligence in general. The study shows that with regard to the monitoring of German companies' human rights due diligence announced in the NAP, the individual elements and steps need to be further concretised in order to provide guidance both for the companies and for the monitoring process itself. It is also important that the planned review must not be based solely on information supplied by companies themselves. At least a random sample of an appropriate size should be taken to verify implementation of the corporate data supplied. This study shows just how much still has to be done. To ensure that it is not just a few pioneers who meet the requirements of the UN Guiding Principles to a sufficient degree, the NGOs take the view that legislation is also required.

Stakeholders affected by corporate wrongdoing have no access to effective remedy in Germany

According to the UN Guiding Principles on Business and Human Rights, states must guarantee that business-related human rights violations are 'investigated, punished and redressed'. Section 6 of the present study begins by examining the key judicial processes for such remedy. Here the study begins by shedding light on problems of legal access that stakeholders affected by human rights

violations in the energy sector face, and outlines new international trends. In the second and third parts of Section 6 it then focuses on two non-judicial grievance mechanisms: the OECD Guidelines for Multinational Enterprises, and the DEG complaint mechanism.

For those affected in foreign countries, the obstacles to accessing judicial remedy are almost insurmountable

In Germany, the legal foundations on which those affected either by human rights violations in global business relationships, or damage caused by global climate change, can base their case are either fragmentary or very uncertain. If a subsidiary or business partner of a German corporation abroad contributes to human rights violations, the corporation in question usually cannot be sued before civil courts in Germany. The main reason for this is the principle of corporations having separate legal entities, pursuant to which wrongdoing by the subsidiary cannot be attributed to the parent company. In Germany there is also no so-called forum necessitatis rule. This would enable a German court to declare itself competent if it were necessary to guarantee for those affected a fair trial or the right to judicial protection, if this were not possible in their home country. The situation with regard to criminal law is also unsatisfactory. Unlike most European countries Germany still has no corporate criminal law.

The situation is made more difficult by procedural obstacles, particularly in civil law. In Germany it is not possible, for instance, for several persons who have suffered similar damage due to the same actions of a corporation to file a class action lawsuit under civil law. Moreover, for many of those affected the risk of legal costs associated with claims for damages is almost too much to bear. Standards of proof are also particularly high in Germany. Unlike in other legal systems, in German civil law there is no comprehensive procedure for adducing evidence through which the plaintiff can force the opposing party to disclose relevant information.

In the NAP the German Government neglected to introduce legal reforms that have already been set in motion in other European countries. On 21 February 2017 the French National Assembly, for instance, passed a the corporate duty of vigilance law requiring large companies to implement human rights due diligence. Companies must draw up, implement and publish plans on how they will perform their due diligence and include both their business

activities and their main suppliers in this. Those affected by violations of due diligence can claim compensation for non-compliance with these duties under civil law. In Switzerland first of all the Federal Council, then the Swiss Parliament, will deliberate on a similar initiative. In 2015 the UK already introduced the Modern Slavery Act that imposes on companies duties of transparency in this regard which they must implement in their supply chains. In February 2017 the Dutch Parliament adopted a child labour due diligence law, violation of which can result in fines. If the Senate gives its approval too, the Act will be effective from January 1, 2020.

There have also been court rulings in several countries that reflect forward-looking trends. In the Netherlands, for example, four Nigerian farmers sued the Dutch company Shell and its subsidiary in Nigeria for causing oil pollution and destroying their agricultural land and fishing grounds. In January 2013 a court of the first instance in Den Haag decided in one of the four cases that Shell was responsible for the pollution. The appeal proceedings have not yet been completed. In Canada in October 2016 a court declared itself competent for a case brought by Eritrean refugees, who are suing the Canadian mining company accused of involvement in violating international customary law (prohibition of forced labour, torture and crimes against humanity) in an Eritrean mine.

In several countries courts are now also dealing with damage caused by greenhouse gas emissions generated by corporations, or resulting from deficient state measures to mitigate climate change. This includes a suit brought by a Peruvian farmer and mountain guide against the German RWE Group. In November 2015 he sued RWE before the regional court in Essen as the largest emitter of CO₂ in Europe and as a contributor to climate change. RWE had refused to pay for half of one per cent of the measures needed to protect against a melting glacier, calculated on the basis of its emissions.

Non-judicial grievance mechanisms not delivering any tangible improvement for those affected

As well as judicial remedy, states must also provide effective and appropriate non-judicial grievance mechanisms where corporate activities have led to human rights violations. To be effective, according to the UN Guiding Principles these must be legitimate, acceptable, predictable, equitable, transparent and rights-compatible.

The OECD Guidelines for Multinational Enterprises currently are regarded as the key state-based non-judicial grievance mechanism in the world. Since 2011 the OECD Guidelines have included a separate chapter on human rights that corresponds to the UN Guiding Principles.

Since the year 2000, the German National Contact Point (NCP) alone has received just under 40 OECD complaints. Six of these concern the energy sector. It is remarkable that the NCP rejected four out of the first five complaints it received. The German NCP partially accepted only one complaint – against Nordex DE – concerning a wind farm in Turkey. In the course of the mediation procedure Nordex agreed to improve its due diligence process. This pledge relates to future cases, however, whereas the concerns of those directly affected in this specific case were not dealt with adequately.

Neither in the aforementioned cases nor in cases outside the energy sector is the German NCP meeting the requirements of the UN Guiding Principles. Major doubt with regard to the legitimacy and neutrality of the German NCP remains warranted – the NCP was for a long time directly attached to the Division for Foreign Direct Investment at the Federal Ministry for Economic Affairs and Energy. As a result of the NAP, in 2017 the Ministry made the NCP a unit reporting directly to the Director-General for External Economic Policy. This at best weakens the suspicion that the unit might tend to look kindly on business, but does not eliminate it. Above all, the fact that the NCP is based in the economics ministry means it still lacks an independent supervisory body – a fact that NGOs have long been pointing out. A further problematic aspect is the requirement of the German NCP that those submitting grievances should refrain from campaigns and public relations work against the businesses in question, even if this involves using only facts that have already been published. This robs NGOs of an important means of drawing attention to the concerns of those affected, and thus pressing for a solution to the problem.

Moreover, the NCP mediation procedure is rarely about reparation for those affected. In the vast majority of cases it is about reaching agreement on improved corporate conduct for the future. An international study of 250 complaints revealed that the situation of those affected was directly improved by an OECD complaint in just one per cent of cases. To really establish the NCP as an ‘effective’ non-judicial grievance mechanism for implementing the UN Guiding Principles, as envisaged by the German Gov-

ernment in the National Action Plan, both structural and procedural improvements are needed. The forthcoming peer review of the German NCP will offer an opportunity to prompt such changes.

The DEG grievance mechanism – a study with no consequences?

In early 2014, together with the Dutch development bank FMO the KfW subsidiary DEG established a grievance mechanism. By doing so they were following the example set by several multilateral development banks, such as the World Bank. Between early 2014 and June 2016 the panel received seven complaints, two of which it accepted. In many respects this mechanism is implementing the effectiveness criteria contained in the UN Guiding Principles better than the NCP. This applies particularly to the criterion of legitimacy. This is because the panel operates independently of the DEG. The three experts engaged there were selected through a public invitation to tender, and possess expertise on social, environmental and human rights matters.

The only complaint for which an investigative report by the panel is already available concerns the co-financing of the Barro Blanco dam in Panama. Resistance to this dam is being put up particularly by sections of the Ngäbe-Buglé indigenous community, as some seven hectares of their territory is to be flooded by the dam. In 2015 the panel published a detailed report on the project, according to which the DEG had failed to perform its due diligence in several respects. The report indicated that no appropriate consultations had taken place, and the financiers had not taken the resistance of the affected communities seriously. The DEG responded by emphasising that it intended to improve the quality of its assessment and monitoring of environmental and social risks. Unfortunately, shortly before that together with other financiers it had pressurised the Government of Panama to realise the project, even after the construction of the dam had been temporarily halted by the Panamanian environmental agency ANAM due to shortcomings that had come to light during the environmental impact assessment.

This look at the NCP and the DEG at the same time highlights both the potential and the limits of non-judicial grievance mechanisms. On the one hand they can – provided that their neutrality is guaranteed – help clarify matters and provide support to those affected by injustice. Beyond that, resolving conflicts requires the actors

concerned when in doubt to be willing to give precedence to human rights in the implementation of projects. Grievance mechanisms are only effective when they lead to real improvement for those affected. This means that human rights violations must be not only investigated, but also punished and redressed, as the UN Guiding Principles require. Hence non-judicial grievance mechanisms can never replace courts – they can only complement them.

2017 Report
The Global Energy Sector and Human Rights –
Putting German Business and Policy to the Test

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