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

2017 Report (executive summary)
The state duty to protect against human rights violations in the German energy sector

- The ten largest German public utility companies must comply with the EU’s Transparency and Consumer Rights Directive, which requires companies to disclose information about human rights and environmental risks associated with their products. This includes information about any human rights violations that may occur in their supply chains.

- German companies are responsible for ensuring that their human rights due diligence efforts extend beyond their domestic operations to their foreign subsidiaries and business partners. This is particularly relevant in the context of renewable energy projects, which often involve international partnerships and supply chains.

- The German Energy Act of 2017 requires companies to conduct human rights due diligence in their energy projects. This includes identifying potential human rights risks and taking steps to mitigate them. Companies are also required to report on their human rights due diligence efforts in their annual sustainability reports.

- The German government has taken a number of steps to promote human rights due diligence in the energy sector. These include the development of a National Action Plan on Business and Human Rights, which sets out concrete actions to be taken by companies to improve their human rights performance. The plan includes provisions for enhanced due diligence in foreign investments and trade promotion activities.

- The German government has also taken steps to improve its own human rights due diligence efforts. This includes the establishment of a contact point for human rights issues within the Foreign Ministry, which is responsible for ensuring that the government’s foreign policy is consistent with human rights principles.

Corporate responsibility to respect human rights in the energy sector

- The German government has taken steps to encourage companies to adopt human rights policies and practices in their energy projects. This includes the development of voluntary guidelines, such as the UN Guiding Principles on Business and Human Rights, which provide a framework for companies to conduct due diligence and take steps to prevent human rights abuses.

- Companies are increasingly recognizing the importance of human rights due diligence in the energy sector. A number of companies have conducted human rights risk assessments and have taken steps to prevent and mitigate human rights abuses in their energy projects.

- The German government has also taken steps to promote accountability for human rights abuses in the energy sector. This includes the development of national mechanisms to address human rights violations, such as the German Commission on Corporate Human Rights Due Diligence, which was established in 2016 to monitor companies’ human rights due diligence efforts.

- The German government has also taken steps to promote international cooperation on human rights due diligence in the energy sector. This includes the development of international standards, such as the UN Guiding Principles on Business and Human Rights, which provide a framework for companies to conduct due diligence and take steps to prevent human rights abuses.

- The German government has also taken steps to promote transparency and accountability in the energy sector. This includes the development of new transparency mechanisms, such as the German Transparency Act, which requires companies to disclose information about their energy projects and operations.
AROUND THE WORLD, GERMAN COMPANIES ARE INVOLVED IN ENERGY PROJECTS THAT RAISE HUMAN RIGHTS PROBLEMS.

Intimidation of activists, ranging from verbal threats to murder

Diseases caused by environmental pollution

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

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.)

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:

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

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.

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.

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

DRUMMOND (COLOMBIA)
EnBW procures coal from.

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

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.

CESME 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.

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Summary and conclusions

Over the last three years the debate on business and human rights has reached a new level. Since 2011, the UNGuiding 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 2014 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 exhaus-tive 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 environmen-tal risks, including those associated with their business relationships, and must put forward strategies for man-aging 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 Govern-ment 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 meet-ing, it reaffirmed to the German Bundestag its scepti-cism 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 corpora-tions 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 habita-tion. 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 develop-ment 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 compre-hensive 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 destruc-tion, 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 partic-u-larly 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 abil-ity 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. Sec- tion 4, however, identifies major gaps in the protection of human rights in connection with the international busi-ness 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 compa-nies 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 atten-tion has so far been paid to human rights. None of the companies surveyed had 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 compa-nies make no public commitment to human rights.

Many of these energy providers import coal, gas and other fuels, however. Some of them do report compli-ance 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 min-ing 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-
used 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 Finish 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/Kreditinstitute 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.

Concerning CSR, 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 human rights as a 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.

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 standards. One crucial weakness of the human rights declaration is the lack of transparency. 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. 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 Hidroagamosa 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 complained 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. In any case 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.
materials, liberalise services, tighten up intellectual prop-
erty rights, improve market access and protection for Eu-
ropean 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 min-
erals regulation approved in 2016 concerns only tin, tal-
talum, 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 con-
ditions, 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 in-
vestment 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 exprop-
riation, but also in case of so-called ‘indirect’ expropria-
tion. 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 invest-
ment 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 profitabil-
itv of an investment. Various successful actions brought 
by US corporations have demonstrated how concrete this 
rule is, including in the energy sector. Ecuador, for instance, 
was sentenced to pay compensation to Chevron. The ra-
tionale 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 Swed-
ish energy group Vattenfall against the Federal Republic 
of Germany before an arbitration court – concerning envi-
rimental regulations under water law for the Mooburg 
coal-fired power plant, and Germany’s phasing out of nu-
clear 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 prec-
edence of human rights to be clarified unequivocally in a 
general exception clause in the trade agreements them-
selves, and in the UN human rights treaty for transnation-
al 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 before-
hand. So far, the EU has refused to do either. Although the 
German Government has advocated early impact assess-
ments 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, rais-
es 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 pro-
tection projects in developing countries. These include 
projects in the energy sector.

The problem is that the term ‘sustainable develop-
ment’ is not defined in the so-called modalities and pro-
cedures 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 con-
sultations with the affected population. Particularly the 
Group of 77 (G77) and China have successfully negotiat-
ed arrangements whereby it is a matter for the discretion 
of the countries hosting projects to define their own sus-
tainability 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 sev-
eral cases in which CDM projects have led to both massive 
environmental degradation, and human rights violations 
against indigenous peoples. The two actions brought by 
the Sasan coal-fired power plant in India the inhabi-
ant of four villages were forcibly ejected and their property 
destroyed. They also report that the new settlements lack 
appropriate living conditions, and not enough houses were provided in the 
new settlements. The new, lower quality land does not enable people to secure an appropriate standard of liv-
ing 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 reg-
istered 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 agree-
ment, 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 mas-
sive negative developments associated with the CDM 
the new market-based mechanism should be of a radi-
cally 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 
future 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 
tackled 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 
themsevles hold responsibility for respecting human rights 
in their activities and business relationships. They are 
therefore expected to adopt a policy commitment to re-
spect human rights, integrate human rights into all areas 
of corporate policy, assess human rights risks and im-
pacts, take measures to prevent these risks, remedy dam-
age, report transparently on risks and measures, and set 
time frames. Section 5 examines whether the German companies are implement-
ing 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 in human rights in which they under-
take 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 com-
mittment 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
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 standards called for by 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 misrepresented. This disinformation concerning the handing over 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 23 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 whether it is 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 reluctantly 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 vague information or none at all on the concrete risks and impacts of their activities and business relationships. They often report 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. A subsidiarity 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 nonessistis 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 deducing 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 of 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 committed 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 Government 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 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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