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**GERMAN ACTION PLAN ON
BUSINESS AND HUMAN RIGHTS:
A STEP FORWARD OR JUST BUSINESS AS USUAL?**

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ABSTRACT

With the endorsement of the UN Framework and the associated Guiding Principles the business and human rights debate obtained a long lacking authoritative conceptual framework, clarifying the different but complementary responsibilities of states and corporations. Now, in order to achieve sustainable progress and to ensure its functionality, much depends on the legal and political implementation of the principles at the national level - through so-called National Action Plans on business and human rights (NAPs). In the last five years, twenty-one countries have published such action plans and many more are in the process of drafting. In this thesis, a special focus has been set on the German NAP and its current status of practical implementation. Countries such as Germany, which are home to a large number of corporations operating globally, have a particular role to play in fostering human rights protection. After having announced the publication of an ambitious action plan, Germany had the opportunity to provide a minimum standard of human rights due diligence and to implement measures to effectively preventing possible violations in the first place. The questions of whether Germany fulfils this role and to what extent the NAP has the potential to contribute towards greater responsibility and accountability of state measures and corporate practice lie at the core of this paper.

LIST OF ABBREVIATIONS

| Abbreviation | German | English |
|---------------------|--|---|
| BHRRC | | Business & Human Rights Resource Centre |
| BMAS | Bundesministerium für Arbeit und Soziales | Federal Ministry of Labour and Foreign Affairs |
| BMWi | Bundesministerium für Wirtschaft und Energie | Federal Ministry of Economics and Energy |
| BMZ | Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung | Federal Ministry for Economic Cooperation and Development |
| CHRB | | Corporate Human Rights Benchmark |
| CSOs | | Civil Society Organisations |
| CSR | | Corporate Social Responsibility |
| DGB | Deutscher Gewerkschaftsbund | German Trade Union Federation |
| DGCN | Deutsches Global Compact Netzwerk | German Global Compact Network |
| DIMR | Deutsches Institut für Menschenrechte | German Institute for Human Rights |
| DIHR | | Danish Institute for Human Rights |
| ECCHR | | European Centre for Constitutional and Human Rights |
| ENNHRI | | European Network of National Human Rights Institutions |
| EU | | European Union |
| FRA | | European Union Agency for Fundamental Rights |
| HRDD | | Human Rights Due Diligence |
| HRRS | | Human Rights Respect System |
| ICAR | | International Corporate Accountability Roundtable |
| IMA | Interministerielle Arbeitsgruppe | Inter-ministerial Committee |
| MNC | | Multinational Corporations |
| NAP | | National Action Plan |
| NBA | | National Baseline Assessment |
| NCP | | National Contact Point |
| NHRI | | National Human Rights Institution |
| OECD | | Organisation for Economic Co-operation and Development |
| SEA | | Social & Environmental Affairs |
| SMEs | | Small and Medium-sized Enterprises |
| UK | | United Kingdom |

UN
UNHRC

UNGPs
UNWG

TNC

United Nations
United Nations Human Rights
Council
United Nations Guiding Principles
United Nations Working Group on
the issue of human rights and
transnational corporations
Transnational Corporation

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1. INTRODUCTION

In September 2012, a disastrous fire in a Pakistani textile factory led to the death of more than 250 workers. Due to the defective conditions, in particular the deficient fire safety protocols, many workers did not reach the exits in time, suffering an agonising death. Apart from the Rana Plaza collapse in Bangladesh in 2013, the tragedy at the Ali Enterprises is one of the most devastating of its kind in the global textile supply chain. The German clothing retail company KiK, the biggest textile discounter in Germany, was the factory's main customer.¹ Two and a half years later, one survivor and three families of the victims, on behalf of the surviving dependants, filed a lawsuit against KiK at the district court in Dortmund, claiming that the company bears a shared responsibility for the factory's conditions, and seeking compensation for their suffering.² The lawsuit is a unique case: never before has a worker from an Asian supplier brought a German company before a German court; nor has a German court ever accepted jurisdiction and granted legal aid to such claimants. At the moment of writing (May 2018), experts are clarifying whether the plaintiffs have a right to compensation under Pakistani law. In August 2016, the European Centre for Constitutional and Human Rights (ECCHR), a German human rights organisation supporting the four Pakistanis, called on the German Government to implement enforceable human rights due diligence (hereinafter HRDD) for German companies operating abroad.³ The ever-increasing interconnectedness of corporate processes across national borders entails major challenges for human rights protection, and so countries such as Germany, which are home to several corporations,

¹ Dohmen, C., 'Klage gegen KiK: Brandopfer fordern Entschädigung', *Deutschlandfunk*, 19 December 2016, www.deutschlandfunk.de/klage-gegen-kik-brandopfer-fordern-entschaedigung.724.de.html?dram:article_id=374307 (accessed 10 May 2018).

² Krajewski, M. and M. Saage-Maaß (eds.), *Die Durchsetzung menschenrechtlicher Sorgfaltspflichten von Unternehmen: Zivilrechtliche Haftung und Berichterstattung als Steuerungsinstrumente*, Baden-Baden: Nomos, 2018, p.73.

³ 'Schadenersatzklage gegen KiK: Gericht bewilligt Prozesskostenhilfe für Brandopfer', *Frankfurter Allgemeine*, 30 August 2016, www.faz.net/aktuell/wirtschaft/unternehmen/schadenersatzklage-gegen-kik-gericht-bewilligt-prozesskostenhilfe-fuer-brandopfer-14412523.html (accessed 10 May 2018).

must take appropriate steps to protect against these violations. At the same time, corporations must start to acknowledge their shared responsibility for their operations and act with due diligence in order to mitigate, prevent and remedy human rights abuses connected to their business activities.

The concept of corporate HRDD can be traced back to the work of the UN Special Representative on the issue of transnational corporations and other businesses enterprises and human rights, John Ruggie. In 2008, Ruggie and his team proposed the “Protect, Respect, Remedy” Framework (hereinafter UN Framework) to the UN Human Rights Council (UNHRC), clarifying the role of states and corporations in the context of business and human rights by means of three pillars: the state duty to *protect* against human rights violations, the corporate responsibility to *respect* human rights and the access to *remedy* for victims of corporate human rights abuses.⁴ In June 2011, after decades of discussing the role of businesses with regard to human rights and several failed projects at the international level, the UNHRC unanimously adopted the UN Guiding Principles on business and human rights (hereinafter Guiding Principles or UNGPs), a set of guidelines for implementing the UN Framework.⁵ In this ground-breaking decision, the UN for the first time directly addressed the responsibility of corporations, thus attempting to close the ‘governance gap’ for human rights protection in the global economy. As a strong soft-law instrument, the Guiding Principles were quickly recognised as the authoritative global standard for addressing the risk of adverse corporate human rights impacts. Following the endorsement, they were incorporated into international codes of practice, the policies of the European Union (EU), the advocacy work of civil society organisations (CSOs) as well as the social responsibility processes of large corporations. Most importantly, as a response to the requests by the UN, the EU and the Council of Europe, multiple states around the world have committed themselves to implementing the UNGPs at the national level through so-called National Action Plans on business and human rights (NAPs).

Events such as the lawsuit against KiK demonstrate that things are on the move: victims of corporate human rights violations have started raising their voices, civil society

⁴ UN Human Rights Council, ‘Protect, Respect and Remedy: A Framework for Business and Human Rights – Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie’ A/HRC/8/5, 7 April 2008, hereinafter UN Framework.

⁵ United Nations, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, 2011, hereinafter Guiding Principles.

actors continue revealing corporate abuses in third world countries and consumers and shareholders are paying increasing attention to sustainable aspects of their purchases and investments. In the past year, France adopted a law establishing a duty of vigilance for large international corporations. Likewise, other countries are currently in the process of drafting legislation with regard to corporate HRDD. So far, twenty-one countries have implemented the Guiding Principles through NAPs and many more are in the drafting process. In 2014, after several countries had already published NAPs, Germany initiated the process of developing a NAP under the auspices of the Foreign Ministry. As the third largest exporting country and the second largest textile importer in the world, Germany has an important role to play in the global trade market.⁶ While Germany's economy contributes to the creation of employment and thus the enhancement of social standards, the rising connectivity and the associated opacity of business activities harbour the risk of negative impacts on people along the supply chain. Provided that host states cannot or do not want to guarantee human rights protection, countries such as Germany bear special responsibilities in ensuring policies for corporations to respect human rights. Consequently, in order to achieve comprehensive human rights protection in the global economy, much depends on the legal and political actions of governments in their respective national contexts. Through its NAP, the German government has the opportunity to enforce a minimum standard of corporate due diligence and to implement measures to effectively prevent possible violations in the first place.

The question as to whether Germany fulfils this role of protecting from corporate human rights violations lies at the heart of this research work. In particular, with a view to the announcement of the German government to present an ambitious NAP⁷, it is important to analyse and evaluate the measures laid out therein and to take a closer look at the initiatives that have followed since its adoption in December 2016. The first part of the thesis explains the methodological approach that was taken in order to provide a comprehensive picture of the recent developments and current *status quo* in Germany. In

⁶ For the statistics, see: <https://de.statista.com/statistik/daten/studie/37013/umfrage/ranking-der-top-20-exportlaender-weltweit/> (accessed 5 April 2018).

⁷ See e.g. DIMR, 'Stellungnahme „Zögerliche Umsetzung“ Der politische Wille reichte nicht weiter: Deutschland setzt die UN-Leitprinzipien um - mit kleinen Schritten', 21 December 2016, www.institut-fuer-menschenrechte.de/publikationen/show/stellungnahme-zoegerliche-umsetzung (accessed 5 April 2018).

the second part, the thesis introduces the context of the business and human rights discourse, discusses the various initiatives taken at international and regional level preceding and following the endorsement of the UNGPs and gives an overview of the NAP landscape as well as the recent developments that have arisen thereof. In that respect, the document provides a brief summary of the guidelines and thematic criteria that have been developed by some leading organisations on the basis of which governments are advised to draft their NAPs. The third chapter is devoted to the assessment of the German Action Plan. In a comprehensive analysis, the engagement and drafting phase as well as the content of the NAP are outlined, discussed and evaluated. Based on this analysis, the fourth part of the thesis provides an account of the current implementation status of the measures laid out in the NAP and points out several initiatives that have taken place since its publication. In addition, the thesis takes a closer look at the corporate practice of three German industry sectors and analyses in what ways specific companies have set out to integrate HRDD.

2. METHODOLOGY

2.1. Research Approach

The analysis pursues an interpretative qualitative research strategy under the constructivist framework. Through critical engagement with the data, the observation of the ongoing international debate and the use of knowledge and ideas gained from interviews with relevant stakeholders, the following lines of inquiry were addressed: firstly, this thesis aims at analysing the elaboration process, content and implementation of the German NAP on business and human rights in a comparative perspective. Secondly, the paper makes an assessment as to what extent the measures outlined in the action plan have been implemented into practice. Finally, the dissertation evaluates whether the adoption of both the Guiding Principles and the German NAP has fostered corporate conduct towards implementing HRDD. Considering the theoretical nature of the research questions, the thesis is based considerably upon desk research on the international debate and the practice of business and human rights. A comprehensive (policy) document analysis was conducted with the aim of identifying the presence or absence of relevant issues. Given the absence of literature on the intermediate status of the implementation, and with a particular focus on forming an encompassing perspective on the topic, interviews with various stakeholders were carried out. The research thus followed an inductive procedure, during which information and different points of view were gathered, called into question and put into context with the ultimate aim of developing in-depth knowledge of the issue under consideration and to provide an evaluation of the findings.⁸

⁸ See e.g. Denzin, N.K. and Y. Lincoln (eds.), *The Sage Handbook of Qualitative Research*, 5th ed., Sage Publications Ltd., 2017.

2.2. Sources

The data was collected through primary and secondary sources, respectively through policy documents, semi-structured interviews and relevant academic literature and position papers. The primary sources encompassed the policy documents and legal texts adopted by the UN, the EU and at national level with regard to the topic of business and human rights. The German NAP, the UN Framework and the associated Guiding Principles constituted the core documents for the analysis. The NAPs of other countries such as Italy and Finland served as objects of comparison. The existing NAP guidelines and toolkits on the implementation of the UNGPs formed the methodological instrument on the basis of which the German NAP was assessed. In addition, the content of various websites of companies and institutions were examined and evaluated.

As mentioned previously, interviews with different stakeholders were conducted in order to integrate various perspectives as well as to collect information and opinions with particular regard to the second and third research questions. The respondents were chosen on the basis of their participation in the development process of the German NAP and their expertise in the field of business and human rights. In order to elucidate the issue in question as well as possible, experts from different sectors such as business, government and civil society were consulted. The interviews followed a semi-structured approach, allowing for open-ended questions on a controversial topic of biased character. The participants were sent individual questionnaires in advance, which helped the interview partners to prepare for the interview and served as an orientation during the conversations. There was sufficient room for spontaneous questions and topics not covered by the questionnaire, thus allowing for some flexibility. The interviews took between thirty minutes and one hour and were conducted in German. At the beginning of each interview, the terms of citation were agreed upon. The information gained from certain interviews has thus been used according to a loosened ‘Chatham House’ rule, meaning that instead of the person’s name, only the respective institution is mentioned.

The ideas and information gathered from primary sources were complemented by secondary sources such as scholarly articles, academic literature and newspaper articles on the topic of business and human rights, specifically the debates surrounding the UNGPs and the NAPs as well as any recent developments at international and regional level. The position papers by CSOs about the German NAP were consulted during the

assessment. Finally, the German and English online presence of the Business & Human Rights Resource Centre (BHRRC) served as a particularly important databank for this thesis.

2.3. Delimitations

As outlined above, the thesis relied on an interpretive qualitative analysis based on desk research and semi-structured interviews with stakeholders. In the course of the NAP implementation, the German government itself will be conducting a survey of the implementation status of pillar II of the UNGPs. In order to avoid any overlaps, the thesis does not include a statistical survey with business enterprises on their human rights due diligence implementation. Instead, the paper concentrates on specific business enterprises and initiatives, allowing for a comprehensive analysis of these examples. Moreover, it was a deliberate decision not to make a comprehensive comparison between various NAPs but to concentrate on one national case. The aim of this thesis is therefore not to provide a detailed overview of the NAP landscape, by discussing the various approaches and evaluating their individual potentials. On the contrary, the thesis intends to present a comprehensive analysis of the German NAP and an evaluation of the intermediate status of its practical implementation. Germany was chosen on the basis of its interconnectedness and strength in the global market, its leading role in the European Union and above all, its announcement to bring forward an ambitious action plan. Beyond that, there has so far been no academic in-depth analysis of the German NAP.

Given the dearth of substantive physical documents on the practical implementation, the thesis, *inter alia*, relied on the information gathered from various interviews with representatives from business, government and civil society. This means, however, that the knowledge gained from these interviews could not be easily verified and the reliability of the sources not be entirely guaranteed. To ensure the information is as reliable as possible, the questionnaires for the individual participants were designed along common themes. This ultimately led to the replication of relevant information. At the same time, the paper aimed at providing a multiple-angled approach to the issue under discussion. Although valuable interviews with participants holding different points of view were conducted, the sample did not include all perspectives on the topic for reasons of confidentiality or due to limited availability.

Throughout the thesis a neutral stance was attempted towards the issue in question. The analysis was based on criteria established by official institutions and academics. The findings in the position papers were examined for correctness before being included in the argument. Nevertheless, pursuing an *interpretivist* approach, it is recognised that the findings might have been constructed based on the researchers own background and perceptions. In principle, by bringing together different perspectives on the issue, the intention was to present as comprehensive and balanced a picture as possible of the situation.

2.4. Terminology

Discussing the topic of business and human rights requires a short explanation of the different titles used for business enterprises. In the context of the international initiatives and policies within the UN, the term Transnational Corporations (TNCs) is predominant, covering both TNCs and Multinational Corporations (MNCs). The United Nations Conference on Trade and Development defines these corporations as “incorporated or unincorporated enterprises comprising parent enterprises and their foreign affiliates”⁹. Even though these two terms are interchangeable in everyday usage, they differ in some criteria: MNCs operate branches in various countries, but they are managed from one home country, whereas TNCs operate a considerable number of subsidiaries without considering any particular country as their base.¹⁰ In order to avoid any confusion and with regard to the Guiding Principles which apply to any kind of corporation “regardless of their size, sector, location, ownership and structure”¹¹, the paper makes use of the term “international corporations” (or solely “corporations”), taking into account both TNCs and MNCs. The title “business enterprises” will be used synonymously. In contrast, the designation of small and medium-sized enterprises

⁹ United Nations Conference on Trade and Development, ‘Transnational corporations (TNCs)’, [http://unctad.org/en/Pages/DIAE/Transnational-corporations-\(TNC\).aspx](http://unctad.org/en/Pages/DIAE/Transnational-corporations-(TNC).aspx) (accessed 1 May 2018).

¹⁰ See e.g. Weissbrodt, D. and M. Kruger, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’, *The American Journal of International Law*, vol.97, 2003, p.908.

¹¹ Guiding Principles, p.1.

(SMEs) is used when referred to companies having up to 250 employees or in the case of small enterprises less than 50 employees.¹²

¹² The numbers follow the EU definition, see: http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition_de (accessed 2 May 2018).

3. THE END OF THE BEGINNING

3.1. International Instruments and Standards

In the decades preceding the adoption of the Guiding Principles, various initiatives at the international level had evolved with the attempt to link businesses with human rights responsibilities. These initiatives can be summarised as two different but parallel movements. While one group very early on advocated for legally binding practices, the other group, mainly consisting of Western states and business enterprises, favoured measures on a voluntary basis. In the 70s, rising foreign investments and decolonisation led to the start of a development process for a Code of Conduct with the aim of establishing a “comprehensive multilateral instrument”¹³, identifying the rights and duties of international corporations. The different interests of developing and developed countries made this a difficult undertaking, with the former hoping for an instrument to reduce the negative effects of corporations in their countries and the latter seeking the full protection of their corporations. This controversy, as well as a trend towards greater liberalisation of regulatory measures, eventually led to the end of the negotiations in the early 1990s.

However, as the discussion on corporate human rights responsibilities continued, Kofi Annan, former UN Secretary-General, initiated - with the beginning of the new century - the establishment of a Global Compact hoping to “give a human face to the global market.”¹⁴ Unlike the Code of Conduct which was designed to directly regulate businesses, the Global Compact simply provides a platform for exchange and support which is based on ten basic principles covering human rights, labour, environment, and anti-corruption issues.¹⁵ Its voluntary nature has led to criticism on the part of CSOs

¹³ Sauvart, K.P., ‘The Negotiations of the United Nations Code of Conduct of Transnational Corporations Experience and Lesson Learned’, *The Journal of World Investment & Trade*, vol.16, 2015, p.12.

¹⁴ United Nations, ‘Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos’ UN Doc. SG/SM/6881, 1 February 1999.

¹⁵ For more details see: www.unglobalcompact.org (accessed 15 March 2018).

which had been advocating for the legal nature of the Code of Conduct. Nonetheless, by joining approximately 12,900 participating companies and organisations, the Global Compact has been able to push forward the discussion on business responsibility and accountability. At the same time, others once again clamoured for the elaboration of a mandatory framework for business enterprises. However, the resultant *Draft Norms on Responsibilities of Transnational Corporations and Other Enterprises with Regard to Human Rights*, which were formally adopted in 2003 by the UN Sub-Commission and which imposed direct obligations on corporations to protect human rights, were ultimately shattered by the interests of the business community. The UN Commission decided that the proposal did not hold a legal standing and was thus abandoned.¹⁶

Ruggie, who was appointed Special Representative on the subject of human rights and businesses shortly after the rejection of the Draft Norms, was one of the main critics of the Norms. Upon receiving the advice at an informal meeting with governments to “[a]void a train-wreck”¹⁷, Ruggie decided that “the flaws of the Norms make the effort a distraction from, rather than a basis for, moving the Special Representative’s mandate forward” and that “the debate over the Norms obscures rather than illuminates promising areas of consensus and cooperation”.¹⁸ Despite this, the experience of the Code of Conduct, the Draft Norms and the Global Compact had shaped and influenced the production of the UN Framework. Through an extensive stakeholder engagement, Ruggie and his team were able to develop a well-organised document consisting of a ‘smart-mix’ of measures, national and international as well as voluntary and mandatory.¹⁹ Unlike the Draft Norms, the Guiding Principles clearly distinguish between the state duty to *protect*, the corporate responsibility to *respect* and the access to *remedy*. States as the main duty-bearers of international law should put into place policies and legislation in order to prevent, investigate, punish and redress human rights abuses by corporations and should formulate clear expectations towards companies.²⁰ This includes the establishment of

¹⁶ UN Commission on Human Rights, ‘Responsibilities of transnational corporations and related business enterprises with regard to human rights’, 20 April 2004, Decision 2004/116.

¹⁷ Ruggie, J., *Just Business: Multinational Corporations and Human Rights*, New York/London: W. W. Norton & Company, 2013, p.xx (preface).

¹⁸ ECOSOC, ‘Interim Report of the Special Representative of the Secretary-General on the Issues of Human Rights and Transnational Corporations and Other Business Enterprises’ UN Doc. E/CN.4/2006/97, 22 February 2006, para.69.

¹⁹ Guiding Principles, p.5.

²⁰ Guiding Principles, p.3.

judicial and non-judicial mechanisms that provide effective remedies for victims of corporate human rights abuses as well as the facilitation of non-state based mechanisms. By respecting human rights, corporations have the responsibility to address and prevent negative human rights impacts through the implementation of due diligence processes. In order to drive the effective implementation of the Guiding Principles forward, the UNHRC decided to establish a *Working Group on the issue of human rights and transnational corporations and other business enterprises* (hereinafter UNWG) which annually brings together governments, corporations and stakeholders to discuss and share challenges as well as best practices.²¹

The UNGPs rapidly turned into the “new global standard for business and human rights”²². In 2011, soon after the endorsement of the UNGPs, the Organisation for Economic Co-operation and Development (OECD) published a new version of its *OECD Guidelines for Multinational Enterprises* which contained recommendations for responsible business behaviour. For the first time, the Guidelines were complemented by a chapter solely committed to human rights which is aligned to the Guiding Principles and strongly promoted their implementation.²³ It is important to note that the OECD occupies an important role with regard to the third pillar of the UNGPs. Governments adhering to the OECD are required to establish a National Contact Point (NCP) whose main task is to raise awareness and further promote the effective implementation of the OECD Guidelines as well as to receive and evaluate complaints about alleged corporate breaches. NCPs are thus the main state-based non-judicial mechanisms that provide victims of corporate human rights violations with access to remedy.

Apart from the OECD Guidelines, the language of the UNGPs is visible in the 2012 version of the *IFC Performance Standards on Environmental and Social Sustainability of the International Finance Corporations*.²⁴ Very recently, in June 2017, the Committee

²¹ UNGA, Res. 17/4, ‘Human rights and transnational corporations and other enterprises’ UN Doc A/HRC/Res/17/4, 6 July 2011.

²² Jerbi, S., ‘UN Adopts Guiding Principles on Business and Human Rights - What Comes Next?’, *Institute for Human Rights and Business*, 17 June 2011, www.ihrb.org/other/commentary-un-guiding-principles-business-human-rights (accessed 15 March 2018).

²³ OECD, ‘OECD Guidelines for Multinational Enterprises’, OECD Publishing, 2011, <http://dx.doi.org/10.1787/9789264115415-en> (accessed 14 July 2018).

²⁴ International Finance Corporation, ‘IFC Performance Standards on Environmental and Social Sustainability’, 1 January 2012, www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES (accessed 15 March 2018).

on Economic, Social and Cultural Rights published *General comment No. 24 on State obligations under the International Convention on Economic, Social and Cultural Rights in the context of business activities*, emphasising the important role of corporations in contributing to the realisation of socioeconomic rights.²⁵ However, the institution that has been the main driver of the implementation of the Guiding Principles is the EU. Immediately after the endorsement, the EU incorporated the ideas of the UNGPs into its new 2011 Strategy for Corporate Social Responsibility. Most importantly, the European Commission together with the appointed UNWG called for states to develop NAPs on business and human rights with the aim of implementing the UNGPs at national level.²⁶ Both the developments on business and human rights within the EU as well as the status and on-going process of the NAPs will be discussed in greater detail in the subsequent chapters.

However, parallel to this positive reception, criticism towards the Guiding Principles had emerged. In early 2011, various CSOs published a *Joint Civil Society Statement*, in which they identified several shortcomings of the UNGPs.²⁷ Their main criticism referred to missing specifications as well as to vaguely formulated recommendations. They were not opponent to the UNGPs but worried that if these deficient gaps were not addressed, they would “prevent the Guiding Principles from effectively advancing corporate responsibility and accountability for human rights and so may fail to gain widespread acceptance by civil society.”²⁸ Their criticism and the advocacy of various countries such as, *inter alios*, Ecuador, Peru and some African states²⁹, led to the adoption of a UN Resolution in which the UNHRC decided to establish an open-ended working group with the mandate to “elaborate an international legally

²⁵ ECOSOC, ‘General comment No. 24 on State obligations under the International Convention on Economic, Social and Cultural Rights in the context of business activities’ UN Doc E/C.12/GC/24, 10 August 2017.

²⁶ OHCHR, ‘State national action plans’, www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx (accessed 15 March 2018).

²⁷ International Federation for Human Rights et al., ‘Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights’, January 2011, www.fidh.org/IMG/pdf/Joint_CS_O_Statement_on_GPs.pdf (accessed 18 March 2018).

²⁸ *Ibid.*

²⁹ BHRRC, ‘Statement on behalf of a Group of Countries at the 24rd Session of the Human Rights Council’, www.business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf (accessed 15 March 2018); see also ESCR-Net, ‘Joint Statement: Call for an international legally binding instrument on human rights, transnational corporations and other business enterprises’, www.eschr-net.org/node/365592 (accessed 19 March 2018).

binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”³⁰ As the experiences of the UN Code of Conduct and the Draft Norms have already shown, the new mandate unsurprisingly turned out to be a difficult undertaking. Ruggie opposed this development, fearing principally that states would use an on-going treaty process as a pretext for not taking steps to implement other significant instruments.³¹ He furthermore doubted the willingness of many states to support such a binding treaty, and so be obliged to reach an agreement and result in the near future.³² The beginnings of the discussions have in fact been challenging as the following chapter shows. However, at the moment of writing this thesis (June 2018), open consultations on a proposed binding treaty have taken place. In October 2018, the working group will meet for its fourth session to discuss further steps.³³

The different approaches as discussed in this chapter show the dynamic of the discourse on business and human rights and the associated challenges. Undoubtedly, the UNGPs have initiated a new phase in the area of business and human rights. By combining voluntary and binding measures, and by addressing the states’ duty to protect, the corporate responsibility to respect and the access to remedy, it can be argued that the Guiding Principles offer a sophisticated guideline for states and corporations based on which further progress can be made. The task now is to take a closer look at their implementation in order to evaluate their actual potential to contribute to a more responsible, transparent and accountable business world.

3.2. The Role of the European Union

Principle 10 of the UNGPs acknowledges that multilateral institutions play a “vital role” in supporting states to meet their responsibility to protect against corporate human rights abuses.³⁴ As a political and economic organisation with 28 Member States, the EU has therefore a special role to play in fostering the international governance regime on

³⁰ UNGA Res. 26/9, ‘Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights’ UN Doc A/HRC/RES/26/9, 14 July 2014.

³¹ Ruggie, 2013, p.59.

³² Ruggie, 2013, p.60.

³³ For more information see UNHRC, <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx> (accessed 21 June 2018).

³⁴ Guiding Principles, p.12.

business and human rights. Since the adoption of the European Commission's Green Paper on *Promoting a European framework for Corporate Social Responsibility* in 2001, the Union has been addressing corporate human rights responsibility under the umbrella term of Corporate Social Responsibility (CSR). Over the last eight years, the EU shifted its focus more strongly towards human rights, adopting and introducing various initiatives and policies. In the following pages, the thesis demonstrates some of the most important EU actions and discusses whether the EU - as the leading institution on both CSR and human rights - does justice to this role.

In 2011, the EU made a major step by renewing its *Strategy 2011-14 for Corporate Social Responsibility* in which it introduced a new definition of CSR. While previously defined as “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis”³⁵, the new definition refers to “the responsibility of enterprises for their impacts on society”³⁶, thus moving it away from the notion of voluntarism and instead recognising CSR and most importantly human rights as a core practice of business enterprises.³⁷ Following the provisions made in the Guiding Principles, the EU requested corporations to identify, prevent and mitigate any impacts their business activities might have on stakeholders and society at large.³⁸ Only a few months earlier, the EU had enthusiastically endorsed the UNGPs as a “clear and authoritative policy framework”³⁹ and assured its responsibility for successful implementation by Member States. In order to live up to this responsibility, the EU called on Member States to develop NAPs on business and human rights with the aim of transforming the UNGPs according to their respective national circumstances.⁴⁰

³⁵ European Commission, ‘A Renewed EU strategy 2011-14 for Corporate Social Responsibility’ COM(2011) 681 final, Brussels, 25 October 2011, p.3, hereinafter 2011-14 CSR Strategy.

³⁶ Ibid., p.6.

³⁷ Bernaz, N., *Business and Human Rights: History, law and policy – Bridging the accountability gap*, New York: Routledge, 2017, p.6.

³⁸ 2011-14 CSR Strategy, p.6.

³⁹ EU Permanent Delegation to the United Nations Office and other international organisations in Geneva, ‘EU Comments on the draft Guiding Principles for the implementation of the UN “Protect, Respect and Remedy” Framework’ D(2011) 700 246, January 2011, <https://business-humanrights.org/sites/default/files/media/documents/ruggie/eu-comments-on-draft-guiding-principles-31-jan-2011.pdf> (accessed 23 March 2018).

⁴⁰ 2011-14 CSR Strategy, p.14.

Parallel to the 2011-14 CSR Strategy, the EU adopted the *EU Strategic Framework and Action Plan on Human Rights and Democracy*.⁴¹ Unlike in previous years, where human rights were mainly addressed regarding specific topics and countries, the EU now for the first time introduced a “unified strategic document”⁴², recognising human rights as underpinning all internal and external EU initiatives. In both the Strategic Framework as well as the 2015 revised Action Plan on Human Rights and Democracy, the Union confirmed its role in encouraging the implementation of the UNGPs; announced the production of human rights guidance for specific business sectors as well as SMEs; and once again called on Member States to implement the UNGPs through NAPs.⁴³

From these documents it becomes evident that the EU acknowledges the UNGPs as the overarching instrument of business and human rights for its own activities. Even though in all its initiatives the EU invokes the various existing global tools such as the Global Compact principles and the OECD Guidelines, they are together seen as instruments to ultimately support states and business enterprises in implementing the UNGPs. As a quasi-member, the European Commission is authorised to actively participate in the inter-governmental organisation, such as taking part in the OECD Ministerial Council Meetings or in preparing texts, legal acts and making proposals and amendments.⁴⁴ The EU is thereby in a position of observing the compliance of Member States’ cooperation with the guidelines and establishment of NCPs. The Union thus has a key role to play in supporting the OECD Guidelines and the initiatives deriving therefrom. In that context, with regard to access to remedy, the Council of the EU in its Conclusion on business and human rights requested the EU Fundamental Rights Agency (FRA) to formulate an opinion on judicial and non-judicial remedies and their effective implementation in the area of business and human rights. In April 2017, the FRA published its Opinion in which it identified “possible avenues to lower barriers for access

⁴¹ Council of the European Union, ‘EU Strategic Framework and Action Plan on Human Rights and Democracy’, 25 June 2012, www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf (accessed 23 March 2018), hereinafter EU Strategic Framework.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Bijlmakers, S., Footer, M. and N. Hachez, ‘The EU’s engagement with the main Business and Human Rights instruments’, Leuven Global Governance Studies, 2015, www.fp7-frame.eu/wp-content/uploads/2016/09/Deliverable-7.4.pdf (accessed 23 March 2018).

to remedy at the EU level”⁴⁵, suggesting that “more could be done to ensure effective access to remedy for business-related human rights abuse within the EU.”⁴⁶ The Opinion thus serves as advice not only for the EU bodies and actions but also for individual Member States in implementing pillar three of the UN Framework.

The EU’s commitment to support the implementation of the UNGPs is further reflected in three guidance documents. Through multi-stakeholder consultation, the European Commission was able to provide three different sectors with specific guidelines on how to practically implement the corporate responsibility to respect human rights.⁴⁷ Less than a year earlier, the European Commission had published a guide to human rights for SMEs. Through this, the EU responded to the UNGPs’ general understanding that the Guiding Principles apply “to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.”⁴⁸ Since SMEs constitute about 99% of all businesses in the EU⁴⁹, it is particularly important to provide these companies with aid.

In the early years after the adoption of the UNGPs, the EU mainly contributed to the rising acknowledgement of human rights in business conducts through soft law measures. Though, in recent years, the EU has started implementing legislative initiatives in the form of directives and regulations. One promising example is the *Directive on Non-Financial Disclosure and Diversity Information* which entered into force in December 2014.⁵⁰ The directive obliges large public-interest entities with more than 500 employees to include in their management report a non-financial statement with information on the

⁴⁵ Council of the European Union, ‘Council Conclusion on Business and Human Rights’ 10254/16, 20 June 2016, para.14.

⁴⁶ European Union Agency for Fundamental Rights, ‘Improving Access to remedy in the area of business and human rights at the EU level: Opinion of the European Union Agency for Fundamental Rights’ 10 April 2017, p.5, at <http://fra.europa.eu/en/opinion/2017/business-human-rights> (accessed 15 June 2018).

⁴⁷ European Commission; Shift and IHRB, ‘Employment & recruitment agencies sector guide on implementing the UN guiding principles on business and human rights’, 2013, www.ihrb.org/pdf/eu-sector-guidance/EC-Guides/E&RA/EC-Guide_E&RA.pdf; ‘ICT sector guide on implementing the UN guiding principles on business and human rights’ (2013), www.ihrb.org/pdf/eu-sector-guidance/EC-Guides/ICT/EC-Guide_ICT.pdf; ‘Oil and Gas sector guide on implementing the UN guiding principles on business and human rights’ (2013), www.ihrb.org/pdf/eu-sector-guidance/EC-Guides/O&G/EC-Guide_O&G.pdf.

⁴⁸ Guiding Principles, p.1.

⁴⁹ European Commission, ‘What is an SME?’, http://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition_de (accessed 23 March 2018).

⁵⁰ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, Official Journal of the European Union, L330/1, 15 November 2014.

policies pursued with regard to social and environmental matters as well as their outcomes and potential risks.⁵¹ Member States were expected to transpose the directive into national legislation by December 2016, implying that the first reports will be published in 2018. This mandatory reporting measure aims at strengthening the transparency and accountability of around 8.000 corporations in the EU Member States and thus offers a common benchmark for companies and other institutions.⁵² At the same time, the instrument can serve to identify still existing governance gaps and challenges which could be systematically addressed in further steps.⁵³ Even though the directive holds several shortcomings, such as leaving room for interpretation of some reporting requirements⁵⁴, it is a major step forward in “embedding into EU law the corporate responsibility to respect human rights and the environment”⁵⁵.

Furthermore, the EU adopted a new directive on public procurement. In doing so, the EU reacted to its earlier intention to “[f]acilitate the better integration of social and environmental considerations into public procurement.”⁵⁶ Although the directive makes room for social considerations far more often than its predecessor, it refrains from making any reference to human rights or any other global human rights instrument.⁵⁷ Especially with regard to the commitment made in the EU Strategic Framework - that human rights underpin all internal and external actions of the EU - the Union missed the opportunity to prove its intention.

⁵¹ Ibid.

⁵² Chambers, R. and A. Yilmaz-Vastardis, ‘The New EU Rules on Non-Financial Reporting: Potential Impacts on Access to Remedy’, in C. Márquez Carrasco & K. Buhmann, (eds.), *Human Rights & International Legal Discourse*, vol.10, no.1, 2016.

⁵³ See e.g. Baumann-Pauly, D. and J. Nolan (eds.), *Business and Human Rights: From Principles to Practice*, New York/London: Routledge, 2016, p.288.

⁵⁴ For more details see e.g. De Roo, K., ‘The Role of the EU Directive on Non-financial Disclosure in Human Rights Reporting’, *European Company Law*, vol.12, no.6, 2015.

⁵⁵ European Coalition for Corporate Justice, ‘Assessment of the EU Directive on the disclosure of non-financial information by certain large companies’, May 2014, www.business-humanrights.org/sites/default/files/media/documents/eccj-assessment-eu-non-financial-reporting-may-2104.pdf (accessed 6 June 2018).

⁵⁶ 2011-14 CSR Strategy, p.11.

⁵⁷ Outhwaite O., and Martin-Ortega, O., ‘Human Rights in Global Supply Chains: Corporate Social Responsibility and Public Procurement in the European Union’, p.60 in Márquez Carrasco and Buhmann (eds.), *Human Rights & International Legal Discourse*, vol.10, no.1, 2016.

Then again, in May 2017 the EU adopted a regulation, addressing EU importers of conflict-affected minerals⁵⁸, which will come into effect by January 2021. The aim of this regulation is to ensure that business enterprises involved in the import of conflict-affected minerals meet international standards. The regulation is an attempt to bring an end to the financing of armed groups as well as the exploitation of local communities and to make sure corporations import those minerals from responsible sources. Adopting such binding regulation, the Union sets a more determined sign for the necessity of a more human rights compliant global supply chain.

The policies discussed in this chapter demonstrate that the EU has been actively participating in fostering the developments in the business and human rights field undertaken by international actors. Through its range of initiatives, the Union has been addressing all three pillars of the UNGPs. By calling on Member States to translate the UNGPs into national plans and by offering its support in this regard, the EU refers to the first pillar. The second pillar is represented in various initiatives: the sector guidance plans serve as assisting tools for corporations to practically implement the Guiding Principles in their daily business activities. Most importantly, through its legal acts, the EU paved the way for greater business transparency and accountability. As a quasi-member of the OECD, the Union is furthermore in a position to strengthen pillar three of the UNGPs. By observing Member States' compliance with the OECD Guidelines and by monitoring the NCPs, the EU can play an important role in encouraging and supporting states to fulfil their responsibilities.

This positive engagement was, however, shaken by the reluctance and hindrance of the EU to constructively participate in the discussions on the legally binding treaty on business enterprises. In the three sessions that have taken place since 2015, the EU Member States either voted against the resolution, refused to participate at the second session or delayed the start of the third session.⁵⁹ Having set two main requirements,

⁵⁸ Regulation (EU) 2017/821 of the European Parliament and the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, Official Journal of the European Union, vol.60, 19 May 2017.

⁵⁹ European Parliament, European Parliament Research Service, 'Towards a Binding Treaty on Business and Human Rights', July 2017, p.7, [www.europarl.europa.eu/RegData/etudes/BRIE/2017/608636/EPRS_BRI\(2017\)608636_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608636/EPRS_BRI(2017)608636_EN.pdf) (accessed 24 March 2018).

firstly to expand the scope of the treaty to all business enterprises, and secondly to make sure that the treaty does not undermine the implementation of the UNGPs, the EU is now actively participating in the negotiations.⁶⁰ The European Parliament has repeatedly announced its full support of this binding treaty and has called on Member States to commit and engage in its negotiations.⁶¹ First of all, this shows the existing discrepancy between the EU institutions with regard to certain actions; the European Parliament favouring hard law mechanisms while the European Commission promotes voluntary, awareness raising initiatives.⁶² Above all, it demonstrates that the EU is, despite everything, an institution with both economic and political dimensions. This is also reflected in various actions regarding economic objectives. In June 2010, the European Council adopted the *Europe 2020* strategy, with the purpose of overcoming the economic crisis and to improve competitiveness and productivity through sustainable and inclusive growth.”⁶³ Shortly thereafter, the European Commission adopted the *Single Market Act*, “a series of measures to boost the European economy and create jobs.”⁶⁴ Since both of these took place almost simultaneously with the actions implemented with regard to business and human rights, it is striking that the topic of human rights was not mentioned once in either of the two initiatives. The future challenge for the biggest trade block in the world⁶⁵ will consequently be to balance both interests, economic and political, and the intention to implement human rights in all EU policies; and ultimately to foster the idea that human rights and CSR should lie at the core of every business activity. In order to fulfil its role of a leading human rights institution, the EU must pursue a more “comprehensive, coherent approach”⁶⁶.

Summarising the above, it can be concluded that the commitments and various actions of the EU, whether they constitute voluntary or regulating measures, have been contributing to the enhancement of the business and human rights discourse and

⁶⁰ Ibid., p.11.

⁶¹ Ibid.

⁶² See e.g. Hautala, H., ‘Five years from Rana Plaza: EU Commission need to fulfill its promises’, *Euractiv*, 26 April 2018, www.euractiv.com/section/justice-home-affairs/opinion/five-years-from-rana-plaza-eu-commission-needs-to-fulfill-its-promises/ (accessed 6 May 2018).

⁶³ European Commission, ‘Europe 2020 Strategy’, <http://ec.europa.eu/growth/single-market/smact/> (accessed 24 March 2018).

⁶⁴ Ibid.

⁶⁵ European Commission, ‘EU position in world trade’, <http://ec.europa.eu/trade/policy/eu-position-in-world-trade/> (accessed 2 April 2018).

⁶⁶ Hautala, 2018.

ultimately to the on-going implementation of the UNGPs. One of the most important initiatives has been the call for the production of NAPs by Member States which are discussed more thoroughly in the subsequent chapter. Yet, this means that the EU should not only make sure that Member States formulate such action plans but also to follow up on the practical implementation of the outlined measures in the NAPs. In the case that the plans or any of the other provisions will not be genuinely and effectively implemented, thus preventing systemic structural change, the responsibility will, *inter alia*, fall back to the EU. At the same time, the EU would be in a position to present legislative measures to ensure the corporate respect for human rights and to entrench HRDD, following the example of several countries that are currently implementing statutory measures.

3.3. Current Status of National Action Plans

NAPs on business and human rights are a rising phenomenon. In 2011, the European Commission was the first institution to call on Member States to translate the UNGPs into NAPs. Shortly thereafter, the European Council in its EU Strategic Framework reiterated this request and extended the deadline to the end of 2013.⁶⁷ In 2014, the UNHRC adopted a resolution on human rights and businesses, in which it emphasised the important role of NAPs and welcomed the work of the UNWG in encouraging and guiding states to implement the Guiding Principles through action plans.⁶⁸ At around the same time, the Council of Europe adopted a *Declaration of the Committee of Ministers on the UN Guiding Principles on business and human rights* in which it calls on Member States to develop NAPs.⁶⁹ Building on the Guiding Principles, the Committee of Ministers further adopted a *Recommendation on human rights and business* in 2016. This document outlines the specific expectations towards Member States and provides

⁶⁷ EU Strategic Framework.

⁶⁸ UNGA Res. 26/22, 'Human rights and transnational corporations and other business enterprises' UN Doc A/HRC/26/L.1, 23 June 2014.

⁶⁹ Council of Europe, 'Declaration of the Committee of Ministers on the UN Guiding Principles on business and human rights', 16 April 2014, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c6ee3 (accessed 2 April 2018).

guidance on how to prevent and remedy corporate human rights violations, *inter alia* inviting states to develop or revise already existing NAPs.⁷⁰

To date, twenty-one NAPs on business and human rights have been published and another twenty-two NAPs are in the process of being developed.⁷¹ The phenomenon of NAPs on human rights in general, however, is not a new one. The idea emerged during the 1993 World Conference on Human Rights in Vienna. In the Vienna Declaration and Programme of Action, the World Conference “recommend[ed] that each State consider the desirability of drawing up a national action plan identifying steps whereby that State would improve the promotion and protection of human rights.”⁷² At the same time, the UN Office of the High Commissioner for Human Rights published a *Handbook on National Human Rights Plans of Action* in which it outlined various criteria for developing NAPs, provided ideas on content and structure and gave guidance on how to implement and monitor these measures.⁷³ Since the World Conference, a considerable number of NAPs have been produced. As these NAPs are drafted by governments, they can be defined as “policy documents in which a State articulates priorities and actions that it will adopt to support the implementation of international, regional, or national obligations and commitments with regard to a given policy area or topic.”⁷⁴

NAPs on business and human rights are further specified as an “evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the [Guiding Principles].”⁷⁵ At the regional level, it has been the important work of National Human Rights Institutions (NHRIs) to promote the development of NAPs. In 2012, the European Network of NHRIs held a regional

⁷⁰ Council of Europe, ‘Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business’, 2 March 2016, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1ad4 (accessed 25 June 2018).

⁷¹ OHCHR, ‘State national action plans’, www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx (accessed 2 April 2018).

⁷² UNGA, ‘Vienna Declaration and Programme of Action’ UN Doc A/CONF.157/23, 12 July 1993.

⁷³ OHCHR, ‘Professional Training Series No.10: Handbook on National Human Rights Plans of Action’, 29 August 2002, www.ohchr.org/Documents/Publications/training10en.pdf (accessed 2 April 2018).

⁷⁴ ICAR and DIHR, ‘National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks’, June 2014, www.icar.ngo (accessed 3 April 2018); hereinafter ICAR/DIHR Toolkit.

⁷⁵ UN Working Group on Business and Human Rights, ‘Guidance on National Action Plans on Business and Human Rights’, 2015 (updated version), www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf (accessed 3 April 2018).

workshop which was hosted by the German Institute for Human Rights (DIMR). In the resultant *Berlin Action Plan on Business and Human Rights*, the network committed to establish a business and human rights focal point, to undertake national baseline studies with the aim of identifying gaps within the respective national system as well as to monitor on human rights impacts.⁷⁶

These various requests have led to a rising number of published NAPs: The United Kingdom (UK) (2013/2016), the Netherlands (2013) and Denmark (2014) were the first countries that developed and published NAPs on business and human rights. These were followed by Lithuania (2015), Sweden (2015) and Norway (2015). Colombia, as the first non-European country, launched its NAP in 2015, followed by other non-European countries such as the United States (2016) and Chile (2017). Furthermore, by the end of 2016, Switzerland, Italy and Germany had published their NAP. Last year, countries such as France, Poland, Spain, Belgium, the Czech Republic and Ireland joined the movement.⁷⁷ A notable observation is the high number of European countries, eighteen out of twenty-one, that have developed and published NAPs. The reason for this is very likely the pioneering promotion by the EU and the Council of Europe in encouraging and guiding states to implement the UNGPs. Meanwhile, many non-European states, such as countries from Latin American, African and ASEAN regions, are currently in the process of developing NAPs.⁷⁸ As strong soft-law instruments, these action plans are useful tools for increasing policy coherence within governmental entities. Furthermore, they allow governments to identify challenges, gaps and impacts with regard to business and human rights as well as to develop adequate measures to effectively implement the UN Framework.

Concurrently, however, substantive concerns towards this politically charged document have emerged. CSOs and various academics have been criticising the missing binding measures and the hesitant approach towards the third pillar of the UNGPs.⁷⁹ It

⁷⁶ European Group of National Human Rights Institutions, 'Berlin Action Plan on Business and Human Rights', September 2012, www.cndh.fr/sites/default/files/enhri_berlin_workshop_action_plan_bhr.pdf (accessed 3 April 2018).

⁷⁷ OHCHR, 'State national action plans', www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx (accessed 4 April 2018).

⁷⁸ Ibid.

⁷⁹ See e.g. ICAR, 'Assessment of existing National Action Plans (NAPs) on Business and Human Rights', 2nd version, August 2017, www.icar.ngo/publications/2017/8/23/assessments-of-existing-national-action-plans-naps-on-business-and-human-rights-august-2017 (accessed 4 April 2018).

has been argued that the reason for this is the lack of adequate focus on the topic of extra-territorial liability of corporations operating abroad to be found in the Guiding Principles.⁸⁰ The UNGPs simply remark that:

States are not generally required under international human rights law to regulate the extra-territorial activities of business domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognised jurisdictional basis. Within these parameters, some human rights treaty bodies recommend that home states take steps to prevent abuse by business enterprises within their jurisdiction.⁸¹

In so stating, Ruggie reaffirms that states are not required to take regulatory steps at the domestic level with an extra-territorial effect. However, they are permitted to do so and might choose to implement binding regulations in form of mandatory reports or prosecutions regardless of where the offense took place. So far, NAPs have been either silent or vague with regard to the topic of extra-territorial obligations. This has thus led to the third pillar of the UNGPs constituting the weakest topic in NAPs. Related to this issue, others fear that NAPs are a useful tool for governments to overshadow their actual reluctance to implement policies that would address corporations in a much more rigorous way, and thus as might be perceived as “putting business at a competitive disadvantage”.⁸²

In addition to these concerns, assessments of some of the early published NAPs have pointed out various shortcomings with regard to their format, structure and content.⁸³ Weaknesses across NAPs refer to a lack of transparency regarding the drafting process as well as the missing timelines, budget information and responsibilities for implementing the outlined measures. Furthermore, it has been found that only a small number of countries carried out a comprehensive national baseline assessment in order to identify existing gaps in law and policies before pursuing the drafting process.⁸⁴ With regard to the content, only a few NAPs lay out clear measures and future actions or focus on

⁸⁰ See Augenstein, D. and D. Kinley, ‘When Human Rights Responsibilities Become Duties: The Extra-Territorial Obligations of States that Bind Corporations’, in Deva and Blichitz (eds.), *Human Rights Obligations of Business Beyond the Corporate Responsibility to Respect?*, Cambridge: Cambridge University press, 2013.

⁸¹ Guiding Principles, p.3, no.2.

⁸² Methven O’Brien, C. et al., ‘National Action Plans: Current Status and Future Prospects for a New Business and Human Rights Governance Tool’, *Business and Human Rights Journal*, vol.1, no.1, 2015.

⁸³ See e.g. ICAR, 2017.

⁸⁴ Ibid.

vulnerable groups. Above all, and as discussed in the previous paragraph, there is a lack of exploration of regulatory actions with particular regard to adequate access to remedy, and thus a failure of developing a smart-mix of voluntary and mandatory measures.

However, despite these shortcomings, NAPs have the potential to significantly contribute towards greater responsibility and accountability of state measures and corporate behaviour. By outlining specific actions, governments can be held accountable, especially on a comparative basis with other states.⁸⁵ Several strengths have been found with regard to existing NAPs. All plans include a clear commitment to the Guiding Principles, discuss international and regional standards and initiatives as well as integrate thematic human rights issues.⁸⁶ During most NAP drafting processes, the majority of governmental entities were involved and in-depth consultation with various stakeholders took place, albeit without at-risk groups. An increasing number of NAPs further included information on the implementation and monitoring of outlined future actions. Even though many NAPs failed in elaborating on regulatory measures, a few countries have demonstrated that the discourse on business and human rights and thus the implementation of NAPs, can indeed trigger binding regulations of an extra-territorial nature. One and a half years after the publication of the first version of the British NAP, the UK passed its Modern Slavery Act into law. The Bill aims at establishing “a comprehensive legal framework to combat slavery, servitude and forced or compulsory labour and human trafficking, and to guarantee the protection of victims.”⁸⁷ Under section 54, the Act contains a provision on transparency in supply chains which requires commercial organisations with an annual turnover above £36m to publish statements on the steps that have been taken to prevent slavery and human trafficking along the supply chain.⁸⁸ In addition, the BHRRC placed special emphasis on awareness raising, establishing the Modern Slavery Registry, an online platform, on which it collects all modern slavery statements by organisations and evaluates companies’ compliance with

⁸⁵ Methven O’Brien, 2015.

⁸⁶ Ibid.

⁸⁷ Martin-Ortega, O., ‘Human Rights Risks in Global Supply Chains: Applying the UK Modern Slavery Act to the Public Sector’, *Global Policy*, vol.8, no.4, 2017, p.514.

⁸⁸ Government of the United Kingdom, ‘Modern Slavery Act, 2015’, p.42ff., www.legislation.gov.uk/ukpga/2015/30/pdfs/ukpga_20150030_en.pdf (accessed 15 March 2018); see also the website of the Modern Slavery Registry powered by Business and Human Rights Research Centre, <https://www.modernslaveryregistry.org> (accessed 4 April 2018).

the provisions set out in the Modern Slavery Act.⁸⁹ Although the percentage of companies meeting all minimum requirements is only 19% and the number of convictions is still unsatisfactory (though increasing), it can still be said that the UK through this groundbreaking law has “encourage[d] informed business and procurement decision-making, and increase[d] consumer choice by disclosing relevant information.”⁹⁰ The significant increase in prosecutions as well as the naming and shaming of non-compliance urges corporations to carry out due diligence processes along their supply chains in order to prevent any negative human rights infringements in their production chains and thus ensure compliance with the new bill.

Only recently, two other countries, the Netherlands and France, have taken further significant steps to introduce mandatory due diligence rules. In February 2017, the Dutch Parliament adopted the Child Labour Due Diligence Law which requires corporations to examine and report whether child labour occurs along their supply chain and to draw up plans of action in case violations are present.⁹¹ If approval by the Senate will be granted, the bill will become effective by January 2020, providing sufficient time for companies to adapt to the new provisions.⁹² While the Netherlands is still awaiting approval, France, in a historic step, was able to embed HRDD in national law. After a four-year process of legislative and political conflicts and discussions between civil society, trade unions and Members of Parliament, the National Assembly finally adopted the Duty of Care Law in February 2017.⁹³ Even though the final draft had been lobbied as unconstitutional by many right-wing legislators, the Council ruled that most of the law’s text was in fact in accordance with constitutional principles.⁹⁴ The law obliges a duty of vigilance on corporations headquartered in France with at least 5,000 employees or foreign companies

⁸⁹ Ibid.

⁹⁰ Martin-Ortega, 2017.

⁹¹ India Committee of the Netherlands, ‘Child Labour Due Diligence Law for companies adopted by Dutch Parliament’, 8 February 2017, www.indianet.nl/170208e.html (accessed 4 April 2018).

⁹² Ibid.

⁹³ Cossart, S. et al., ‘The French Law on Duty of Care: A Historic Step Towards Making Globalisation Work for All’, *Business and Human Rights Journal*, vol.2, no.2, 2017.

⁹⁴ European Coalition for Corporate Justice, ‘Last hurdle overcome for landmark legislation: French Corporate duty of vigilance law gates green light from Constitutional Council’, 24 March 2017, <http://corporatejustice.org/news/435-last-hurdle-overcome-for-landmark-legislation-french-corporate-duty-of-vigilance-law-gets-green-light-from-constitutional-council> (accessed 5 April 2018); see also Cossart, 2017.

with French subsidiaries employing 10,000 people worldwide.⁹⁵ These corporations are from now on required to develop at the end of two consecutive financial years so-called “plans de vigilance” which must include “reasonable oversight measures that are capable of identifying risks and preventing serious harm to rights and fundamental freedoms, the health and safety of individuals and the environment”.⁹⁶ This means that around 150-200 corporations must establish actions that mitigate and prevent serious human rights violations resulting not only from the company itself but also from business partners such as subsidiaries and suppliers and must put into place monitoring plans to follow-up on their implementation.⁹⁷ Corporations which fail to publish a vigilance plan or to implement the outlined measures can be made liable to under the new law. However, they will no longer be subject to a civil penalty of ten to thirty million Euro as was initially drafted but then later removed by the Council. The new French Duty of Care Law is an important step towards greater accountability of corporations’ global activities. The more such laws are adopted or discussed at regional and national level the greater is the chance for other countries to follow suit. The years to come will show whether these laws will prove effective.

The endorsement of the UNGPs and the resulting NAPs has stimulated process at the regional and national level. At the same time, although states have started to implement regulatory measures in the form of laws, many states still remain hesitant in elaborating and implementing more rigorous actions. However, it is precisely such firm action that would prove those countries right, which have been so reluctant in supporting the negotiations with a legally binding treaty on corporations and instead have highly praised Ruggie's Guiding Principles.

3.3.1. Guidelines and Toolkits

After the endorsement of the UNGPs and the various following requests at international and regional level for governments to draw up NAPs, several organisations

⁹⁵ Décision no. 2017-750 DC du 23 Mars 2017 du Conseil Constitutionnel, www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2017/2017-750-dc/decision-n-2017-750-dc-du-23-mars-2017.148843.html (accessed 5 April 2018).

⁹⁶ Ibid.

⁹⁷ Ibid. See also Cuff, M., ‘French Duty of Vigilance Law one year on: What’s changed for French corporations?’, *BusinessGreen*, 13 March 2018, www.businessgreen.com/bg/feature/3028217/france-duty-of-vigilance-law-one-year-on-whats-changed-for-french-corporates (accessed 7 June 2018).

started to formulate guidelines and toolkits with the aim of supporting governments in the drafting and implementation process. In the following, the main guidelines are introduced. The criteria outlined in these guidelines form the methodological framework on the basis of which the German NAP is assessed in the subsequent chapter.

In June 2014, the International Corporate Accountability Roundtable (ICAR), together with the Danish Institute for Human Rights (DIHR) published a comprehensive *Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks*. The toolkit was developed on the basis of the inputs gathered from various stakeholders such as representatives of governments, civil society, business, academia, investors, NHRIs and other organisations. The toolkit aims at providing “the first building blocks toward a common framework for developing and evaluating NAPs.”⁹⁸ The authors identified three main parts: 1) a National Baseline Assessment (NBA) to analyse the current condition and arising gaps, 2) a guide on how to develop and draft NAPs, and 3) ideas on how to monitor and follow-up on the NAP implementation phase. With regard to the NBA, the toolkit provides a template addressing each Guiding Principle with the help of various indicators which can be used by the assigned institutions. The second part focusses on recommendations regarding stakeholder participation, scope and content of the NAP as well as transparency and accountability issues. The final part addresses the phase after the finalisation of the NAP, which - as it emphasises - should be seen as the beginning of the implementation process.⁹⁹

A couple of months later, the UNWG launched the *Guidance on National Action Plans on Business and Human Rights*¹⁰⁰ (hereinafter UNWG Guidance) which resembles and complements the ICAR/DIHR toolkit. The UNWG Guidance distinguishes between five main phases: (i) an initiation phase in which areas of responsibility should be clarified and a work plan developed, (ii) an assessment and consultation phase including an NBA and a stakeholder engagement format, (iii) a phase for drafting, consulting and finalising the NAP, (iv) the actual implementation phase, and (v) a phase committed to evaluating

⁹⁸ ICAR/DIHR Toolkit, p.vi (preface).

⁹⁹ ICAR/DIHR Toolkit, p.49.

¹⁰⁰ UN Working Group on Business and Human Rights, ‘Guidance on National Action Plans on Business and Human Rights’, 1st version, December 2014, www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf (accessed 6 April 2018); hereinafter UNWG Guidance.

and updating the existing NAP. With regard to the content of a NAP, the guidance recommends to including a statement of commitment to the Guiding Principles as well as some background and context concerning the NAP movement; formulating clear government expectations towards corporations; providing measures in response to the identified impacts and gaps; and specifying the intentions for monitoring and updates.

In their article ‘The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment with respect to the UN Guiding Principles on Business and Human Rights’, Damiano de Felice and Andreas Graf take up the recommendations outlined in the ICAR/DIHR toolkit and the UNWG Guidance. They argue that NAPs can only be effective if they pursue eight specific criteria. Whereas the development process should include 1) a comprehensive NBA, 2) government-wide participation, 3) stakeholder consultation and engagement, and 4) a monitored implementation; the content should consist of 5) a government statement in favour of the UNGPs, 6) a structure in conformity with the Guiding Principles, 7) clearly formulated, unambiguous measures including deadlines, and 8) capacity-building initiatives.¹⁰¹ On the basis of these criteria, de Felice and Graf assessed several NAPs and provided an overview of the on-going implementation of the UNGPs.

It is important to mention that beyond these leading toolkits, various other guidelines on thematic issues have been published. In 2016, UNICEF together with ICAR and DIHR published a guiding document on *Children’s Rights in NAPs on Business and Human Rights*, which serves as a thematic supplement to the ICAR/DIHR toolkit. Shortly afterwards, the series was extended by two other supplements, a guidance on *Human Rights Defenders in NAPs* and a guideline on *Extractives and NAPs*; the former jointly developed by ICAR and the International Service for Human Rights, the latter by ICAR and the Due Process of Law Foundation. It is beyond the scope of this thesis to discuss these various guidelines in detail.

The work of NGOs, in particular of ICAR which has been the driving organisation in this regard, the Danish Institute, the UNWG as well as academics, provides comprehensive, straightforward advice for governments and stakeholders on how to

¹⁰¹ De Felice, D. and A. Graf, ‘The Potential of National Action Plans to Implement Human Rights Norms: An Early Assessment with Respect to the UN Guiding Principles on Business and Human Rights’, *Journal of Human Rights Practice*, vol.7, no.1, 1 February 2015, p.18.

approach the development, implementation and review of their NAP and “serve as a standard of practice against which other stakeholders can measure Government action.”¹⁰²

¹⁰² UNWG Guidance, p.2.

4. ASSESSMENT OF THE GERMAN NAP ON BUSINESS AND HUMAN RIGHTS

4.1. Introduction to the German NAP

In the final plenary conference of the development process of the German NAP, Michael Addo, member of the UNWG, announced: “This is the NAP we are looking for. It is expected to be a worldwide showcase.”¹⁰³ A year later, on 16 December 2016, the Federal Cabinet adopted the German NAP on business and human rights. Together with Switzerland, Italy and the United States whose NAPs were published around the same time, Germany, as the 12th country adopting an action plan, joined the movement. The country thus followed the requests made by the EU, the UNHRC and the Council of Europe to implement the UNGPs at the national level.

Since other countries - shortly after the adoption of the UNGPs - had already started the drafting process of NAPs, a group of German CSOs published a position paper in April 2013 in which they called for the German government to develop an action plan based on the Guiding Principles and other relevant human rights instruments.¹⁰⁴ Shortly afterwards, the German National CSR Forum adopted a resolution similarly urging the Federal Government to decide on steps for implementing the UNGPs.¹⁰⁵ These demands were eventually incorporated into the government’s coalition agreement of December 2013 in which Germany promised to operationalise the Guiding Principles at national

¹⁰³ Addo, M., ‘3. Plenumskonferenz Nationaler Aktionsplan für Wirtschaft und Menschenrechte’, Berlin, 3 November 2015, p.4, www.auswaertiges-amt.de/de/aussenpolitik/themen/aussenwirtschaft/wirtschaft-und-menschenrechte/-/205210 (accessed 5 April 2018).

¹⁰⁴ CorA and Forum Menschenrechte, ‘Positionspapier Wirtschaft und Menschenrechte - Erwartungen an einen deutschen Aktionsplan’, April 2013, www.oxfam.de/system/files/positionspapier_aktionsplan-wirtschaftmr_2013-04_korr.pdf (accessed 5 April 2018).

¹⁰⁵ Auswärtiges Amt, ‘Prozessvorschlag für einen Nationalen Aktionsplan zur Umsetzung der UN-Leitprinzipien zu Wirtschaft und Menschenrechte in Deutschland’, Berlin, 20 March 2015, p.3, www.auswaertiges-amt.de/blob/267104/9d5643b6e8a292a1ad22c10c8baf62eb/141106-ausgestaltungnapwimr-data.pdf (accessed 5 April 2018).

level.¹⁰⁶ One year later, on 6 November 2014, the German NAP development process began. Early on it became apparent that this process would closely be observed by regional and international institutions. At the G7 Summit meeting in June 2015, the Federal Government had announced the presentation of an ambitious action plan.¹⁰⁷ In the opening conference, the German Commissioner for Human Rights and Humanitarian Aid emphasised the important role of Germany in ensuring corporate human rights compliance. He stressed in his speech that of all countries Germany is particularly economically interconnected due to its large and export-driven economy.¹⁰⁸ On the one hand, Germany's economy contributes to the creation of employment and the enhancement of social and environmental standards. On the other hand, the rising connectivity and the associated opacity of business activities can lead to negative impacts on people along the supply chain. Thus, countries such as Germany bear a special responsibility in providing clear expectations and ensuring policies for corporations to respect, mitigate and avoid human rights infringements.¹⁰⁹ It is therefore not surprising that the UNWG announced the special interest of the international community in the outcome of the German NAP and stressed that further developments in the business and human rights field would very much depend upon its quality.¹¹⁰

Against this background, an analysis of the German NAP is conducted. The aim is to evaluate to what extent the action plan can live up to these claims. First of all, the development process comprising the stakeholder engagement as well as the structure and scope of the NAP is scrutinised. In the second step, the measures outlined in the plan are identified, discussed and where relevant, compared to other NAPs. In the last step, a closer look is taken at the monitoring and follow-up process which the NAP provides.

¹⁰⁶ Bundesregierung, 'Deutschlands Zukunft gestalten, Koalitionsvertrag zwischen CDU, CSU und SPD', 18. Legislaturperiode, Berlin, 2013, p.180, www.bundesregierung.de/Content/DE/_Anlagen/2013/2013-12-17-koalitionsvertrag.pdf?__blob=publicationFile&v=3 (accessed 5 April 2018).

¹⁰⁷ See e.g. DIMR, 2016.

¹⁰⁸ Auswärtiges Amt, 'Eröffnungsrede des Beauftragten der Bundesregierung für Menschenrechtspolitik und Humanitäre Hilfe, Christoph Strässer, zur Auftaktveranstaltung "Wirtschaft und Menschenrechte"', 6 November 2014, www.auswaertiges-amt.de/de/newsroom/141106-mrhh-wi-menschenrechte/266704 (accessed 5 April 2018).

¹⁰⁹ Ibid.

¹¹⁰ Addo, M. 3. Plenumskonferenz, p.4.

4.2. Development Process

On 6 November 2014, representatives of government departments, economy, associations, civil society and embassies came together to begin the process of developing the German NAP.¹¹¹ The Foreign Ministry was chosen as the leading authority in the process. Other ministries, such as the Ministry of Labour and Social Affairs (BMAS), the Ministry for Consumer Protection, the Ministry of Economics and Energy (BMWi), the Ministry for Economic Cooperation and Development (BMZ), as well as the Ministry for the Environment, Nature Conservation and Nuclear Safety have actively taken part in the proceedings. Together with representatives of trade associations, NGOs, the German Trade Union as well as two advisory members of the DIMR and econsense, the above mentioned ministries formed the steering group which was summoned at the end of 2014 with the aim of accompanying the project.¹¹² The process document which was published at the beginning of the undertaking shortly mapped out the context and background of the NAPs development process and established the main goals for the German project: 1) support from all participants is anticipated; 2) sufficient time for stakeholder participation should be made; and 3) the beginning of the implementation process should still lie in the current legislative period.¹¹³ The document furthermore provided a timeline in which it termed the process for two years with the final vote taking place in spring 2016.¹¹⁴ During the time of development, three plenary conferences and twelve hearings took place in which various thematic issues were discussed. A contact point was established for those who had not been invited to the meetings but that still wanted to send suggestions and recommendations.¹¹⁵ A short video was published by the Foreign Ministry which explained the background and course of the NAP process.¹¹⁶ The establishment and structure of this development phase constitutes a well-thought-out and comprehensive

¹¹¹ Auswärtiges Amt, 'Eröffnungskonferenz zum Nationalen Aktionsplan für Wirtschaft und Menschenrechte', Berlin, 6 November 2014, www.auswaertiges-amt.de/de/aussenpolitik/themen/aussenwirtschaft/wirtschaft-und-menschenrechte/expertenanhoerungen-node (accessed 5 April 2018).

¹¹² BMAS, 'Der NAP in Originalfassung', www.csr-in-deutschland.de/DE/Wirtschaft-Menschenrechte/NAP-Originalfassung/2-Entstehungsprozess/entstehungsprozess.html (accessed 5 April 2018).

¹¹³ Auswärtiges Amt, 'Prozessvorschlag für einen Nationalen Aktionsplan zur Umsetzung der UN-Leitprinzipien zu Wirtschaft und Menschenrechte in Deutschland', p.3.

¹¹⁴ Ibid., p.4.

¹¹⁵ BMAS, 'Der NAP in Originalfassung'.

¹¹⁶ Auswärtiges Amt, [online video], www.youtube.com/watch?v=z3bl218qb7U (accessed 5 April 2018).

approach. A high level of disclosure and transparency was provided during the first year of consultation. The presentations and discussions during the conferences and hearings were recorded in writing and published on the website of the Foreign Ministry where they are still accessible today.

In addition, the in-depth consultation phase with stakeholders was preceded by the creation of a baseline assessment. In their toolkits, the ICAR and DIHR recommend states to undertake an NBA “at the start of an intervention to analyse current conditions.”¹¹⁷ By identifying gaps in the implementation of the UNGPs, the NBA forms the basis on which further discussions can be built and according to which the NAP should be drafted. Together with Italy, which had undertaken a report on the Italian case in 2013¹¹⁸, Germany was one of the first countries to conduct a comprehensive NBA. The German Institute for Human Rights was commissioned with the development of the NBA and presented the final outcome in April 2015. Germany was the first country making use of the NBA template provided by ICAR and DIHR. Thus, a comprehensive document was created, giving an overview of the German *status quo* with regard to each of the 31 Guiding Principles.¹¹⁹ The DIMR outlined the various regulations, procedures and laws in the context of business and human rights in Germany, identified implementation gaps and formulated input-related questions that could be addressed later on in the process. In two sessions, stakeholders had the chance to comment on the first draft of the NBA and to give additional suggestions. In the final version, which is available online, the DIMR intended to take these proposals into account. In cases of opposing evaluations, the DIMR had anticipated compromise formulations. However, the DIMR made it so that the document did not necessarily mirror the position of the institute but constituted a process-integrated document.¹²⁰

¹¹⁷ ICAR/DIHR Toolkit, p. 31.

¹¹⁸ On 13 November 2012, the Scuola Superiore Sant’Anna and the Italian Ministry of Economic Development published a baseline assessment “Business and Human Rights: The Italian Case“, available in Italian at www.business-humanrights.org/en/documents/business-and-human-rights-the-italian-case (accessed 5 April 2018).

¹¹⁹ DIMR, ‘National Baseline Assessment: Umsetzung der UN Leitprinzipien für Wirtschaft und Menschenrechte’, 2015, www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Weitere_Publikationen/National_Baseline_Assessment_Umsetzung_der_UN-Leitprinzipien_fuer_Wirtschaft_und_Menschenrechte.pdf (accessed 5 April 2018).

¹²⁰ Ibid., p.4.

4.2.1. Stakeholder Participation

The German NAP is, *inter alia*, a result of a one-year consultation process with various stakeholders. Throughout the hearings and plenary conferences, representatives of government, business, civil society, trade unions, employer associations and law firms exchanged opinions on crucial topics such as the state duty to protect, the corporate responsibility to respect human rights, the system of foreign trade promotion, trade agreements, due diligence requirements, transparency and access to remedy. It was repeatedly stressed that the aim of these consultations was not to find a consensus or to present a final outcome but to gain ideas, positions and different approaches that would be channelled in the actual drafting process.¹²¹ Even though opinions differed, constructive dialogue took place. The following account of the agreements and different perspectives has been summarised from the twelve hearings and the three plenary conferences that took place in the first year of the NAP engagement process. Participants agreed that the NAP should contain a clear definition of HRDD and provide guidance on the steps corporations are expected to take. While corporations needed further specifications of the very abstract Ruggie framework, it was agreed that the German state should provide support and information, in particular for SMEs. With respect to the topic of public procurement, the different parties agreed that human rights must be firmly anchored in procurement and that products which do not comply with minimum standards must be excluded. Various requests were made including the importance of a focus on people in vulnerable situations, the necessity of human rights awareness raising in universities, especially in the area of economics as well as the necessity of promoting the OECD Guidelines in non-OECD states and of supporting NAP processes in developing and newly industrialised countries.¹²²

However, it soon became clear that the question of the nature of the actions - whether regulatory measures were needed or a voluntary approach should be favoured - would cause a controversy that would run through all subsequent consultations. CSOs called for the implementation of statutory provisions, emphasising that voluntary soft-law measures had not led to the desired results in the past. Representatives of business,

¹²¹ See e.g. ‘Anhörung 3: Verantwortung zur Achtung und Wahrung der Menschenrechte entlang der Liefer- und Wertschöpfungsketten’, 11 May 2015, p.2.

¹²² Summarised from the twelve hearings and the three plenary conferences that took place in the first year of the NAP development process.

however, worried that the flexibility and practicability of voluntary approaches might be restricted through binding regulations. Rather, corporations should be given the opportunity to conduct risk analyses before the implementation of regulatory steps. Regulatory measures should be kept to a minimum, if at all. Business representatives thereby invoked the argument that the UNGPs did not foresee the statutory introduction of HRDD least with regard to extra-territorial activities. Civil society actors countered this argument, claiming that according to the UNGPs governments are not required but also not discouraged to take regulatory action. In this regard, CSOs emphasised that there should not be a state of boundless liability, however corporations should be held accountable for damage that could have been identified and thus avoided.

In retrospect, Isabel Ebert from the BHRRC has criticised the discussions for going around in circles. Instead of finding an approach towards a smart mix of both, the discourse had mainly focused on the question of whether the German NAP should be binding or remain with only voluntary measures.¹²³ Frank Zach from the German Trade Union Federation (DGB) would have liked to see more discussions, consensus finding and compromise settlement.¹²⁴ According to him, some topics could have been addressed in a more ambitious way. As the name suggests and as mentioned earlier, the hearings were not aimed at finding agreements on the different topics but to collect various ideas, opinions and expert know-how which was then to be considered by the editorial team, tasked with the formulation of the NAP's content.

In the last plenary session, Sara Blackwell from ICAR criticised the absence of right-holders from affected areas throughout the processes of already existing NAPs. In this regard, she emphasised that the German process had shown its first positive steps.¹²⁵ Indeed, at the eleventh hearing on 3rd November 2015, a representative of the *Movimiento Rios Vivos* in Colombia reported on the negative effects resulting from a project in which Germany had been involved through foreign trade promotion.¹²⁶ He suggested that the NAP should include enhanced audits and permanent monitoring in order to examine

¹²³ Interview with Isabel Ebert, EU Representative and Researcher, Business and Human Rights Research Centre, 23 March 2018.

¹²⁴ Interview with Frank Zach, German Trade Union Federation, 24 April 2018.

¹²⁵ Blackwell, S., '3. Plenumskonferenz Nationaler Aktionsplan für Wirtschaft und Menschenrechte', Berlin, 3. November 2015, p.5.

¹²⁶ Auswärtiges Amt, 'Anhörung 9: Außenwirtschaftsförderung und Menschenrechte am Beispiel der Exportkreditgarantien, Investitionsgarantien und UFK-Garantien', 3 November 2015, p.9.

whether compensatory measures should be taken. In the last plenary session, Sophorn Yang, chairwoman of the Cambodia Alliance Trade Union described the situation of Cambodia's textile industry. Even though improvements had been made, people were still experiencing grave human rights violations.¹²⁷ By involving representatives of vulnerable groups, Germany follows the recommendations made by the guidelines discussed in the preceding chapter. While the inclusion of more at-risk stakeholders such as indigenous people, migrant workers and people with disabilities would have been desirable, many present CSOs spoke on behalf of these groups.¹²⁸

The stakeholder consultation was a comprehensive and thought-out process. The two formats, plenary conferences and hearings, provided for constructive dialogue. The inclusion of a wide range of different stakeholders led to the exchange of various opinions. It is therefore all the more regrettable that there was no time made for another consultation before the final publication in December 2016.¹²⁹ At the outset of the project, it was announced that the entire process of developing the NAP would be led by existing guidelines.¹³⁰ However, the toolkits by ICAR/DIHR and the UNGW foresee a consultation and revision of the draft version of the NAP before final publication. Here, the German NAP process falls behind other NAPs such as the Italian one, which published the drafted plan for a six-week public consultation.¹³¹ According to the process document, the adoption of the NAP was initially planned for the second quarter of 2016 but went on for another six months. It is argued that the reason for this extension was the intervention of the Finance Ministry, which strongly opposed the mandatory due diligence requirements for corporations found in the draft version.¹³² As a result, a heated debate

¹²⁷ Yang, S., Cambodia Alliance Trade Union, '3. Plenumskonferenz Nationaler Aktionsplan für Wirtschaft und Menschenrechte', Berlin, 3 November 2015, p.3.

¹²⁸ Summarised from the twelve hearings and the three plenary conferences that took place in the first year of the NAP development process.

¹²⁹ See e.g. CorA et al., 'Kein Mut zu mehr Verbindlichkeit: Kommentar deutscher Nichtregierungsorganisationen zum Nationalen Aktionsplan Wirtschaft und Menschenrechte der Bundesregierung', 6 February 2017, p.4, www.cora-netz.de/cora/wp-content/uploads/2017/03/2017-02-06_CorA-ForumMR-VENRO_NAP-Kommentar_überarb.pdf (accessed 7 April 2018).

¹³⁰ Auswärtiges Amt, 'Eröffnungskonferenz zum Nationalen Aktionsplan für Wirtschaft und Menschenrechte', p.3.

¹³¹ Inter-ministerial Committee for Human Rights (CIDU), 'Italian National Action Plan on Business and Human Rights', https://cidu.esteri.it/resource/2016/12/49117_f_NAPBHRENGFINALEDEC152017.pdf (accessed 15 April 2018).

¹³² See e.g. Deutscher Gewerkschaftsbund, 'Finanzministerium verwässert Aktionsplan für Menschenrechte', 27 July 2016, www.dgb.de/themen/++co++95601dac-53d2-11e6-b7e1-525400e5a74a (accessed 15 April 2018).

flared up. CSOs blamed trade associations for the sudden involvement of the Finance Ministry¹³³, as they feared the dilution of the draft version. As a response, several NGOs initiated an online petition in which they called for the government to include regulatory measures in the NAP.¹³⁴ Indeed, a position paper from the Bavarian Chamber of Industry and Commerce, which was published six months before the adoption of the NAP, reveals the original statutory ideas of the first NAP draft. In this paper, the Chamber clearly opposes the inclusion of regulatory measures regarding procurement law and foreign trade promotion, crosses out formulations of some provided draft paragraphs and gives recommendations for diluted formulations.¹³⁵ Comparing these suggestions with the final document of the NAP shows that several of these formulations have been integrated into the updated version.

These events casted a shadow on the NAP development process. It was particularly frustrating for the many participants that had contributed to a constructive dialogue during the stakeholder engagement phase. What had previously been considered a promising approach turned out to be a conflict of interests in which it seemed that only one side could emerge as a winner. Despite these downsides, the stakeholder consultations had been an important element of the development process. In order to evaluate to what extent these ideas were included in the final document, the content of the NAP must be analysed.

4.2.2. Scope and Structure

The German NAP is structured in six chapters following the idea and composition of the UNGPs. At the outset, the NAP gives a short overview of the UNGPs recognising them as the “first international reference framework”¹³⁶ and commits to their implementations. Furthermore, the NAP points out the role of Germany as a country

¹³³ See e.g. Brot für die Welt, ‘Pressemeldung Organisationen protestieren: Finanzministerium torpediert Auflagen für Unternehmen zur Einhaltung von Menschenrechte’, Berlin/Aachen, 26 Juli 2016, www.brot-fuer-die-welt.de/pressemeldung/2016-organisationen-protestieren-finanzministerium-torpediert-auflagen-fuer-unternehmen-zur-einhaltung-von-menschenrechten/ (accessed 15 April 2018).

¹³⁴ OpenPetition Deutschland, www.openpetition.de/petition/online/menschenrechte-vor-profit (accessed 15 April 2018).

¹³⁵ Industrie- und Handelskammer Bayern, ‘Stellungnahme zum Nationalen Aktionsplan – Umsetzung der VN-Leitprinzipien Wirtschaft und Menschenrechte 2016-2020’, 8 June 2016, www.ihk-muenchen.de/ihk/documents/CSR-Ehrbarer-Kaufmann/BIHK_Stellungnahme_NAP_Juni2016_final.pdf (accessed 22 May 2018).

¹³⁶ The Federal Government (ed.), ‘National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights 2016-2020’, p.4, <https://globalnaps.org/country/germany>, hereinafter German NAP.

which is economically particularly interwoven and recognises the responsibility of states in protecting human rights. The second chapter shortly summarises the course of the development process and lists the stakeholders involved in the project. In chapter three, the Federal Government expresses its expectations for corporations to integrate HRDD into their business activities. Germany expects companies, in particular when operating abroad, to fulfil due diligence requirements proportionate to their size and sector. As a response to the requests by various participants during the stakeholder consultation, the NAP comprehensively describes the elements of HRDD: 1) a policy statement in which the company expresses its commitment to respect human rights; 2) procedures for determining the factual and potential human rights impacts; 3) measures addressing the identified impacts; 4) a report on the impact analysis and the measures taken; and 5) complaint mechanisms for people affected by these impacts.¹³⁷ All five steps are described in more detail, outlining the main procedures that are to be taken in order to comply with the requirements. The following chapter is the most extensive one, addressing the areas of action for the Federal Government under the three pillars of the UNGPs: state duty to protect, challenges in corporate practice and the associated support services, and access to remedy. Each part contains an overview of the *status quo* including legislation in force and related measures that have already been implemented as well as a section on the planned future measures. The last two chapters deal with the topic of policy coherence and monitoring in which the Federal Government commits to a robust monitoring procedure. In this context, an inter-ministerial committee under the auspices of the Foreign Ministry is to be established with the task of conducting an annual survey of the implementation status of pillar II of the UNGPs.

With regard to its structure and content, the NAP is for the most part in line with the criteria set out by the ICAR/DIHR toolkit and the UNWG Guidance. Unlike some other NAPs which mainly address the state duty to protect and the access to remedy, the German NAP addresses all three pillars of the Guiding Principles including measures aimed at facilitating the corporate responsibility to respect. Unfortunately, the Federal Government did not establish clear target dates for the outlined measures nor did it clarify responsibilities for the implementation of each measure. It is thus incomprehensible at what time the action points will be operationalised. In this respect, the NAPs of Finland

¹³⁷ German NAP, p. 7ff.

and Colombia are further advanced. For each topic or measure, they clarify the responsible ministry and provide deadlines about when the measures should have been put in place.

4.3. Field of Actions and Outlined Measures

As previously mentioned, before starting the development process Germany announced the publication of an ambitious NAP. And in fact, the German NAP contains a unique feature. Unlike any other state, the Federal Government formulates a clear future goal:

The aim is that at least 50% of all enterprises based in Germany with more than 500 employees will have incorporated the elements of human rights due diligence described in [this NAP] into their corporate processes by 2020. Enterprises which have not adopted particular procedures and measures should be able to explain why they have not done so (the comply or explain mechanism). If fewer than 50% of the enterprises defined above have incorporated the elements of human rights due diligence described in chapter III into their corporate processes by 2020 and the target is thus missed, the Federal Government will consider further action, which may culminate in legislative measures.¹³⁸

In doing so, Germany not only sets out clear expectations for companies to carry out human rights due diligence but also establishes an ambitious benchmark. Assuming the Federal Government seeks to achieve this aim, it must take solid measures to support and facilitate this progress. The following section therefore analyses the various actions outlined in the German NAP and discusses whether they have the potential to contribute to the fulfilment of this goal.

4.3.1. Commercial and Development Policies

In July 2017, half a year after the publication of the German NAP, the German government hosted the controversial G20 summit in Hamburg. The twenty most important industrialised countries and emerging economies met for the 12th time in order to discuss topics such as international trade, the global economy, migration, women's

¹³⁸ German NAP, p.10.

empowerment and development aid. In this context, the countries' leaders committed “to further align [their] actions with the 2030 Agenda for Sustainable Development” and “to work with stakeholders to strive towards its ambitious and integrated implementation and timely realisation in accordance with national circumstances.”¹³⁹ In its report to the High-Level Political Forum in June 2016, the German government had highlighted that the promotion of “sustainable development is one of the German government’s fundamental goals in all its activities and the yardstick it uses to measure them.”¹⁴⁰ It also acknowledged that even though “Germany has on the whole achieved a very high level of development, further efforts are needed to meet the SDGs at national level and in doing so also make appropriate contributions to meeting the goals globally.”¹⁴¹ Only two months earlier to the G20 summit, the Labour and Employment Ministers of the G20 countries came together to discuss new ways to achieve a sustainable and inclusive economy. In their Declaration, the Ministers emphasised “the responsibility of businesses to exercise due diligence in line with the UN Guiding Principles”¹⁴², committed to support corporations, in particular SMEs in implementing due diligence procedures and underlined their encouragement to establish non-judicial grievance mechanisms.¹⁴³

With the German NAP having been adopted in the context of these events, the Federal Government had the possibility to demonstrate its determination to overcome still existing gaps. Thus, it is to be welcomed that the Federal Government recognises environmental, social and human rights standards as firmly underpinning free-trade agreements, including impact-assessments and monitoring.¹⁴⁴ In this regard, the Government advocates for an ambitious sustainability chapter in the planned TTIP

¹³⁹ European Commission (ed.), ‘G20 Leaders’ Declaration: Shaping an interconnected world’, Hamburg, 7/8 July 2017, www.g20germany.de/Content/EN/_Anlagen/G20/G20-leaders-declaration.pdf?__blob=publicationFile&v=11 (accessed 25 April 2018).

¹⁴⁰ The Federal Government, ‘Executive Summary of the Report of the German Government to the High-Level Political Forum in July 2016’, 3 June 2016, https://sustainabledevelopment.un.org/content/documents/10374GER_Report_to_HLPF_2016_Exec_Summary.pdf (accessed 25 April 2018)

¹⁴¹ Ibid.

¹⁴² Federal Ministry of Labour and Social Affairs, G20 Labour and Employment Ministers Meeting 2017, Ministerial Declaration, Towards an Inclusive Future: Shaping the World of Work, 18/19 May 2018, p.6, www.g20.utoronto.ca/2017/g20-labour-ministerial-declaration.pdf (accessed 6 June 2018).

¹⁴³ Ibid., p.7.

¹⁴⁴ German NAP, p.13; The Generalised System of Preferences (GSP+) is a developmental tariff instrument which grants developing countries duty reductions on their exports. For more details, see: https://ec.europa.eu/taxation_customs/business/calculation-customs-duties/rules-origin/general-aspects-preferential-origin/arrangements-list/generalised-system-preferences_en (accessed 8 June 2018).

agreement, emphasises the importance of impact-assessments before the start of negotiations, seeks to improve trading opportunities for developing countries and to strengthen the GSP+ instrument.¹⁴⁵ However, these measures are formulated in a very general manner. The Federal Government establishes no concrete actions. Whereas trade agreements continue to provide for high investment protection, they restrict states and regional organisations' policy space or, in other words, their "right to regulate".¹⁴⁶ The importance to consider national law and regional policies in such agreements, meaning that states "retain adequate policy and regulatory ability to protect human rights"¹⁴⁷, is not discussed in the NAP; neither does it refer to the need for effective grievance mechanisms and for possible sanctions.

Through its development policies, the Federal Government has the possibility to contribute to the achievement of the 2030 Agenda. This is why it is important that the German government plans on reviewing these development policies, in particular the contractual clauses of the 'develoPPP programme'¹⁴⁸, guaranteeing a stronger compliance with the Guiding Principles.¹⁴⁹ The Federal Government further seeks the promotion of NAP processes in developing countries. In this context, the BMZ sponsors a research project at the DIMR with the aim of supporting the establishment of NHRIs in partner countries.¹⁵⁰ With regard to regional and international financial institutions such as the World Bank, the Federal Government should not only "track" how they ensure human rights in their reform processes but declare its advocacy of binding requirements for HRDD.¹⁵¹ The commercial and development policies of the German Government remain vague and hardly go beyond the current *status quo*. Unfortunately, the Federal Government did not adequately seize the opportunity to address the still existing gaps to ultimately contribute to the achievement of the Sustainable Development Goals.

¹⁴⁵ German NAP, p.13.

¹⁴⁶ For more details on the right to regulate in the context of international investment law, see Titi, A., *The Right to Regulate in International Investment Law*, Nomos, 2015.

¹⁴⁷ Guiding Principles, p.11.

¹⁴⁸ The develoPPP programme is a collaboration between the European private sector and the German public sector. It offers a funding opportunity to corporate projects with a developmental objective. For more details see: www.developpp.de/en/content/developppde (accessed 6 June 2018).

¹⁴⁹ German NAP, p.15.

¹⁵⁰ German NAP, p.14.

¹⁵¹ German NAP, p.15.

4.3.2. People in Vulnerable Situations

During the stakeholder consultation phase, representatives of civil society had repeatedly called for the Federal Government to address issues concerning groups in vulnerable situations or at heightened risk. The NAP guidelines also foresee the inclusion of measures aiming at improving the situation of such groups.¹⁵² Under the first action field, the state duty to protect, the Federal Government commits to “take specific action to step up its wide-ranging commitment to the protection of human rights defenders“ as well as to stand up for “the rights of vulnerable groups, such as indigenous peoples or children and youth or persons with disabilities.”¹⁵³ Although, mention is made of these groups, the specific measures are not further explained. Thus, it remains unclear what actions the Federal Government is planning to take regarding the empowerment of these groups. With respect to human trafficking and the situation of migrant workers and whistleblowers, the action points are more explicit: first of all, a working group was established in order to develop a strategic approach with the aim of preventing and combating human trafficking; secondly, agreement on a bill was reached to improve the situation of migrant workers in temporary work contracts; and thirdly, the protection of whistleblowers will be further improved through the transposition of the EU directive on the safeguard of trade secrets.¹⁵⁴ The latter, even though it protects informants “for revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted for the purpose of protecting the general public interest”¹⁵⁵, has been controversial and repeatedly criticised for failing to provide adequate protection.¹⁵⁶ With regard to gender, the Federal Government regards equal rights for men and women at the workplace as a top priority and acknowledges that there is still a substantial pay gap, with women earning

¹⁵² See also: Methven O’Brien, 2015, p.123.

¹⁵³ German NAP, p.15.

¹⁵⁴ German NAP, p.12, see also: Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, Official Journal of the European Union, L157/1, 15 June 2016, hereinafter EU Directive on Trade Secrets Protection.

¹⁵⁵ EU Directive on Trade Secrets Protection, Art.5.

¹⁵⁶ For detailed information, see e.g. Corporate Europe Observatory, ‘Adapting the EU Directive on Trade Secrets ‘Protection’ into National Law’, 1 February 2017, p.16ff, <https://corporateeurope.org/power-lobbies/2017/02/adapting-eu-directive-trade-secrets-protection-national-law> (accessed 12 June 2018); Abazi, V., ‘Trade Secrets and Whistleblower Protection in the European Union’, *European Papers*, vol.1, no.3, 2016.

about 7% less than men.¹⁵⁷ The German government thus “initiated a dialogue between employers’ and employees’ organisations on this issue and has introduced numerous non-legislative measures such as the Equal Pay Day and a new computer-assisted assessment procedure for the identification of corporate pay discrimination.”¹⁵⁸ In this regard, Germany could take more rigorous steps, for example requiring corporations, regardless of their size, to make salaries transparent or to pronounce a ban on pay discrimination altogether. In order to empower women at the workplace, Germany encourages businesses to subscribe to the Women’s Empowerment Principles¹⁵⁹. The Federal Government furthermore wants to assist partners in developing countries in improving the situation for women who still experience widespread discrimination and violence.¹⁶⁰ These commitments aiming at improving the situation of people in vulnerable situations are welcome. However, it would have been desirable for the government to have addressed these commitments in more concrete, target-oriented measures.

4.3.3. State and Business Nexus

Guiding Principles 5-7 outline that states when directly linked to business activities such as through public procurement activities, export credits or when the company is owned or controlled by the state must take additional steps to prevent corporate human rights abuses. As the primary duty-bearers under international law, states hold a special responsibility in case human rights are violated by such companies. For this reason, states should act upon their means of power and require corporations to carry out due diligence. This is an opportunity the German state must seize upon, especially in view of both the already ambitious goal of the Federal Government and in order to contribute to the Agenda 2030, which anticipates the promotion of sustainable public procurement practices.¹⁶¹ In April 2016, Germany transposed the EU directive on public procurement into national law. The new rule simplifies public procurement procedures, making it

¹⁵⁷ German NAP, p.13.

¹⁵⁸ Ibid.

¹⁵⁹ The Women’s Empowerment Principles are a set of principles with the aim of empowering women in the workplace, market place and society, resulting from a collaboration between the Global Compact and the UN Women, for more information see: www.wepinciples.org.

¹⁶⁰ German NAP, p.15.

¹⁶¹ United Nations Global Market Place, ‘Sustainable Procurement Tools’, www.ungm.org/Shared/KnowledgeCenter/Pages/PT_SUST (8 June 2018).

easier for SMEs to access public procurement, and allows for the consideration of environmental and social aspects.¹⁶² During the NAP stakeholder consultation, the participants called for the Government to align the procurement law with the UNGPs. As the DIMR, the DGB and several NGOs legitimately criticise, the Federal Government did not sufficiently include such aspects in the new rule.¹⁶³ Corporate HRDD is not mentioned in the law, nor does it enshrine clear mandatory provisions for social criteria.¹⁶⁴ It is to be welcomed that the government, apart from providing training courses for procurement staff, plans on examining the possibility of including HRDD in a future revision and announces the drafting of a phased plan in this regard.¹⁶⁵ However, the Federal Government does not set any time frame for this measure, nor does it clarify the institution responsible for implementation. Since the law has only recently become effective, an examination of the law in the near future seems rather unlikely.¹⁶⁶ In other NAPs, states undertake more promising measures. For example, the Finnish NAP provides that the procurement data informs about social aspects which have been covered in the procurement process.¹⁶⁷

A similar approach can be observed regarding subsidies. The Federal Government acknowledges that subsidies “must not conflict with other political aims, such as protection of human rights.”¹⁶⁸ The German government therefore plans to reconsider to what extent the Subsidy Policy Guidelines, a voluntary assessment mechanism, are aligned with the UNGPs and whether elements can be applied in future obliging corporations receiving subsidies to carry out due diligence. Although these considerations are important, they are again rather vague and miss a clear target-date for implementation. With regard to external-trade promotion, Germany plans to “ensure that human rights, which have hitherto been an element of the environmental and social impact assessment,

¹⁶² EU Procurement Directive.

¹⁶³ See e.g. DIMR, *Stellungnahme*, 2016, p.7.

¹⁶⁴ See e.g. BMWi, ‘Vergaberechtsmodernisierungsgesetz’, www.bmwi.de/Redaktion/DE/Artikel/Service/vergaberechtsmodernisierungsgesetz.html (accessed 8 June 2018).

¹⁶⁵ German NAP, p.16.

¹⁶⁶ See e.g. CorA, 2017, p.9.

¹⁶⁷ Finnish Ministry of Employment and the Economy, ‘National Action Plan for the implementation of the UN Guiding Principles’, 2014, p.21, <https://tem.fi/documents/1410877/3437254/National+Action+Plan+for+the+implementation+of+the+UN+guiding+principles+21102014.pdf> (accessed 15 April 2018), hereinafter Finnish NAP.

¹⁶⁸ German NAP, p.16.

are given more specific consideration and a higher profile in assessment procedures.”¹⁶⁹ Human rights due diligence reports are to be included into the assessment procedures in cases where there is a high risk of negative human rights impacts. Unlike the first draft of the German NAP, which provided that companies failing to comply with HRDD are to be excluded from foreign-trade promotion, the adopted final draft of the NAP did not include such rigorous measures; likely due to the preceding conflict of interests between the ministries.¹⁷⁰ Again, no specific target-dates or clarifications on responsibilities are provided.

In the commentary section of the UNGPs, Guiding Principle 4 states that “where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business enterprise may entail a violation of the State’s own international law obligations.”¹⁷¹ Finland requires unlisted companies that are either partly or entirely state-owned to report on CSR, including human rights, and clearly expresses its expectation towards these companies to “take human rights into consideration in a responsible and transparent manner, both in their own organisation and in their subcontracting supply chains.”¹⁷² The Danish NAP announces a bill “proposing that the largest Danish companies and state-owned limited liability companies in future must expressly state in their reports what measures they are taking to respect human rights and reduce their impact on the climate.”¹⁷³ In this regard, the German Federal Government merely plans on expanding the training courses for the responsible authorities, refers to the Public Corporate Governance Code of the Federation, a guideline consisting of recommendations and suggestions as well as plans on increasing and publishing the number of companies applying the German Sustainability Code.¹⁷⁴ There does not exist any explicit request for corporations controlled or owned by the state to carry out due diligence procedures. Although it is made clear that a business enterprise when under state control or, “in other words if a majority stake is held directly by the

¹⁶⁹ German NAP, p.17.

¹⁷⁰ CorA, 2017, p.10.

¹⁷¹ Guiding Principles, p.7.

¹⁷² Finnish NAP, p.22.

¹⁷³ The Danish Government, ‘Danish National Action Plan - implementing of the UN Guiding Principles on Business and Human Rights’, March 2014, p.27, www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark_NationalPlanBHR.pdf (accessed 30 April 2018).

¹⁷⁴ German NAP, p.18f.

public treasury, or if its actions may otherwise be attributed to the state, ... bears special responsibility under the UN Guiding Principles to respect human rights”¹⁷⁵, no substantive measures are taken to oblige these companies to respect human rights through due diligence procedures. With regard to this topic, the Federal Government chose to remain unassertive and did not exhaust all means at its disposal.

4.3.4. Measures for Corporate Practice

During the G7 summit in Germany in June 2015, the government leaders committed to support sustainable standards in supply chains and, *inter alia*, encouraged corporations to carry out HRDD.¹⁷⁶ In this context, the G7 have undertaken to support the development of NAPs for the implementation of the UNGPs, to increase transparency within supply chains, to identify high-risk sectors and promote the prevention of negative human rights impacts as well as to strengthen multi-stakeholder initiatives.¹⁷⁷ Since Germany was one of the main drivers behind the inclusion of such a chapter on responsible supply chains in the Leaders’ Declaration, the Federal Government identified a number of measures which aim at supporting the business sector in respecting human rights. The measures run as follows: the Government plans the publication of a study, identifying sectors with a high risk of adverse human rights impacts. Sector-specific guidances to support corporations in conducting due diligence are to be drawn up.¹⁷⁸ It is unclear, however, which institution will conduct this study and at what time. The Federal Government furthermore continues to promote the Vision Zero Fund, an initiative by the G7 leaders aiming at preventing and reducing workplace-related deaths, injuries and accidents in global supply chains.¹⁷⁹ Multi-stakeholder initiatives such as the Partnership for Sustainable Textiles, the Sustainable Cocoa Forum and the Round Table on Human Rights in Tourism shall be supported further on. The former, initiated by the BMZ, consists of voluntary and mandatory elements. Members are required to adhere to social

¹⁷⁵ German NAP, p.18.

¹⁷⁶ Leaders’ Declaration G7 Summit, Schloss Elmau, 7-8 June 2015, p.5, https://sustainabledevelopment.un.org/content/documents/7320LEADERS%20STATEMENT_FINAL_CLEAN.pdf (accessed 19 April 2018).

¹⁷⁷ Ibid.

¹⁷⁸ German NAP, p.20.

¹⁷⁹ Ibid.

and environmental standards, which are monitored by an independent third party. Since 2017, members of the partnership are required to report on their measures and are subject to a sanction mechanism. The goal of the Federal Government is to “have 75% of the German textile and clothing market signed up to the Textile Partnership by 2018”¹⁸⁰. Here, the government sets a benchmark and a clear target-date. The Federal Government furthermore grants increased funding for the Roundtable on Human Rights in Tourism, a Federal Government-funded initiative launched by the German Global Compact Network (DGCN) in 2012.¹⁸¹ In order to ensure that enterprises operating in conflict zones are not involved in any adverse human rights impacts, the Federal Government “is committed to the establishment of binding due diligence rules, which should be proportionate and should not entail unnecessary red tape, particularly for small and medium-sized enterprises.”¹⁸² The Federal Government thereby alludes to the EU regulation on conflict minerals, which was agreed upon during the time of the German NAP process and adopted a couple of months after the NAP publication.

During the expert hearings, trade unions expressed the need for information especially with regard to SMEs and the establishment of a helpdesk.¹⁸³ In this respect, the Federal Government announces its intention to “assist small and medium-sized enterprises in particular in fulfilling the extensive corporate due-diligence requirements and expectations relating to human rights”¹⁸⁴. The government therefore undertakes to establish a helpdesk on business and human rights, located in the Agency for Business and Economic Development of the BMZ.¹⁸⁵ The helpdesk would serve as a first contact point for corporations where they receive information on existing services and networks. Such services include the training and advice programs of the DGCN which are to be expanded and supplemented by web seminars and other formats on HRDD.¹⁸⁶ In addition to the CSR Award, which has so far been presented twice, the government also plans on

¹⁸⁰ Ibid.

¹⁸¹ German NAP, p.21.

¹⁸² German NAP, p.22.

¹⁸³ Auswärtiges Amt, ‘Anhörung 4: Unterstützung von Unternehmen bei der Wahrnehmung von Verantwortung für die Menschenrechte nach den UN-Leitprinzipien für Wirtschaft und Menschenrechte’, 24 Juni 2015.

¹⁸⁴ German NAP, p.22.

¹⁸⁵ German NAP, p.23.

¹⁸⁶ German NAP, p.24.

introducing an additional prize, awarding responsible supply chain management.¹⁸⁷ This award is important insofar as it can provide an incentive for corporations to implement due diligence processes. Another incentive that could encourage corporate compliance with human rights standards is the possible introduction of a certification mark into German law which the Federal Government takes into consideration.¹⁸⁸

On an international comparison, the German NAP is one of the few NAPs (together with e.g. the Swedish NAP) that engages with the second pillar of the UNGPs in a separate chapter. Although most NAPs outline governments' expectations of due diligence towards corporations, most of them do not expand on the challenges corporations might face. In order to meet these expectations, corporations require assistance and incentives. The ideas of providing SMEs with informational support¹⁸⁹, conducting a study on high-risk areas and formulating guidance, encouraging multi-stakeholder initiatives, and awarding responsible supply chain management, are therefore important contributions of the German government in providing corporations with substantive support.

4.3.5. Access to Remedy

Under Guiding Principle 25, states “must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.”¹⁹⁰ The third pillar of the UNGPs thus comes under the state duty to protect against corporate human rights abuses. In cases where access to remediation is guaranteed, sanction mechanisms are effective and non-judicial procedures well positioned, the third pillar can contribute substantively towards more human rights compliant corporate behaviour. In order to facilitate the use of existing remedy mechanisms for affected people, the Federal Government undertakes to produce a multilingual information brochure in which it informs about available remedies in

¹⁸⁷ Ibid.

¹⁸⁸ German NAP, p.21.

¹⁸⁹ See also: UNWG Guidance, p.20.

¹⁹⁰ Guiding Principles, p.27.

Germany.¹⁹¹ In addition, the introduction of compensation for surviving family members is planned as a sign of “reparation for the survivors’ grief and as a gesture of sympathy, respect, and solidarity.”¹⁹² It is to be welcomed that the government also envisages to expand the existing sanctions on corporations under criminal law and to focus the consultancy advice of the German Foundation for International Legal Cooperation significantly towards business and human rights.¹⁹³ The Foundation is present in almost 30 partner countries where it provides advice on legal reforms such as civil, criminal or administrative law.¹⁹⁴ In the future the Federal Government also plans on emphasising best practices regarding corporate-based grievance mechanisms.¹⁹⁵

Although, these measures constitute good practices, the German government fails to acknowledge the existence of barriers in accessing German law, neither does it further explore this topic.¹⁹⁶ As several CSOs rightly criticise, the German NAP remains far beneath its potential. During the hearing on access to remedy, it was repeatedly mentioned that there were no possibilities in German legislation for filing collective complaints. However, human rights violations by corporations are far more likely to affect groups of people rather than individuals. Unfortunately, collective complaints are not discussed or mentioned in the NAP. Another obstacle refers to the issue of burden of proof. Affected parties filing a complaint must provide evidence for their claim. However, in most cases companies do not disclose information relevant to the case, which makes it almost impossible to prove the claim. In its position paper, the DGB calls for the reversal of the burden of proof, with the result that the sued company would have to refute the presumption.¹⁹⁷ However, it would have already been sufficient to ease the burden of proof to some extent, in order to show the state’s intention to facilitate the access to remedy. Just like collective complaints, the issue of burden of proof was not incorporated into the German NAP. As the DIMR summarises, the Federal Government - by solely

¹⁹¹ German NAP, p.25.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ For more information, see: Deutsche Stiftung für Internationale Rechtliche Zusammenarbeit e.V., www.irz.de/index.php/en/about-us (accessed 8 June 2018).

¹⁹⁵ German NAP, p.25.

¹⁹⁶ Deutscher Gewerkschaftsbund, ‘Stellungnahme des Deutschen Gewerkschaftsbundes zum Entwurf des Nationalen Aktionsplanes, Umsetzung der VN-Leitprinzipien für Wirtschaft und Menschenrechte: Menschenrechte in der Wirtschaft brauchen eine ambitioniertere Umsetzung’, 21 December 2016, p.8, www.dgb.de/themen/++co++8874ecf2-c831-11e6-82ad-525400e5a74a (accessed 18 April, 2018).

¹⁹⁷ Ibid., p.8.

providing affected parties with a multilingual information brochure - underestimated the extent of the issue.¹⁹⁸

Compared to the measures facilitating access to law and courts, the measures regarding the state-based non-judicial grievance mechanism are more promising. The main extrajudicial mechanism of the German State has been the National Contact Point for the OECD Guidelines. It was established in 2000 without any specific legal basis and has since handled 30 cases.¹⁹⁹ In order to strengthen the work of the NCP, the Federal Government plans on promoting the compliance with the OECD Guidelines as well as on conducting a peer review of the NCP as encouraged by the G7 in the Leaders' Declaration.²⁰⁰ In addition, the German NCP will undergo a reorganisation, including the increasing of staff and the creation of a new organisational entity within the BMWi.²⁰¹ Another positive aspect is that the NCP will be extended to become the main grievance mechanism for external trade promotion.²⁰² In future, companies receiving foreign trade promotion are required to participate in grievance proceedings against them.

Guiding Principle 31 lays out several criteria that ensure the effectiveness of non-judicial grievance mechanisms. It follows that the NCP should be legitimate, accessible, predictable, equitable, transparent as well as right-compatible.²⁰³ Housing the NCP in the BMWi casts some doubt on its impartiality and thus questions the criterion of legitimacy. However, most NCPs are located within one governmental body of a country. Norway is one of the few examples with a NCP operating independently from the government, established as an expert advisory body.²⁰⁴ Although the measures planned by the Federal Government are to be welcomed, it must be pointed out that the NCP as a non-judicial body solely serves as a mediator in complaint procedures and does not provide for a solution in the form of remediation activities. The aim of the NCP is to settle the dispute

¹⁹⁸ Ibid., p.9.

¹⁹⁹ OECD, 'OECD Guidelines for Multinational Enterprises National Contact Point Peer Reviews: Germany', www.oecd.org/corporate/Germany-NCP-Peer-Review-2018.pdf (accessed 18 June 2018).

²⁰⁰ Leaders' Declaration, p.5.

²⁰¹ German NAP, p.26.

²⁰² German NAP, p.17.

²⁰³ Guiding Principles, p.33f.

²⁰⁴ National Contact Point for Responsible Business Norway, <http://nettsteder.regjeringen.no/ansvarlignaringsliv2/en/national-contact-point-norway/> (accessed 20 April 2018).

between the parties, to find an agreement and to publish a statement or report.²⁰⁵ This means that even though the NCP is a strong non-judicial grievance mechanism, it does not replace important domestic judicial mechanisms. Regarding the chapter on the access to remedy, the German government did not consider any “ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.”²⁰⁶

4.4. Monitoring and Follow-up

In their article, de Felice and Graf write that NAPs “are most likely to produce long-lasting effects if they are understood as continuous processes based on recurrent monitoring, as opposed to one-time events.”²⁰⁷ Whereas the early NAPs did not include information on reporting and monitoring processes, the more recent NAPs followed the recommendations and integrated chapters on monitoring and follow-up mechanisms. In most of these NAPs, a working group or an inter-ministerial committee is established, responsible for reviewing and verifying the implementation of the measures. They are supported and advised by consultative bodies composed of CSOs, representatives of business, trade unions and other relevant stakeholders. In this context, the German NAP provides that a permanent inter-ministerial committee led by the Foreign Ministry is established which will “drive forward the development of the NAP implementation process.”²⁰⁸ The NAP Steering Group which supported and accompanied the project from the very outset is to be integrated in the National CSR Forum where it shall make recommendations and monitor the activities of the committee. However, disconcertingly, the formulation is that the establishment of the inter-ministerial committee is “subject to budgetary approval”²⁰⁹. Here, it would have been appropriate to ensure that necessary resources are provided so that the committee can adequately carry out its mandate.

And yet, in comparison to the other NAPs, the German NAP proposes the most promising and comprehensive follow-up mechanism. In response to the ambitious goal set at the beginning of the NAP, the inter-ministerial committee is about to review the

²⁰⁵ OECD, ‘Specific instances mechanism of the OECD Guidelines for Multinational Enterprises’, <http://mneguidelines.oecd.org/specificinstances.htm> (accessed 20 April 2018).

²⁰⁶ Guiding Principles, p.28.

²⁰⁷ De Felice and Graf, 2015.

²⁰⁸ German NAP, p.28.

²⁰⁹ Ibid.

implementation of the due diligence expectations outlined in the third chapter “by means of an annual survey conforming to current scientific standards”²¹⁰ and consisting of quantitative and qualitative elements. A representative sample will show whether 50% of all German-based enterprises with more than 500 employees will have integrated the due diligence requirements, thus whether the goal will be achieved. In addition, the committee will carry out interviews in order to obtain a general picture of the challenges companies have encountered during the incorporation of the due diligence stages.²¹¹ The NAP does not describe the procedures of the survey in greater detail. With regard to the samples, the German NAP again introduces a unique feature. By annually examining the companies’ implementation status of the due diligence requirements, the Federal Government gives the outlined state expectation regarding pillar II of the UNGPs more weight. In case the survey reveals that less than 50% of the affected companies have integrated the requirements, the likelihood of legislative measures such as a law on corporate HRDD increases strongly. This also signifies that the survey must be carried out in a reasoned, credible and transparent manner, so that the result in 2020, whether it be positive or negative, cannot be called into question by neither CSOs, the business community nor any other relevant stakeholder.

4.5. Voluntary Nature of the Measures

The German NAP demonstrates that the Federal Government continues to focus on voluntary self-commitment. As learned, it is only in 2020 after the comprehensive review process that the government “will consider further action, which may culminate in legislative measures.”²¹² At the moment, companies do not have to fear any sanctions if they refrain from implementing due diligence requirements. Many of the demands and expectations of the hearings and plenary conferences have not been adequately included in the German NAP. Particularly with respect to the state-business nexus, the Federal Government could have demonstrated its determination to achieve the intended objective. Instead, the measures remain irresolute; no new requirements for state-owned companies are introduced and corporations receiving foreign trade promotion or support by any other

²¹⁰ Ibid.

²¹¹ German NAP, p.28.

²¹² German NAP, p.10.

means do not have to worry any suspensions. With regard to remediation, the Federal Government fails to acknowledge the existing barriers for affected persons in accessing German law. Although it undertakes to reform the NCP, no steps are taken to reassess domestic judicial mechanisms. The Federal Government plans on improving the situation of people in vulnerable situations, however, does not set out specific measures which clarify how this can be achieved. In general, the measures do not contain target dates and the responsible entities are not specified, which complicates the follow-up, in particular for relevant stakeholders.

Right at the beginning of the NAP, the Federal Government expressed its due diligence expectations towards companies. The chapter comprehensively describes the steps corporations must take to fulfil these requirements. It is precisely for this well formulated chapter that NGOs and trade union representatives criticise the absent statutory framework. Frank Zach from the DGB wonders why these expectations have not been made mandatory at the time of adoption. He argues that there would have been sufficient time for corporations to integrate the requirements into their business activities, since the implementation of such a law would not be realised from one day to the next.²¹³ In its position paper, the DIMR criticises the missing political will to formulate binding regulations and thus to create a fair level playing field, especially for those corporations that are already forerunners in the field of sustainable supply chains.²¹⁴ Apart from that, the Federal Government should have formulated the conditions of the survey result in a more rigorous manner. Considering the introduction of possible legislative measures in case the aim is not reached is not enough. Instead, there should have been a clear statement that in any event a law on HRDD is the essential consequence.

This notwithstanding, in comparison with the other NAPs, the German Action Plan fares well. None of the other NAPs sets such a clear benchmark, nor provides for a comprehensive monitoring mechanism to follow up on the integration of the expressed expectations towards companies. With the German NAP, the Federal Government initiates a process that will likely induce corporations to take the topic seriously. Companies now have the chance to show that they are capable of self-regulation. If they fail to do so, other regulatory measures may follow as announced by the government.

²¹³ Interview with Frank Zach, German Trade Union Federation, 24 April 2018.

²¹⁴ DIMR, 2016, p.12.

Even though many action points are worthy of improvement and require more determination, the expectation set out is indeed ambitious. In that context, one should not forget that such an action plan is the result of a political negotiation process and thus by definition a political document. It mirrors the compromises that were feasible at the time of production.²¹⁵ As Isabel Ebert from the BHRRC writes, the German NAP consists of “a clever combination of carrot and stick that will also require close monitoring by civil society of progress or lack thereof by business.”²¹⁶ The NAP constitutes the starting point for the Federal Government to implement the UN Framework. Since its publication, more than a year has passed. Whether the NAP is a “worldwide showcase” can ultimately only be demonstrated through the effort taken in implementing the measures into practice. The subsequent chapter therefore takes a closer look at the intermediate status of the operationalisation, examines to what extent the measures laid out in the NAP have been proved worthy in practice and discusses the events and processes that have been initiated to accompany the process.

²¹⁵ From an interview with the Federal Ministry for Foreign Affairs, Department for Business and Human Rights, 17 April 2018.

²¹⁶ Ebert, I., ‘3 entry points to implement the German National Action Plan’, *Business & Human Rights Resource Centre*, 22 December 2016, available at www.business-humanrights.org/en/3-entry-points-to-implement-the-german-national-action-plan (accessed 5 April 2018).

5. FROM PRINCIPLES TO PRACTICE

The assessment of the German NAP has shown that the Federal Government does not face an easy task. It has set an ambitious goal: 50% of Germany's business enterprises with more than 500 employees should have implemented the due diligence requirements set out in the NAP into their business practice by 2020. If they fail to do so, the Federal Government will assume binding measures – as it says in the 2018 coalition agreement of the new German government. In the agreement, the new government clearly states that statutory regulations will follow if the results of the review process reveal that voluntary self-commitment is not sufficient.²¹⁷ In the following, a closer look will be taken at both the implementation status of the measures and initiatives of the German government as well as the current corporate practice with regard to human rights.

5.1. Government Initiatives

To launch the process of implementation, several institutions tasked with the coordination and monitoring of the measures were established in early 2017. Within the Foreign Ministry, the Department for Business and Human Rights was founded consisting of seven staff members.²¹⁸ While the Foreign Ministry is responsible for the development of the overall implementation process, it is not responsible for the implementation of individual measures. In this respect and as announced in the NAP, an inter-ministerial committee (IMA) was established. The main task of the IMA has been the monitoring and coherence of the measures undertaken as well as the promotion of the implementation process. The IMA is advised by a working group on business and human rights which

²¹⁷ Bundesregierung, 'Ein neuer Aufbruch für Europa, Eine neue Dynamik für Deutschland, Ein neuer Zusammenhalt für unser Land, Koalitionsvertrag zwischen CDU, CSU und SPD', 19. Legislaturperiode, 14 March 2018, www.cdu.de/system/tmf/media/dokumente/koalitionsvertrag_2018.pdf?file=1 (accessed 15 May 2018).

²¹⁸ From an interview with the Federal Ministry for Foreign Affairs, Department for Business and Human Rights, 17 April 2018.

was integrated into the German CSR Forum located in the BMAS. Part of the working group is stakeholders from the economy, civil society and trade unions.²¹⁹ Both the IMA and the working group meet every eight weeks and regularly report to each other. The implementation of the various measures outlined in the NAP has been distributed among the respective ministries.²²⁰ In what follows, the developments and implemented measures will be outlined and discussed.

5.1.1. Implementation Status of the Measures

For the purpose of the analysis, the initiatives are grouped together into measures under the state duty to protect, support measures and measures facilitating the access to remedy. While all these actions fall under the state duty to protect, the first group clearly addresses provisions and actions the government could influence with some political will, in particular addressing the state and business nexus.

5.1.1.1. Measures Under the State Duty to Protect

The assessment of the German NAP has shown that the measures under the state duty to protect were formulated rather vaguely and concentrate primarily on promotion measures and review processes. It is therefore not surprising that the implementation has been proceeding rather slowly. At the same time, the indefinite nature of the measures makes it difficult to determine their actual status of implementation. With regard to the EU directive on the protection of trade secrets, Germany missed the deadline (9 June 2018) of transposition into national law. Ironically, a draft version of the German legislation was leaked in April 2018. According to experts, the draft version closely follows the text and content of the directive, transposing that informants must have “acted for the purpose of protecting the general public.”²²¹ This does not only imply that the

²¹⁹ BMAS, ‘Entwicklungen des Aktionsplans unter Einbindung von Politik, Wirtschaft und Zivilgesellschaft’, www.csr-in-deutschland.de/DE/Wirtschaft-Menschenrechte/Ueber-den-NAP/Entwicklung-des-NAP/entwicklung-des-nap.html (accessed 15 May 2018).

²²⁰ From an interview with the Federal Ministry for Foreign Affairs, Department for Business and Human Rights, 17 April 2018; this information is at that time not publicly available.

²²¹ EU Directive on Trade Secrets Protection, Art.5. See e.g. Osborne Clarke, ‘Know-how protection in Germany: Trade Secrets Act will have considerable consequences for companies’, 16 April 2018, <http://www.osborneclarke.com/insights/know-how-protection-in-germany-trade-secrets-act-will-have-considerable-consequences-for-companies/> (accessed 12 June 2018).

burden of proof remains with the whistleblower, but also that any exceptions lie in the decisions of the courts at national and EU level which have to balance individual rights and economic interests.²²² However, while at this stage the protection of informants is not adequately guaranteed, the German government took an important step in ensuring safeguards for temporary employees. In April 2017, four months after the adoption of the German NAP, the new bill on temporary work and service contracts came into force. The new regulation provides that after nine months of service temporary workers receive the same remuneration as an employee of the borrowing company.²²³ Furthermore, it prohibits the employment of temporary workers as a means to break a strike. In addition, corporations are required to disclose the personnel leasing conditions in the contract and towards the temporary employee.²²⁴ In case of breaches, lending and borrowing companies can be sanctioned with a fine up to €500,000.²²⁵ The bill is therefore an important step in preventing the abuse of temporary agency work as well as to improve the overall situation of temporary employees.

With regard to public procurement, the NAP stated that “federal, state, and local authorities bear particular responsibility in this domain, in that they must discharge the state duty to protect human rights and ensure that the use of public funds does not cause or foster any adverse human rights.”²²⁶ The NAP assessment has shown that the planned measures do not live up to this commitment. In principal, there are sufficient possibilities to seek advice on sustainable procurement, covered by various institutions such as the Centre of Excellence for Sustainable Procurement, the Sustainable Compass and the Fair Procurement Network. The problem is therefore rather that the government has not taken resolute measures to guarantee sustainable procurement in the form of mandatory requirements. This is, however, slowly changing. In the 2017 action plan on the promotion of sustainable textiles, the Federal Government sets the objective that by 2020

²²² Corporate Europe Observatory, 2017, p.16ff.

²²³ BMAS, ‘Hintergrundinformationen zum Gesetzesentwurf’, 30 March 2017, www.bmas.de/DE/Schwerpunkte/Leiharbeit-Werkvertraege/FAQ-Leiharbeit/faq-leiharbeit.html (accessed 16 May 2018).

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ German NAP, p.15.

50% of the textiles procured by the government must be sustainable.²²⁷ In the course of this undertaking, the Federal Government is currently working on respective guidelines as well as a phased plan for the procurement of sustainable textiles. This is an important step. However, in order to achieve binding minimum standards throughout all procurement procedures, the Federal Government must address all relevant sectors, in particular critical product groups, and formulate target actions and determine responsibilities.²²⁸ In addition, it must be clarified how corporations can prove their compliance with the criteria and how violations are handled. One possibility would be to record non-compliance and clear abuses of human rights standards in the nation-wide competition register.²²⁹ This would help the responsible procurement authorities to examine on an individual case basis whether there are grounds for exclusion. It is encouraging that in the coming months, the topic of procurement as well as trade policy will be thoroughly discussed both within the IMA and in the stakeholder working group.²³⁰ Since there are only two years left until 2020, the Federal Government must now react and take resolute steps in order to fulfil their particular responsibility.

In this context, it is essential to identify the steps the Federal Government has taken regarding the planned study on high-risk sectors. At the moment of writing this thesis (June 2018), the BMAs initiated the tendering process for the elaboration of such a risk-study.²³¹ The company winning the tender (deadline 1 August 2018) will be tasked with the identification of particular relevant risk sectors and regions in supply chains of the German economy. Apart from the prioritisation and mapping of high-risk sectors and their profiles, the objective of the study is to identify and evaluate existing initiatives in

²²⁷ Federal Government, 'Der Beitrag der Bundesregierung zur Förderung von nachhaltigen Textilien, Textil-Maßnahmenplan der Bundesregierung 2017', www.bmz.de/de/mediathek/publikationen/reihen/weitere_materialien/bmz_br_roadmap_textil.pdf (accessed 16 May 2018).

²²⁸ See e.g. CorA, 'Anforderungen an eine sozial verantwortliche öffentliche Beschaffung im Rahmen des Nationalen Aktionsplans zur Umsetzung der UN-Leitprinzipien für Wirtschaft und Menschenrechte', February 2018, www.cora-netz.de/cora/wp-content/uploads/2018/03/CorA_Anforderungen-Beschaffung-NAP_2018-03.pdf (accessed 16 May 2018).

²²⁹ Ibid.

²³⁰ Interview with Frank Zach, German Trade Union Federation, 24 April 2018

²³¹ See the publication of the tender:

<http://www.service.bund.de/IMPORTE/Ausschreibungen/eVergabe/198790.html?nn=394926> (accessed 14 June 2018).

the area of HRDD as well as to work out areas where there is need for further action.²³² On the basis of this risk study and within the framework of so-called sector dialogues, the Federal Government, together with actors from the economy and multi-stakeholder fora, undertakes to draw up sector-specific guidelines and best practice examples. In this respect, at the end of November 2017, the first stakeholder conference took place during which various representatives discussed their experiences and expectations towards sector-specific dialogues and the thereof resulting guidance. The workshops and discussions revealed the necessity for further debates on topics such as anti-trust obstacles, efficiency control and the geographic scope of corporate HRDD.²³³ The study, which is expected to be published in the first half of 2019, could be of particular interest for authorities deciding on the allocation of public procurement, foreign trade promotion and subsidies as well as for corporations receiving those funds. The guidelines will be important instruments for companies in high-risk sectors, outlining clear expectations and guidance. Even though this process is taking up considerable time, it is important that time and effort is put into the specification of HRDD for different (sensitive) sectors and regions and that this is agreed upon under trustworthy conditions by all relevant stakeholders.

Apart from initiating the implementation of some of the measures outlined in the NAP, the Federal Government has also put effort into a promotional activity. During the months of October and November 2017, travellers, commuters and passers-by would come upon different colourful motives illustrating the adverse impacts corporations can have on people in the global supply chain. The motives were accompanied by the slogan “Achtung, Menschenrechte!” (Caution, Human Rights!) and the statement that corporations have the responsibility to respect human rights when producing and purchasing goods in Germany and worldwide.²³⁴ This is part of an information campaign initiated by the BMAS. Through extensive outdoor advertising at train stations and

²³² BMAS, ‘Leistungsbeschreibung: „Studie zur Identifikation von Risikobranchen und -regionen in Liefer- und Wertschöpfungsketten der deutschen Wirtschaft als Basis für Branchendialoge“’, <https://www.evergabe-online.de/tenderdocuments.html?1&id=198790> (accessed 14 June 2018).

²³³ Hamburger Stiftung für Wirtschaftsethik, ‘Workshop zum Nationalen Aktionsplan Wirtschaft und Menschenrechte’, 5 December 2017, www.stiftung-wirtschaftsethik.de/artikel/workshop-zum-nationalen-aktionsplan-wirtschaft-und-menschenrechte.html (accessed 16 May 2018).

²³⁴ V-Formation, ‘BMAS – Achtung, Menschenrechte!’, <http://vformation.de/bmas/> (accessed 21 July 2018).

airports as well as online and print advertisements, the aim was to move the topic of business and human rights into the public awareness and to inform about the German NAP. However, the campaign did not appeal to everyone. Spiegel Online, one of Germany's biggest news pages, claimed that the expensive action, carried out by a public relations agency, was only aimed at diverting the attention from the NAP's missing binding regulations.²³⁵ According to the development spokesman of the Green Party, the campaign has been misleading as it insinuates that human rights in the corporate context have been a high priority of the German government in recent years.²³⁶ Indeed, the campaign in itself and the message it conveys, that corporations have the responsibility to respect human rights, does not fit well with the reluctant initiatives regarding public procurement and foreign trade promotion. Nevertheless, the campaign is of importance. Not only does it raise awareness of the topic of business and human rights and encourage the public to obtain more information, but it also increases the government's accountability. The more the government informs about the issue and the planned measures, the higher the expectations will be on part of the public. This will make it difficult for the government to put industrial interests above human rights issues. At the same time, it forces the government to take credible and resolute measures.

5.1.1.2. Support Measures

Since the adoption of the NAP, the German government has expanded its support programmes and incentives for corporations to respect human rights. Within the Department for Economy and Development of the BMZ, a helpdesk was established specifically for the purpose of providing information about the NAP. It serves as the first point of contact for corporations to receive information about different services in the area of business and human rights.²³⁷ Apart from supporting corporations in the implementation of projects, the helpdesk organises workshops and roundtables informing

²³⁵ Klawitter, N., 'Wie der Gerechtigkeitspakt weich gespült wurde', *Spiegel Online*, 28 February 2018, www.spiegel.de/spiegel/gerechtigkeitspakt-die-fragwuerdige-kampagne-der-regierung-a-1195806.html (accessed 22 May 2018).

²³⁶ Ibid.

²³⁷ Agentur für Wirtschaft und Entwicklung, 'Nachhaltigkeit', www.wirtschaft-entwicklung.de/nachhaltigkeit/ (accessed 17 May 2018).

about new trends and developments.²³⁸ In the next step, corporations will have the possibility to participate in seminars and trainings organised by the German Global Compact Network. With the adoption of the German NAP, the advisory and training programs of the DGCN have been expanded. For corporations that have only recently started to develop a human rights policy, the DGCN offers publications, web seminars and group coaching. For corporations already demonstrating a sophisticated HRDD or a sustainability policy, the DGCN provides training and peer learning events.²³⁹ In addition, a working group of the German CSR forum of the Federal Government is currently developing the intersectoral CSR consensus paper.²⁴⁰ The aim of the consensus is to specify the expectations of a responsible management of HRDD, thus to provide business enterprises with orientation and security for the sustainable management of supply chains. Any private or public enterprise operating in Germany will have the opportunity to join the consensus. The consensus serves as a complementary document to the NAP, in that it provides guidance and advice on the practical implementation of the requirements.²⁴¹ However, the consensus paper has so far not been published.

Furthermore, as announced in the NAP, the government awarded an additional special prize for responsible supply chain management. At the end of January 2017, a selected number of companies was awarded a CSR prize in different sizes and thematic categories for the third time. The winner of the special category in 2017 is the Weleda Group, a German/Swiss producer of natural cosmetics and anthroposophical medicines. For 15 years, Weleda has been pursuing responsible supply chain management: it has implemented the Ethical BiTrade standards in all its purchases; knows about the origin and route of each product, comprising around 1,200 supply chains; and has achieved an organic share of 80% of its raw materials.²⁴² As part of a programme funded by the BMAS a practical day preceded the award ceremony during which sustainable enterprises

²³⁸ Agentur für Wirtschaft und Entwicklung, 'NAP Helpdesk Wirtschaft und Menschenrechte', 11 April 2018, p.3, www.csr-praxistage.de/bnzh-upj/uploads/2018/04/praxistag_muc_ws-b_20180411.pdf (accessed 17 May 2018).

²³⁹ From an Interview with the German Global Compact Network, 19 April 2018.

²⁴⁰ German NAP, p.10.

²⁴¹ Vereinigung der Bayerischen Wirtschaft e.V., 'Anforderungen an einen "Berliner CSR-Konsens zur Unternehmensverantwortung in Wertschöpfungs- und Lieferketten"', Entwurf, 24 February 2016, www.vbw-bayern.de/Redaktion/Frei-zugaengliche-Medien/Abteilungen-GS/Sozialpolitik/2016/Downloads/Entwurf_BMAS.pdf (accessed 18 May 2018).

²⁴² BMAS, 'Preisträger 2017', www.csr-in-deutschland.de/DE/CSR-Preis/CSR-Preis-2017/Preistraeger-2017/Weleda/weleda.html (accessed 17 May 2018).

exchanged experiences, clarified standards and statutory regulations and discussed challenges.²⁴³ The CSR award thus represents an important platform and creates incentives for corporations to further develop their sustainability strategies. In addition, it provides the opportunity to share best practice examples and to learn from each other's policies as anticipated in the German NAP.²⁴⁴

As stated in the Guiding Principles, SMEs “may have less capacity as well as more informal processes and management structures than larger companies”²⁴⁵. The available support services that have been initiated or expanded in the course of the adoption of the NAP are therefore particularly helpful for SMEs. Corporations willing to integrate HRDD procedures into their business activities are provided with comprehensive information and advice.

Against this background, in the event that the 2020 goal is not reached and legislative measures are implemented, it will then be difficult for business enterprises and economic organisations to argue that there has not been enough time or adequate support on the part of the government.

5.1.1.3. Access to Remedy

With regard to the third pillar of the UNGPs, the German government has primarily undertaken the reform of the German OECD NCP, the main non-judicial state-based complaint mechanism. Much to the resentment of CSOs, the Federal Government did not intend to improve the possibilities for victims of corporate human rights abuses to access remediation through legal processes. Since at present the German industry is still strongly opposed to the planned class action for consumers initiated by the EU Commission²⁴⁶, the possibility to file collective complaints for corporate human rights violations continues to be highly unlikely in the foreseeable future. As far as judicial mechanisms are concerned, attention is focussed on the on-going lawsuit against KiK. If it is decided that the plaintiffs have a right to compensation under Pakistani law and that the lawsuit will be further

²⁴³ Ibid.

²⁴⁴ German NAP, p. 25.

²⁴⁵ Guiding Principles, p.15.

²⁴⁶ For detailed information see e.g. Berschens, R. et al., ‘Wirtschaft und Verbraucherschützer streiten über Sammelklage’, *Handelsblatt*, 24 March 2018, www.handelsblatt.com/politik/international/plaene-der-eu-kommission-wirtschaft-und-verbraucherschuetzer-streiten-ueber-sammelklagen/21110816.html (accessed 17 May 2018).

pursued by the district court in Dortmund, it would create entirely new possibilities. As discussed before, the Federal Government could have already taken steps to realise enforceable HRDD in Germany. However, with the 50% benchmark, the government has postponed this decision until 2020.

Instead, over the past year since the adoption of the German NAP, the Federal Government has been concentrating on reorganising the German NCP. As announced in the NAP, the NCP has been subject to a peer review by the OECD.²⁴⁷ In the course of this review, OECD Watch, a global network of CSOs advocating for sustainable and human rights compliant business activities, has published an analysis of the German NCP.²⁴⁸ In response to the NAP, several structural changes were identified. The NCP was transferred to a distinct entity within the BMWi that “provides a greater element of autonomy and visibility, an increased number of dedicated staff and a strategic promotional plan.”²⁴⁹ As of 2017, the NCP comprises five staff members and receives an annual budget of €300,000.²⁵⁰ In addition, the NCP has expanded its promotional activities, the collaboration with other NCPs and its engagement with industry and trade union associations.²⁵¹

However, the peer review shows that there is still potential for improvement: in future reforms, the NCP should clarify and define the roles of the inter-ministerial steering group and the advising multi-stakeholder working group on the OECD Guidelines, as well as update the provisions made in the Procedural Notes.²⁵² Improvements should furthermore be anticipated with regard to the high standards of proof and campaigning restrictions. In order to be more consistent and to facilitate comparison and quality, the final statements should follow a clear template. In the NAP, it was stated that the NCP “will be upgraded to become the central grievance mechanism for external trade promotion.”²⁵³ In the coming months, the NCP should clarify how this measure will be operationalised in practice. OECD Watch furthermore criticises the lack of an oversight

²⁴⁷ OECD, Peer Review, 2017.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ Ibid.

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ German NAP, p.17.

body tasked with reviewing complaints and the ability to lodge appeals.²⁵⁴ It now depends on the Federal Government and the BMWi to implement the recommendations made in the peer review. If successfully operationalised, the NCP could become a strong non-judicial complaint body for corporate human rights violations. At the same time, the NCP should not be understood as a surrogate for legal mechanisms. In this regard, much has still to be done.

5.1.2. A Special Case: The Partnership for Sustainable Textiles

In the NAP, the German government set the aim “to have 75% of the German textile and clothing market signed up to the Textile Partnership by 2018.”²⁵⁵ The multi-stakeholder alliance was initiated in 2014 by the Development Minister, Gerd Müller, as a response to the disastrous collapse of the Rana Plaza building in Bangladesh.²⁵⁶ The primary objective of the partnership has since been to join the forces of all its members such as the government, business enterprises, NGOs, trade unions and associations in order to improve the social, ecological and economic standards along the textile supply chain.²⁵⁷ From the outset, the partnership has been both the flagship project and the “problem child” for the Federal Government. As the largest textile alliance worldwide, it brings various actors together, who then mutually learn through the exchange of experiences and lay down common objectives for better sustainability in the textile sector. Originally, the alliance was intended to integrate mandatory social and ecological standards for textile companies.²⁵⁸ However, since corporations clearly objected to this idea, the partnership and its members have been undertaking voluntary measures. Since principally everyone can join the alliance, it has repeatedly become a target of criticism. Left oriented parties and CSOs have been claiming that corporations can adorn

²⁵⁴ OECD Watch, ‘OECD Watch submission to the 2017 Peer Review of the German NCP’, 17 May 2017, www.oecdwatch.org/publications-en/Publication_4370 (accessed 18 May 2018).

²⁵⁵ German NAP, p.20.

²⁵⁶ Bündnis für nachhaltige Textilien, www.textilbuendnis.com/wer-wir-sind/das-buendnis/ (accessed 20 May 2018).

²⁵⁷ Ibid.

²⁵⁸ Hartmann, K., *Die grüne Lüge: Weltrettung als profitables Geschäftsmodell*, München: Blessing Verlag, 12 February 2019.

themselves with the name of the Textile Partnership without taking adequate measures.²⁵⁹ For many NGOs advocating for statutory regulations, the partnership is simply the second option.²⁶⁰ Even some of the socially and ecologically progressive corporations such as the manufacturer of sports equipment VAUDE are sceptical about the alliance, though still admitting that it is “better than nothing”.²⁶¹

As outlined in the NAP, the partnership has now “established an obligation to comply with sustainability standards and to guarantee corporate due diligence in the textile and clothing sector.”²⁶² Indeed, from this year on, members to the partnership are required to publish so-called annual roadmaps in which they formulate individual objectives along a list of indicators and implement measures to achieve these goals. Preceding the roadmaps, they have been required to establish a baseline assessment of their *status-quo* on the basis of which the roadmaps are to be formulated.²⁶³ As of 2019, the members must publish a progress report demonstrating the improvements that have been achieved in comparison to the *status quo* analysis. For each undertaking, the members must demonstrate whether the measures have been achieved or explain why they have not. The plausibility of this review process will then be examined by an external body. In case the information is rated as implausible, the member has the chance to revise the content.²⁶⁴

Since the indicators are designed according to the UNGPs, textile companies belonging to the partnership would likely fulfil the due diligence requirements set out in the German NAP – however, this is only in theory. If adequately implemented, corporations would know and prioritise their risks and possible negative impacts, have a system in place to identify all relevant business partners and manufacturers and oblige them to comply with the social alliance goals and provide victims of corporate human rights violations with adequate access to remedy. After the test phase in 2017 did not turn

²⁵⁹ Bündnis 90 Die Grünen, ‘Textilbündnis: Zwei Jahre staatlich gefördertes Fair-washing’, 14 October 2016, www.gruene-bundestag.de/presse/pressemitteilungen/2016/oktober/textilbuendnis-zwei-jahre-staatlich-gefoerdertes-fair-washing.html (accessed 8 June 2018).

²⁶⁰ Ibid.

²⁶¹ ‘Textilbündnis kommt in Bewegung – Vaude: „Besser als nichts“’, *Schwäbische Wirtschaft*, 19 July 2017, www.schwaebische.de/ueberregional/wirtschaft_artikel,-textilbündnis-kommt-in-bewegung-vaude-besser-als-nichts-_arid,10705031.html (accessed 18 May 2018).

²⁶² German NAP, p.20

²⁶³ Textil+mode, ‘Review-Prozess’, www.textil-mode.de/themen/textilbuendnis/review-prozess (accessed 18 May 2018).

²⁶⁴ Ibid.

out as promising as anticipated, it now remains to be seen whether companies fulfil the requirements this year.²⁶⁵ A contrary indication is that it is so far unclear what will happen if corporations do not adequately implement their measures. Even though the NAP talks of a “robust sanctions regime and regular reporting on the implementation of the roadmaps”²⁶⁶, the Development Minister has so far not provided clarification on the possible consequences for non-compliant corporations or the absence of adequate progress.²⁶⁷ Thus, it remains highly questionable whether corporations have to fear suspension from the alliance or any other robust sanctions.

Equally questionable is the issue of whether the Textile Partnership can raise its number of corporations to 75% by the end of 2018. At the moment, the partnership comprises approximately 50% of the German textile and clothing market - lower than in the previous year.²⁶⁸ Due to the new mandatory review process, several corporations left the alliance in 2017, arguing that the requirements for the roadmaps were too ambitious.²⁶⁹ As a response to an enquiry by the Green Party on how the German government plans on acquiring new members, the Federal Government referred to the conversations they are having with potential new members and the responsibilities of other alliance members in this regard.²⁷⁰ The conversations could now however become difficult: only recently, in April 2018, Müller announced the implementation of a national seal for sustainable textiles known as the “Green Button” which would help consumers to identify sustainable clothes. The Development Minister will be taking a large risk in claiming that clothes containing this seal would have been produced in a 100%

²⁶⁵ Südwind, ‘Eine intensive Zeit im Textilbündnis: Rückblick auf das Jahr 2017 und Ausblick auf 2018 aus Sicht der zivilgesellschaftlichen Vetreter_innen im Steuerungskreis’, 13 December 2017, www.suedwind-institut.de/index.php/de/aus-unseren-netzwerken/eine-intensive-zeit-im-textilbuendnis-rueckblick-auf-das-jahr-2017-und-ausblick-auf-2018-aus-sicht-der-zivilgesellschaftlichen-v.html (accessed 7 June 2018).

²⁶⁶ German NAP, p.20.

²⁶⁷ Koehler R., ‘Textilproduktion: Minister Müller droht Firmen mit Sanktionen – irgendwann’, *Fashionunited*, 23 June 2017, <https://fashionunited.ch/nachrichten/business/textilproduktion-minister-mueller-droht-firmen-mit-sanktionen-irgendwann/2017062311674> (accessed 19 May 2018).

²⁶⁸ Textilbündnis, <https://www.textilbuendnis.com/wer-wir-sind/das-buendnis/> (accessed 19 May 2018).

²⁶⁹ Szent-Ivanyl, T., ‘Faire Arbeitsbedingungen: Viele Konzerne verweigern sich dem Textilbündnis’, *Kölner Stadt-Anzeiger*, 30 July 2017, www.ksta.de/wirtschaft/faire-arbeitsbedingungen-viele-konzerne-verweigern-sich-dem-textilbuendnis--28088360 (accessed 19 May 2018).

²⁷⁰ Deutscher Bundestag, Kleine Anfrage, Drucksache 19/1551, 26 March 2018, <http://dip21.bundestag.de/dip21/btd/19/015/1901551.pdf> (accessed 19 May 2018).

sustainable and fair way.²⁷¹ Most of the partnership's member corporations oppose this idea. In their eyes, such a promise could never be guaranteed or comprehensively audited.²⁷² In principal, the approach to provide consumers with reliable information on the products they buy is a sensible one.²⁷³ At the same time, one can argue that the effort would now better be put into the review process and into supporting corporations in implementing adequate measures that comply with the requirements set out in the German NAP.

Parallel to the introduction of the new review process, the EU Parliament adopted a non-binding resolution on the subject of sustainable textiles. Having noted that “the existing voluntary initiatives for the sustainability of the garment sector's global supply chain have fallen short of effectively addressing human rights”, the parliament called on the EU Commission “to go beyond the presentation of a Staff Working Document and to propose binding legislation on due diligence obligations for supply chains in the garment sector”²⁷⁴. Due to the different interests within the EU, resolute action is not expected in the near future. As long as the EU Commission and Member States refrain from implementing due diligence legislation, initiatives such as the Partnership for Sustainable Textiles will play an important role. Despite its difficulties, by bringing corporations and other actors together to share best practices and to set objectives for the future, the alliance has the ability to foster sustainable standards. The experience and know-how of such multi-stakeholder initiatives is particularly valuable for the planned sector dialogues and the resulting sector guidelines. Partly due to the partnership's design and effort, the textile industry is positively compared to other German sectors and claimed to be the most progressed sector in reference to the implementation of HRDD.²⁷⁵ It is now important to clearly communicate the consequences business enterprises have to fear in case they

²⁷¹ Szent-Ivanyi, T., ‘Die Globalisierung gerecht gestalten: Entwicklungsminister Müller über faire Lieferketten und ein staatliches Siegel für faire Kleidung’, *Frankfurter Rundschau*, 24 April 2018, www.fr.de/wirtschaft/textilwirtschaft-die-globalisierung-gerecht-gestalten-a-1492783,2 (accessed 19 May 2018).

²⁷² Bochow, A., ‘Ein grüner Knopf für fair produzierte Kleidung’, *Schwäbisches Tagblatt*, 18 May 2018, www.tagblatt.de/Nachrichten/Ein-gruener-Knopf-fuer-fair-produzierte-Kleidung--373642.html (accessed 19 May 2018).

²⁷³ From an Interview with Lisa Fiedler, VAUDE, 7 June 2018.

²⁷⁴ European Parliament, ‘European Parliament resolution of 27 April 2017 on the EU flagship initiative on the garment sector (2016/2140(INI))’, 27 April 2017, para.5.

²⁷⁵ From Interviews with several stakeholders such as the DGCN, DGB and twentyfifty.

refrain from publishing their annual roadmaps or fail to formulate adequate measures leading to progress.

5.1.3. Review Process

The German NAP did not give many details about the planned review of the corporate implementation of the due diligence elements described in chapter III. According to the NAP, an annual survey “will be conducted on the basis of a representative sample to establish the number of enterprises that have introduced elements of due diligence ... and will also include qualitative interviewing on the substantive depth of these measures and the challenges encountered during their implementation in enterprises.”²⁷⁶ In case the findings of the survey reveal that by 2020 less than 50% of all German-based companies with more than 500 employees have incorporated those elements, the Federal Government will introduce legislative measures as outlined in the new coalition agreement. The monitoring survey is therefore of particular importance and thus the IMA’s key task.²⁷⁷ In order to achieve widespread acceptance and recognition of the final result by different actors such as civil society, the economy and the government, the samples must be designed in a thorough and comprehensible way as well as in line with “scientific standards” as stipulated in the NAP.²⁷⁸ No matter what the outcome of the survey is, instead of being called into question, the aim should be the approval on the part of all stakeholders.²⁷⁹ Moreover, since this comprehensive survey is so far a unique approach in both width and depth compared to other NAPs, it will not only be closely followed by German actors but also at the regional and international level.

According to the information from the Department for Business and Human Rights, the review has been divided into several stages.²⁸⁰ During the preparation of this thesis, an EU-wide tendering procedure took place selecting the company conducting the

²⁷⁶ German NAP, p.28.

²⁷⁷ Ebert, I., Conference, ‘Plan de Acción Nacional sobre Empresas y DDHH’, Seville, 15 June 2018.

²⁷⁸ From an interview with the Federal Ministry for Foreign Affairs, Department for Business and Human Rights, 17 April 2018; see also German NAP, p.28.

²⁷⁹ Ibid.

²⁸⁰ Ibid.

review.²⁸¹ On the basis of several differently weighted criteria - expertise in monitoring and evaluation of management processes, expertise in human rights issues and corporate HRDD procedures, and experience in equilibrating different stakeholder perspectives - a group of companies has been entrusted with the conception, implementation and evaluation of the surveys. The German Ernst & Young auditing company takes the lead in the work, while collaborating with three project partners: the German research and consultancy institute Adelphi, the German sustainable management consultancy Systain Consulting and the Swiss consultancy on business and human rights focusright.²⁸²

An initial qualitative survey is planned for the end of 2018. The sample will include approximately 30 companies from different sectors participating on a voluntary basis. Rather than statistical representativeness, this initial survey aims at gathering inputs, clarifying unclear questions and identifying technical problems.²⁸³ In 2019 and 2020, the actual quantitative surveys will be conducted. Germany is home to around 6,375 companies with more than 500 employees, which means the survey addresses approx. 3,150 (50%) business enterprises.²⁸⁴ In order to achieve a statistically representative sample, the survey needs to assess approx. 400 responses by different companies each year. Apart from the quantitative result, the surveys also intend to gather qualitative feedback such as on the challenges encountered by corporations during the implementation of the due diligence requirements.²⁸⁵ The Federal Government will decide on further steps on the basis of the final results, which will be expected by the end of 2020.

The general approach of the survey sounds promising. However, as the procedure is still in the initial phase and little is known about the sample's approach, it is difficult to draw any conclusions. In principle, it is regrettable that the tendering process was not immediately initiated at the beginning of 2017 shortly after the adoption of the NAP, allowing for the quantitative survey to start in 2018. Although it is to be welcomed that

²⁸¹ Details on the tendering can be found here: <https://www.evergabe-online.de/tenderdetails.html?0&id=182350> (accessed 21 May 2018).

²⁸² From an email exchange with the Federal Ministry for Foreign Affairs, Department for Business and Human Rights, 13 June 2018.

²⁸³ From an interview with the Federal Ministry for Foreign Affairs, Department for Business and Human Rights, 17 April 2018.

²⁸⁴ Ibid.

²⁸⁵ Ibid.

the Federal Government plans on conducting a first test phase in order to guarantee the comprehension and operability of the survey, these initial procedures could have already taken place by the end of 2017. As the Department for Business and Human Rights indicated, at the time of the NAP publication the relevant institutions were not yet prepared for their task.²⁸⁶ Another reason for the postponement of the survey initiation might have been the distractions of the federal elections taking place in the second half of 2017, the associated election campaign and eventually the lasting government formation. Despite this, the explicit intention to design the survey in a comprehensible, transparent and acceptable manner is still an important and laudable goal. It should thus be noted that such a comprehensive approach requires time and expertise.

As the survey process has been initiated, the Federal Government is now facing a difficult balancing act. CSOs, advocating for the implementation of a due diligence law, have been expressing their concerns and demands. According to CorA, the survey may not only cover whether and what kind of due diligence policies have been integrated in the corporation but also what the situation on-site actually looks like.²⁸⁷ The Friedrich Ebert Foundation fears that due to the optional character of the survey only those companies that have already integrated a decent amount of due diligence elements in their business procedures will participate in the sample.²⁸⁸ In addition, the question arises as to how the Federal Government will deal with a low response rate. If companies not responding to the survey are categorised as “non-compliant”, the outcome of the survey will most likely result in statutory regulation. On the other hand, if only those companies that respond to the survey are considered as part of the sample, the outcome might appear more positive than it actually is.²⁸⁹ Above all, the conversations with the DGCN, the DGB and the human rights consultancy twentyfifty have demonstrated that these stakeholders are sceptical as regards the realisation of the 50% benchmark by 2020.²⁹⁰

These reservations and concerns exemplify the difficult task the Federal Government is about to face. Since the 50% benchmark is a unique feature compared to

²⁸⁶ Ibid.

²⁸⁷ CorA, ‘Der Nationale Aktionsplan Wirtschaft und Menschenrechte: Erwartungen an die Umsetzung’, 7 March 2016, www.cora-netz.de/cora/der-nationale-aktionsplan-wirtschaft-und-menschenrechte-erwartungen-an-die-umsetzung/ (accessed 21 May 2018).

²⁸⁸ Friedrich Ebert Stiftung, ‘Ein Gesetz am Ende des Tunnels?’, 24 April 2018, www.fes.de/e/ein-gesetz-am-ende-des-tunnels/ (accessed 21 May 2018).

²⁸⁹ Ibid.

²⁹⁰ From Interviews with several stakeholders such as the DGCN, DGB and twentyfifty.

the other NAPs, all eyes will be on the survey outcome. After all, if the goal is not reached, according to their promise in the coalition agreement, the new government will have to take legislative measures.

5.2. Corporate Practice

With the adoption of the Guiding Principles in 2011, more and more corporations have been engaging with the topic of human rights and social standards in their supply chains. The expectations laid out in the German NAP as well as the general rise of the discourse have given the topic a new sense of urgency. Due to the ever-growing demand of consumers for sustainably produced goods and the increasing interest of investors in sustainability strategies of corporations, companies can no longer afford to refrain from addressing the conditions in their supply chains. Thus, after having discussed and analysed the quality of the German NAP and the implementation status of the measures laid out therein, it is important to take a look at the corporate practice with regard to human rights. In the following, the thesis addresses the question whether the adoption of both the Guiding Principles and the German NAP has fostered corporate conduct towards implementing HRDD. For this purpose, three different German industry sectors - textile, automotive and energy – have been chosen. Companies such as Tchibo, Daimler and RWE, which are among others discussed in this section, had also participated in the stakeholder consultations phase during the NAP drafting.

5.2.1. Textile Sector

The textile industry has been one of the most controversial sectors regarding the topic of sustainability and human rights. In the years of 2012 and 2013, several tragedies, such as the disastrous collapse of the Rana Plaza building in Bangladesh, revealed the catastrophic working conditions in producing countries. These incidents served as a wake-up call – states, companies and CSOs agreed on the urgency to improve social standards in the textile supply chains. At the same time, these disasters sensitised consumers about the poor working conditions in the clothing industry, who increasingly demand fair and ecologically produced clothes. However, regarding the question whether there has been tangible improvement within the last couple of years, opinions differ

widely. On the one hand, the interviews carried out in the context of this thesis indicate that the textile sector is the German branch of industry that has progressed the most in complying with the Guiding Principles.²⁹¹ In particular, those companies belonging to the Textile Partnership are slowly implementing due diligence processes in their business activities. On the other hand, critical voices have been claiming that no substantial changes have been reached and working conditions continue to be inadequate.²⁹² Many corporate initiatives or special production lines (e.g. the G-Star “Raw for the Ocean” collection produced in collaboration with musician Pharrell Williams) are still associated with greenwashing practices.²⁹³

For a long time, the most prominent attempt to evaluate operating procedures and code of conducts in the factories of producing countries has been to carry out social audits. However, the disastrous events within the textile industry have shown that social audits are not sufficient in order to substantially and lastingly improve the situation on-site. Although audits are necessary for identifying visible defects such as missing security measures, they can rarely identify long-term problems as they only show an ad-hoc insight.²⁹⁴ Thus, there is a risk that employees are pressured to give prepared answers to the auditors’ questions, providing a distorted picture of the situation. Moreover, social audits only capture the situations on-site, however do not scrutinise the practices of buying companies such as the exertion of downward pressure on prices and delivery times.²⁹⁵ Incidents such as the fire in the Ali Enterprises factory in which KiK had produced its clothes reveal the insufficient reliability of audits and certifications. Only three weeks before the tragedy, the factory had been certified to the international standard SA8000, a recognised overall framework to evaluate social and labour standards.²⁹⁶ These shortfalls as well as the adoption of the UNGPs and the following NAP movement have led to the fact that more and more corporations have changed or expanded their

²⁹¹ From Interviews with several stakeholders such as the DGCN, DGB and twentyfifty.

²⁹² Hartmann, 2018.

²⁹³ Ibid.

²⁹⁴ Burckhardt, G., *Corporate Social Responsibility – Mythen und Maßnahmen: Unternehmen verantwortungsvoll führen, Regierungslücken schließen*, 2nd ed., 9 January 2014, p.116ff; see also Terwindt C. and Saage-Maass, M., ‘Liability of Social Auditors in the Textile Industry’, *Friedrich Ebert Stiftung*, December 2016, available at www.ecchr.eu/fileadmin/Publikationen/Policy_Paper_Liability_of_Social_Auditors_in_the_Textile_Industry_FES_ECCHR_2016.pdf (accessed 5 June 2018).

²⁹⁵ Ibid.

²⁹⁶ Burckhardt, 2014, p.116.

approaches to the topic of human rights. While there are still many business enterprises focusing on this top-down approach of social auditing, several forerunner companies pursue a more comprehensive and participative approach. In the following, three of these best practice examples are analysed in more detail.

In the past years, both the internationally operating manufacturer of sport goods, adidas, and one of the largest German consumer goods and retail companies, Tchibo, have been incorporating due diligence processes into their business activities. According to the results of the Corporate Human Rights Benchmark (CHRB), a multi-stakeholder initiative establishing comparative snapshots of the human rights performance of the largest corporations worldwide, adidas is one of the leading companies.²⁹⁷ Out of 98 corporations from different sectors, adidas is ranked fifth with a score of 56% (highest score: 69%).²⁹⁸ In addition, adidas has for the second time been ranked highest according to the 2018 Fashion Transparency Index of the Fashion Revolution, a not-for-profit movement around the world. Out of 150 large business enterprises, adidas reached a score of 144,5 (out of 250), disclosing a majority of policies and procedures on their website and in reports.²⁹⁹ The aim of the index is to provide consumers and stakeholders with comparable information on the social and environmental performance of the most popular brands.³⁰⁰

The department responsible for the topic of human rights at adidas is the Social & Environmental Affairs (SEA) department, which is led by a human rights lawyer and is located within 20 different countries.³⁰¹ In order to be able to manage the risks throughout the supply chains, adidas conducts an annual “high level assessment of socio-political and human rights issues”³⁰² of the various countries in which the corporation produces its goods. Within its risk management system, adidas integrates human rights on equal terms with other business considerations. Since the adoption of the UNGPs, adidas has been enhancing its due diligence processes publishing for example a FAQ on human rights and

²⁹⁷ Corporate Human Rights Benchmark, <https://www.corporatebenchmark.org> (accessed 5 June 2018).

²⁹⁸ Ibid.

²⁹⁹ Fashion Revolution, ‘Fashion Transparency Index 2018’, p.25, http://issuu.com/fashionrevolution/docs/fr_fashiontransparencyindex2018?e=25766662/60458846 (accessed 5 June 2018).

³⁰⁰ Ibid., p.17.

³⁰¹ Adidas Group, ‘Social and Environmental Affairs Team’, http://sustainabilityreport.adidas-group.com/en/SER2007/b/b_2_2.asp (accessed 5 June 2018).

³⁰² Adidas response to the BHRRC, www.business-humanrights.org/en/adidas-0 (accessed 5 June 2018).

responsible business practices and strengthening its complaint mechanisms.³⁰³ In case of potential or actual violations of human rights, individuals or organisations can make a complaint through the Third Party Complaint Mechanism. Complainants can either make use of the hotline number that is advertised in factories or send an email or letter to the SEA department. Each year the complaints and outcomes are published on the corporation's website.³⁰⁴ Adidas furthermore indicates that complaints can also be made through the Fair Labor Association which is a multi-stakeholder initiative in the US, or through the German NCP. Only recently in March 2018, the German NGO Clean Clothes Campaign announced its intention to file "a complaint against adidas to the German National Contact Point of the OECD for failing to provide access to remedy to 327 workers from their Indonesian shoe supplier Panarub."³⁰⁵ The incident dates back to 2012, when workers were dismissed after they went on a strike to demand the payment of higher wages. The NGO accuses adidas of violation of the OECD Guidelines and the UNGPs by not having adequately carried out HRDD.³⁰⁶ Adidas reacted to the allegations, claiming that there are "no justifiable grounds for such a complaint."³⁰⁷ However, adidas would be "happy to share with the NCP [its] efforts and actions to date to seek remedies and to assist the parties resolve their longstanding dispute."³⁰⁸ This shows that forerunner companies are not immune to human rights issues in their supply chains. However, it is important that companies are aware of these risks, and implement measures and actions to avoid or react to negative impacts, and are open to conflict resolution procedures. Thus, adidas admits that even though it has "very robust systems in place to identify and address potential and actual human rights impacts"³⁰⁹, the company also highlights that there are

³⁰³ Adidas, 'Human Rights', www.adidas-group.com/en/sustainability/compliance/human-rights/#/policies-and-guidance/ (accessed 5 June 2018).

³⁰⁴ Adidas, 'Human Rights: Due Diligence Approach', www.adidas-group.com/en/sustainability/compliance/human-rights/#/policies-and-guidance/ (accessed 5 June 2018).

³⁰⁵ Clean Clothes Campaign, 'Clean Clothes Campaign files complaint against Adidas for breaching OECD guidelines in Indonesia', 14 March 2018, <https://cleanclothes.org/news/2018/03/14/clean-clothes-campaign-files-complaint-against-adidas-for-breaching-oecd-guidelines-in-indonesia> (accessed 6 June 2018).

³⁰⁶ Ibid.

³⁰⁷ Adidas, 'Response to CCC's Filing of an OECD NCP Complaint re. PT Panarub Dwikarya Benoa (PDB)', 16 March 2018, www.business-humanrights.org/en/clean-clothes-campaign-to-file-complaint-against-adidas-to-german-national-contact-point-for-allegedly-breaching-oecd-guidelines-in-indonesia-incl-co-response#c170572 (accessed 6 June 2018).

³⁰⁸ Ibid.

³⁰⁹ Adidas response to the BHRRC.

still areas in which they have to further assess and strengthen the oversight of human rights issues.

Tchibo, one of the largest consumer goods and retail companies in Germany, has been focusing on a so far unique approach. For the purpose of this thesis, a focus will be set on a particular initiative within Tchibo's sustainability strategy, the Worldwide Enhancement of Social Quality Programme (hereinafter WE-Programme). The WE-Programme originates from a development collaboration between the public and private sector. Together with the German Agency for International Cooperation, a federal enterprise supporting the German government in its development projects, the BMZ and Tchibo initiated the programme in 2007, starting with a four-year pilot phase.³¹⁰ For the past few years, Tchibo has been continuing the project on its own. The WE-Programme pursues a participative approach, bringing managers and workers of factories together to identify and discuss issues through problem-solving methods and conflict moderation.³¹¹

The programme proceeds in four steps: as the first step, a preparation phase takes place during which Tchibo selects and invites factories to participate in the project, undertakes a baseline analysis of the major challenges in the factories and recruits local trainers.³¹² As the second step, the local trainers (which later take the role as mediators in the dialogues) are trained and prepared for their task. As they speak the native language and are familiar with the cultural values of the respective country, they are important intermediaries. Apart from knowledge on social standards, they also receive training on moderating techniques.³¹³ In the third phase, dialogue-oriented workshops take place which are constantly accompanied by these trainers. Small groups from different suppliers consisting of managers and employees come together to identify problems related to social standards, analyse the causes thereof and agree on future goals which are then collected in action plans for each facility. Within a one or two year cycle, several of those workshops are carried out. In between, the local trainers support the production

³¹⁰ WE-Programme, 'Project Partners in the Pilot Phase', www.we-socialquality.com/Project-WE/Project-parties.aspx?l=2 (accessed 6 June 2018).

³¹¹ Tchibo, 'WE – Der Mensch im Mittelpunkt', www.tchibo.de/gut-gemacht-das-we-programm-c400059065.html (accessed 6 June 2018).

³¹² WE-Programme, 'Program Flow – how WE is designed', www.we-socialquality.com/controller.aspx?n=23&l=2 (accessed 6 June 2018).

³¹³ Ibid.

facilities on-site and evaluate the implementation status of the measures.³¹⁴ In the final step, the implementation process is followed-up and continuously developed. Through a reporting process, Tchibo is able to identify whether further adjustments are needed. In order to guarantee capacity-building, a WE team is set up in each factory which repeatedly participates in training activities such as individual coaching and trainer conferences.³¹⁵

The WE-Programme is a best practice example in several aspects: first of all, the project shows the importance of collaborations between the public and private sector in the development area and demonstrates how such a partnership can work in practice. Beyond that, the programme exemplifies how a participative approach can lead to substantial changes in production facilities in comparison to a top-down process. Although the approach takes time and might require greater resources, it achieves long-term effects. Instead of an ad-hoc visit, the WE-programme follows a dynamic and lasting approach during which adjustments are made, trainers are further qualified and dialogue is encouraged. Above all, instead of imposing ways of improvement and making decisions upon suppliers, the project anticipates involving affected groups in often vulnerable situations and gives them the opportunity to communicate their concerns. Accordingly, Tchibo was able to implement the programme in 363 factories and eleven different countries. In total, the company reached out to approximately 50,000 employees who have been taking part in the programme (status as of May 2018).³¹⁶

However, the German pioneer company in the field of sustainability is the manufacturer of sports equipment VAUDE. VAUDE is a family-managed medium-sized company with approximately 1,000 employees based in the south of Germany. Since 2009, the company has been pursuing a sustainable approach, understanding sustainability as their brand essence and thus integrating ecological and social processes in all their business activities. In 2015, it received the German Sustainability Award as Germany's most sustainable company. This award is endorsed by the Federal Government together with business associations and various national and international

³¹⁴ Ibid.

³¹⁵ Ibid.

³¹⁶ Probe, A., 'Arbeitsbedingungen in Asiens Textilfabriken: Tschibo setzt in Asien auf langfristige Wirkungen', *Textilwirtschaft*, 7 May 2018, www.textilwirtschaft.de/business/unternehmen/arbeitsbedingungen-bilanz-nach-zehn-jahren-dialogprogramm-we-in-tchibo-fabriken-210035 (accessed 6 June 2018).

NGOs.³¹⁷ At the international level, VAUDE was able to prevail over 33,000 other companies, receiving the esteemed European Business Award for Environmental and Corporate Sustainability.³¹⁸ In order to raise the social standards along its supply chain, VAUDE has closely been collaborating with the European non-profit and multi-stakeholder initiative Fair Wear Foundation (FWF). The FWF “works with brands, factories, trade unions, NGOs and sometimes governments to verify and improve the workplace conditions for garment workers in 11 production countries in Asia, Europe and Africa.”³¹⁹ Each year the FWF examines whether VAUDE’s management system is established in a manner that leads to an improvement or maintenance of the standards.³²⁰ In addition, the FWF carries out social audits in the production sites in which VAUDE produces its goods. Apart from monitoring the documents and security situation of the facilities, the auditors keep close contact with the employees. Based on these audits, VAUDE establishes action plans which are continuously implemented. After two years, another audit takes place to review whether the measures have been implemented and if improvement can be found.³²¹ Furthermore, the employees in the production facilities have the opportunity to report complaints to the FWF, which are supervised by a local employee of the FWF. VAUDE is obliged to solve the problem with the manufacturer which will be monitored and later published by the FWF. Overall, VAUDE pursues the approach of consolidating relationships with manufacturers in the long term. Instead of terminating a contract with the manufacturer in cases of human rights violations, VAUDE engages with the facility and intends to solve the solution.³²² In the FWF’s Brand Performance Check of 2018, VAUDE reached a benchmark of 94 out of 100, meaning that the company complies with the Code of Labour Practice, a code comprised of eight ILO labour standards and the UN Declaration on Human Rights, and thus assumes leader

³¹⁷ Deutscher Nachhaltigkeitspreis, www.nachhaltigkeitspreis.de/wettbewerbe/unternehmen/preistraeger-unternehmen/2015/vaude-sport-gmbh-co-kg/ (accessed 7 June 2018).

³¹⁸ European Business Awards, ‘Winners named in Grand Final of 2016/17 European Business Award’, 4 May 2017, www.businessawardseurope.com/news/item/europes-best-businesses-named-in-2016-17-european-business-awards (accessed 7 June 2018).

³¹⁹ Fair Wear Foundation, ‘What is FWF’, available at <https://www.fairwear.org/about/> (accessed 7 June 2018).

³²⁰ Chefsache, ‘Integrated Reporting – Transparente Berichterstattung bei VAUDE’, [online video], 30 March 2017, www.youtube.com/watch?v=UJ9mC1GrWbI (accessed 7 June 2018).

³²¹ Ibid.

³²² Ibid.

status within the FWF.³²³ As a leading company in the field of sustainability, the German NAP did not play any particular new role within the business activities of VAUDE. Lisa Fiedler, who is responsible for sustainable matters at VAUDE, regards the German NAP as little relevant for most corporations as it does not include regulatory measures.³²⁴ Nonetheless, she observes an increasing number of corporations engaging with the topic of social standards and due diligence processes in their supply chains.³²⁵

Within the textile sector, adidas, Tchibo and in particular VAUDE are forerunner companies in the field of human rights. The examples demonstrate that comprehensive engagement with and improvement of sustainable issues is best achieved in collaboration with various stakeholders. While these best practice examples provide an insight into particularly progressive initiatives and business practices, they also show that forerunner companies are still confronted with challenges. Even though adidas is advanced in respecting human rights according to the UNGPs, the performance outcome of the CHRB and the Fashion Transparency Index demonstrate that there is still considerable room for improvement. According to Antje von Dewitz, who is the CEO of VAUDE, all corporations should be obliged to respect human rights in their global supply chains and thus implement due diligence procedures in their business operations. She argues that no comprehensive change can be achieved on-site if only a few companies make the effort. In order to ensure a fair level playing field, VAUDE is clearly advocating for mandatory minimum standards.³²⁶

5.2.2. Automobile Sector

The automobile industry plays an essential role in Germany. Together with China, Japan and the US, Germany belongs to the largest car manufacturers worldwide. In terms of turnover, it is the most important branch of industry in Germany. Lately, companies such as Volkswagen, Daimler, BMW, Audi and Porsche together have been employing around 808.000 employees.³²⁷ Thus, the sector has been contributing in great aspects to

³²³ Fair Wear Foundation, 'VAUDE Brand Performance Check 2018', www.fairwear.org/member/vaude-sport-gmbh-amp-co-kg (accessed 6 June 2018).

³²⁴ Interview with Lisa Fiedler, VAUDE, 7 June 2018.

³²⁵ Ibid.

³²⁶ "'Die Kunden wollen ein gutes Gewissen': VAUDE-Chefin Antje von Dewitz im Interview", *Südkurier*, 13 April 2018, www.suedkurier.de/suche (accessed 28 May 2018).

³²⁷ Ibid.

the creation of employment and the enhancement of social standards in Germany. In the same way, it means that the automotive supply chain is steadily growing. This can entail negative impacts: the more tiers there are in a supply chain, the more difficult it becomes to overlook and retrace the origins of the raw materials and the conditions under which they are being extracted and further processed. The acquisition of raw materials, for example cobalt, poses a particular challenge for these companies. In 2016, Amnesty International revealed in its report *This is What We Die For* the “hazardous conditions in which artisanal miners, including thousands of children, mine cobalt in the Democratic Republic of the Congo.”³²⁸ Cobalt is a key element in rechargeable lithium-ion batteries, which are used in cell phones and electronic items as well as electric cars. Since the industry for electric cars has been growing in the past years, the demand for and prices of cobalt have similarly increased and will continue to do so in the future. In order to fulfil their responsibility to respect human rights, corporations must implement and improve their due diligence practices in order to prevent and mitigate human rights violations in their supply chains. However, according to Amnesty International’s follow-up report *Time to Recharge*, the German automobile sector still lags behind, in particular when it comes to the disclosure of refiners and mitigation of supply chain risks.³²⁹ Amnesty concluded that even though the German automobile company BMW appears to have the best overall performance compared to the surveyed electric vehicle producers, important steps still need to be taken.³³⁰

Nevertheless, over the past years a lot has been done in the automobile sector that should be given credit. Due to the limited scope of this thesis, focus will be set on two automobile companies: Daimler and BMW. With the accession to the Global Compact in the early 2000’s, both companies started to engage with the topic of human rights and from then on continuously expanded their human rights commitment. In 2012, a clear change of language can be identified in the sustainability reports. The Guiding Principles and thus the idea of a corporate HRDD became the main reference framework for

³²⁸ Amnesty International, <https://www.amnesty.org/en/documents/afr62/3183/2016/en/> (accessed 28 May 2018).

³²⁹ Amnesty International, ‘Time to Recharge: Corporate Action and inaction to tackle Abuses in the Cobalt Supply Chain’, 2017, www.amnesty.org/download/Documents/AFR6273952017ENGLISH.PDF (accessed 27 May 2018).

³³⁰ Ibid, p.100.

respecting human rights in the supply chain. For example, as a response to the endorsement of the UNGPs, BMW carried out its first comprehensive human rights risk analysis along the value chain in order to be able to implement adequate due diligence procedures.³³¹ In 2011, Daimler also established a risk assessment system. On the basis of the Human Rights Compliance Assessment tool of the DIHR³³², Daimler examined the production sites in three countries in 2011, followed by eight more in 2012.³³³ Early on, BMW and Daimler started to oblige their suppliers to respect human rights, organised training courses for employees and implemented complaint management systems.

In 2017, both sustainability reports make a reference to the German NAP. In this regard, BMW is in contact with the Foreign Ministry and the BMAS in order to receive information on the further specification of the provisions.³³⁴ For complying with the due diligence requirements outlined in the NAP and the UNGPs, Daimler is currently implementing a so-called Human Rights Respect System (HRRS).³³⁵ Since 2013, Daimler has been developing the HRRS, an extended and systematic management approach for human rights comprising risk identification, programme control, monitoring and reporting.³³⁶ In recent months in particular, the HRRS has been increasingly discussed in German newspapers as it is now entering its crucial phase. By the end of 2018, it is expected that the system's methodology will be finalised. By 2020, the system is supposed to be established in all supply chains.³³⁷ On the basis of the HRRS, Daimler anticipates to identify systematic risks and possible negative human rights impacts of their corporate activities at an early stage. The procedure comprises four phases: 1) the

³³¹ BMW, 'Sustainable Value Report 2012', www.bmwgroup.com/content/dam/bmw-group-websites/bmwgroup_com/responsibility/downloads/de/2012/BMWGroup_SVR2012_DE_Onlineversion_130513.pdf (accessed 27 May 2018).

³³² DIHR, 'Human Rights Compliance Assessment', www.humanrights.dk/business/the-human-rights-compliance-assesment (accessed 27 May 2018).

³³³ Daimler, 'Nachhaltigkeitsbericht 2013', www.daimler.com/dokumente/nachhaltigkeit/sonstiges/daimler-nachhaltigkeitsbericht-2013.pdf (accessed 27 May 2018).

³³⁴ BMW, 'Sustainable Value Report 2017', www.bmwgroup.com/content/dam/bmw-group-websites/bmwgroup_com/ir/downloads/en/2017/BMW-Group-SustainableValueReport-2017--EN.pdf.

³³⁵ Daimler, 'Nachhaltigkeitsbericht 2017', p.83, www.daimler.com/dokumente/nachhaltigkeit/sonstiges/daimler-nachhaltigkeitsbericht-2017.pdf (accessed 28 May 2018).

³³⁶ Daimler, 'Nachhaltigkeitsbericht 2014', p.43ff, www.daimler.com/dokumente/nachhaltigkeit/sonstiges/daimler-nachhaltigkeitsbericht-2014.pdf (accessed 28 May 2018).

³³⁷ Daimler, 'Nachhaltigkeitsbericht 2017', p.83.

identification of potential human rights risks, 2) the definition, initiation and management of preventive and counteractive measures, 3) the monitoring of the effectiveness of the measures, in particular the high risk entities, and 4) the fulfilment of reporting requirements.³³⁸ According to Renata Jungo-Brüngger, Head of the Integrity and Legal Affairs Department, Daimler thus complies with the due diligence requirements set out in the German NAP.³³⁹ In case the HRRS is capable of making the supply chains as transparent as possible, it is a promising approach. On the basis of this system, Daimler has already suspended one of its suppliers as it did not provide the required evidence demonstrating compliance with human rights.³⁴⁰

BMW has also been actively integrating HRDD processes into its corporate activities over the last few years. In 2016, BMW incorporated the human rights requirements into their global compliance management system with the aim of increasingly respecting human rights at all their locations.³⁴¹ In 2017, BMW conducted a global Human Rights Compliance Assessment covering more than 90% of BMW's organisational units. The identified potential for optimisation will be addressed in 2018. In addition to this, in May 2017 BMW concluded its report pursuant to the UK Modern Slavery Act for the first time. The due diligence process comprises various measures from employee training, complaint mechanisms, contractual requirements for business partners, regular reporting to contractual requirements and training for suppliers. With regard to the complaint possibilities, BMW established a Helpline BMW Group Compliance Contact. In case of possible human rights violations, people can anonymously call the BMW Group SpeakUp Line.

Apart from their own due diligence processes, BMW and Daimler have been members of Drive Sustainability, "a partnership of 10 leading automotive companies that work together to improve sustainability in the supply chain."³⁴² In March 2017, Drive Sustainability was launched. It replaced the European Automotive Working Group on

³³⁸ Ibid, p.84.

³³⁹ Gerster, M., 'Stärkere Kontrolle in der Lieferkette: Daimler will Menschenrechte besser schützen', *Automobilwoche*, www.automobilwoche.de/article/20180502/NACHRICHTEN/180509986/staerkere-kontrolle-der-lieferkette-daimler-will-menschenrechte-besser-schuetzen (accessed 28 May 2018).

³⁴⁰ Ibid.

³⁴¹ BMW, 'Sustainable Value Report 2017', p.32ff.

³⁴² Drive Sustainability, '10 of the biggest world automakers partner to launch 'Drive Sustainability'', 29 March 2017, <https://drivesustainability.org/mediaroom/10-of-the-biggest-world-automakers-partner-to-launch-drive-sustainability/> (accessed 28 May 2018).

Supply Chain Sustainability, with the aim to “evolve from a group of companies working together to a leadership industry initiative, pushing for innovative and impactful approaches to enhance supply chain sustainability.”³⁴³ The partnership concentrates on working together with suppliers, on establishing common requirements and organising training series, events and local networks. In this regard, a Self-Assessment Questionnaire has been established in order to assess the sustainable and social performance of suppliers.³⁴⁴ Additionally, the partnership has commissioned the sustainable advisory firm, the Dragonfly Initiative, to conduct a Raw Materials Observatory, which assesses environmental, social and corporate governance risks in the sourcing of raw materials and identifies possibilities for joined actions.³⁴⁵ Recently, in April 2018, the partnership introduced a risk assessment study at the OECD Forum on responsible mineral supply chains in Paris, which comprises the assessment of 37 materials processed in automobile and electronic products.³⁴⁶

The recent developments and examples show that a fair amount has happened in the automobile sector. The German automotive industry is aware of its responsibility to respect human rights. Customers and investors have increasingly been demanding sustainably produced goods.³⁴⁷ From the outset, the companies have been implementing due diligence processes which are continuously improved and extended. With the Drive Sustainability partnership, automotive corporations respond to the disclosures and criticism by Amnesty International. In order to overlook the raw material extraction in countries such as the Democratic Republic of Congo and to prevent adverse human rights violations such as child labour, not only joined action by corporations is required but also collective action by all stakeholders, civil society organisations, the government and companies.

³⁴³ Ibid.

³⁴⁴ Drive Sustainability, ‘Compliance’, <https://drivesustainability.org/compliance/> (accessed 28 May 2018).

³⁴⁵ Drive Sustainability, ‘Raw Materials’, <https://drivesustainability.org/raw-materials/> (accessed 28 May 2018).

³⁴⁶ Drive Sustainability, ‘Automotive now has a tool to assess risks linked to raw materials’, 18 April 2018, <https://drivesustainability.org/mediaroom/automotive-now-has-a-tool-to-assess-risks-linked-to-raw-materials/> (accessed 28 May 2018).

³⁴⁷ From an Interview with Carolin Seeger, twentyfifty, 3 May 2018.

5.2.3. Energy Sector

There is hardly any other industry branch that is more associated with human rights violations than the energy sector. More precisely, almost one third of human rights complaints can be assigned to the raw materials and energy industry.³⁴⁸ Mega projects such as the construction of dams for hydro power plants, the building of wind farms and the mining of coal can cause a series of human rights abuses: whole communities are forced to relocate; the environment is severely contaminated, destroying livelihoods or leading to diseases; and activists and human rights defenders are intimidated, injured or killed. Most of the time these communities are not included in the decision-making, let alone receive adequate compensation and support. Furthermore, the energy sector is the main cause of the global climate change which in turn increasingly endangers human rights – according to former UN High Commissioner for Human Rights Mary Robinson, climate change constitutes the biggest threat to human rights.³⁴⁹

As the seventh largest energy consumer worldwide³⁵⁰, Germany has an important role to play to ensure that human rights violations are protected throughout the supply chains of German energy companies. At the same time, corporations must act with due diligence to mitigate and prevent human rights violations connected to their business activities. However, a comprehensive investigation conducted in 2017 by Germanwatch and Misereor, two German CSOs, shows that neither the German state is living up to its duty nor are German energy companies adequately exercising their HRDD in their international business activities.³⁵¹ Energy companies are in many cases in whole or in part held by public authorities. Apart from the large supra-regional energy corporations, there are around 1,000 public utility companies in Germany mainly owned by municipalities.³⁵² However, as analysed in chapter four of this thesis and as discussed by Germanwatch and Misereor, the German state does not fulfil its particular responsibility or uses its leeway to oblige state-owned companies or business enterprises receiving

³⁴⁸ Germanwatch and Misereor, 'The Global Energy Sector and Human Rights: Putting German Business and Policy to the Test', 2017, p.7, <http://germanwatch.org/de/download/20709.pdf> (accessed 30 May 2018).

³⁴⁹ World Future Council, 'Climate change – the greatest threat to human rights in the 21st century', 6 July 2016, www.worldfuturecouncil.org/climate-change-greatest-threat-human-rights-21st-century/ (accessed 10 July 2018).

³⁵⁰ For the statistics, see: <https://de.statista.com/themen/1288/energiemarkt/> (accessed 30 May 2018).

³⁵¹ Germanwatch and Misereor, 2017.

³⁵² Ibid., p.28.

foreign trade promotion to comply with HRDD requirements. At this point, companies do not have to fear any sanctions or legal consequences.

This is also reflected in the practices of the German energy corporations. According to Germanwatch and Misereor, none of the 30 surveyed corporations can demonstrate HRDD standards in accordance with the UNGPs, or as it is expected since the end of 2016 in the German NAP. The study reveals that only seven companies have adopted a policy statement concerning the respect for human rights.³⁵³ While two-thirds of the corporations have conducted human rights risk assessments, only eight have included potentially affected communities³⁵⁴ and only two have published their analysis.³⁵⁵ In their annual sustainability reports, only nine of the thirty companies engage with the topic of human rights in a separate chapter.³⁵⁶ While most companies have implemented complaint mechanisms and contact points, only a few indicate to have complaint procedures abroad.³⁵⁷ The study concludes that even though more and more companies are engaging with the topic of human rights, serious deficits still remain.³⁵⁸

For the purpose of this thesis, three of the largest German energy corporations in terms of turnover will be analysed in more detail as they have the necessary resources and could serve as exemplary functions in the energy sector. In the previous years, EnBW, the third largest energy corporation in Germany, has repeatedly been in the headlines for its collaboration with the controversial company Drummond for extracting coal in Colombian mines. Drummond has been accused for having supported paramilitary forces which are said to have killed critics of the coal mining.³⁵⁹ So far, EnBW did not intend to assume responsibility and to draw consequences.³⁶⁰ On its homepage, EnBW commits to the UN Human Rights Charter and claims to be in the process of implementing the Guiding Principles. In this regard, EnBW intends to meet the requirements of a

³⁵³ Ibid., p.138.

³⁵⁴ Ibid., p.9

³⁵⁵ Ibid., p.139.

³⁵⁶ Ibid., p.9.

³⁵⁷ Ibid., p.141.

³⁵⁸ A response from several energy corporations can be found at <http://www.spiegel.de/media/media-41299.pdf> (accessed 30 May 2018).

³⁵⁹ Koch, H., 'Wenn für Strom gemordet wird', *Taz*, www.taz.de/!5424237 (accessed 30 May 2018).

³⁶⁰ Müller, A., 'Neue Vorwürfe um Kohle aus Kolumbien', *Stuttgarter Zeitung*, 18 October 2016, www.stuttgarter-zeitung.de/inhalt.karlsruher-energiekonzern-enbw-neue-vorwuerfe-um-kohle-aus-kolumbien.432f9a38-412c-459b-9e17-ab167eba73d8.html (accessed 30 May 2018).

sustainable supply chain and to take adequate measures.³⁶¹ In its principles of conducts for the procurement of raw materials, the corporation has been laying down its expectations towards direct suppliers and business partners to respect human rights.³⁶² However, in the code of practice for its employees, EnBW has missed the opportunity to make any reference to human rights.³⁶³ The newest integrated annual report of 2017 indicates that EnBW anticipates the expansion of direct supply relationships with the aim of exerting more influence on producers. At the end of 2017, the first contract of its kind was established.³⁶⁴ The report furthermore states that suppliers are repeatedly subject to a multi-tiered screening process which is followed up by the compliance department.³⁶⁵ In the case that the screening reveals non-compliance or adverse human rights impacts, EnBW reserves the right to terminate the contract relationship.³⁶⁶ At least once a year, the sustainability committee comes together to discuss the performance of all relevant suppliers and elaborates on remedial measures where necessary.³⁶⁷ In addition, EnBW makes a reference to the German NAP on business and human rights. According to the report, the further development of the measures for sustainable coal procurement are influenced by the recommendations of the German NAP. In this context, EnBW has deepened its collaboration with governmental and non-governmental representatives.³⁶⁸ Apart from these positive approaches, the newest development is to be welcomed in particular. At the shareholders' meeting on 8 May 2018, EnBW responded to the critic of shareholders regarding the coal procurement policies, announcing that the company has intensively dealt with the matter of responsible procurement and will expand the direct

³⁶¹ EnBW, www.enbw.com/unternehmen/konzern/ueber-uns/verantwortung/unser-beitrag/ (accessed 30 May 2018).

³⁶² EnBW, 'Verhaltensgrundsätze für die verantwortliche Beschaffung von Steinkohle und anderen Rohstoffen', 15 July 2014, www.enbw.com/media/konzern/docs/verantwortung/2014_07_15a-verhaltensgrundsätze-enbw-v1.0.pdf (accessed 30 May 2018).

³⁶³ EnBW, 'Regeln einhalten – Verantwortung übernehmen', www.enbw.com/media/investoren/docs/corporate-governance/verhaltenskodex-des-enbw-konzerns.pdf (accessed 30 May 2018).

³⁶⁴ EnBW, 'Integrierter Geschäftsbericht 2017', p.47, www.enbw.com/media/downloadcenter-konzern/geschaeftsberichte/enbw-integrierter-geschaeftsbericht-2017.pdf (accessed 29 May 2018).

³⁶⁵ Ibid.

³⁶⁶ Ibid.

³⁶⁷ Ibid.

³⁶⁸ Ibid.

supplier relationships on the basis of a clear schedule.³⁶⁹ The German environment and human rights organisation *urgewald* welcomes the commitment of EnBW to conduct a profound analysis and to make the situation in Colombia a main priority. At the same time, however, *urgewald* emphasises that other energy companies such as Vattenfall GmbH are more advanced in respecting human rights.³⁷⁰

The Vattenfall GmbH is a German subsidiary of the Swedish energy corporation Vattenfall and the fourth largest energy company in Germany. On its homepage, Vattenfall GmbH commits to take into account and address impacts on the local communities.³⁷¹ The newly updated code of conduct for suppliers makes specific reference to human rights. The corporation expects its suppliers to respect all internationally recognised human rights and reserves the right to conduct due diligence along the supply chains. In case of violations, suppliers are required to take adequate steps to solve the issue. If the violations continue to be taking place or the supplier refrains from disclosing the relevant information, Vattenfall GmbH will initiate the suspension or termination of the business relationship.³⁷² In particular in high risk areas, suppliers are expected to carry out profound due diligence.³⁷³ Through a whistleblower procedure, employees, contractors and other stakeholders have the opportunity to report irregularities. In seven countries, Vattenfall provides a complaint contact in form of an external ombudsman.³⁷⁴ In contrast to EnBW, Vattenfall makes an explicit reference to human rights in the company's code of conduct, committing to respect human rights on the basis of the principles of the Global Compact.³⁷⁵

³⁶⁹ Drews, E., 'EnBW-Hauptversammlung: EnBW-Aktionäre bangen um Kraftwerke', *Stuttgarter Zeitung*, 8 May 2018, www.stuttgarter-zeitung.de/inhalt.enbw-hauptversammlung-enbw-aktionaere-bangen-um-kraftwerke.c119952d-ed49-4049-b403-f6662b8d680a.html (accessed 29 May 2018).

³⁷⁰ Urgewald, 'Zitat zur Hauptversammlung', 8 May 2015, <https://urgewald.org/medien/zieht-enbw-umstrittenen-lieferanten-konsequenzen> (accessed 29 May 2018).

³⁷¹ Vattenfall, 'Impact on local communities and nature', <https://corporate.vattenfall.com/sustainability/society-and-stakeholders/impact-on-local-communities/> (accessed 30 May 2018).

³⁷² Vattenfall, 'Vattenfall Verhaltenskodex für Lieferanten', October 2017, p.2, https://corporate.vattenfall.de/globalassets/deutschland/geschaeftsfelder/fuer_lieferanten/171004_vf_code_of_conduct_for_suppliers_de.pdf (accessed 30 May 2018).

³⁷³ Ibid., p.3.

³⁷⁴ Vattenfall, 'Whistleblowing', <https://corporate.vattenfall.com/about-vattenfall/corporate-governance/internal-governance/integrity/whistleblowing/> (accessed 30 May 2018).

³⁷⁵ Vattenfall, 'Wir werden an unseren Taten gemessen: So handeln wir', 2014, p.8, https://corporate.vattenfall.de/globalassets/deutschland/vattenfall_verhaltenskodex_12.2014.pdf (accessed 30 May 2018).

In its sustainability report of 2017, Vattenfall devotes a separate chapter to the topic of human rights. Here, a special emphasis should be placed on a recently conducted comprehensive risk assessment of the Colombian coal supply chain. Vattenfall thereby reacts to the findings of a third-party study which had revealed that “Vattenfall’s most significant human rights risks lie in the sourcing of fuels and goods and services from high risk countries such as Colombia.”³⁷⁶ In a 14-month process, Vattenfall conducted desktop research, on-site visits, fact-checking and stakeholder consultations. To discuss the assessment in detail, which is accessible online, would go beyond the scope of this thesis. In principle, the risk assessment is the first to be conducted by Vattenfall and has been carried out in accordance with the UNGPs. The report indicates that the assessment was no easy task, particularly in regard of the different views and perceptions of the various stakeholders. However, according to Vattenfall, the analysis has helped “to identify the main risks and give input to [their] due diligence processes to gain an understanding of how these risks could be handled in the context of the mining sector in Colombia.”³⁷⁷ In a further step, Vattenfall intends to follow up on the problematic areas and to collaborate with individual mining companies. In this regard, action plans are to be formulated with the aim of improving the situation for the affected communities. In addition, Vattenfall has arranged to carry out such a risk assessment in Russia.³⁷⁸ In doing so, Vattenfall takes important steps to implement the due diligence requirements laid out in the UNGPs and in the respective NAPs. The corporation makes its measures transparent and sets clear future goals which can then be followed up by all relevant stakeholders.

In contrast, Vattenfall’s competitor RWE, the second largest German energy company, is currently standing before a German court. A Peruvian farmer has filed a lawsuit against RWE, claiming that the energy corporation holds responsibility for the

³⁷⁶ Vattenfall, ‘A Human Rights Risk Assessment in Colombia: “Vattenfall’s effort on coal supply chain responsibility”’, 2017, p.4, <https://corporate.vattenfall.com/globalassets/corporate/sustainability/doc/A-human-rights-risk-assessment-in-Colombia.pdf> (accessed 30 May 2018).

³⁷⁷ Ibid., p.92.

³⁷⁸ Ibid.

climate change damage that is endangering the livelihood of his community.³⁷⁹ While the court in Essen had dismissed the case in the first instance, it later decided to hear the case.³⁸⁰ The plaintiff is seeking reimbursement for the money he himself had spent to protect his house and the money that will be needed to establish flood defences to protect his community from the melting glacier. On parts of CSOs, the case is seen as an historic breakthrough: for the first time a court has decided that a corporation can principally be made responsible for climate-induced damages.³⁸¹ According to newspapers, RWE has been arguing that the case is inadmissible and that a single company should not be held responsible for consequences of climate change.³⁸² It remains to be seen whether the court establishes a responsibility in this case. However, the fact that the court in Essen has decided to hear the evidence gives the topic an entirely new significance and can be of relevance for the decision-making of investors and shareholders.

In summary, the energy industry is a delicate sector. Thus, the human rights responsibilities of states and corporations are complex. While states have the duty to provide their population with adequate power supply, or in other words have to make sure each person has access to energy; they also have to ensure that human rights are respected during the production of it.³⁸³ Since energy companies are often in part or in whole owned by the state or municipalities, the government has a particular responsibility to make sure that corporations respect human rights. At the same time, corporations face a difficult task in respecting and following up on human rights issues, as they are mainly involved in major projects taking place in high-risk countries and areas. Even though some positive developments could be identified, most energy companies are still far from complying with the due diligence requirements. According to an analysis by the DIMR, it is only through a joint, transnational effort of corporations, governments and institutions that the

³⁷⁹ See e.g. ‘Peruanischer Bauer bring RWE vor Gericht’, *Zeit*, 30 November 2017, www.zeit.de/wirtschaft/2017-11/klimawandel-rwe-klage-bauer-peru, see also ‘German court to hear Peruvian farmer’s climate case against RWE’, *the Guardian*, www.theguardian.com/environment/2017/nov/30/german-court-to-hear-peruvian-farmers-climate-case-against-rwe (accessed 30 May 2018).

³⁸⁰ *Ibid.*

³⁸¹ Germanwatch, ‘Historischer Durchbruch mit weltweiter Relevanz bei “Klimaklage”’, 30 November 2012, <https://germanwatch.org/de/14794> (accessed 30 May 2018).

³⁸² *The Guardian*, 2017.

³⁸³ Germanwatch and Misereor, 2017, p.22.

human rights situation in countries such as Colombia can be improved.³⁸⁴ Both home and host states must assume their responsibilities to take adequate steps to avoid human rights violations. All companies within the supply chain from producers, intermediaries and buyers have to make sure affected communities are included into the decision-making and adequately reimbursed.³⁸⁵ NHRIs should function as mediators between the communities and the host state and make recommendations to governments. Finally, civil society organisations must contribute in depoliticizing existing conflicts and in informing states and corporations about country-specific as well as local risks.³⁸⁶ Only through this joint effort will the improvement of working conditions in global supply chains be achieved.

³⁸⁴ Niebank, J.-C. and D. Utlu, DIHR (ed.), 'Schutzlücken schließen: transnationale Zusammenarbeit zu Menschenrechten am Beispiel Kohleabbau in Kolumbien', Berlin, 2017, www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/ANALYSE/Analyse_Schutzluecken-schliessen_Transnationale-Zusammenarbeit-zu-Menschenrechten.pdf (accessed 25 May 2018).

³⁸⁵ Ibid.

³⁸⁶ Ibid.

6. CONCLUSION

With the endorsement of the UN Framework and the associated Guiding Principles the business and human rights debate obtained a long lacking authoritative conceptual framework, clarifying the different but complementary responsibilities of states and corporations. While states as the main duty bearers must protect against the abuse of human rights by third parties, including businesses, corporations must respect human rights as expected by society and implement HRDD procedures into their business practices. However, this means that for achieving sustainable progress and to guarantee its functionality much depends on the specification and practical implementation at the domestic level. In the past years, as a response to several requests, various states have started to implement the UNGPs through National Action Plans on business and human rights. Due to its economic strength and interconnectedness and its announcement to elaborate an ambitious NAP, a focus was placed on the German approach. However, the analysis of the NAP measures and the current implementation status has demonstrated that the German NAP does not represent a “worldwide showcase”. The German government missed the opportunity to adequately address topics concerning the state business nexus such as public procurement and foreign trade promotion and to facilitate access to remediation for affected people, precisely those issues that would require robust action. Instead, the measures concentrate mainly on awareness raising and support activities.

And yet, despite its downsides, the NAP contains several unique features which are indeed ambitious and have the potential to contribute to the enhancement of human rights in the business context. None of the other NAPs formulate such a clear target nor provide for a comprehensive review process to follow up on corporations’ integration of the HRDD expectations. Even though corporations at this point in time do not have to fear any legal consequences in case of non-compliance, they might do so soon: in the case that less than 50% of German companies have implemented the HRDD requirements by 2020,

the new German government promises to take legislative measures. As the review process has been initiated, the IMA is confronted with the difficult task of presenting a representative outcome which will be accepted by all stakeholders. Apart from the monitoring, the Federal Government has reorganised and strengthened its state-based non-judicial complaint mechanism. In future, companies receiving foreign trade promotion are obliged to cooperate with the OECD NCP to solve cases against them. In addition, the complaints are to be processed in a more uniform manner allowing for better traceability of the procedures. The government furthermore launched the process of undertaking a sector risk study on the basis of which sector dialogues are to be held and specific sector guidance compiled.

With this in mind, the German NAP has brought the discourse on business and human rights a step forward. With the endorsement of the Guiding Principles in 2011 and the following action plan at national level, the pressure on companies to give more weight to human rights in their activities and business relations has therefore considerably increased and will continue to rise in the coming years. The assessment of corporate practice has shown that in the meantime at least some corporations have risen more committedly to their human rights challenge. However, while more and more corporations touch upon the topic of human rights, only a few make human rights a core essence of their activities and integrate HRDD processes into their strategies. The thesis thus comes to the conclusion that corporate HRDD can only be comprehensively achieved through a holistic approach. First of all, in order to ensure a level playing field and to close the existing gaps in human rights protection, minimum standards and requirements must be applied to HRDD. The legislative developments in states such as the UK, France, the Netherlands and lately also in Switzerland demonstrate the understanding that voluntary and incentive-driven measures are insufficient. Particularly in light of the recent developments in the lawsuit against the German textile discounter KiK – the first expert opinion judged the case as being time-barred under Pakistani law – the introduction of enforceable HRDD becomes even more urgent.³⁸⁷ Here, the EU can play an important role by introducing a general standard for due diligence in the form of adequate regulation, thus providing for equal competition and the protection of human rights.

³⁸⁷ ECCHR, ‘Klage gegen KiK: Landgericht Dortmund darf Verfahren nicht an Verjährung scheitern lassen!’, 5 June 2018, <https://www.ecchr.eu/nc/pressemitteilung/klage-gegen-kik-landgericht-dortmund-darf-verfahren-nicht-an-verjaehrung-scheitern-lassen/> (accessed 15 June 2018).

Although the EU in recent years has contributed to the enhancement of the discourse, it must pursue a more comprehensive and coherent approach.

At the same time, laying down legal minimum standards should not be understood as the only and ultimate objective; it needs a wider perspective. Currently, legislation in the field of business and human rights addresses a limited number of corporations. For example, the duty of vigilance law in France - although a major step in obliging companies with human rights obligations - covers approx. 150-200 corporations, implying that the majority of companies are not affected by this law. Thus, in order to attain competitive conditions and to address a wide range of corporations, future legislation should be “graduated in accordance with the size of the company and by sector.”³⁸⁸ However, since such laws merely define minimum standards, intensive action beyond that is required. This is why, as the UNGPs foresee and as the assessment of the NAP implementation and the corporate practice has shown, it takes joint effort and responsibility to achieve widespread and comprehensive change in order to improve social standards in global supply chains. In very complex markets, such as the sectors discussed above, it is important to mobilise and harness the forces of all stakeholders involved. Apart from governments, which as the most important actors should provide a clear policy framework, other actors such as civil society organisations, national human rights institutions, shareholders and investors, multi-stakeholder alliances, sector partnerships as well as consumers have a vital role to play. Only through the national and transnational collaborations and partnerships of these actors - between NGOs and corporations, governments and companies, NHRIs among each other and through the critical reflection of investors, shareholders and consumers - can far-reaching improvements be obtained. By raising awareness of the topic and advocating for mandatory HRDD legislation, NGOs can jointly exert pressure on the government to take resolute action. Last but not least, Germany, having initiated several important actions, must build upon these promising first steps and beyond that has to make sure that the concept of human rights due diligence does not just remain the effort of a handful of corporations but becomes “business as usual”.

³⁸⁸ Grabosch, R. and C. Scheper, ‘Corporate Obligations with Regard to Human Rights Due Diligence’, Friedrich Eber Stiftung, December 2015, <http://library.fes.de/pdf-files/iez/12167.pdf> (accessed 15 June 2018).

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