universität wien

DIPLOMARBEIT

Titel der Diplomarbeit

„The *UN Guiding Principles on Business and Human Rights* applied to the involvement of Andritz in the Belo Monte hydropower scheme“

Verfasserin

Mag. Verena Hinteregger

angestrebter akademischer Grad

Magistra (Mag.)

Wien, 2014

Studienkennzahl lt. Studienblatt:	A 057 390
Studienrichtung lt. Studienblatt:	Internationale Entwicklung
Betreuer:	ao. Univ.-Prof. Dr. René Kuppe

Acknowledgments

I wish to thank Prof. Dr. René Kuppe for developing the topic of this thesis and his helpful suggestions and comments. Also I want to thank all my friends and family. Whereas most of them were able to put my mind on other things, one friend had the miraculous ability to get me to actually focus on my thesis and another to finalize it. But foremost, I am grateful to my parents, who not only supplied me with all the skills and resources necessary to study, but most importantly taught me the value of being human.

Index

Introduction

> We have to choose between a global market driven only by calculations of short-term profit, and one which has a human face. Between a world which condemns a quarter of the human race to starvation and squalor, and one which offers everyone at least a chance of prosperity, in a healthy environment. Between a selfish free-for-all in which we ignore the fate of the losers, and a future in which the strong and successful accept their responsibilities, showing global vision and leadership.[1]

> Clearly, a more fundamental institutional misalignment is present: between the scope and impact of economic forces and actors, on the one hand, and the capacity of societies to manage their adverse consequences, on the other. This misalignment creates the permissive environment within which blameworthy acts by corporations may occur without adequate sanctioning or reparation. For the sake of the victims of abuse, and to sustain globalization as a positive force, this must be fixed.[2]

Media reports remind us regularly that business activities can have adverse impacts on all kind of human rights. The list of recent scandals includes the poor working conditions in Foxconn factories[3] and the lack of building regulations in the textile fabrics of Bangladesh leading to the death of over 1000 workers in April 2013.[4] There is no comprehensive information available regarding business and human rights violations, but it is possible to suspect an increase of human rights abuse through business activities since the 1990s.[5]

In the 1970s – already before the increase of human rights infringements linked to business activities – the relationship between human rights and business became a frequently discussed topic on the international agenda.[6] Although the UN could be used as a forum, the cold war clouded the discussion and led to the alienation between the United Nations and the business sector.[7] At the end of the 1990s, former Secretary-General Kofi Annan revived the debate by launching the *UN Global Compact*. The endorsement of the *UN Guiding Principles on*

---

[1] *Annan*, *Kofi*: Press Release: Secretary-General proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos: 4 [hereinafter *Annan*, UN Doc. SG/SM 6681 (1999)].

[2] *Ruggie, John Gerard*: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. Business and human rights: mapping international standards of responsibility and accountability for corporate acts: para. 3 [hereinafter *Ruggie*, UN Doc. A/HRC/4/35 (2007)].

[3] Foxconn is a supplier company of Apple.

[4] cf. *APA* (2013a): Fabrik in Bangladesch: Überlebende nach über zwei Wochen geborgen. In: *Der Standard*. 10/05/13. Available at: http://derstandard.at/1363710594969/Fabrikeinsturz-im-April-Schon-ueber-1000-Tote [accessed 24/10/2013].

[5] *Ruggie*, *John Gerard* (2013): Just Business. Multinational Corporations and Human Rights. New York, London: W.W. Norton&Company: 2 [hereinafter *Ruggie* 2013].

[6] cf. *Sagafi-nejad, Tagi/Dunning, John H.* (2008): The UN and Transnational Corporations: From Code of Conduct to Global Compact. Indiana: Indiana University Press: 41 et seqq [hereinafter *Sagafi-nejad/Dunning* 2008].

[7] *Kell, Georg* (2005): The Global Compact Selected: Experiences and Reflections. In: *Journal of Business Ethics* 59: 69–79: 70 [hereinafter *Kell* 2005]; cf. *Kell, Georg, Anne-Marie Slaughter, and Thomas Hale* (2007): Silent Reform through the Global Compact. In: *UN Chronicle* 44: 26–31: 27 [hereinafter *Kell/Slaughter/Hall* 2007]; cf. *Sagafi-nejad/Dunning* 2008: 53.

Business and Human Rights[8] by the Human Rights Council in June 2011 marked an important milestone in the process of binding business to some human rights standards after a setback through the *UN Draft Norms*. John Ruggie, the UN Secretary-General's Special Representative for Business and Human Rights[9], developed the first instrument to address the issue accepted by governments.[10] The 31 principles of the *UN Guiding Principles* rest on three pillars. The first one – the bedrock – is the state duty to protect human rights, the second one is the corporate responsibility to respect human rights, and the third one is the access to remedy.[11] The aim of this thesis is to apply the *UN Guiding Principles* to a specific case and elaborate if the principles can be a practical tool to address the involvement of a multinational corporation in human rights violations.

The case is the involvement of Andritz in the Belo Monte hydropower scheme in Brazil. The Belo Monte dam on the Xingu River will be the third biggest dam in the world.[12] Local and international non-governmental organizations (NGOs) criticize the project for two main reasons. Besides negative impacts on the environment, the lives of the local population – mainly indigenous peoples – are disrupted.[13] Especially the consultation rights of the indigenous population have been ignored by the Brazilian government.[14] The thesis will concentrate on human rights violations.

Andritz, domiciled in Austria, is one of the biggest global suppliers of electro-mechanical systems and services for hydropower plants and one of the leaders for hydraulic power generation.[15] As part of a consortium, composed of Alstom, Andritz and Voith[16], Andritz is supplying turbines and generators, as well as excitation systems for the main power house and

[8] Hereinafter *UN Guiding Principles.* See Annex 3.
[9] Hereinafter SRSG.
[10] *Mares, Radu* (2011): Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress. In: Mares, Radu [ed.]: *The UN Guiding Principles on Business and Human Rights. Foundations and Implementation.* Leiden, Boston: Martinus Nijhoff: 1-49: 1 [hereinafter *Mares* 2011].
[11] *Ruggie, John:* Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. [hereinafter *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011)].
[12] *Hall, Anthony/Branford, Sue* (2012): Development, Dams and Dilma: The Saga of Belo Monte. In: *Critical Sociology* 38: 851 – 862: 851 [hereinafter *Hall/Branford* 2012].
[13] *Id.*: 855.
[14] *Fearnside, Philip M.* (2006): Dams in the Amazon: Belo Monte and Brazil's Hydroelectric Development of the Xingu River Basin. In: *Environmental Management* 38: 16 – 27: 24 [hereinafter *Fearnside* 2006]; cf. *Hall/Branford* 2012: 857
[15] *Andritz*: Homepage: Andritz Hydro: http://www.andritz.com/hydro.htm [accessed 24/10/13].
[16] All three companies are head-quartered in European countries. (*Gobbi Pontrioli, Francesco* (2013): Belo Monte Dam project: an outline. Library Briefing. Library of the European Parliament: 3).

all auxiliary equipment and other hydro-mechanical equipment for the Pimental power house of the Belo Monte project. The order value is approximately 330 Million Euro.[17]

The research questions that follow are: Are the *UN Guiding Principles* applicable to the involvement of Andritz in the Belo Monte hydropower scheme? Which of the 31 principles are relevant and in what way? What are the consequences for Andritz and Austria?

I chose this case for several reasons. First of all, rights of indigenous peoples are especially fragile because they are preserved for a specific often marginalized group. Secondly, Austria as the home state of Andritz approved the *UN Guiding Principles* and is currently working on a draft to increase the responsibility of states and business for human rights violations.[18] Moreover, Andritz has a CSR strategy indicating that they try to conduct their business in compliance with human rights.[19]

After explaining the theoretical basis and the methodology used in this thesis, in chapter II I focus on the situation at hand in Belo Monte with special focus on the infringements of human rights and the involvement of Andritz. The next chapter will outline the history of the *UN Guiding Principles* by elaborating prior UN initiatives in the area, and tracing the efforts of John Ruggie. In chapter IV the two issues are brought together by applying the specific obligations of the *UN Guiding Principles* on the present case. First, it is analyzed how Austria tries to regulate human rights behavior of companies abroad in general and in the case of Belo Monte. Finally, the question how Andritz handles their own human rights responsibility in the case of Belo Monte is answered in chapter IV. In the conclusion the results will be summarized.

[17] *Andritz Group* (2011): Andritz News. Andritz to Supply Major Equipment for Belo Monte Hydropower Plant. Available at http://www.andritz.com/hydro/hy-news/hy-news-detail.htm?id=5589 [accessed at 24/10/2013] [hereinafter *Andritz Group* (2011)]. See Annex 4.

[18] *BMWFJ, BMLFUW* (2013): Draft. Nationaler Aktionsplan CSR (NAP CSR). Stand: 29.05.2013 [hereinafter: *BMWFJ/BMLFUW* 2013].

[19] *Andritz* (2010a): Andritz Code of Business Conduct and Ethics. July 2010: 5 et seq. Available at http://grz.g.andritz.com/c/com2011/00/01/32/13292/1/1/0/800923192/gr-grz-_3515840-v5-andritz_code_of_business_conduct_and_ethics_e.pdf [accessed 26/11/13] [hereinafter *Andritz* (2010a)].

Chapter I: Theoretical Basis and Methodology

1. Theoretical Basis: From *State Values* to *Community Values* in the international system

To understand why and how the *UN Guiding Principles* can be used as a tool to broach the issue of human rights and business, it is important to analyze the recent developments in the international political and legal system.

Globalization had a severe impact on the economic landscape. In 2011, of the one 175 largest economic entities 111 were companies.[20] Additionally, to the increase in trans-border trading, globalization led to changes regarding the basic perception of society.[21] Prior to globalization, the state was seen as the only representative of society.[22] Now societies are not limited to the border of a national state; they extend across countries.[23]

I agree with Paulus and Koroma, who conclude that the changes in society led to a change in the *International Community*.[24] International Organizations, NGOs and Multinational Companies (MNCs) [25] became more important actors on the international stage in recent years. This new *International Community* initiated a shift of values in international law: Traditionally, states protected the classical *State values* of sovereignty and independence. Now the focus has moved towards *Community values* like human rights or protection of the environment.[26]

The increasing economical influence of companies and the shift to community values led to the perception that MNCs are

[20] *White Steven* 2012: The Top 175 Global Economic Entities, 2011. Available at http://dstevenwhite.com/2012/08/11/the-top-175-global-economic-entities-2011/ [accessed 24/10/2013].
[21] *Koroma, Abdul G.* (2009): The Effects of Globalization on the Development of International Law. In: *Hobe, Stephan* [ed.]: Globalisation - the State and International Law. Stuttgart: Franz Steiner Verlag: 25-33: 25 [hereinafter *Koroma* 2009].
[22] *Id.*: 29 et seq.
[23] *Id.*: 25, 29 et seq.
[24] *Paulus, Andreas L.* (2001): Die Internationale Gemeinschaft im Völkerrecht. Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung. München: C.H. Beck: 227 et seqq. [hereinafter *Paulus* 2001]; cf. *Koroma* 2009: 29 et seq.
[25] Ruggie defines MNCs as enterprises that have business activities in more than one country (cf. *Ruggie* 2013: Introduction). Ruggie's definition is adopted for this thesis.
[26] *Paulus* 2001: 250 et seqq.

> [...] sharing disproportionately too small a burden in assuring the just distribution of social goods and of assuming too small a share in remedying the unequal social distribution of harms and risks.[27]

The consequence is the call for more regulation for business activities regarding human rights. Although the need for more regulations is mostly acknowledged by business, NGOs and governments, the change in values did not lead to a change in the international legal system. States are still the only widely recognized subjects of international law.[28] To include business into the international human rights framework, two questions need to be answered: Why should companies (and not other non-state actors) have human rights responsibilities and how can businesses be bound to human rights on an international level?

1.1. Why should companies have human rights responsibilities?

Ruggie argues that the corporate responsibility to respect is an essential factor in his framework, "because it is the basic expectation society has of business in relation to human rights."[29] Along a similar line argues Steinhardt. He concludes that the economic self-interest dictates companies to follow at least some human rights standards. Otherwise they may lose socially conscience shareholders or consumers.[30]

Deva questions this approach because it does not answer why society has this expectation, how it can be measured and how far it goes. He reasons that this argument lacks normativity.[31]

To put the obligation on a normative basis, natural law could be used. Natural law sees human rights as entitlements guaranteed by the value of being human, independent of the state's willingness to recognize them. It could be argued that governments merely protect human rights, but that everyone is obliged to respect them.[32]

---

[27] *Shamir, Ronen* (2005): Corporate Social Responsibility: A Case of Hegemony and Counter-Hegemony. In: *De Sousa Santos, Boaventura/Rodríguez-Garavito, César A.* [ed.]: Law and Globalization from Below. Towards a Cosmopolitan Legality. Cambridge Studies in Law and Society. New York: Cambridge University Press: 92-118: 93 [hereinafter *Shamir* 2005].

[28] *Paulus* 2001: 227.

[29] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): para. 6; Ruggie refines this approach in the 2009 report (UN Doc. A/HRC/11/13 (2009)) and his book „Just Business" (Ruggie 2013).

[30] *Steinhardt, Ralph G* (2005): Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria. In: *Alston, Philip* [ed.]: Non-State Actors and Human Rights. New York: Oxford University Press: 213 et seq. [hereinafter *Steinhardt* 2005]

[31] *Deva, Surya* (2012a): Guiding Principles on Business and Human Rights: Implications for Companies. In: *European Company Law* 9: 101–109: 104 [hereinafter *Deva* 2012a].

[32] *Steinhardt* 2005: 214.

The assumption of a quid pro quo regarding states and companies is more of a practical nature: companies receive the right to make profits and to limit the liability of stockholders to the extent of their investment, and in exchange they can be expected to respect minimum standards of human rights. Here companies are seen as both private and public actors.[33] This is especially true, when companies exercise basic government functions, which they received through privatization. It seems reasonable that companies should be held accountable, when fulfilling activities that are normally responsibilities of a state.[34]

Morally governments, NGOs and even companies accept the obligation of corporations to respect human rights, but the legal aspects of this responsibility are still cause for heated debates.[35] For the purpose of answering the research question, it suffices that companies accept their responsibility as a social norm. Andritz has a CSR strategy which shows their willingness to comply with basic human rights standards.

1.2. How can companies be bound to human rights obligations on an international level?

There have been different attempts to integrate business enterprises in the international human rights legal framework.[36]

Customary international law was consulted to bind companies because international human rights treaties are clear on obliging only states.[37] To derive a norm that binds non-state actors, proponents of this idea cite the preamble of the Universal Declaration on Human Rights: [38]

> Therefore The General Assembly proclaims this Universal Declaration on Human Rights as a common standard of achievement for all peoples and all nations, to the end *that every individual and every organ of society* […] shall strive by teaching and education to promote respect for these rights and freedoms

[33] *Id.*: 215.
[34] *Id.*: 214.
[35] *Ruggie* 2013: 92.
[36] *Bretschger, Roman* (2010): Unternehmen und Menschenrechte. Elemente und Potenzial eines Informellen Menschenrechtsschutzes. Zürich, Basel, Genf: Schulthess: 11 [hereinafter *Bretschger* 2010].
Business is already bound by domestic law in their host and home country. This thesis focuses on international legal responsibilities.
[37] *Knox, John H.* (2011) The Ruggie Rules: Applying Human Rights Law to Corporations. In: *Mares, Radu* [ed.]: The UN Guiding Principles on Business and Human Rights. Foundations and Implementation. Leiden, Boston: Martinus Nijhoff: 51-83: 59 et seq. [hereinafter *Knox* 2011]; cf. *Bretschger* 2010: 11; cf. *Ruggie*, UN Doc. A/HRC/4/35 (2007): para. 35 et seqq.
[38] *Knox* 2011: 59 et seq.; *Bretschger* 2010: 11; *Ruggie*, UN Doc. A/HRC/4/35 (2007): para. 35 et seqq.

> and by progressive measures, national and international, to secure their universal and effective recognition and observance […].[39]

Louis Henkin interprets the norm in the sense that

> [e]very individual includes juridical persons. Every individual and every organ of society excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all. So, in the second half-century of the Universal Declaration, the idea-ideology of human rights challenges states to address their responsibility for human rights in the world of the next century. […] It challenges "private" institutions to recognize their responsibility, whether or not states do.[40]

Although this approach is supported morally, legally it is rejected by Buhmann, Knox and Ruggie. First of all the Universal Declaration was adopted in a time were the state-centrist conception of international law dominated and the influence of MNCs could not been foreseen.[41] And even if business was meant to be included, the declaration was not seen as legally binding at all. Furthermore, non-state actors are only mentioned in the preamble, which is never mandatory.[42]

Also international economic and financial organizations were consulted to bind business to human rights. The development of the World Trade Organization (WTO) is loosely linked to the new human rights responsibility of companies.[43] Although the norms which are enforced by the WTO do not support human rights, human rights advocates have some possibility to put pressure on states by threatening retaliatory sanctions.[44] The World Bank Group (WB) concerns itself normally with economical problems; however, sometimes it considers human rights if it supports economical development programs.[45]

Few direct human rights accountability instruments exist on an international level. Examples are the International Criminal Courts.[46] There have been some further developments through the Rome-Statute[47]; still, it is not possible to "speak of any established system of international

---

[39] *Universal Declaration of Human Rights*, UN Doc. A/Res/3/217 A (III): Preamble [hereinafter UDHR]. Hylightning by the author.

[40] *Henkin*, *Louis* (1999): The Universal Declaration at 50 and the Callenge of Global Markets. In: *Brooklyn Journal of International Law*, 25: 25.

[41] *Buhmann, Karin* (2011): The Development of the 'UN Framework': A Pragmatic Process Towards a Pragmatic Output. In: Mares, Radu [ed.]: *The UN Guiding Principles on Business and Human Rights. Foundations and Implementation.* Leiden, Boston: Martinus Nijhoff: 85-105: 89 [hereinafter *Buhmann* 2011].

[42] *Knox* 2011: 60; *Bretschger* 2010: 12; *Ruggie*, UN Doc. A/HRC/4/35 (2007): para. 35 et seqq.; *Ruggie* 2013: 40.

[43] *Steinhardt* 2005: 210 et seqq.; *Bretschger* 2010: 21.

[44] *Steinhardt* 2005: 211.

[45] *Bretschger* 2010: 22. The withdrawal of a loan by the WB after protest in Belo Monte in 1989 can serve as an example.

[46] *Reinisch, August* (2005): The Changing International Legal Framework. In: Alston, Philip [ed.]: *Non-State Actors and Human Rights.* New York: Oxford University Press: 82 [hereinafter *Reinisch* 2005]; *Bretschger* 2010: 25.

[47] *Id.*: 87.

mechanisms whereby non-state actors are held directly accountable for human rights violations [...]."[48]

National Courts and laws are gaining more influence in the field of human rights and business.[49] The best known example is the Alien Tort Claims Act under US law. Lately, it has been used by foreign plaintiffs to sue enterprises for human rights violations even if they did not occur on US territory.[50] The Supreme Court is currently deciding a case which will influence the future of this instrument.[51]

To sum up, there is no international enforcement mechanism in place to bind business to human rights obligations. Therefore, soft law instruments developed under the auspices of the United Nations became the focus of further efforts. They are a relatively new and successful way to push the agenda forward.

1.3. Soft Law and Codes of Conduct

Numerous definitions of soft or weak law exist. Ellis describes soft law broadly as "somehow of relevance to law."[52] Baxter gives a definition also used in my thesis: "[T]here are norms of various degrees of cogency, persuasiveness, and consensus which are incorporated in agreements between States but do not create enforceable rights and duties."[53] Legal norms, which do not create rights or duties, therefore can be qualified as some kind of international law, as soft law.[54] Ruggie himself sees the *UN Guiding Principles* as soft law instrument.[55] The endorsement of the *UN Guiding Principles* by governments gave the document an authoritative character without putting legal obligations on states or corporations. This is a strong argument for the characterization as soft law.

O'Connel sums up advantages of soft law for the regulation of globalization:

---

[48] *Id.*: 82.
[49] *Id.*: 87.
[50] *Reinisch* 2005: 88; *Bretschger* 2010: 37.
[51] *Ruggie* 2013: 43.
[52] *Ellis*, *Jaye* 2012: Shades of Grey: Soft Law and the Validity of Public International Law. In: *Leiden Journal of International Law*, 25: 313-334: 319 [hereinafter *Ellis* 2012].
[53] *Baxter, R.R.* (1980): International Law in "Her Infinite Variety". In: *The International and Comparative Law Quarterly*, 25, 4: 549-566: 549 [hereinafter *Baxter* 1980].
[54] *Id.*: 549.
[55] *Ruggie* 2013: 124.

> Its instruments are flexible, being able to take almost any form global actors wish to use.[56] Soft law instruments thus can provide an experimental response to new challenges as they continually arise. Another attractive aspect of soft law for globalization is that it can regulate behavior of non-state actors from giant multinationals to NGOs and individuals. Soft law can fill the gaps of a hard law instrument without the need for entering into the laborious procedure of treaty amendment.[57]

Moreover, if states have consented to a soft law instrument, further agreements, standards and debates are framed by the accepted norms. The issue is not solely reserved to domestic jurisdiction anymore, but part of an international framework.[58]

The flexibility is mirrored in the range of codes of conduct which emerged since the 1970s as a popular instrument to bind business to human rights.[59] Codes of conduct are divided into regional and international Corporate Codes of Conduct, which adopted by Transnational Corporations themselves, or International Organisations.[60] The common flaw of all those Codes of Conduct is that they are not legally binding.[61] Although intergovernmental codes like the *UN Guiding Principles* or the *OECD Guidelines*[62] are voluntary and non-binding as well, they have some political authority through the endorsement of member states of the International Organization.[63]

The disadvantages of the codes of conduct are also the disadvantages of soft law in general. Soft law instruments lack supervision and enforcement mechanisms. Furthermore, critics argue that soft law could blur the line between law and not-law leading to a mix between law, politics, economics and science.[64] Of course, this criticism is valuable; however due to globalization and the new "international community", non-state actors already take a role in "law-interpreting, law-implementing and eventually law-making."[65] The question regarding the voluntary character remains, making an interdisciplinary debate on the functions non-state

---

[56] *O'Connell, Mary Ellen* (2000): The Role of Soft Law in a Global Order. In: Shelton, Dinah [ed.]: *Commitment and Compliance. The Role of Non-Binding Legal Norms in the International Legal System.* Oxford, New York: Oxford University Press. 100-114: 109 [hereinafter *O'Connell* 2000].
[57] *Id.*: 110.
[58] *Baxter* 1980: 565; cf. *Ruggie* 2013: 45 .
[59] *Keller, Hellen* (2008): Codes of Conduct and Their Implementation: The Question of Legitimacy. In: Von Bogdandy, Armin/Wolfrum, Rüdiger: *Legitimacy in International Law, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht.* Heidelberg: Springer: 220-298: 223 [hereinafter *Keller* 2008]; cf. *Bretschger* 2010: 12; cf. *Reinisch* 2005: 42 et seqq.
[60] cf. *Keller* 2008: 223 et seqq.; cf. *Reinisch* 2005: 43 et seq.; cf. *Bertschger* 2010: 12 et seqq.
[61] *Reinisch* 2005: 52; *Bretschger* 2010: 20.
[62] OECD Guidelines for Multinational Enterprises.
[63] *Keller* 2008: 261.
[64] cf. *Ellis* 2012: 333.
[65] *Bolewski*, *Wielfried* (2007): Diplomacy and International Law in Globalized Relations. Heidelberg: Springer. 85 et seqq [hereinafter *Bolewski* 2007).

actors can fulfil in international law, especially in the light of a new *International Community* necessary.[66]

Though the academic debate about legitimacy and usefulness of soft law still takes place, the practice already passed the theory. Due to recent developments in international law and human rights law, soft law exists and is broadly accepted.[67] This thesis embraces the *UN Guiding Principles* as a well sought out soft law instrument to push the debate about human rights and business forward. The connection between the *UN Guiding Principles* and the involvement of Andritz in the Belo Monte hydropower scheme is another small step to examine the scope of possible applications and extend the view on the issue of human rights and business.

2. Methodology

2.1. Qualitative Content Analysis

The guiding methodology used in my thesis is the qualitative content analysis.[68] It is the best fit because it is used to analyze all types of recorded communication.[69] Furthermore, qualitative content analysis is popular regarding case studies as it is an open, descriptive and more interpretative method than others.[70]

> Qualitative content analysis defines itself within this framework as an approach of empirical, methodological controlled analysis of texts within their context of communication, following content analytical rules and step by step models, without rash quantification.[71]

Qualitative content analysis was developed in the second half of the 20th century as a reaction to "superficial analysis without respecting latent contents and contexts, working with simplifying and distorting quantification."[72] Nonetheless, Mayring adopted some advantageous basic ideas used by the quantitative content analysis for the qualitative content analysis:

---

[66] *Id.*: 89.
[67] *Id.*: 90 et seqq.
[68] For the chapters II, III and IV I additionally use legal interpretation techniques.
[69] *Mayring Philipp* (2000): Qualitative Content Analysis. In: *Forum: Qualitatvie Social Research* 1, 2: Paragraphs 1–28 [hereinafter *Mayring* 2000].
[70] *Mayring, Philipp* (2003): Qualitative Inhaltsanalyse. Grundlage Und Techniken. 8th ed. Weinheim, Basel: Beltz Verlag: 21 [hereinafter *Mayring* 2003].
[71] *Mayring* 2000: para. 5.
[72] *Id.*: para. 6.

As first step, material is fitted into a model of communication. Besides determining the objective of the analysis, the author, the developing process, the socio-cultural background and the impact of the text are examined closely. Secondly, the material is studied step by step and divided into content analytical units. Next, the aspects of the analysis are fit into categories which have to be justified and revised through the analysis process (feedback loop). At last, criteria of reliability and viability have to be fulfilled. The procedure must be comprehensible and it must be possible to check the reliability. Reliability can also be revised through triangulation, meaning that the study must be coherent with other studies.[73] The following model shows the analysis steps of the qualitative content analysis:

1. Determination of the material
2. Analyzing the development of the material
3. Formal criteria of the material
4. Determining the direction of the analysis
5. Theoretical differentiation of the research question
6. Determination of the technique of analysis and the concrete rules of procedure
7. Definition of the analytical unit
8. Analyzing step by step according to the categories through:
Summary, Explication, Structuring
9. Feedback loop of the category system through theory and material
10. Interpretation of the results according to research question
11. Reliability Check[74]

The focus of the qualitative content analysis is the development of categories, which are determined through a reciprocal relationship between theory (the research question) and the concrete material.[75] The categories are developed through three different strategies. By summarizing the analysis units, important parts of the text can be filtered.[76] Explication is used to explain unclear passages by analyzing additional material.[77] Structuring is the tool to

[73] *Mayring* 2000: 7; *Mayring* 2003: 13.
[74] after *Mayring* 2003: 54.
[75] *Halbmayer* 2010: Homepage: Einführung in die empirischen Methoden der Kultur- und Sozialanthropologie. Qualitative Inhaltsanalyse. Available at http://www.univie.ac.at/ksa/elearning/cp/ksamethoden/ksamethoden-91.html [accessed 24/10/2013].
[76] *Mayring* 2003: 59.
[77] *Id.*: 77.

develop categories, making it the most important qualitative analyzing technique.[78] Through a feedback loop by using theory and material the categories are constantly revised.

Because scientific literature about current developments in Belo Monte is not available, I occasionally have to fall back on newspaper articles to fill the knowledge gaps. The newspaper articles are chosen carefully, as the objectivity is never granted. Finding objective sources is also a problem regarding the involvement of Andritz in the hydropower scheme. To overcome any accusation of partiality, I mainly use press releases published by Andritz. As the press strategy of Andritz is not a very forthcoming, I also have to fall back on newspaper articles.

The main materials I use to analyze the history of the *UN Guiding Principles* are UN Documents, especially documents published by the SRSG. The free access to UN documents gives me the advantage of following the developing process of the text. Additionally, I rely on scientific literature to underline and further explain aspects of the progress made in the debate.

I analyze the material using all three strategies. Summarizing and explication is especially important for the next two chapters, while structuring material is the focus of chapter IV. The forth chapter answers the research questions by structuring the findings about indigenous peoples rights in Belo Monte and subsuming the facts under the obligations laid out in the *UN Guiding Principles.*

2.2. Legal Methodology

Although the UN Guiding Principles are not legally binding, they draw on existing legal standards and can be categorized as soft law. To interpret and apply the standards set in this semi-legal document, I will rely on legal methodology. Furthermore legal methodology is used in chapter II section 3 about violation of indigenous peoples' rights through the construction of the dam.

2.2.1. International Treaties

The Vienna Convention on the Law of Treaties (VCLT) from the year 1969 establishes guidelines for the interpretation of treaties in Section 3 (Articles 31-33). The *UN Guiding*

[78] *Id.*: 82.

Principles are not an international treaty, but the document was endorsed by governments through the Human Rights Council. The basic rule is laid down in Article 31:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[79]

This thesis is written in English because the only authentic version of the *UN Guiding Principles* is in English. Translating the *UN Guiding Principles* would have changed the ordinary meaning given to the terms. The context is the whole text including the preamble and interpretative documents.[80] In the case of the *UN Guiding Principles* the Office of the High Commissioner of Human Rights (OHCHR) published an interpretive guide in 2012.[81] That a treaty has to be interpreted and fulfilled in good faith, corresponds with the general principles of law. The notion that the treaty should be interpreted "in the light of its object and purpose" refers to the teleological interpretation. Object and purpose are usually found in the preambles and in general articles.[82] The *UN Guiding Principles* lay out their objective and purpose in the general principles and the foundational principles.[83]

The *travaux préparatoires* mentioned in article 32 of the VCLT are a supplementary mean of interpretation used to confirm the text interpretation.[84] They include drafts, protocols and other preliminary papers. In the case of the UN Guiding Principles, the preceding papers from the SRSG constitute inter alia the preparatory work.

International case law developed two more interpretation rules which became part of international customary law: According to the rule "favor contractus, effet utile", obligations (in doubtful cases) are to be interpreted in a way that fulfills the object and purpose of the treaty. The second rule states that limitations of the freedom of states have to be interpreted restrictedly (in doubtful cases), thus giving the states the greatest freedom of action.[85]

---

[79] *UN* (1969): Vienna Convention on the Law of Treaties, 23 May 1969. Available at United Nations, Treaty Series, vol. 1155, p. 331 [hereinafter VCLT].

[80] *Alvarez, José E.* (2005): International organizations as law-makers. Oxford: Oxford University Press: 83 [hereinafter *Alvarez* 2005]; *Zemanek, Karl* (2004): Das Völkervertragsrecht. In: *Neuhold, Hanspeter/Hummer, Waldemar/Schreuer, Christoph* [ed.]: Österreichisches Handbuch des Völkerrechts. Textteil. Wien: Manz: 45-78: 63 [hereinafter *Zemanek* 2004].

[81] *OHCHR* 2012: The Corporate Responsibility to Respect Human Rights. An Interpretive Guide. Geneva, New York. HR/Pub/12/02 [hereinafter *OHCHR* 2012]

[82] *Zemanek* 2004: 64.

[83] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): General principles, principles 1,2, 11-15.

[84] VCLT; cf. *Alvarez* 2005: 83.

[85] *Zemanek* 2004: 64.

2.2.2. Legal syllogism

Legal syllogism is a logical approach to apply a legal norm on a specific case.[86] Syllogism is a way to draw inferences. The first western philosopher who described this way of reasoning was Aristoteles. A simple example of a legal syllogism is the following:
Major premise/Legal Norm: All human beings are born free and equal in dignity and rights.[87]
Minor premise/Fact: Indigenous peoples are men.
Conclusion: Indigenous peoples are born free and equal in dignity and rights to other men.

In daily life everyone needs to reason and syllogism is used regularly as a tool to make decisions, still it is important for jurists to be aware of the used methods to work properly.[88] As Bäcker mentions, the conclusion is only right if the premises (the legal norm and the facts) are in itself correct and justified.[89] In the present thesis, the facts are the situation of indigenous peoples in Belo Monte and the involvement of Andritz and the legal norms are the provisions of the *UN Guiding Principles*. I describe the situation in Belo Monte in chapter II with a special focus on the human rights situation of the indigenous population. Here, legal syllogism is used to determine which international and national obligations Brazil is violating. Also the involvement of Andritz will be examined. In chapter III I give an overview over the *UN Guiding Principles* and their development, which sets the context for every obligation. The facts found in chapter II, are used to identify the applicable principles. In a final step, the facts are subsumed under the *UN Guiding Principles*.

[86] *Bäcker, Carsten* (2009): Der Syllogismus als Grundstruktur des jursitischen Begründens? In: *Rechtstheorie*, 40: 404-424: 406 et seq. [hereinafter *Bäcker* 2009]; *Zippelius, Reinhold* (1994): Juristische Methodenlehre. München: Beck: 90 et seqq.
[87] Art. 1, UDHR.
[88] *Bäcker* 2009: 404.
[89] *Id.*: 409.

Chapter II: The Belo Monte hydropower scheme: History, Criticism, Human Rights Violations and the Involvement of Andritz

The Belo Monte dam is located at the Xingu River[90] Basin in the state of Pará.[91] It will be the third largest dam worldwide in terms of energy producing capacity (approximately 11,200 megawatts) after the Three Gorges Dam in China and Itaipu, a Brazilian-Paraguayan dam.[92] According to the plans, a Panama Canal-worth of soil will be moved and 14.4 billion US $ will be spent.[93] The nearly forty year long history of the megaproject is characterized by conflicts between the government and the affected indigenous communities in the area.

1. Development

The project Belo Monte, till 1989 known as Kararaô, was put on the agenda in 1970 by the military government, but was soon dropped due to controversy.[94] In the 1980s it reappeared under president Sarney.[95] A massive hydroelectric plan for Brazil, including the Xingu river dam, developed by Eletrobras[96] became public in 1987.[97] The plan included all 297 dams that were expected to be built till 2010 and listed more projects regardless of their construction date.[98] The plan intended the completion of Belo Monte, which consisted of two dams, Kararaô (Belo Monte) till 2000 and Barbaquara (Altamira) till 2005.[99] Since 1986, Brazilian law requires environmental impact studies and a brief public document "Report on Environmental Impact" for big infrastructure projects. Difficulties with environmental impact

[90] The Xingu River is a north-flowing tributary to the Amazon in the State of Pará (*Fearnside 2006*: 16).
[91] *Fearnside* 2006: 16; *Diamond, Sara/ Poirier, Christian* (2010): Brazil's Native Peoples and the Belo Monte Dam: A Case Study. In: *NACLA Report on the Americas*: 25-29: 25.
[92] *Indigenous Communities Application for Precautionary Measures* (2010): Indigenous Communities of the Xingu River Basin v. Brazil, Inter-American Commission of Human Rights, PM 382/10 (2010): 2 [hereinafter *Indigenous Communities* 2010]; *Hall/ Branford* 2012: 851; cf. *Diamond/Poirier* 2010: 25 et seq.
[93] *The Economist* (2013): Dams in the Amazon: The Rights and Wrongs of Belo Monte. In: *The Economist*. 04/05/13 [hereinafter *The Economist* 2013].
[94] *Indigenous Communites* 2010: 4.
[95] *Hall/Branford* 2010: 852; *Fearnside* 2006: 21.
[96] Eletrobras is an electric utilities company in Brazil responsible for the country's energy development (*Fearnside* 2006: 19). The Brazilian federal government owns 52 percent of the ordinary shares (*Eletrobras* 2010: Homepage. About us. Eletrobras's role).
[97] *Fearnside* 2006: 19 et seq.; cf. *Hall/Branford* 2012: 852
[98] *Fearnside* 2006: 19 et seq.; cf. *Ministério das Minas e Energia*/*Eletrobrás* (1987): Plano Nacional de Energia Elétrica 1987/2010. Plano 2010. Relatório Executivo. Rio de Janeiro. Available at http://www.planalto.gov.br/ccivil_03/decreto/1980-1989/anexo/and96652-88.pdf [accessed 24/10/2013].
[99] *Fearnside* 2006: 20.

reports and the licensing process are typical for Brazilian Amazonia.[100] A presentation held by a consulting firm that conducted the first study of Belo Monte at a public hearing in Altamira showed typical problems with the consulting process. Lack of space, no prior information about the project, and missing technical experts prevented an effective participation of the local population.[101]

Opposition against the dam was strong, which was seen in the *First Encounter of the Indigenous Nations of the Xingu* in 1989 that became famous, because of a picture showing a female indigenous leader wielding a machete in front of the face of an Eletronorte[102] representative.[103] As a consequence, the World Bank (WB) withdrew its loan, making it difficult for Eletronorte to secure funding.[104] Eletronorte changed the name of the project, because *kararaô* is a Kaiapó term with religious meaning. Furthermore, they signaled that the dams upstream would not been built.[105]

The Belo Monte dam was redesigned between 1989 and 2002.[106] The flooded area was reduced from 1225 to approximately 514 square kilometers.[107] "The main rationale for this was to avoid flooding part of the Bacajá Indigenous Area, an important consideration to avoid the need for approval by the National Congress."[108] Fearnside argues that regularly evolving plans are a tactic in Amazonian development projects, because any criticism can be dismissed by accusing critics of knowledge gaps regarding actual plans.[109]

After opposing the project during his election campaign, president Luiz Inácio Lula da Silva has prioritized the construction of Belo Monte as part of his Accelerated Growth Program (PAC).[110] To push the project forward "a legislative decree was passed [in 2005] by the National Congress, authorizing construction of Belo Monte depending only on viability and environmental studies by the 'competent agencies'."[111] In 2008, a second big meeting was

---

[100] *Id.*: 20.
[101] *Id.*: 20.
[102] Eletronorte is a subsidiary of Eletrobras responsible for electrical power in Northern Brazil (*Fearnside* 2006: 19).
[103] *Hall/Branford* 2012: 852; cf. *McCormick, Sabrina* (2010): Damming the Amazon: Local Movements and Transnational Struggles Over Water. In: *Society & Natural Resources: An International Journal* 24: 34-48: 39 et seq [hereinafter *McCormick* 2010].
[104] *Carvalho, Georgia O.* 2006: Environmental Resistance and the Politics of Energy Development in the Brazilian Amazon. In: *The Journal of Environment & Development* 15: 245-268: 258.
[105] *Fearnside* 2006: 21.
[106] *Id.*: 20 et seq.
[107] *Indigenous Communities* 2010: 2; *Fearnside* 2006: 20 et seq.; *Hall/Branford* 2012: 853.
[108] *Fearnside* 2006: 20.
[109] *Fearnside* 2006: 21.
[110] *Diamond/Poirier* 2010: 25; cf. *DKA* (2012): Das Staudammprojekt 'Belo Monte' in Brasilien. Die indigenen Völker am Xingu leisten Widerstand. Fact-Sheet: 2 [hereinafter *DKA* 2012].
[111] *Fearnside* 2006: 22.

held by the representatives of the indigenous communities, scientists, NGOs and environmental activists to oppose the construction.[112]

A provisional license was granted in February 2010 by Brazil's environmental control agency (IBAMA). The impact assessment was approved and the project auction was scheduled for April of that year. The Norte Energia consortium won the auction.[113] Brazilian public companies are with 49.98 percent the biggest shareholders.[114] To start with the construction 40 environmental mitigation preconditions had to be met. In January 2011, IBAMA granted a "partial" installation license[115], even though a lot of the requirements were not fulfilled.[116]

During this time, protest against the dam which symbolizes for many the development paradigm continued.[117] Additionally, legal action was taken. In 2011, court decisions blocked the project twice; in February because not all preconditions have been met, and in September because the fish stocks in the River Xingu could be in danger.[118] Even the Inter-American Commission on Human Rights (IACHR) of the Organization of American States (OAS) requested that the license process be suspended on the grounds that the free, prior and informed consent of traditional peoples is missing, constituting a breach of human rights.[119] After pressure from President Rousseff, who suspended payment to the IACHR, withdrew the ambassador to the OAS and recalled its candidate to the IACHR, the IACHR revoked its condemnation.[120] In August 2012, federal court halted the work again, acknowledging that

---

[112] *DKA* 2012: 2.

[113] *Hall/Branford* 2012: 853.

[114] *Norte Energia S.A.* (2013): Homepage. Shareholding Structure. Available at http://norteenergiasa.com.br/site/ingles/shareholding-structure/ [accessed 02/11/13].

[115] The "partial" installation license permitted the commencement of the construction work, despite noncompliance (*Amazon Watch* (2011): Federal Judge Suspends Partial License for Construction of the Belo Monte Dam in Brazilian Amazon. 25/2/2011. Available at http://amazonwatch.org/news/2011/0225-judge-suspends-partial-license-for-construction-of-the-belo-monte-dam [accessed 04/01/2014]). However, the public prosecutor of the State of Pará criticizes that Brazilian legislation does not recognize this concept in any sector (for more information see *Hurwitz Zachary* (2010): A Partial Installation License for Belo Monte? Entirely Illegal. 11/11/2010. Available at http://www.internationalrivers.org/blogs/258/a-partial-installation-license-for-belo-monte-entirely-illegal [accessed 04/01/2014]).

[116] *Hall/Branford* 2012: 853.

[117] *Id.*: 853.

[118] *Hall/Branford* 2012: 854 et seq; cf. *APA* (2011): Vorläufiger Baustopp für Mega-Kraftwerk Belo Monte. In: *Der Standard*. 26/02/2011. Available at http://derstandard.at/1297819032783/Brasilien-Vorlaeufiger-Baustopp-fuer-Mega-Kraftwerk-Belo-Monte [accessed 04/01/14].

[119] *Hall/Branford* 2012: 853; *American Commission of Human Rights* (2011): Indigenous Communities of the Xingu River Basin, Pará, Brazil, PM 382/10. Available at http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp [accessed 04/11/13].

[120] *Hall/Branford* 2012: 854; *Duckworth*, *Catie* (2012): The Dangers of the Hemisphere Operating Without the IACHR's Guidance. In: *Council on Hemispheric Affairs*. 25/07/12; *Picq, Manuela* (2012): Is the Inter-American Commission of Human Rights Too Progressive? In: *AlJazeera English*. 09/06/2012.

indigenous groups were not consulted properly.[121] The decision was overturned later that month by the Supreme Court.[122]

Currently the construction work and the protests continue. Due to the determination of the government to build this dam, the possibility that the project will be abandoned seems unlikely.[123]

2. Criticism of the dam

The dam is criticized for many reasons. Besides human rights infringements and unknown environmental impacts, lately also the economic efficiency and the social benefit were called into doubt. To get a comprehensive overall picture, all aspects will be researched, focusing on the impacts on indigenous peoples and the inadequate consulting process.

2.1. Social Benefits and Economic Efficiency

As one of the biggest emerging economies, Brazil needs to search for more and diverse energy sources.[124] Two questions need to be asked to determine if Belo Monte is the most social sustainable and efficient way to provide more energy for the population: Who will profit from the produced energy? And could it be produced in a cheaper and less controversial way?

One argument frequently used by the government to underline the importance of Belo Monte is the positive social impact of the project. The Brazilian government sees Belo Monte as essential to

> […] achieve some of the fundamental objectives pursued by the Brazilian Federal Constitution, such as the promotion of human dignity, national development, eradication of extreme poverty, and the reduction of social and regional inequalities.[125]

[121] *Watts, Jonathan* (2012): Belo Monte Dam Construction Halted by Brazilian Court. In: *The Guardian*. 16/08/12.
[122] *The Associated Press* (2012): Brazil: Court Allows Dam Construction to Resume in Brazil. In: *The New York Times*. 28/08/12.
[123] *Hall/Branford* 2012: 854.
[124] *Carvalho* 2006: 245.
[125] *Federal Republic of Brazil* (2011): Response from the State of Brazil: Indigenous Communities of the Xingu River Basin v. Brazil, Inter-American Commission of Human Rights, PM 382/10: para. 103 [translated by *Sampaio*; hereinafter: *Federal Republic of Brazil* 2011].

This argument is not without its merits seeing as Brazil experienced an energy shortage in 2001 that led to the rationing of energy for several months.[126] However, Fearnside objects that the biggest collector of produced energy would be the multinational aluminum industry.[127] The dam would fail to provide energy for the population and would not even stimulate job creation, apart from construction and consulting jobs, because aluminum production needs a lot of energy but only few workers.[128]

Additionally to the failure to provide energy for the population, experts say that there are other ways which have lower environmental and social costs to produce the same amount of energy.[129] Carvalho summarizes the following:

> […] creating incentives for the use of renewable energy sources; […] increasing efficiency of transmission systems; […] decentralizing generation through the development of small hydro, solar, and wind resources; and […] increasing ethanol, biodiesel, and biomass generation, as well as cogeneration, gasification of organic residues, and other alternative strategies.[130]

Furthermore, part of the energy crisis in 2001 was due to the fact, that Brazil produces most of its energy through hydropower (87 %[131]) and in that year the reservoirs have been depleted.[132] Experts argue that because of the seasonal fluctuation of the water stand and the lack of a bigger reservoir the dam would be ineffective in the dry season.[133] The climate change is further increasing the risk of droughts in the Amazonian area. This inefficiency would lead to the necessity to construct more upstream dams to fill the gap.[134]

It has to be acknowledged that there are other studies which conclude that the Belo Monte dam is the most efficient way to produce the energy Brazil is in need of.[135]

But even *The Economist,* a newspaper that tends to have a neoliberal perspective, concludes an article on Belo Monte with the notion, that "[i]f Belo Monte turns out to be a white elephant, the bill will fall on the taxpayer."[136]

---

[126] *Carvalho* 2006: 245, 248; *The Economist* 2013.
[127] *Fearnside* 2006: 19, 23.
[128] *Id.*: 23.
[129] *Carvalho* 2006: 246; cf. *Pontes, Felício* (2011): O Custo de Belo Monte. In: *Jornal O Globo*.; cf. *Hall/Branford* 2010: 860; cf. *The Economist* 2013.
[130] *Carvalho* 2006: 246.
[131] *Id.*: 248.
[132] *Buarque de Hollanda, Jayme/Poole, Alan Douglas* (n.d.): Sugarcane as an Energy Source in Brazil. Instituto Nacional de Eficiéncia Energética: 7.
[133] *Cassuto, David* (2011): Belo Monte: The Legal Waters Continue to Roil. In: *Jurist*; *Hall/Branford* 2010: 854; cf. *Fearnside* 2006: 23.
[134] *Hall/Branford* 2010: 854.
[135] cf. *De Castro, Nivalde José/da Silva Leite, André Luis/de A. Dantas, Guilherme* 2011: Análise comparativa entre Belo Monte e empreendimentos alternativos : impactos ambientais e competitividade econômica. Universidade Federal do Rio de Janeiro. Grupo de Estudos do Sector Eléctrico. Available at http://www.nuca.ie.ufrj.br/gesel/TDSE35.pdf [accessed 02/11/13].

To sum up, the social benefits and the efficiency of the project are highly controversial.

2.2. Environmental Impact

The landscape of the area will change radically through the construction of the dam. 80 percent of the Xingu River's flow will be diverted through two canals. The Big Bend, a 100 kilometer loop-like part of the river, will be dried out.[137] Over 500 square kilometers of rainforest will be flooded.[138]

The flora and fauna of the region will be affected through the changes of the landscape and the population influx.[139] Biodiversity will be reduced and fish migration routes will be altered. Additionally, the population influx could lead to the deforestation of 5000 square kilometers of Amazonian rainforest.[140]

Finally, tropical dams increase green house gas emissions.[141] The decomposition of vegetation in the flooded areas leads to the release of methane. Although the exact amount is still controversial, it is sufficient to affect global levels.[142]

As mentioned above, it might be necessary to build further dams to stabilize the water level of the reservoir.[143] Those upstream dams will intensify the impacts on the environment severely.[144]

The environmental impacts are linked to the problems of the indigenous communities. Indigenous peoples have an inseparable cultural, social, religious and economic bound with their lands and territories.[145] Indigenous claims to land rights involve not only traditional property rights and claim to a title but also cultural, social and spiritual claims. The right to

---

[136] *The Economist* 2013.
[137] *Diamond/Poirier* 2010: 26.
[138] *Indigenous Communities* 2010: 2.
[139] For information regarding the impact on pioneer vegetation formations see *Cunha/Ferreira* 2012.
[140] *Hall/Branford* 2010: 855; *Xingu Vivo* (2011): Se Não for Controlado, Desmatamento Indireto Causado Por Belo Monte Pode Passar de 5 Mil Km^2. 26/04/11. Available at http://www.xinguvivo.org.br/2011/04/26/se-nao-for-controlado-desmatamento-indireto-causado-por-belo-monte-pode-passar-de-5-mil-km%C2%B2/ [accessed 02/11/13].
[141] *Carvalho* 2006: 259; *Fearnside* 2002: 92.
[142] *Fearnside* 2002: 92.
[143] *Fearnside* 2006: 24; cf. *Carvalho* 2006: 259.
[144] *Carvalho* 2006: 259.
[145] *Gilbert, Jérémie/Doyle, Cathal* (2011): A new Dawn over the Land: Shedding Light on Collective Ownership and Consent. In: Allen, Stephen/Xanthaki, Alexandra [ed.]: *Reflection on the UN Declaration on the Rights of Indigenous Peoples.* Oxford/Portland: Hart Publishing: 289 [hereinafter *Gilbert/Doyle* 2011]; cf. *Daes, Erica-Irene A.*: Prevention of Discrimination and Protection of Indigenous Peoples and Minorities. Indigenous peoples and their relationship to land. Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes. [hereinafter *Daes*, UN Doc E/CN.4/Sub.2/2001/21].

own and use their land is crucial for indigenous communities.[146] Therefore, the environmental and the social impacts of Belo Monte are interlinked with indigenous peoples' rights.

2.3. Impacts of Belo Monte on Indigenous Communities

Estimations say that between 20,000 and 40,000 people, rural and urban, could be forced to leave their homes.[147] Besides expulsing people, the dam could also attract up to 100,000 migrant workers. Job creation through the dam will not be strong enough to employ them all. Approximately 18,000 jobs will be created directly through the dam and 25,000 indirectly, thus leaving a great part of job seekers unemployed.[148] Strikes, occupation of the construction site and kidnapping of engineers in the area are a sign of the protests and social tensions arising.[149]

About 800 people from the Juruna, Xikrín, Arara, Xipaia, Kuruaya, Kaiapó, and other indigenous peoples will no longer be able to depend on the river for survival.[150] The terrestrial and aquatic fauna will be destroyed and the dam will be a physical barrier, making it hard for the indigenous communities to rely on the river for food.[151] For example, the Kaiapó would lose migratory fish species essential to their diet.[152] This problem will be worsening as the population influx will stimulate illegal fishing, hunting and logging on indigenous lands and increase prices for basic food.[153] Seeing as indigenous peoples of the area traditionally travel by boat, their mobility would be reduced drastically. Some peoples would even lose a major source of income because the ability to sell their products by boat would be reduced.[154]

The construction of the dam will also entail health hazards for the indigenous population. In the Big Bend area, the water flow will be reduced leading to stagnant pools of water, which will augment the number of Malaria cases. The number of other waterborne diseases will also

---

[146] *Gilbert/Doyle* 2011: 291; cf. *Jaichand, Vinodh/Sampaio, Alexandre Andrade* (2013): Dam and Be Damned: The Adverse Impacts of Belo Monte on Indigenous Peoples in Brazil. In: *Human Rights Quarterly* 35: 408-447: 426 [hereinafter *Jaichand/Sampaio* 2013].
[147] *Diamond/Poirier* 2010: 26 et seq.; cf. *Hall/Branford* 2012: 584.
[148] *Hall/Branford* 2010: 855; cf. *Jaichand/Sampaio* 2013: 416.
[149] *Gobbi Pontrioli* 2013: 2; cf. *Hall/Branford* 2010: 855.
[150] *Diamond/Poirier* 2010: 27.
[151] *Jaichand/Sampaio* 2013: 437; *Indigenous Communities* 2010: 19 et seq.
[152] *Diamond/Poirier* 2010: 27.
[153] *Jaichand/Sampaio* 2013: 416, 437 et seq; *Indigenous Communities* 2010: 24 et seqq.
[154] *Diamond/Poirier* 2010: 27.

increase and access to drinking water will decline. This will put more pressure on the already overburdened health system.[155]

Finally, the cultural and religious freedom would be damaged by the dam: "The word *Xingu* means 'house of God' to indigenous groups, and its destruction will represent nothing less than a cosmological catastrophe to them."[156]

2.4. The "consulting" process

When criticism was raised because indigenous peoples were not consulted, the first reaction of the government was to deny that indigenous peoples were affected and that any would be directly impacted.[157] Essentially the state argued that consultations were not obligatory, but merely a courtesy granted by the state. When this line of arguing proved to be untenable,[158] government officials stated that they actually had engaged in a consultation process to legitimate the construction. According to the state, consultation included "[...] promoting public hearings where the project was exhibited to the society or [...] establishing a dialogue with indigenous peoples through meetings that took place on their lands."[159]

Elétrobras organized four public hearings with the objective to inform the Brazilian society on the course of the construction and to address criticism.[160] Not all the 40,000 families directly affected by the dam had the chance to actively engage in the hearings. [161] Also security forces hindered public prosecutors and civil society representatives to take part in the meetings, no translators were provided, "[...] and the few public queries that were voiced were dismissed, ridiculed and evasively answered."[162] Two days before the hearing a 20,000 page document was made available to the public. This made it impossible to read all the relevant information before the audience. Furthermore, no version in any indigenous peoples' language was

[155] *Jaichand/Sampaio* 2013: 437; *Indigenous Communities* 2010: 15 et seqq.
[156] *Diamond/Poirier* 2010: 27.
[157] *Jaichand/Sampaio* 2013: 443.
[158] See section above about the Impacts.
[159] *Jaichand/Sampaio* 2013: 443; *Indigenous Communities*: 2010: 27 et seqq.
[160] *Jaichand/Sampaio* 2013: 443.
[161] *Jaichand/Sampaio* 2013: 443; *Diamond/Poirier* 2010: 27; cf. *CIMI - Indigener Missionsrat* (2009): Info-Brief 892. Indigene Gemeinschaften vom Xingu fordern mehr Diskussionen über Kraftwerk Belo. Available at http://www.amk.or.at/cimi_info/wp-content/uploads/2009/12/info-892.doc [accessed at 24/10/13] [hereinafter *CIMI* 2009].
[162] *Diamond/Poirier* 2010: 27 et seq.; cf. *Jaichand/Sampaio* 2013: 443 et seq.; cf. *CIMI* 2009.

provided.[163] It is highly doubtful that those meetings were held to really consult with indigenous peoples.[164]

The encounters with indigenous peoples on their land were organized by FUNAI, a government agency which aims to protect indigenous peoples' interests.[165] Leaders of the indigenous peoples deny that they participated in any official audiences. José Carlos Arara of the Arara people has video material of an encounter that shows government employees promising an official meeting.[166] No environmental or social impact studies were provided before the audience.[167]

To conclude, it can be assessed that no real consulting process was initiated and the ideas of the indigenous peoples did not in any way influence the plans for the dam.

3. Violation of Indigenous Peoples' Rights through the construction of the Belo Monte dam

This section explores what substantive and procedural indigenous peoples' rights already have been or are going to be violated through the construction of the Belo Monte dam.

To answer this question, the situation of the indigenous population outlined above has to be subsumed under indigenous peoples' rights granted in the Brazilian Constitution and international treaties. Measures the Brazilian government has taken to involve the indigenous communities in the constructing process will be researched in order to see if procedural provisions were fulfilled.

The rights of indigenous peoples in Brazil can be derived from the Brazilian Federal Constitution and international treaties it is subject to.[168] The 1988 Constitution of Brazil recognized for the first time in Brazilian history the rights of indigenous peoples.[169] Additionally, Brazil ratified, signed or voted for numerous international treaties that protect human rights and/or indigenous peoples' rights. In the year 1948, it voted in favour of the Universal Declaration of Human Rights (UDHR).[170] Brazil ratified the American Convention

[163] *Jaichand/Sampaio* 2013: 444.
[164] *Id.*: 443.
[165] *Id.*: 443.
[166] *Diamond/Poirier* 2010: 27.
[167] *Jaichand/Sampaio* 2010: 444.
[168] *Id.*: 413.
[169] *Moog Rodrigues, Maria Guadalupe* (2002): Indigenous Rights in Democratic Brazil. In: *Human Rights Quarterly* 24, 2: 487-512: 501.
[170] *UNBISNET*:

on Human Rights (ACHR)[171], the International Covenant on Economic, Social and Cultural Rights (ICESCR)[172], and the International Covenant on Civil and Political Rights (ICCPR) in 1992. [173] It ratified the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights[174] in 1996 and the Convention concerning Indigenous and Tribal Peoples in Independent Countries[175] (ILO Convention 169) in 2002. In 2007, Brazil voted in favor of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[176]

3.1. Substantive Indigenous Peoples' Rights in Brazil

3.1.1. The right to self-determination

The right to self-determination of indigenous peoples is laid out in the ICESCR and the UNDRIP. Article 1 of the ICESCR grants the right to self determination to all peoples and Article 3 of the UNDRIP specifies that this right includes indigenous peoples as well.[177] Two aspects are inherent to the right to self-determination; the external and the internal aspect.[178] The external aspect is equated to secession, but also includes autonomous representation in matters that relate to indigenous communities and the right to have contact with other indigenous peoples regardless of state borders.[179] The internal aspect of the right to self-determination is the right to determine a governmental system and participate in matters that

---

http://unbisnet.un.org:8080/ipac20/ipac.jsp?&profile=voting&uri=full=3100023~!909326~!0&ri=1&aspect=power&menu=search&source=~!horizon [accessed 02/11/13].

[171] *OAS*: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm [accessed 02/11/13].

[172] *UNTC*: http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-3&chapter=4&lang=en [accessed 02/11/13].

[173] *UNTC*: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en [accessed 02/11/13].

[174] *OAS*: http://www.oas.org/juridico/english/sigs/a-52.html [accessed 02/11/13].

[175] *ILO*, *Normlex*: http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102571 [accessed 02/11/13].

[176] *UBISNET*: http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares61295 [accessed 02/11/13].
cf. *Jaichand/Sampaio* 2013: 413.

[177] Art.1, ICESCR; Art. 3, UNDRIP.

[178] *Quane, Helen* (2011): The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights? In: Allen, Stephen/Xanthaki, Alexandra (ed.): *Reflections on the UN Declaration on the Rights of Indigenous Peoples.* Oxford and Portland: Hart. Publishing: 260 [hereinafter *Quane* 2011]; cf. *Jaichand/Sampaio* 2013: 421 et seq.

[179] *Quane* 2011 : 260 ; cf. *Jaichand/Sampaio* 2013: 421 et seq.

relate to indigenous peoples.[180] The question whether the ICESCR, or the UNDRIP grant the controversial debated right to secession to indigenous peoples is not relevant in the present case. As in most cases, the indigenous peoples from the Belo Monte movement are not aiming at becoming an independent nation state but demand the right to be part of decisions that concern their territory and livelihood.[181] [182] It is undisputed that the right to self-determination includes the right to participate in decisions that concern indigenous peoples.[183] The question remaining is whether Brazil accepts the right to self-determination and fulfills it in the case of Belo Monte.

With the Constitution of the year 1988, Brazil turned a page after their assimilation policy and enacted legislative measures to protect the rights of indigenous peoples.[184] Still, the national legislation failed to recognize explicitly the right to self-determination.[185]

Jaichand and Sampaio argue that an obligation to recognize the right to self-determination could be derived from a combination of Article 1 of the ICESCR and Article 5 paragraph 2 of the Brazilian Federal Constitution.[186] Article 5 paragraph 2 states that

> [t]he rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil is a party.[187]

But in the case *Raposa Serra do Sol* in 2009 the Supreme Federal Tribunal dismissed this reading:

> The Tribunal held that international treaties are only applicable when they are in conformance with the constitutional order and that when the Constitution makes reference to peoples, it does so in order to address the country as a whole.[188]

The decision was also due to the specifics of the case. The judges wanted to make sure that the right to succession could not be implemented and stroke down the right to participate at the same time. To sum up, the Brazilian courts do not grant the indigenous peoples the right to self-determination and therefore participation.

---

[180] *Quane* 2011: 260; cf. *Jaichand/Sampaio* 2013: 422 et seq.
[181] *Wiessner, Siegfried* (2012): Indigenous Self-determination, Culture, and Land: a Reassessment in Light of the 2007 UN Declaration on the Rights of Indigenous Peoples. In: Pulitano, Elvira [ed.]: *Indigenous Rights. In the Age of the UN Declaration.* New York: Cambridge University Press: 45.
[182] cf. *Jaichand/Sampaio* 2013: 422.
[183] cf *Quane* 2011: 272 et seqq.; cf. *Jaichand/Sampaio* 2013: 423.
[184] *Jaichand/Sampaio* 2013: 417.
[185] *Id.*: 417 et seq.
[186] *Id.:* 418.
[187] Art. 5 para. 2, Brazilian Federal Constitution [translated by *Sampaio*].
[188] *Jaichand/Sampaio* 2013: 418.

Nevertheless, the ICESCR and the UNDRIP grant this right. Seeing as Brazil never started a serious dialogue with the affected indigenous peoples living in the area surrounding Belo Monte, Brazil infringed Article 3 of the ICESCR and Article 5 of the UNDRIP.[189] But the Supreme Court already hindered a reading that interprets the ICESCR as legally binding, or at least as authoritative. Also the UNDRIP constitutes a soft law instrument and is not obligatory for Brazil. Still, for the present case it should be acknowledged that the Brazilian government ignored those standards, because the *UN Guiding Principles* bind corporations and home states to human rights, even if the host state of a company fails to fulfill them.

3.1.2. Indigenous Peoples' Land Rights

As mentioned above, the right to own and use their land is crucial for indigenous peoples.[190] Prior to the ILO Convention 169 international law ignored the special relationship between indigenous communities and their land, culture, spiritual meaning and society.[191] The ILO Convention 169 confirms that

> […] governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.[192]

The UNDRIP also recognizes this special bound and the inter-generational approach to land rights.[193]

All the mentioned international legal instruments confirm the human right to own property. Article 17 paragraph 1 of the UDHR grants everyone "the right to own property alone as well as in association with others."[194] Article 14 of the ILO Convention 169 and Article 26 of the UNDRIP recognize explicitly the communal character of this right for indigenous peoples.[195] In Article 21 paragraph 1 of the ACHR it is not expressed that the right to own property can be enjoyed collectively.[196] But in the case *Awas Tingni* the Inter-American Court of Human Rights clarified that the American Convention recognizes the communal character of the

[189] *Id.*: 424.
[190] *Gilbert/Doyle* 2011: 291; cf. *Jaichand/Sampaio* 2013: 426.
[191] *Stocks, Anthony* (2005): Too Much for Too Few: Problems of Indigenous Land Rights in Latin America. In: *Annual Review of Anthropology* 34, 85-104: 90.
[192] Article13, ILO Convention; *Gilbert/Doyle* 2011: 293.
[193] Art. 25 UNDRIP; cf. *Gilbert/Doyle* 2011: 294.
[194] Art. 17 para. 1 UDHR; cf. *Jaichand/Sampaio 2013*: 426.
[195] Art. 14, ILO Convention 169; Article26 UNDRIP; cf. *Jaichand/Sampaio* 2013: 426.
[196] Art.21 para. 1, ACHR ; *Jaichand/Sampaio* 2013: 426 et seq.

indigenous peoples' right to property by combining Article 21 paragraph 1 with Article 29 letter b, which forbids a restrictive interpretation.[197]

The Brazilian Federal Constitution corresponds with international standards. This is especially progressive seeing as the Constitution was established before the ILO Convention 169.[198] Article 231 of the Constitution recognizes the original rights to the lands indigenous peoples traditionally occupy.[199] Traditionally, occupied lands include land on which indigenous peoples "live on a permanent basis", areas used for "productive activities" and land "indispensable to the preservation of the environmental resources necessary for their well-being and for their physical and cultural reproduction, according to their uses, customs and traditions". [200] Paragraph 2 of the same Article establishes the legal nature of the right:

> The lands traditionally occupied by Indians are intended for their permanent possession and they shall have the exclusive usufruct of the riches of the soil, the rivers and the lakes existing therein. [201]

At first, the right may be characterized as limited, because it does not entail the right to own but only the right to possess and the usufruct right. But the Federal Supreme Tribunal characterized the right to exclusive usufruct as a right "*sui generis* in nature, and [therefore it] cannot be equated to what are normally the concepts of usufruct and possession."[202] Hence, the state cannot alienate or dispose of those rights.[203] This conception can be seen as an advantage as indigenous peoples often lose their lands when the land right is given to individuals or third parties.[204]

---

[197] *Inter-American Court of Human Rights* (2001): The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, (Ser. C) No. 79, Judgment 31/08/01; Art.29 letter b, ACHR:

> No provision of this Convention shall be interpreted as: […] (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;

Jaichand/Sampaio 2013: 427.

[198] *Stocks* 2005: 91.

[199] Art. 231, Brazilian Federal Constitution. English translation available at http://pdba.georgetown.edu/constitutions/brazil/english96.html [accessed 24/10/2013].

[200] Art. 231 paragraph 1, Brazilian Federal Constitution. English translation available at http://pdba.georgetown.edu/constitutions/brazil/english96.html [accessed 24/10/13].

[201] Art. 231 para. 2, Brazilian Federal Constitution [translated by Sampaio]; cf. *Jaichand/Sampaio* 2013: 427.

[202] *Jaichand/Sampaio* 2013: 427.

[203] cf. Art. 231 para. 4, Brazilian Federal Constitution. English translation available at http://pdba.georgetown.edu/constitutions/brazil/english96.html [accessed 24/10/13]:

> The lands referred to in this Articleare inalienable and indisposable [sic!] and the rights thereto are not subject to limitation.

cf. *Jaichand/Sampaio* 2013: 427 et seq.

[204] *General Confederation of Workers of Peru* (1998): Representation (article 24) - Peru - C169 – 1998: Report of the Committee set up to Examine the Representation on Alleging Non-Observance by Peru of the Indigenous and Tribal People's Convention, 1989 (No. 169), made under Article 24 of the ILO Constitution: para. 26; cf. *Jaichand/Sampaio* 2013: 428.

To fulfil the indigenous peoples' land rights, the Union needs to "demarcate them [the territories], protect and ensure respect for all of their property."[205] Article 67 of the Temporary Constitutional Provisions Act ordered the state to "conclude the demarcation of the Indian lands within five years of the promulgation of the Constitution".[206] Although this law is characterized as a strong law which ensures the demarcation process, Brazil failed to demarcate all of the *terras indígenas*.[207] For example, the *Cachoeira Seca* is a region that would be affected by the impact of the Belo Monte dam, and it still lacks demarcation.[208] Daes concludes that "purely abstract or legal recognition of indigenous lands [...] can be practically meaningless, unless the physical identity of the property is determined and marked."[209]

3.1.2.1. Limitations of the indigenous peoples' right to land

Like most of the human rights, the right to land is not absolute, but has to be weighed of with certain public interests. Article 29 UDHR and Article 21 paragraph 1 ACHR order a general proportionality assessment in regard to peoples' right to property.[210] Article 15 of the ILO Convention 169 and Article 32 paragraph 2 UNDRIP require free, prior and informed consent of indigenous peoples before exploration of resources on their land.[211]

Paragraphs 3 and 6 of Article 231 of the Brazilian Federal Constitution restrain the right of indigenous peoples' to their land as well. Paragraph 6 determines the "relevant public interest of the Union" as a cause to limit the access to land.[212] The term "relevant public interest" is not elaborated, leaving room for interpretation.[213]

---

[205] Art. 231, Brazilian Federal Constitution. English translation available at http://pdba.georgetown.edu/constitutions/brazil/english96.html [accessed 24/10/13].

[206] Art. 67, Temporary Constitutional Provisions Act. English translation available at http://www.v-brazil.com/government/laws/ADCT.html [accessed 24/10/13].

[207] *Daes*, UN Doc. E/CN.4/Sub.2/2001/21: para. 50, 55; UN Doc. CCPR/C/CO/2 (2005): para.6.

[208] *Jaichand/Sampaio* 2013: 428 et seq.; *American Commission of Human Rights*: PM 382/10: para. 32.

[209] *Daes*, UN Doc. E/CN.4/Sub.2/2001/21: para. 50.

[210] Art. 29 UDHR (general proportionality assessment for all human rights); for example Art. 21 para. 1, ACHR: "The law may subordinate such use and enjoyment to the interest of society."

[211] Art. 16, ILO Convention 169; for example Art. 32 para. 2 UNDRIP:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

[212] Art. 231 para. 6, Brazilian Federal Constitution.

[213] *Jaichand/Sampaio* 2013: 429.

The present case falls under Article 231 paragraph 3 which specifics inter alia the process when "hydric resources" are affected.[214] The Article requires additionally consultations with the communities involved and the authorization of the National Congress before implementing a project on indigenous lands.

In conclusion, international law and Brazilian law accept that the government can deprive indigenous peoples of their land, when the rights of the minority are balanced out with the interest of the majority.[215] This consideration is the strongest legal argument from the Brazilian government. Hence, it has to be assessed if the interest of the majority is proportional to the rights of the minority.[216] The Brazilian Supreme Federal Tribunal considers the proportionality assessment an effective way to decide such cases.[217]

3.1.2.2. Proportionality Assessment

In general three steps are to be followed to evaluate the proportionality of an infringement on fundamental rights: adequacy, necessity and proportionality (in its strict sense).[218] In the present case, the infringement is the deprivation of land and interference with indigenous peoples land rights. [219]

First of all, it has to be researched if the proposed activity is adequate to achieve the aim.[220] In the case of Belo Monte the proposed activity is the construction of the Belo Monte dam. The objective set by the government is the production and supply of energy. Once completed, the Belo Monte hydropower station will be able to produce energy. Hence, the proposed activity is adequate to achieve the objective. But the adequacy could be put in question when the aim would be to produce at least 11,000 megawatts of electricity. As shown above, it is not certain that Belo Monte is able to produce this amount of electricity due to water stand fluctuation.

To examine if the measure is necessary, it is important to research whether the same aim could be achieved through measures which would cause less harm.[221] As shown in greater

[214] Art.231 para. 3, Brazilian Federal Constitution; cf. *Jaichand/Sampaio* 2013: 429 et seq.
[215] *Jaichand/Sampaio 2013*: 430.
[216] See chapter II section 2.1.
[217] *Jaichand/Sampaio* 2013: 432; cf. *Mendes, Gilmar* (2001): O Princípio da proporcionalidade na Jurisprudência do Supremo Tribunal Federal: Novas Leituras. In: *Revista Diálogo Jurídico*, 1, 5: 1-25 [hereinafter *Mendes* 2001].
[218] *Da Silva, Virgílio Afonso* (2002): O proporcional e o razoável. In: *Revista dos Tribunais*, 798, 23-50: 34 [hereinafter *Da Silva* 2002].
[219] *Jaichand/Sampaio* 2013: 432.
[220] *Da Silva* 2002: 36.
[221] *Id.*: 38 et seq.

detail in the section about economic efficiency, experts doubt that the Belo Monte dam is the most efficient way to produce the amount of energy. Other means could probably achieve the same aim and would not put the livelihood of a number of indigenous peoples in danger. Furthermore, they are financially more advantageous for Brazil.[222] The dam fails the necessity test.

Still, it has to be taken into account that there are other experts who found that the Belo Monte dam is the best way to produce this amount of energy. So to assess without a doubt if the dam is proportional, I apply the proportionality in its strict sense to the case of Belo Monte. To know if the "importance of the aim to be achieved can justify the intensity by which fundamental right(s) are going to be restricted" infringements on other indigenous peoples' rights have to be taken into account.[223] The following section explores what other indigenous peoples rights might be in jeopardy.

3.1.3. Indigenous Peoples' Cultural Rights

Article 4 paragraph 1 of the ILO Convention 169 orders states to take special measures to safeguard indigenous peoples' cultures.[224] Article 27 of the ICCPR gives minorities the right to "enjoy their own culture, to profess and practise their own religion, or to use their own language."[225] The UNDRIP protects the cultural heritage of indigenous peoples in several articles.[226] Article 215 paragraph 1 of the Brazilian Constitution guarantees legal protection of the culture rights.[227] Although the legal guarantees are strong, the Special Rapporteur on the rights of indigenous peoples, James Anaya, complains that many indigenous groups face the weakening of their cultures, traditions and languages due to the fact that they are not living on their territory anymore.[228] Already in 1993, it was clear that being indigenous and territory are connected:

[222] *Jaichand/Sampaio* 2013: 433.
[223] *Id*.: 432.
[224] Art. 4 paragraph 1, ILO Convention 169; cf. *Jaichand/Sampaio* 2013: 434.
[225] Art. 27, ICCPR.
[226] Art. 8, 11, 14, 15, 31 UNDRIP.
[227] Art. 215, Brazilian Federal Constitution; cf. *Jaichand/Sampaio* 2013: 434.
[228] *Anaya, James*: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya Addendum: Report on the Situation of Human Rights of Indigenous Peoples in Brazil, UN Doc. A/HRC/12/34/Add.2 (2009): para. 9.

> The very concept of "indigenous" embraces the notion of a distinct and separate culture and way of life, based upon long-held traditions and knowledge which are connected, fundamentally, to a specific territory.[229]

Protecting cultural property is linked with to realization of territorial rights and self-determination of indigenous peoples.[230] This connection between cultural rights and territorial rights leads to a broader approach for cultural rights:

> When addressing indigenous peoples' cultural right to own and use their lands, there is an issue of survival for the group that includes reference to civil and political rights (as ultimately the issue is to protect the right of a group to survival, and thus the right to life), but also to economic, social and cultural rights (as it is through the use of their lands that indigenous peoples' economic, social and cultural rights will be guaranteed).[231]

So the right to land as a cultural right includes "[...] a right to access to the means of livelihood and the minimum standard for sustenance; [...] protection of a particular way of life; [...] rights as means of cultural protection."[232]

3.1.3.1. The right to life, health and food

The right to life is guaranteed by Article 3 of the UDHR, Article 6 paragraph 1 of the ICCPR, Article 4 paragraph 1 of the ACHR, Article7 of the UNDRIP and Article 5 of the Brazilian Federal Constitution.[233] States do not only have the duty not to harm life, but also to protect life through assuring the right to food and the right to health.[234] But even if the government does not accept this broad interpretation the right to food and health are also laid down in specific articles. The right to health is laid down in the Article 25 of the UDHR, Article 12 of the ICESCR, Article 10 of the Protocol of San Salvador, Article 7 paragraph 2 of the ILO Convention 169, and Article 21 of the UNDRIP. Article 196 of the Brazilian Federal Constitution clarifies that it is a duty of the state to reduce the risk of illnesses.[235] The right to food is guaranteed by Article 25 of the UDHR, Article 11 of the ICESCR, Article 12 of the

---

[229] *Daes, Erica-Irene* (1993): Discrimination against Indigenous Peoples. Study on the protection of the cultural and intellectual property of indigenous peoples: para. 1 [hereinafter *Daes*, UN Doc. E/CN.4/Sub.2/1993/28].
[230] *Id*.: para. 4.
[231] *Gilbert, Jérémie* (2006): Indigenous peoples' land rights under international law: from victims to actors. New York: Transnational Publishers: 116.
[232] Cf. *Jaichand/Sampaio* 2013: 435 et seqq.
[233] Art. 3, UDHR; Art. 6 para. 1, ICCPR; Art. 4 para. 1, ACHR; Art. 7, UNDRIP; Art. 5 Brazilian Federal Constitution; cf. *Jaichand/Sampaio* 2013: 435 et seq.
[234] *Gilbert* 2006: 122; cf. *Jaichand/Sampaio* 2013: 436.
[235] Art. 25, UDHR; Art. 12, ICESCR; Art. 10, Protocol of San Salvador; Art. 7 para. 2, ILO Convention 169; Art. 21, UNDRIP; Art. 196, Brazilian Federal Constitution; cf. *Jaichand/Sampaio* 2013: 437.

Protocol of San Salvador, Article 7 paragraph 4 of the ILO Convention 169 and Article 29 paragraph 1 of the UNDRIP. Article 6 of the Brazilian Constitution also categorizes health and the right to food as social rights.[236]

The obligation to supply indigenous population with food can be fulfilled by guaranteeing them access to their land.[237] Regarding food security the dam will be a physical barrier to get access to food. Furthermore, the flora and fauna will be destroyed, taking away the most important source for nutrition. The increase of population will intensify illegal hunting, fishing and logging activities and thus further reduce the stock of plants and animals. Also the price for staples will rise. To conclude, Belo Monte will impair the food security of the indigenous peoples in the area.

The health of the indigenous peoples in the area around Belo Monte will be harmed through the construction of the dam. As shown above, through the stagnation of the river flow and the reduced access to clean drinking water, malaria and waterborne diseases are more likely to occur. Furthermore, the health system is threatened through the population influx. Not only does the Brazilian government not reduce the risk of illnesses but also it increases the likelihood of epidemics and a decline of the overall health situation.[238]

3.1.3.2. Protection of a particular way of life

Article 27 of the ICCPR is protecting the way of life of indigenous peoples.[239] Also the Articles 11 and 12 of the UNDRIP are preserving the way of life.[240] Article 216 of the Brazilian Constitution grants the protection of the "ways of creating, making and living" of "the various groups that form Brazilian society."[241] Fishing and hunting as main economic

---

[236] Art. 25, UDHR; Art. 11, ICESCR; Art. 12, Protocol of San Salvador; Art. 7 paragraph 4, ILO Convention 169; Art. 29 paragraph 1, UNDRIP; cf. *Jaichand/Sampaio* 2013: 436.

[237] The European Parliament supports this view: *European Parliament* (2003): Resolution on Guatemala, P5_TA(2003)0190/C 64 E/609:

> Article11of the International Covenant on Economic, Social and Cultural Rights, implies the obligation on the part of the State and the international community to guarantee the access of vulnerable groups to the resources needed to feed themselves, in particular access to land.

[238] *Jaichand/Sampaio* 2013: 437 et seq.

[239] Art. 27, ICCPR; cf. *OHCHR*: General Comment No. 23: The Rights of Minorities (Art. 27), UN Doc CCPR/C/21/Rev.1/Add.5 (1994): para. 7:

> With regard to the exercise of the cultural rights protected under Article27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples.

[240] Art. 11, 12, UNDRIP.

[241] Art. 216, Brazilian Federal Constitution. English translation available at http://pdba.georgetown.edu/constitutions/brazil/english96.html [accessed 24/10/13]; *Jaichand/Sampaio* 2013: 438.

activities are an important element of indigenous peoples' culture in the area. Also travelling by boat and selling products or buy staples would be made impossible.[242] The construction of the dam would also result in the isolation of the Juruna peoples because the reduced water flow would make it impossible to use their only means of transportation in order sell nuts they collect.[243]

The UN Human Rights Committee has asserted that projects which have a certain limited impact on indigenous people's way of life have to be tolerated, as long as they do not amount to a complete denial of the right protected by Article27 of the ICCPR.[244] It is evident that the whole livelihood of indigenous peoples in the area depends on the river and thus the construction of Belo Monte leads to the complete denial of their right granted under Article27 ICCPR.[245]

3.1.3.3. Protection of the cultural heritage

Cultural Rights include the "cultural heritage" like languages, songs, traditions and cults which are linked to the territory.[246] In the case *Awas Tingni* the Inter-American Court elaborated the connection between cultural heritage and property rights:

> For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.[247]

According to the Inter-American Commission on Human Rights, Article 27 of the ICCPR includes the right to cultural identity as well.[248] Article 21 of the ACHR was interpreted by the Inter-American Court as the right of indigenous peoples "to enjoy their particular spiritual

---

[242] *Diamond/Poirier* 2010: 27.
[243] *Jaichand/Sampaio* 2013: 438.
[244] *Human Rights Committee* (1995): Jouni E. Länsman et. al. v. Finland, Communication. No. 671/1995, UN Doc. CCPR/C/58/D/671/1995 (1996): para. 10.3; cf. *Jaichand/Sampaio* 2013: 439.
[245] cf. *Jaichand/Sampaio* 2013: 439.
[246] *Gilbert* 2006: 134.
[247] *Inter-American Court of Human Rights* (2001): The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, (Ser. C) No. 79, Judgment 31/08/01: para. 149. cf. *Jaichand/Sampaio* 2013: 439 et seq.
[248] *Inter-American Commission of Human Rights* (1985): Yanomami v. Brazil, Judgment, Resolution Nº 12/85, Case Nº 7615, Brazil: para. 7:

> That international law in its present state, and as it is found clearly expressed in Article27 of the International Covenant on Civil and Political Rights, recognizes the right of ethnic groups to special protection on their use of their own language, for the practice of their own religion, and, in general, for all those characteristics necessary for the preservation of their cultural identity.

cf. *Jaichand/Sampaio* 2013: 440.

relationship with the territory they have traditionally used and occupied."[249] The Brazilian Federal Constitution recognizes the obligation of the state to protect indigenous peoples' manifestations and their "social organization, customs, languages, beliefs and traditions" in Article 231.[250] Article 5 paragraph 6 guarantees "[…] the protection of places of worship".[251] The word Xingu means "house of God" in the local indigenous languages. Therefore, it seems impossible to build a giant dam, without destroying the spiritual balance of the river and the surrounding land.[252]

ad 3.1.2.2. Proportionality Assessment in its strict sense

The land rights guaranteed under Article 231 can be limited when certain criteria are fulfilled. As shown above, it could be argued that the dam is adequate and necessary to meet the energy demand of Brazil. The remaining question is whether the dam is proportional (in its strict sense). The fundamental human rights infringements on indigenous peoples' cultural rights influence this assessment. The importance of supplying the Brazilian population with energy cannot justify grave infringements on land and cultural indigenous peoples' rights. Seeing as most of the violations concern fundamental interests of the indigenous population, implementing other projects to produce energy for the Brazilian people would be more reasonable. Even if those measures would cost more, the fragility of indigenous peoples of the area, would serve as an argument to justify those additional costs. Especially, because the consequences for the indigenous peoples are irreversible once the project is completed.[253]
In conclusion, Brazil violates Article 231 of the Brazilian Federal Constitution, which guarantees land rights to the indigenous peoples.

[249] *Inter-American Court of Human Rights* (2007): Saramaka people v. Suriname, Judgment 28/11/07: para. 95; cf. *Jaichand/Sampaio* 2013: 440.
[250] *Jaichand/Sampaio* 2013: 440.
[251] Art. 5 para. 6, Brazilian Federal Constitution, English translation available at http://pdba.georgetown.edu/constitutions/brazil/english96.html [accessed 24/10/13]; cf. *Jaichand/Sampaio* 2013: 440.
[252] *Diamond/Poirier* 2010: 27.
[253] cf. *Jaichand/Sampaio* 2013: 441.

3.2. Procedural Indigenous Peoples' Rights in Brazil

The procedural rights are derived from the substantive ones mentioned above.[254] As seen above, the right to self-determination guarantees indigenous peoples a meaningful dialogue with government officials and the right that their input affects the decision. Jaichand and Sampaio argue that Article 27 of the ICCPR also implies an obligation to consult with indigenous peoples. This argument has its merits seeing as preservation of the culture is only possible when the indigenous population clarifies the essence of its culture and the necessary measures which are needed to protect it.[255] The right to free, prior, and informed consultation is also laid down in Articles 6 and 15 paragraph 2 of the ILO Convention 169.[256] Article 19 of the UNDRIP orders states to

> […] consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.[257]

The Brazilian Federal Constitution lies down an independent right to a consultation process in Article 231 paragraph 3. After hearing the communities involved the National Congress can authorize the project.[258] So the procedures fall short of the criteria set in national law because there were no hearings conducted by the National Congress.[259]

In the case of Belo Monte the international and national criteria for a valid consulting process have not been met. Even if the four public audiences would be considered as consultation meetings, they fail to fulfil further requirements set by international standards and the Brazilian Federal Constitution.

First of all, the consent was not "free, prior and informed". The fact that security forces were denying people access to the hearing sites shows that the consultation was not free. There was no prior information available before the meetings. The 20,000 pages report was provided two days before the hearing took place making it impossible for the documents to be analyzed in

---

[254] *Id.*: 442.
[255] *Id.*: 442.
[256] Art. 6, 15, ILO Convention 169.
[257] Art. 19, UNDRIP.
[258] Art. 231 para. 3, Brazilian Federal Constitution, English translation available at http://pdba.georgetown.edu/constitutions/brazil/english96.html [accessed 24/10/13]:

> Hydric resources, including energetic potentials, may only be exploited, and mineral riches in Indian land may only be prospected and mined with the authorization of the National Congress, after hearing the communities involved, and the participation in the results of such mining shall be ensured to them, as set forth by law.

[259] See chapter II section 2.4.; cf. *Jaichand/Sampaio* 2013: 444.

advance. Also the document failed to include social and cultural impacts on the indigenous peoples located on the Big Bend.[260] Hence, there could not have been an informed consent.

This view is confirmed by *The Committee of Experts on the Application of Conventions and Recommendations* (CEACR).[261] They recall that according to Article 15 of the ILO Convention 169, the government needs to consult the indigenous peoples before allowing the exploitation of resources on their land.[262] The Committee agrees that the hydropower scheme could affect the peoples not only through displacement and flooding but also alternate the navigability of rivers, flora and fauna and climate.[263] Article 6 of the Convention states that government shall consult the peoples through representative institutions, and that the consultations "shall be undertaken in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures."[264] In its general observation of 2010, the Committee specifies the requirements for the consulting process. The consultations process

> [s]hould allow the full expression of the viewpoints of the persons concerned, in a timely manner and based on their full understanding of the issue, so that they may be able to affect the outcome and a consensus can be achieved, and be undertaken in a manner that is acceptable to all parties.[265]

Ad hoc consultation may not be sufficient and communities need to be included in the preparation of environmental studies.[266] The Committee concludes that the consultation process did not reach the requirements of Articles 6 and 15 of the ILO Convention 169 and that the indigenous peoples could not take part in determining their priorities in accordance with Article 7 of the Convention.[267]

> The Committee asks the Government as follows:
>
> (i) to take the necessary steps to carry out consultations with the indigenous peoples affected, in accordance with Articles 6 and 15 of the Convention, on the construction of the Belo Monte hydroelectric plant before the harmful effects of the plant may have become irreversible;

---

[260] *Id.*: 444.
[261] The CEACR is the ILO body responsible for examining the application of ratified Conventions. ILO: Homepage. Supervision. Available at http://www.ilo.org/indigenous/Conventions/Supervision/lang--en/index.htm [accessed 23/10/2013].
[262] *CEACR* (2012): Observation 2012. Indigenous and Tribal Peoples Convention, 1989 (No. 169) – Brazil. Available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:2700476 [accessed at 24/10/13] [hereinafter *CEACR* 2012].
[263] *CEACR* 2012.
[264] Art. 6, ILO Convention 169.
[265] *CEACR* 2012.
[266] *Id*.
[267] cf Art.7, ILO Convention 169.

> (ii) in consultation with the indigenous peoples, to take measures to determine whether the priorities of these peoples have been respected and whether their interests will be adversely affected and to what extent, with a view to adopting appropriate mitigation and compensation measures;
>
> (iii) to provide information on the results of the proceedings pending before the Federal Judge of Pará.[268]

Moreover, the Inter-American Court of Human Rights clarifies that the indigenous peoples need to be consulted in the early stages of the development, not only then when the need to obtain approval from the community arises.[269] The Inter-American Court determined that "[t]he duty to obtain consent responds, therefore, to a logic of proportionality in relation to the right to indigenous property and other connected rights."[270] Seeing as Belo Monte will be the third biggest dam in the world influencing the land and culture of the indigenous population in the most severe way possible, it can be concluded that the consulting measures were not proportional.[271]

According to Jaichand and Sampaio, the Brazilian government has three options: They can cancel the license and start a new study after consulting with indigenous peoples through the National Congress, they can recognize indigenous peoples' right to veto the dam as the international legal obligations are interpreted by the Inter-American Court on Human Rights and the majority of the Brazilian Supreme Tribunal or they disregard all obligations and continue with the construction.[272]

Currently, it looks like the government tends to ignore all international and national legal obligations.

4. The Involvement of Andritz

The Andritz Group is headquartered in Graz, listed on the stock exchange and is employing about 23,800 people worldwide. The company supplies plants, equipment and services in the

---

[268] *CEACR* 2012.

[269] *Inter-American Court of Human Rights* (2007): Saramaka people v. Suriname, Judgment 28/11/07: para. 133; cf. *Jaichand/Sampaio* 2013: 444.

[270] *Inter-American Court of Human Rights* (2009): Indigenous and Tribal People's Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System Doc. No. 56/09, OEA/Ser.L/V/II: para. 333. The Court refers to *Anaya*, UN Doc. A/HRC/12/34 (2009): para. 47:

> Necessarily, the strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved. A significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent.

[271] *Jaichand/Sampaio* 2013: 445.

[272] *Id.*: 446.

following areas: hydropower, the pulp and paper industry, the metal forming and steel industry, and the solid/liquid separation in municipal and industrial sectors.[273] Andritz Hydro is as subsidiary of Andritz Group responsible for supplying electro-mechanical systems and services for hydropower plants and is one of the leaders for hydraulic power generation.[274] They employ 7,469 people.[275] 1,600 employees work in Brazil.[276]

Andritz Hydro is supplying as part of a consortium composed of Alstom (consortium leader), Andritz, and Voith three Francis turbines and generators, 14 excitation systems for the main power house (Belo Monte), six bulb turbines and six generators, all auxiliary equipment and other hydro-mechanical equipment for the Pimental power house of the Belo Monte project. The order value is approximately 330 Million Euro.[277] This constitutes the largest single order in the history of the company's division Hydro and about 5 to 10 percent of the equipment of the whole Belo Monte project. [278]

Austrian based NGOs have criticized Andritz[279] publicly and repeatedly for supplying equipment to Belo Monte. The criticism of organizations like Greenpeace, DKA, Südwind, attac, and others focuses on the unknown environmental consequences and the infringements of indigenous peoples' rights. [280] The Network Social Responsibility nominated Andritz for the eyesore of the year 2012:

> NeSoVe has the opinion, that it is socially irresponsible to participate in such a project, that [sic] expels thousands of people from their country and has incalculable eco-social consequences. [...] It is unacceptable that Austrian companies do profit by projects, which exile people from their living place and destroy the environment.[281]

[273] *Andritz*: Homepage: Andritz Group: About us. Available at http://www.andritz.com/group/gr-about-us.htm [accessed 24/10/2013].
[274] *Graham&Whiteside. Cengage Learning* (2013): The Major Companies Database. Andritz Hydro GmbH; *Andritz*: Homepage: Andritz Hydro. Available at http://www.andritz.com/hydro.htm [accessed 24/10/13].
[275] *Andritz Hydro* (2013): Company Presentation. April 2013: 6.
[276] *Kramer, Angelika* (2013): Interview with Andritz CEO Leitner: „Ich rechne mir nicht ständig aus, wie viel mein Aktienpaket gerade wert ist." In: *Format*. 22/05/2013 [hereinafter *Kramer* 2013].
[277] *Andritz Group* (2011): Andritz News. Andritz to Supply Major Equipment for Belo Monte Hydropower Plant. Available at http://www.andritz.com/hydro/hy-news/hy-news-detail.htm?id=5589 [accessed at 24/10/2013] [hereinafter *Andritz Group* (2011)].
[278] *Network Social Responsibility* (NeSoVe) (n.d): Nominated for the eyesore of the year 2012. Andritz AG in the Belo Monte dam project in Brazil [hereinafter *Network Social Responsibility* (n.d.)].
[279] When a distinction between Andritz Group and Andritz Hydro is not necessary, the thesis uses the term Andritz.
[280] cf. *Greenpeace, DKA, attac et al* (2010): Offener Brief an Andritz AG. 26/02/2010.
[281] *Network Social Responsibility* (n.d.).

Andritz replies by questioning the legitimacy of Austrian-based protest. Leitner, the CEO and president of Andritz Group draws a comparison between the protest and imperialistic tendencies:

> Ob das die Schwarze Sulm in der Steiermark[282] ist oder das Belo Monte-Projekt, die Arroganz zu sagen, es muss weltweit alles so sein, wie ich es aus dem 1. Bezirk in Wien gern hätte, ist ein Rückfall in alte, imperialistische Zeiten.[283]

Austrian-based NGOs may not have the authority or democratic legitimization to tell the Brazilian government how to handle the construction of Belo Monte; nevertheless, they are fulfilling a watchdog function regarding Austrian politics and corporations.[284] Furthermore, Andritz never sent delegates to the project site to consult with indigenous peoples, who are legitimate actors in the Belo Monte process according to international and national law.[285]

In the same interview Leitner acknowledges the protest in Brazil, but he dismisses it by stating that the majority should not be ruled by a minority.[286] This argument is weak seeing as the Brazilian and international legal framework determine the minority rights of indigenous peoples.

However, Andritz also reacted to the substance of the criticism. First of all they argued that Brazil and Andritz comply anyhow with all legal, environmental and social standards.[287] For Andritz the suspense of the license through the court of Pará shows that Brazil has a functioning legal system, which grants indigenous peoples rights.[288] Regarding environmental question Andritz argues that Andritz Hydro is certified according to ISO 14.001 meaning that Andritz is obliged to fulfil the highest environmental regulations.[289]

A more pragmatic counterargument is the notion that the withdrawal of Andritz would not influence the success of the construction. Leitner explains that Andritz only supplies a small part of turbines and generators; the majority is delivered by Astom, Voith and IMPSA from Argentina. So Andritz is neither investor, nor project operator and their equipment could be

---

[282] The very small project „Schwarze Sulm“ in the Austrian region “Schwarze Sulm” is not comparable to the giant dam in Belo Monte. The only similarity is that both are criticized by NGOs.
[283] *Steiermark. ORF* 2013: Andritz-Gewinn um die Hälfte zurückgegangen.07/07/13.
[284] cf. *BMWFJ/BMLFUW* 2013: 14.
[285] *APA* 2013: Belo-Monte-Staudamm: Kräutler wirft Brasilien Verfassungsbruch vor. In: *Der Standard*. 17/05/13.
[286] *Kramer* 2013.
[287] *Id*.
[288] Andritz refers to the suspense of the partial installation license in February 2011. See above (chapter II section 1.).
[289] *OTS* (2011): Andritz: Stellungnahme zum Wasserkraftwerksprojekt Belo Monte: 02/03/11. Available at http://www.ots.at/presseaussendung/OTS_20110302_OTS0268/andritz-stellungnahme-zum-wasserkraftwerksprojekt-belo-monte [accessed 05/11/13].

easily replaced by another firm.[290] But every debate about corporations' responsibility to respect human rights becomes obsolete when companies point to the unwillingness of the other enterprises to comply with human rights as an excuse to ignore their own obligations.

One party that also campaigns intensively against Belo Monte in Austria and on a European level are The Greens. In 2012, members of parliament sent a parliamentary question regarding the federal export guarantees for projects of Andritz to former finance minister, Maria Fekter.[291] Since 2008, Austria accepted export guarantees amounting to 1.7 Billion Euros for projects of Andritz.[292] Andritz did not apply for an export guarantee for Belo Monte.

In conclusion, the involvement of Andritz caused a debate in Austria about the responsibilities of Austrian-based companies for human rights and environmental standards abroad. Moreover, politicians raised the question whether any funding for those companies by the state can be justified.

The aim of this thesis is to approach the answers by applying the obligations of the *UN Guiding Principles* to Andritz and Austria. In order to understand the scope of the provisions, the history behind the *UN Guiding Principles* has to be researched.

[290] *Kramer* 2013.

[291] *Glawischnig-Peisczek/Schwentner* et al. (2012): XXIV. GP.-NR 12504/J, Anfrage betreffend Belo Monte – österreichische Förderung für naturzerstörendes Österreichisches Unternehmen, 11/07/12. [hereinafter *Parlamentarische Anfrage* 12504/J].

[292] *Fekter, Maria* (2012): XXIV. GP.-NR 12294/AB, Beantwortung der Anfrage NR 12504/J, 10/09/12 [hereinafter *Beantwortung der parlamentarischen Anfrage* Nr 12294/AP].

Chapter III: The UN Guiding Principles on Business and Human Rights: A Brief History

Like all legal documents the *UN Guiding Principles* did not develop in a theoretical vacuum, but the text was framed in a political and social debate. It is essential to take into account all the steps the UN has taken to oblige international businesses to human rights standards to understand the full scope of the *UN Guiding Principles*.

1. The relationship between the United Nations and Multinational Corporations before the *UN Global Compact*

Although MNCs emerged in the late 19th century, the UN only started to concern itself with their regulation in the 1970s.[293] In the 1960s, companies began to outsource production into development countries to benefit from cheap labour and other competitive factors. The growing influence of these companies was especially concerning for newly independent nations. MNCs, often tied to former colonial states, imposed a threat for their recently gained independence and economic development.[294] Especially the Soviet Union saw them as a new form of imperialisms.[295] Political and economic changes in the 1970s, like the abandonment of the Bretton Woods system, the energy crisis and the demand for a New International Economic Order by developing countries, entailed that the UN became a battleground regarding this topic, rather than a forum of discussion.[296] MNCs also started adapting their strategies to the new global environment.[297]

In this intense and conflict-prone surroundings of the 1970s, the idea of a legally binding code of conduct for international businesses emerged.[298] But the work of the Commission on

[293] *Wilkins, Mira* (2005): Multinational Enterprise to 1930. Discontinuities and Continuities. In: Chandler, Alfred D./Mazlish, Bruce [ed.]: *Leviathans. Multinational Corporations and the New Global History.* Cambridge: Cambridge University Press: 51 [hereinafter *Wilkins* 2005]; S*agafi-nejad/Dunning* 2008: 41 et seqq.

[294] *Jerbi, Scott* (2009): Business and Human Rights at the UN: What Might Happen Next? In: *Human Rights Quarterly* 31: 299–320: 301 [hereinafter *Jerbi* 2009].

[295] *Sagafi-nejad/Dunning* 2008: 53.

[296] *Id.*: 41, 48 et seq.

[297] *Chandler, Alfred D./Mazlish, Bruce* (2005): Introduction. In: Chandler, Alfred D./Mazlish, Bruce [ed.]: *Leviathans. Multinational Corporations and the New Global History. Cambridge*: Cambridge University Press: 2 [hereinafter *Chandler, Alfred D./Mazlish, Bruce* 2005].

[298] *Coleman, David* (2003): The United Nations and Transnational Corporations: From an Inter-nation to a "Beyond-state" Model of Engagement. In: *Global Society* 17: 339–357: 339 [hereinafter *Coleman* 2003].

MNCs and the Centre on MNCs was slowed down by the Cold War power division and the post-colonial structure.[299]

Later, the collapse of the Soviet Union led to the establishment of the free market paradigm, thus giving the MNCs an even stronger bargaining power.[300] By the mid-1990s the plan to oblige TNCs to a code ultimately dropped from the UN agenda.[301] To overcome this deadlock the focus of the UN shifted from a strictly governmental toward a more voluntary multi-actor approach.[302]

2. The *UN Global Compact*

In 1999, former Secretary-General Kofi Annan held a speech titled "The Global Compact" to the plenary session of the World Economic Forum in Davos:

> I propose that you, the business leaders gathered in Davos, and we, the United Nations, initiate a global compact of shared values and principles, which will give a human face to the global market.[303]

It was not planned that this speech would be the beginning of a global initiative, but the idea spread rapidly.[304] One of the reasons why the *UN Global Compact* could be implemented so quickly, although the idea of a legally binding code disappeared three years before, was that Kofi Annan dealt directly with non-state actors like MNCs, NGOs and civil society.[305] It is constructed as a "global beyond-state agreement, rather than an inter-nation one."[306] The *UN Global Compact* was officially launched in July 2000.[307]

---

[299] *Coleman* 2003: 339 et seq.
[300] *Coleman* 2003: 349 et seq.; cf. *Monks, Robert A.G.* (2005): Governing the Multinational Enterprise. The Emergence of the Global Shareowner. In: Chandler, Alfred D./Mazlish, Bruce [ed.]: *Leviathans. Multinational Corporations and the New Global History.* Cambridge: Cambridge University Press: 189.
[301] *Coleman* 2003: 350; *Rasche, Andreas/Waddock, Sandra/McIntosh, Malcolm* (2012): The United Nations Global Compact : Retrospect and Prospect. In: *Business & Society* 52: 6–30: 14 [hereinafter *Rasche/Waddock/McIntosh* 2012].
[302] *Coleman* 2003: 339; *Rasche/Waddock/McIntosh* 2012: 14.
[303] *Annan*, UN Doc. SG/SM 6681 (1999).
[304] *Kell* 2005: 69.
[305] *Coleman* 2003: 350.
[306] *Id.:* 350.
[307] *Kell* 2005: 69; *UN Global Compact Office* (2011): Corporate Sustainability in the World Economy. United Nations Global Compact. Available at: http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf [accessed 28/10/2013]. [hereinafter *UN Global Compact Office* 2011].

2.1. The content of the *UN Global Compact*

The *UN Global Compact* "is a leadership platform for the development, implementation and disclosure of responsible and sustainable corporate policies and practices."[308] It establishes ten principles in the area of human rights, labour, environment and anticorruption.[309] The *UN Global Compact* seeks to achieve two main objectives: The basic concept is to promote the ten principles worldwide through a partnership of business participants with non-business participants like NGOs, trade unions, UN, government and other agencies and align business operations and strategies.[310] Secondly, it wants to stimulate measures supporting guiding UN development goals.[311] [312] It is based on a voluntary approach, rather than on a regulatory one.[313] According to the UN Global Compact Office the initiative "relies on public accountability, transparency and disclosure to complement regulation and provide a space for innovation and collective action."[314]

In contrast to the *UN Guiding Principles*, the standards set in the *UN Global Compact* are more of a general nature and companies cannot use them as guidance for business activities. The first two principles regarding human rights simply state: "Business should support and respect the protection of internationally proclaimed human rights; and make sure that they are not complicit in human rights abuse."[315]

2.2. Participants in the *UN Global Compact*

Besides companies, stakeholders and participants are: the public sector, including governments, cities, universities and the civil society, including NGOs and labour organizations. The UN serves as a facilitator.[316]

In spring 2012, the *UN Global Compact* had 10,000 business and non-business participants making it the "largest voluntary corporate sustainability initiative worldwide."[317] A year later

---

[308] *UN Global Compact Office* 2011.
[309] *UN Global Compact Office* 2011; The principle regulating anticorruption was established in July 2004 (*Lukas, Karin/ Hutter, Franz-Josef* (2009): Menschenrechte und Wirtschaft. Wien, Graz: Neuer Wissenschaftlicher Verlag: 172 [hereinafter *Lukas/Hutter* 2009]).
[310] *Kell/Slaughter/Hall* 2007: 26; *Rasche/Waddock/McIntosh* 2013: 7; *UN Global Compact Office* 2011.
[311] *UN Global Compact Office 2011.*
[312] Examples for broader UN development goals are the Millennium Development Goals (MDGs).
[313] *UN Global Compact Office* 2011.
[314] *Id.*
[315] *Id*.
[316] *UN Global Compact* 2013: Homepage: UN Global Compact Participants. Available at http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html [accessed 28/10/13].

in April 2013, the *UN Global Compact* had 11,146 business and non-business participants. 7,558 of them are businesses. 35 Austrian based businesses are part of the *UN Global Compact*. Andritz is not a participant.[318]

2.3. Achievements of the *UN Global Compact*

One of the main achievements of the *UN Global Compact* was giving fresh momentum to a new relationship between the UN and the business sector after years of alienation.[319] It is also worth mentioning that the *UN Global Compact* opened a dialogue between NGOs and business representatives.[320]

The voluntary approach has the advantage that companies, also the big global players, are more willing to participate.[321] The underlying idea is that a critical mass of the world economy joins the *UN Global Compact* voluntarily.[322] The labour unions supported this approach, hoping that the UN Global Compact would lead to a "social dialogue at the global level" and promote "effective national laws".[323] Another argument against a regulatory approach is that criminal and/or civil law alone are not effective tools to enforce human rights.[324]

The expectation is that the cooperation and the alignment of business strategies' leads to the repetition, development and implementation of "best practice".[325]

2.4. Remaining Challenges

2.4.1. Ideology

The partnership between the United Nations and the business sector is reason for ideological criticism, putting the neutrality of the UN in question.[326] Activists argued that the *UN Global*

---

[317] *UN Global Compact Office* 2011; *Rasche/Waddock/McIntosh* 2012: 7.
[318] Numbers are based on a search conducted on the 11/04/13.
[319] *Kell/Slaughter/Hall* 2007: 27; *Kell* 2005: 70 et seq.
[320] *Lukas/Hutter* 2009: 173.
[321] *Kell* 2005: 71.
[322] *Kell/Slaughter/Hall* 2007: 26.
[323] *Kell* 2005: 71.
[324] *Lukas/Hutter* 2009: 174; cf. *Ruggie* 2013: 102.
[325] *Lukas/Hutter* 2009: 173.
[326] *Knight/Smith* 2008: 193.

Compact moves the UN closer to the interests of the MNCs and helps "blue washing[327]" activities, without changing the company's operations.[328] Martens also criticises the word "partnership" arguing it undermines not only the specific status of governmental international organisations, but also their democratic legitimacy.[329]

2.4.2. Structure

The main advantage in the structure of the *UN Global Compact* is also seen as its greatest disadvantage: The voluntarism. The strengthening of regulatory enforcement is the main demand of civil society organisations.[330] The fact that North American companies are especially reluctant to join the initiative, although they are a sizeable part of global business, supports the argument that voluntarism alone cannot attract enough companies to reach a tipping point.[331]

Regarding reporting obligations and cooperate accountability, small improvements have been made since 2006. Companies are marked as "inactive", when they fail to submit the COP (Communication in Progress) report, which summarizes the taken steps to fulfil the principles, two years in a row.[332] The call for external monitoring or at least the standardisation of reporting obligations went unheard. Implementation of enforcement mechanism is problematic due to the imprecise and vague wording, which is also cause for critic.[333]

The lack of sanction mechanisms is actually more a question of ideology as the *UN Global Compact* is primary constructed as a platform to discuss and improve human rights action, rather than a regulatory instrument.[334] A proposal from human rights organisations aims to provide positive incentives by awarding public contracts for the UN to companies, which respect and fulfil the ten principles.[335]

---

[327] "Blue washing" (instead of "white washing") is a reference to the UN colour (*Ruggie* 2013: 38).
[328] *Knight/Smith* 2008: 193.
[329] *Martens, Jens* (2004): Precarious "Partnerships". Six Problems of the Global Compact. In: *Global Policy Forum*: Section 6. Available at http://www.globalpolicy.org/component/content/article/225/32252.html [Accessed 28/10/13].
[330] *Knight/Smith* 2008: 194.
[331] cf. *Kell/Slaughter/Hall* 2007: 26.
[332] *Lukas/Hutter* 2009: 174.
[333] *Id.*
[334] cf. *Kell* 2005: 71.
[335] *Lukas/Hutter* 2009: 175.

Another concession to critics was made in 2009 by requiring companies to commit to all principles, instead of giving them the opportunity to pick specific principles.[336]

2.4.3. Institutional implications

There are concerns regarding the institutional implications of the *UN Global Compact*. The *UN Global Compact* was established a few years after the World Trade Organisation (WTO), which led to the conclusion that the WTO is not required to deal with social, environmental, and ethical consequences of business activities. The *UN Global Compact* became the leading global forum regarding those issues, without similar enforcement mechanisms.[337]

3. The *UN Draft Norms*

The *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*[338] (*UN Draft Norms*) were developed from 1999 to 2003 by the UN-Sub Commission for the Promotion and Protection of Human Rights.[339] In 1998, the Sub-Commission on Prevention of Discrimination and Protection of Minorities[340] established a working group "to examine the working methods and activities of transnational corporations."[341] In 2001, the mandate of the working group was extended to develop relevant norms.[342] In 2003, the Sub-Commission unanimously adopted the *UN Draft Norms*, arguing that they „reflect most of the current trends in the field of international law, and particularly international human rights law, with regard to the activities of transnational

[336] *Id.*: 174.
[337] *Knight/Smith* 2008: 194. As shown in chapter I section 1.2. WTO mechanisms can only be used indirectly to enforce human rights.
[338] *Sub-Commission on the Promotion and Protection of Human Rights:* Economic, Social and Cultural Rights. Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights. [hereinafter *Sub-Commission,* UN Doc. E/CN.4/Sub.2/2003/12/Rev.2].
[339] *Seppala, Nina* (2009): Business and the International Human Rights Regime: A Comparison of UN Initiatives. In: *Journal of Business Ethics* 87: 401–417: 403 [hereinafter *Seppala* 2009].
[340] Note that the Sub-Commission on Prevention of Discrimination and Protection of Minorities became the Sub-Commission for the promotion and Protection of Human Rights in 1999.
[341] *Sub-Commission on Prevention of Discrimination and Protection of Minorities*: The relationship between the enjoyment of economic, social and cultural rights and the right to development, and the working methods and activities of transnational corporations, UN Doc. E/C.4/Sub.2/Res/1998/8: para. 4.
[342] *Sub-Commission on the Promotion and Protection of Human Rights*: The effects of the working methods and activities of transnational corporations on the enjoyment of human rights, UN Doc. E/C.4/Sub.2/Res/2001/3: para. 4; *Nolan, Justine* (2005): With Power Comes Responsibility: Human Rights and Corporate Accountability. In: *UNSW Law Journal* 28: 581–613: 584 [hereinafter *Nolan* 2005].

corporations and other business enterprises."[343] A strong debate was initiated after the *UN Draft Norms* were transmitted to the UN Commission on Human Rights and put on the agenda in 2004 and again in 2005.[344]

3.1. The content of the *UN Draft Norms*

The *UN Draft Norms* contain

> 23 articles, drafted in treaty-like language, which set out human rights principles for companies in areas ranging from international criminal and humanitarian law; civil, political, economic, social and cultural rights; to consumer protection and environmental practices.[345]

Weissbrodt and Kruger categorized the UN Draft Norms as *soft law*, but the Commission on Human Rights made clear that the document "as a draft proposal, has no legal standing."[346] According to Deva, the UN Draft Norms mark a new approach in the discussion about the responsibility of MNCs[347] for human rights.[348] First of all the *UN Draft Norms* take all human rights into account and are not limited to labour and/or environmental rights.[349] The proposal states in its General Obligation, that

> transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law national law, including the rights and interests of indigenous peoples and other vulnerable groups.[350]

---

[343] *Sub-Commission on the Promotion and Protection of Human Rights*: Draft Provisional Agenda and Agenda and Adoption of the Report. Draft report of the Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/2003/L.11, Res/2003/16; *Nolan* 2005: 584.
[344] *Nolan* 2005: 584 et seq.
[345] *Ruggie, John*: Promotion and Protection of Human Rights. Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: para.: 56 [hereinafter *Ruggie*, UN Doc. E/CN.4/2006/97].
[346] *Commission on Human Rights*: Responsibilities of transnational corporations and related business enterprises with regard to human rights [hereinafter *Commission on Human Rights*, UN Doc. E/CN.4/Dec/2004/116]; *Weissbrodt, David/Kruger, Muria* (2005): Human Rights Responsibilities of Business as Non-State Actors. In: Alston, Philipp: *Non-State Actors and Human Rights.* New York: Oxford University Press: 339 [hereinafter *Weissbrodt/Kruger* 2005]
[347] The *UN Draft Norms* use the term TNCs. In my thesis the terms MNCs and TNCs are equivalent. See footnote 23.
[348] *Deva, Surya* (2004): UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction? In: *ILSA Journal of International & Comparative Law* 10: 493–523: 497 [hereinafter *Deva* 2004]; *Deva, Surya* (2012b): Regulating Corporate Human Rights Violations : Humanizing Business. Oxon: Routledge: 103 [hereinafter *Deva* 2012b].
[349] *Deva* 2004: 497 et seq.; *Deva* 2012b: 101.
[350] *Sub-Commission*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2: para. 1.

The Norms specific obligations regard the right to equal opportunity and non-discriminatory treatment, the right to security of persons, the rights of workers, national sovereignty and human rights, consumer protection and environmental protection.[351]

Second, the preamble makes a clear reference to the UN Charter, the Universal Declaration of Human Rights and other international treaties to derive obligations for MNCs.[352] The majority of jurist believes that those documents are not applicable to non-state actors.[353] Deva concludes the *UN Draft Norms* do not state existing law, but put those obligations for the first time directly on companies."[354]

Also the *UN Draft Norms* mark a shift of paradigm regarding the nature of the obligations. Before corporations were simply obliged to do no harm, whereas the *UN Draft Norms* impose positive obligations on companies.[355] Within their sphere of influence they are obligated to take measures to protect human rights.[356] In this context the *UN Draft Norms* propose a different way towards implementing these positive obligations. Companies shall be subject to periodic monitoring and verification by the UN and other national and international mechanisms.[357]

This new form of implementation linked to the shift in language from "should" to "shall" was seen as a departure from the voluntary approach.[358]

A last reform for Deva is that "other business enterprises" are obliged by the *UN Draft Norms*

> if the business enterprise has any relation with a transnational corporation, the impact of its activities is not entirely local, or the activities involve violations of the right to security as indicated in paragraphs 3 and 4.[359]

Furthermore, TNCs either ensure that all their business partners and subsidiaries respect human rights, or they are liable.[360]

Nolan concludes that the *UN Draft Norms* went beyond the "opportunistic standard setting" that had shaped the debate around codes of conduct and "worked to confound consensus building on human rights issues."[361]

---

[351] cf. *Id.*
[352] *Sub-Commission*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2; cf. *Deva* 2004: 498.
[353] See Introduction for further discussion.
[354] *Deva* 2004: 498 et seq.
[355] *Deva* 2004: 499; *Deva* 2012b: 101.
[356] *Sub-Commission*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2: para. 1.
[357] *Sub-Commission*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2: para. 16; *Deva* 2004: 500; *Deva* 2012b: 165.
[358] *Deva* 2004: 499.
[359] *Sub-Commission*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2: para. 21.
[360] *Deva* 2004: 500 et seq.; *Deva* 2012b: 102.

3.2. Causes for the failure of the *UN Draft Norms*

The *UN Draft Norms* caused an outcry by the business sector, while the NGOs welcomed the radical new approach.[362] The International Chamber of Commerce (ICC) and the International Organization of Employers (IOE) expressed their great discontent in two statements by describing the *UN Draft Norms* as "counterproductive."[363] Mantilla argues that mainly for nationalistic, political and economic reasons governments sided with the companies, domiciled in their territory, and thus rejected the *UN Draft Norms*.[364]

The following paragraph gives an overview about concerns articulated by the business and the academic sector.

The fact that the *UN Draft Norms* refer to other international legal documents was cause for criticism. First of all, a lot of these instruments had not even been ratified by some states, making it harder to argue that companies should fulfil those obligations.[365] The *UN Draft Norms* just repeat state-based human rights instruments like international conventions and declarations, codes of conducts and others and simply assert that those obligations are binding for companies as well.[366] According to Ruggie "that assertion itself has little authoritative basis in international law - hard, soft, or otherwise."[367] As outlined in the theoretical part, the majority of jurists do not support the direct application of international human rights law to companies.[368]

---

[361] *Nolan* 2005: 591.

[362] *Amnesty International* (2004): The UN Human Rights Norms For Business: Towards Legal Accountability. London: Amnesty International Publications. Available at http://www.amnesty.org/en/library/asset/IOR42/002/2004/en/c17311f2-d629-11dd-ab95-a13b602c0642/ior420022004en.pdf [accessed 28/10/13]; *HRW* (2004): The UN Norms. Towards Greater Corporate Accountability. Available at http://www.hrw.org/news/2004/09/29/un-norms-towards-greater-corporate-accountability [accessed 28/10/13]; *Jerbi* 2009: 305; *Nolan* 2005: 581 et seq.

[363] *ICC/IOE* (2004): Joint views of the IOE and ICC on the draft "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights". Available at http://www.google.at/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDIQFjAA&url=http%3A%2F%2F198.170.85.29%2FIOE-ICC-views-UN-norms-March-2004.doc&ei=Xc5uUvTRH4iHswb_hoDgCg&usg=AFQjCNEGjOv50ZMfM9x3BGTuK_Rj3R7wWQ&bvm=bv.55123115,d.Yms [accessed 28/1013]; *ICC, IOE*: Joint written statement submitted by the International Chamber of Commerce and the International Organization of Employers, non-governmental organizations in general consultative status, UN Doc. E/CN.4/Sub.2/2003/NGO/44; cf. *Kenan Institute for Ethics* (2011): The UN Guiding Principles on Business and Human Rights. Analysis and Implementation. Duke University: 4

[364] *Mantilla, Giovanni* (2009): Emerging International Human Rights Norms for Transnational Corporations - ProQuest. In: *Global Governance* 15: 279–298: 289 [hereinafter *Mantilla* 2009].

[365] *Deva* 2012b: 103.

[366] *Ruggie*, UN Doc.E/CN.4/2006/97: para.: 60.

[367] *Id.*

[368] cf. *Knox* 2012: 59.

Weissbrodt[369] and Kruger characterize the norms as "nonvoluntary", halfway in between mandatory and voluntary.[370] This characterization is questionable, seen as sanction and/or other enforcement mechanism are not included in the draft.[371]

Furthermore, the *UN Draft Norms* expanded the obligations to a high human rights standards which is also very vague.[372] Section 12 of the *UN Draft Norms* states:

> Transnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realization, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realization of those rights.[373]

Even states do not achieve such a high human rights standard, making it impossible for MNCs to guarantee these rights through all their operations.

The Sub-Commission on the Promotion and Protection of Human Rights submitted the Norms to the Commission on Human Rights in 2004.[374] As the lobbying against the norms was strong and support from states was missing, the Commission did not endorse the document.[375]

The focus on the issue was maintained by recommending to the UN Economic and Social Council (ECOSOC) that it

> [r]equest[s] the Office of the High Commissioner for Human Rights to compile a report setting out the scope and legal status of existing initiatives and standards relating to the responsibility of transnational corporations and related business enterprises with regard to human rights, inter alia, the draft norms contained in the above-mentioned document and identifying outstanding issues, to consult with all relevant stakeholders in compiling the report […] and to submit the report to the Commission at its sixty-first session in order for it to identify options for strengthening standards on the responsibilities of transnational corporations and related business enterprises with regard to human rights and possible means of implementation.[376]

---

[369] Chairman of the UN Sub-Commission on the Promotion and Protection of Human Rights in the year 2001. http://www.law.umn.edu/facultyprofiles/weissbrodtd.html [Accessed 10/01/2014].
[370] *Deva* 2012b: 104; *Weissbrodt/Kruger* 2005: 339; *Weissbrodt, David/Kruger, Muria* (2003): Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. In*: The American Journal of International Law*. 97: 901–922: 913 et seqq.
[371] *Deva* 2012b: 104.
[372] *ICC/IOE* (2004); *Deva* 2012b: 103; *Nolan* 2005: 593 et seq.
[373] *Sub-Commission*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2: para. 12.
[374] *Nolan* 2005: 584.
[375] *Mares* 2011: 9.
[376] *Commission on Human Rights*, UN Doc. E/CN.4/Dec/2004/116.

4. The United Nations Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises

4.1. The first mandate (2005 – 2008)

After receiving the report on the "scope and legal status of existing initiatives and standards relating to the responsibility of transnational corporations and related business enterprises with regard to human rights"[377] the Commission on Human Rights called on the UN Secretary-General to appoint a Special Representative on the issue of human rights and transnational corporations for an period of two years to conduct a study on the issue.[378] John Ruggie was appointed as SRSG on July 28, 2005 by Secretary-General Kofi Annan.[379] His mandate was the following:

> (*a*) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
>
> (*b*) To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;
>
> (*c*) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as "complicity" and "sphere of influence";
>
> (*d*) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;
>
> (*e*) To compile a compendium of best practices of States and transnational corporations and other business enterprises.[380]

The first and second mandate of the SRSG which led to the endorsement of the *UN Guiding Principles* are outlined in detail, because the thinking of John Ruggie is important to understand the aim, function and impact of each principle. Through his open communication process, it is possible to follow each developing step.

---

[377] *Id*.
[378] *Commission on Human Rights*: Promotion and Protection of Human Rights. Human rights and transnational corporations and other business enterprises, UN Doc. E/CN.4/2005/L.87: para. 1; cf. *Nolan* 2005: 585; cf. *Mares* 2011: 3.
[379] *Secretary General* (2005): Secretary-General appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises. SG/A/934, 28/07/05. Available at http://www.un.org/News/Press/docs/2005/sga934.doc.htm [accessed 28/10/13].
[380] *Commission on Human Rights*: Human rights and transnational corporations and other business enterprises, UN Doc. E/CN.4/Res/2005/69.

4.2. The Apporoach of John Ruggie: Principled Pragmatism

As one of the chief architects of the *UN Global Compact* and advisor to the Secretary-General, Kofi Annan, John Ruggie already gained experience regarding UN initiatives in the field of human rights and business.[381] But this experience was also cause for concerns. Some human rights activists assumed he would not be interested in constructing a legally binding framework for companies and would dismiss the ideas of the civil sector.[382]

In his interim report in 2006, he rejected the *UN Draft Norms* in a surprisingly open and undiplomatic manner:[383]

> Instead, the Norms exercise became engulfed by its own doctrinal excesses. Even leaving aside the highly contentious though largely symbolic proposal to monitor firms and provide for reparation payments to victims, its exaggerated legal claims and conceptual ambiguities created confusion and doubt even among many mainstream international lawyers and other impartial observers.[384]

Ruggie concluded that the discussion about the Norms distracts from the commonalities and focuses on the differences between the business sector, the civil society and the government.[385] He tried to overcome the stalemate by returning to the view that governments are mainly responsible for the fulfillment of human rights.[386] As he formulated it in his book he committed "Normicide".[387]

The rejection of the *UN Draft Norms* was cause for a fall out between human-rights activists that supported Ruggie and others who opposed his strategy.[388] The supporters of the *UN Draft Norms*, especially the civil society and human rights advocates, believed that this relatively harsh critique was dismissing any further attempt to frame the obligations of companies regarding human rights on a global level and felt that their initial concerns had been confirmed.[389] 107 NGOs underlined the importance of "the establishment of clear, global standards of corporate responsibility and of effective mechanisms for holding companies to

---

[381] cf. *Jerbi* 2009: 308; cf. *Buhmann* 2011: 101.
[382] *Jerbi* 2009: 308.
[383] *Jerbi* 2009: 307; *Ruggie* 2013: 54.
[384] *Ruggie*, UN Doc. E/CN.4/2006/97: para. 59.
[385] *Id.*: para. 69.
[386] *Ruggie*, UN Doc. E/CN.4/2006/97: para. 7; *Backer, Larry Catá* (2011): From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nation's "Protect, Respect and Remedy" and the Construction of Inter-Systemic Global Governance. In: *Pacific McGeorge Global Business & Development Law Journal*: 101–216: 115 [hereinafter *Backer* 2011].
[387] *Ruggie* 2013: 54.
[388] *The Economist* (2007): Doing the Wrong Thing. Human-rights Activist Fall Out over How to Deal with Companies. 25/10/07. Available at: http://www.economist.com/node/10026724/print?story_id=10026724 [Accessed 28/10/13].
[389] *Jerbi* 2009: 307 et seq.

account" in a joint letter in response to the interim report.[390] Jerbi argues that the civil society stressed the differences and failed to acknowledge passages of the report that supported their views.[391]

Soon it came clear that John Ruggie used a participatory, pragmatic approach to ensure the support of stakeholders.[392] He relied on an open form of communication, arranging seminars, conferences, field studies and publishing his views and findings on the topic.[393] He worked closely with the business sector, civil society, states, law firms and other experts to collect input for the issues.[394] Furthermore, he regularly exchanged his views on a private and official basis with supporters and critics.[395] This approach was taken because the *UN Draft Norms* were developed without consulting stakeholders, especially business, which was criticized widely and ultimately led to the failure of the *UN Draft Norms*.[396] According to Buhmann, Ruggie learnt from prior attempts that the legitimacy of process is important to achieve compliance of stakeholders with international non-binding law.[397]

The SRSG described his approach as "Principled Pragmatism":

> […] the Special Representative of the Secretary-General takes his mandate to be primarily evidence-based. But insofar as it involves assessing difficult situations that are themselves in flux, it inevitably will also entail making normative judgements. In the Special Representative's case, the basis for those judgements might best be described as a principled form of pragmatism: an unflinching commitment to the principle of strengthening the promotion and protection of human rights as it relates to business, coupled with a pragmatic attachment to what works best in creating change where it matters most - in the daily lives of people.[398]

Despite the concerns mentioned above, Ruggie was able to reengage the dialogue after the still stand caused by the *UN Draft Norms* and establish himself as an important actor regarding business and human rights accepted by all key players.[399]

---

[390] *AI/HRW/CDES et. al.* (2006): Joint Letter in Response to Interim Report: 1. Availabe at http://germanwatch.org/tw/ruggie06.pdf [accessed 28/10/13].
[391] *Jerbi* 2009: 308.
[392] cf. *Buhmann* 2011: 86; cf. *Mares* 2011: 6.
[393] *Mares* 2011: 6.
[394] *Id.*: 6 et seq.
[395] *Id.*: 7.
[396] *Buhmann* 2011: 89, 101; *Mares* 2011: 6.
[397] *Buhmann* 2011: 90, 101.
[398] *Ruggie*, UN Doc. E/CN.4/2006/97: para. 81.
[399] *Jerbi* 2009: 308; *Deva* 2012b: 105.

4.3. Further preliminary work

After committing "Normicide" in 2006, Ruggie released another report in 2007, titled "Business and human rights: mapping international standards of responsibility and accountability for corporate acts."[400] By examining the state duty to protect, the corporate responsibility and accountability for international crimes and other human rights violations, soft law, and self-regulation mechanisms, he gave an overview over international standards and practice.[401] Backer argues that the importance of this report lies in the structure, because important elements are used in the Framework he developed in 2008.[402] Ruggie underlines the importance of the state duty to protect against human rights violations[403] and dismisses the notion that international human rights instruments bind corporations.[404] In the section about soft law mechanism his tendency towards these types of instruments becomes obvious.[405] He argues that the effectiveness of codes of conduct is high, not only because actual measures are taken but also because they are used as a model for other initiatives.[406] Additionally, Ruggie conducted studies to research existing self-regulation mechanism in the business sector.[407]

He concludes that "no single silver bullet can resolve the business and human rights challenge. A broad array of measures is required, by all relevant actors."[408]

At last, Ruggie asks for a one-year extension of his mandate to complete his assignment, reasoning that due to the broad mandate more time would be necessary to submit "views and recommendations."[409] The UN Human Rights Council[410] extended his mandate for another year in its March 2007 session.[411]

---

[400] *Ruggie*, UN Doc. A/HRC/4/35 (2007).
[401] *Id.*: Summary.
[402] *Backer, Larry Catá* (2011): From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nation's "Protect, Respect and Remedy" and the Construction of Inter-Systemic Global Governance. *Pacific McGeorge Global Business & Development Law Journal*: 101–216: 117 [hereinafter *Backer* 2011].
[403] *Ruggie*, UN Doc. A/HRC/4/35 (2007): para. 18.
[404] *Id.*: para. 44.
[405] *Id.*: para. 44 et seqq.
[406] *Id.* : para. 59 et seq.
[407] *Id.*: para. 63 et seqq.
[408] *Ruggie*, UN Doc. A/HRC/4/35 (2007): para. 88.
[409] *Ruggie*, UN Doc. A/HRC/4/35 (2007): para. 26.
[410] The UN Human Rights Council replaced the Human Rights Commission in 2006 (*Generaly Assembly*: Human Rights Council, UN Doc. A/Res/60/251 (2006): para.1).
[411] *Jerbi* 2009: 309.

4.4. The "Protect, Respect, Remedy" Framework

The report, titled "Protect, Respect and Remedy: a Framework for Business and Human Rights ", was presented in 2008.[412] The framework rests on three interlinked pillars: The state duty to protect, the corporate responsibility to respect and the access to remedies.[413] Ruggie accomplished to establish a corporate governance framework that can be used next to the national laws of the country they operate in.[414] The connection between the state-centric law approach and the emerging human rights policy of non-state actors was new.[415]
The first three reports are one unit as they evolve from breaking with past efforts in 2006, data collection and analyzing in 2007 and guiding to a new path in 2008.[416]

4.4.1. The state duty to protect

For Ruggie the state duty to protect "lies at the very core of the international human rights regime."[417] To strengthen the state duty to respect he focuses on four policy clusters.[418]
The first domain concerns corporate culture. According to Ruggie, most of the states do not provide clear advice for companies regarding their human rights strategies.[419] To fill these gaps Ruggie outlines procedures to influence corporate culture. Reporting obligations can put companies under market pressure.[420] Furthermore, the corporate policy can be used as a tool to determine the criminal accountability of a company. Another instrument to shift the corporate culture is through state-owned enterprises. Not only can the state itself be accountable under international human rights law but the states reputation can be damaged by human rights violations.[421] In chapter IV the efforts of Austria to change the corporate culture are tracked by researching the *Draft NAP CSR*.

---

[412] *Ruggie, John*: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. Protect, Respect and Remedy: a Framework for Business and Human Rights [hereinafter *Ruggie*, UN Doc. A/HRC/8/5 (2008)].
[413] *Ruggie*, UN Doc. A/HRC/8/5 (2008); cf. *Backer* 2011: 108.
[414] *Backer* 2011: 108, 111.
[415] *Id.*: 111.
[416] *Id.*: 118.
[417] *Ruggie*, UN Doc. A/HRC/8/5 (2008): para. 9; *Ruggie* 2013: 82.
[418] *Ruggie*, UN Doc. A/HRC/8/5 (2008): para. 27; *Ruggie* 2013: 85.
[419] *Ruggie* 2013: 251.
[420] *Ruggie*, UN Doc. A/HRC/8/5 (2008): para. 30.
[421] *Id.*: 11.

The second cluster concerns the international investment agreements between states or between states and investors, because they are the point of entry for business.[422] Host countries that need to attract investment often put human rights aside, while negotiating investment agreements. Policy alignment in this area could help support human rights by balancing investment agreements. Furthermore, most of the export credit agencies of home states do not consider human rights.[423] The human rights policy of the OeKB, the Austrian export credit agency, is also a focus of chapter IV.

Next Ruggie elaborates that governance on an international level could also support countries to protect human rights. Exchange with International institutions and governments can provide tools, technical advice, knowledge about challenges, best practices and so on.[424]

It is obvious that human rights cannot function in conflict zones; therefore Ruggie also stressed the need to act sensible especially in regions where conflicts emerged or are likely to emerge.[425]

4.4.2. The corporate responsibility to respect

Although companies have legal human rights obligations through the law of the home and host state, deficiencies exist caused by the unwillingness or inability of states to bind business to human rights.[426]

Past efforts to bind business to human rights focused on selecting a limited set of human rights obligations and applying them to business.[427] But a study conducted by Ruggie showed that companies can violate almost all kind of human rights, making it difficult to choose "core" obligations for companies.[428] Ruggie argues that the International Bill of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work already are a comprehensive list, which can be expanded if needed. Indigenous rights for example can be important for business, when their activities harm indigenous communities.[429]

[422] *Ruggie* 2013: 86.
[423] *Ruggie*, UN Doc. A/HRC/8/5 (2008): para. 33 et seqq.; *Ruggie* 2013: 1653
[424] *Ruggie*, UN Doc. A/HRC/8/5 (2008): 13; Ruggie 2013: 88.
[425] *Ruggie*, UN Doc. A/HRC/8/5 (2008): 14.
[426] *Ruggie* 2013: 89 et seq; cf. Deva 2012b: 103.
[427] *Ruggie* 2013: 90; *Ruggie*, UN Doc. A/HRC/8/5 (2008): para. 51
[428] *Ruggie*, UN Doc. A/HRC/8/5 (2008): para. 52 et seqq.; *Ruggie* 2013: 95.
[429] *Ruggie* 2013: 95 et seq.

Ruggie sees the obligation of companies independently of states duties and argues that the corporate responsibility to respect is an established social norm.[430] To discharge the responsibilities expected by society, enterprises need to ensure due diligence procedures in the whole company. [431] Due diligence "describes the steps a company must take to become aware of, prevent and address adverse human rights impacts."[432] But what is the scope of due diligence? According to Ruggie, there are three factors shaping the scope of due diligence: First, there is the country in which the enterprise operates. Secondly, there is the kind of human rights violations a company's activities may produce. The third factor is whether a corporation contributes to abuse through business relationships in connection with their activities.[433] Tools to ensure due diligence include adopting a human rights policy, conclude an impact assessment before starting with their activities, integrate a human rights policy, track performance through monitoring and auditing processes.[434]

His mandate gave him the task to research the terms "sphere of influence" and "complicity."[435] Ruggie sees the concept "sphere of influence" as highly problematic, because influence includes not only the impact of the corporate activities but also the leverage a company may have over other actors.[436] It would be unreasonable and undesirable that enterprises use their power to influence human rights strategies of other actors, such as states. Furthermore, a state could decide to ignore a problem, leaving it to a company to solve it. This is also an argument for the strict division between the state duty to protect and the corporate duty to respect:

> In short, the scope of due diligence to meet the corporate responsibility to respect human rights is not a fixed sphere, nor is it based on influence. Rather, it depends on the potential and actual human rights impacts resulting from a company's business activities and the relationships connected to those activities.[437]

"Complicity" describes the indirect involvement of companies in human rights violations committed by others.[438] The legal aspects of complicity have been established in the area of acts that rose to international recognized crimes, whereas the non-legal side can be important for other social actors, like consumers.[439] Ruggie explains that companies can easily avoid "complicity"

[430] *Ruggie* 2013: 91; *Ruggie*, UN Doc. A/HRC/8/5 (2008): para. 55.
[431] *Ruggie* 2013: 94.
[432] *Ruggie*, UN Doc. A/HRC/8/5 (2008): para. 56.
[433] *Id.*: para. 57.
[434] *Id.*: para. 60 et seqq.
[435] *Id.*: para. 65.
[436] *Ruggie* 2013:97; *Ruggie*, UN Doc. A/HRC/8/5 (2008): para. 68.
[437] *Ruggie*, UN Doc. A/HRC/8/5 (2008): para. 72.
[438] *Ruggie* 2013: 98.
[439] *Id.*: 98.

when they fulfill all their due diligences duties.[440] Chapter IV analyzes whether Andritz is complicit to human rights violations and if the company takes steps to implement a due diligence process.

In his book "Just Business", Ruggie summed up the idea of the corporate responsibility to respect that was adopted by the *UN Guiding Principles*:

> It exists independently of and yet complements the state duty to protect. It is defined in terms of the classic human rights meaning of respect: noninfringement on the rights of others, and addressing harms that do occur. Its substantive content consists of internationally recognized human rights. And its scope follows from its definition: actual or potential adverse human rights impacts by an enterprise's own activities or through the business relationships connected to those activities.[441]

4.4.3. Access to Remedy

The third pillar is the Access to Remedy. Grievance procedures play an important role in fulfilling the state's duty to protect and the corporate duty to respect.

The first remedy Ruggie mentioned is the judicial mechanism. He argues that it is difficult to get financial compensation through the home or host domestic legal system. On the one hand it gets expensive for victims to work the legal system; on the other hand there may be no domestic legal basis for the claim.[442] In some states steps to enhance the access have been taken and Ruggie encourages governments to improve their legal system for better access to remedies.[443]

But Ruggie focused on non-judicial mechanism to guarantee victims compensations. He established the following criteria as a minimum requirement for a working mechanism:

> "(a) Legitimate: a mechanism must have clear, transparent and sufficiently independent governance structures to ensure that no party to a particular grievance process can interfere with the fair conduct of that process;
>
> (b) Accessible: a mechanism must be publicized to those who may wish to access it and provide adequate assistance for aggrieved parties who may face barriers to access, including language, literacy, awareness, finance, distance, or fear of reprisal;
>
> (c) Predictable: a mechanism must provide a clear and known procedure with a time frame for each stage and clarity on the types of process and outcome it can (and cannot) offer, as well as a means of monitoring the implementation of any outcome;

[440] *Ruggie*, UN Doc. A/HRC/8/5 (2008): para. 81.
[441] *Ruggie* 2013: 100.
[442] *Ruggie*, UN Doc. A/HRC/8/5 (2008): para. 88 et seq.
[443] *Id.*: para. 83.

> (d) Equitable: a mechanism must ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair and equitable terms;
>
> (e) Rights-compatible: a mechanism must ensure that its outcomes and remedies accord with internationally recognized human rights standards;
>
> (f) Transparent: a mechanism must provide sufficient transparency of process and outcome to meet the public interest concerns at stake and should presume transparency wherever possible; non-State mechanisms in particular should be transparent about the receipt of complaints and the key elements of their outcomes.[444]

Three levels of non-judicial grievance mechanism are identified: The Company-level, the state-based level, and the multi-stakeholder or industry initiatives and financiers level.[445] Although there are a multitude of different systems already in place, due to "a lack of awareness as to where these mechanisms are located, how they function, and what supporting resources exist" people do not use them frequently.[446] Furthermore, grievance mechanisms often are limited in competence and coverage.[447]

4.4.4. Reactions to the Framework

The reaction to the framework from the business and government sector was positive. In June 2008, the Human Rights Council welcomed the report of the SRSG and simultaneously instructed the SRSG to operationalize the framework through more specific recommendations to states, concrete guidance for business enterprises, integration of a gender perspective, promotion of best practices and the framework and continuation of working together with all relevant stakeholders.[448] The mandate of the SRSG was extended for a period of another three years.[449]

Other stakeholders who opposed the *UN Draft Norms* endorsed the framework like the International Organization of Employers (IOE), the International Chamber of Commerce (ICC), and the Business and Industry Advisory Committee to the OECD (BIAC).[450]

The civil society remained skeptical. In a Joint Statement from several important human rights NGOs, like Amnesty International, Human Rights Watch, and Oxfam, the SRSG was

[444] *Ruggie*, UN Doc. A/HRC/8/5 (2008): para. 93.
[445] *Id*.: para. 92 et seqq.
[446] *Id*.: para. 102.
[447] *Id*.: para. 103.
[448] *Human Rights Council*: Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/RES 8/7 (2008).
[449] *Id*.
[450] *Jerbi* 2009: 312.

urged to analyze special cases of human rights violations, to ensure that the ones who are most affected by the problem have a voice.[451]

The Permanent Forum on Indigenous Issues supported the policy framework.[452] They made the following suggestions: Regarding the state's duty to protect states should integrate important obligations of the UNDRIP into their human rights framework to ensure compliance of business with those rules.[453]

> Regarding the Americas, corporations must also comply with the rulings of the Inter-American Court of Human Rights, which construe the States' obligations under International Labour Organization (ILO) Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries with regard to the Declaration as extending even to States that have not ratified the Convention. The Forum recommends that this principle be applied in other jurisdictions.[454]

This notion is important in the context of this thesis because Austria did not ratify the ILO Convention 169.[455]

The due diligence process of corporation should also be consistent with the UNDRIP.[456] When projects affect indigenous peoples, the Permanent Forum wants that enterprises have to comply with specific standards of the UNDRIP and the ILO Convention 169.[457]

4.5. The second mandate (2008 – 2011): Interim Reports in 2009 and 2010

The Report in 2009 was the first step to operationalize the Framework.[458] The focus laid on the operational strategies of states and companies. Ruggie used those measures as the starting point for further implementation.[459] Because of the obligations laid on them through human rights treaties states operate through law.[460] But policy reasons also play an important role,

---

[451] *AI/HRW/ICJ* (2008): Written statement for the eighth session of the United Nations Human Rights Council. Available at http://www.hrw.org/news/2008/05/19/joint-ngo-statement-eighth-session-human-rights-council [accessed 28/10/13].
[452] *Permanent Forum on Indigenous Issues*: Report on the eighth session (18-29 May 2009), UN Doc. E/C.19/2009/14: para. 12 [hereinafter *Permanent Forum on Indigenous Issues,* UN Doc. E/C.19/2009/14].
[453] *Id*.: para. 13.
[454] *Id*.: para. 13.
[455] *ILO, Normlex* : http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102549 [accessed 28/10/13].
[456] *Permanent Forum on Indigenous Issues,* UN Doc. E/C.19/2009/14: para. 14.
[457] *Id*.: para. 15.
[458] *Ruggie, John:* Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. Business and human rights: Towards operationalizing the "protect, respect and remedy" framework [hereinafter *Ruggie*, UN Doc. A/HRC/11/13 (2009)].
[459] *Backer* 2011: 118 et seq.
[460] *Ruggie*, UN Doc. A/HRC/11/13 (2009): para. 13; cf. *Backer* 2011: 119.

especially when the state is in some way involved in the business venture.[461] Ruggie emphasized the importance of legal and policy alignment in the areas of corporate law, investment and trade agreement and international cooperation.[462]

Regarding business, Ruggie distinguishes between the legal and the social license to operate.[463] If the social license is not present, the possibility exists, that the venture fails.[464] To ensure the acceptance of the communities, Ruggie looked closer at the responsibility to respect and the due diligence process.[465] Regarding the access to remedies the report refines the findings from the Framework.[466] It is important to note that the 2009 report addresses the Financial Crisis, which started in 2007. Ruggie argues that the question about human rights and business cannot be delayed, especially because the same governance gaps that led to the crisis are also important for wrongdoings of companies regarding human rights.[467]

The 2010 report develops the elements of the 2009 report further.[468] After consulting with different stakeholders, ideas of governments, business and civil society entered the report. Ruggie focused more on the state's legal obligation and its role in dispute resolution. Judicial mechanisms were emphasized. Regarding the corporate responsibility to respect disclosure obligations were put more in the focus.[469]

5. The UN Guiding Principles on Business and Human Rights

The UN Guiding Principles on Business and Human Rights are based on the "Protect, Respect, Remedy" Framework and were presented in 2011 in the SRSG final report, titled "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework". Ruggie pursued his pragmatic approach by initiating an open debate with all important stakeholders preceding the submission of the Principles to the Human Rights Council. A draft of the *UN Guiding Principles* was sent to all member states by the end of 2010 and at the beginning of 2011 it was posted online and the

[461] *Ruggie*, UN Doc. A/HRC/11/13 (2009) para. 16; cf. *Backer* 2011: 119.
[462] *Ruggie*, UN Doc. A/HRC/11/13 (2009) para. 24 et seqq.
[463] *Id.*: para. 46.
[464] The best example is Belo Monte. Although the construction of the dam may not be halted, it is continually delayed.
[465] *Id.*
[466] *Id.*: para. 86 et seqq.
[467] *Id.*: para. 119.
[468] *Ruggie, John*: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/HRC/14/27 (2010); *Backer* 2011: 119.
[469] *Backer* 2011: 119.

public could comment on them.[470] Furthermore, the text was discussed in a multi-stakeholder meeting and with the delegates of the Human Rights Council in January 2011.[471] Each of the principles is explained by a commentary. Further explanations are found in an interpretative guide published by the OHCHR in November 2011.[472]

5.1. Content of the UN Guiding Principles on Business and Human Rights

The *UN Guiding Principles* adopt the three pillars of the framework and set one general principle, eight foundational principles and 23 operational principles in the areas "state duty to protect", "corporate responsibility to respect" and "access to remedy". The Framework outlined *what* should be done, and the *UN Guiding Principles* outlined *how* it should be done.[473]

5.2. Reactions to the UN Guiding Principles

5.2.1. Government sector

Referring to international law as political strategy paid off as governments supported the *UN Guiding Principles* by endorsing them unanimously in the Human Rights Council.[474] Ruggie proposed a further step in his presentation of the report to the United Nations Human Rights Council on May, 30th 2011:

> However, a multilateral approach to providing greater legal clarification may be warranted in response to the diverging national interpretations of the applicability to business enterprises of international standards prohibiting 'gross' human rights abuses, possibly amounting to the level of international crimes. […] Diverging national interpretations can only lead to increasing uncertainty for victims and businesses alike, while posing difficult dilemmas for States themselves, including the potential for jurisdictional conflicts.[475]

The suggestion to clarify the standards regarding severe human rights abuses was ignored by the states.[476] But they committed to more action by installing a working group of five independent experts, of balanced geographical representation, for an initial term of three

[470] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): para. 12.
[471] *Id.*: para. 12.
[472] *OHCHR* 2012.
[473] *Ruggie* 2013: 81.
[474] UN Doc. A/HRC/Res/17/4 (2011); *Knox* 2012: 67.
[475] *Ruggie* 2011: 6.
[476] *Knox* 2012: 67.

years.[477] Additionally, they decided to establish a Forum on Business and Human Rights "to discuss trends and challenges in the implementation of the Guiding Principles and promote dialogue and cooperation on issues linked to business and human rights […]."[478] The forum is held annually and in continuation of Ruggie's transparent approach participants include governments, business enterprises as well as social movements.[479] The first forum was held in Geneva in December 2012.[480]

The European Union (EU) was already endorsing the framework under Swedish presidency (Swedish presidency of the European Union) and also supported the development and now the implementation of the *UN Guiding Principles*.[481]

5.2.2. Civil Society

Human rights groups criticized the *UN Guiding Principles* based on several reasons. One line of criticism referred to the lack of specificity regarding not only the state duty to protect but also the corporation's duty to respect.[482] The fact that the SRSG failed to integrate special recommendations regarding vulnerable groups, such as women, children, indigenous peoples and human rights defenders, was also criticized.[483] The approach Ruggie took regarding the access to remedy was seen as shortcoming, because the right to reparation was not included.[484]

Regarding the question whether the recommendations outlined for companies under the responsibility to respect should be legally binding the NGOs concluded that the approach of Ruggie was far from satisfactory. They argued that "[i]f the respect obligation under

---

[477] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011).
[478] *Id*.
[479] *Id*.
[480] *OHCHR*: Homepage: First annual United Nations Forum on Business and Human Rights, 3-5 December 2012. Available at http://www.ohchr.org/EN/Issues/Business/Forum/Pages/2012ForumonBusinessandHumanRights.aspx [accessed 04/11/13].
[481] cf. *Gorska, Gosia* (2012): Mutual Influence: The Case of the EU and the UN Guiding Principles on Business and Human Rights. In: *Jahrbuch Human Rights,* 109: 109–122; cf. *European Commission* (2011): Press Release: Business and Human Rights: New United Nations Guidelines - European Commission. Available at http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item_id=5220&lang=en&tpa=0&displayType=news [accessed 28/10/13].
[482] *AI/CESR/HRW et al*. (2011): Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights. January 2011: http://www.fidh.org/IMG/pdf/Joint_Civil_Society_Statement_on_the_draft_Guiding_Principles_on_B_and_HR.pdf [accessed 28/10/13] [hereinafter *AI/CESCR/HRWet al.* 2011].
[483] *AI/CESCR/HRW et al.* 2011: 1 et seq.
[484] *Id.*

international human rights law was not legal, but only moral, the legal duty to protect could not be implemented."[485]

Other issues that were not considered are extraterritorial obligations and responsibilities.[486]

A recommendation frequently made by the Civil Society is that the Council should assess the application of the Framework and Guiding Principles in practice to later on take appropriate measures.[487] The SRSG mandate did not include the investigation of specific cases or country visits, therefore the NGOs urged the Council that the next mandate should include those tasks.[488]

5.2.3. Reactions from Indigenous Peoples Representatives

All in all, the reaction of indigenous peoples' representatives has been a positive one, but some incertitude remains. James Anaya, Special Rapporteur on the rights of indigenous peoples stated on the first Forum on Business and Human Rights in Geneva in December 2012 that he welcomed the *UN Guiding Principles*. But Anaya concluded that the specific rights of indigenous peoples, especially the UNDRIP is neither by states, nor corporations seen as part of the human rights that should be protected in the context of business activities.[489] Anaya interprets the comment to principle 12 of the *UN Guiding Principles* in a matter that includes the UNDRIP, the ILO Convention 169 and other conventions, decisions and statements interpreting human right treaties. Furthermore, he supports the idea that corporations should comply with human rights standards regardless of the state's duty to protect, but the extractive industries normally do not go further than compliance with domestic law, regardless of the ineffectiveness of those laws and regulations.[490] Therefore,

---

[485] *ECCHR/FIDH/CELS* (2011): Companies' obligations to respect human rights abroad Joint Statement. Available at http://www.business-humanrights.org/media/documents/ruggie/fian-ngo-joint-statement-re-guiding-principles-companies-obligations-to-respect-jan-2011.pdf [accessed 04/11/13].

[486] *AI/FIDH/RAID et al.* (2011): Joint Civil Statement to the 17th Session of the Human Rights Council http://www.hrw.org/news/2011/05/30/joint-civil-society-statement-17th-session-human-rights-council [accessed 28/10/13] [accessed *AI/FIDH/RAID et al.* 2011].

[487] *Id.*

[488] *Id.*

[489] *Anaya, James* (2012): Statement by Professor James Anaya Special Rapporteur on the rights of indigenous peoples Forum on Business and Human Rights. Available at http://unsr.jamesanaya.org/statements/forum-on-business-and-human-rights-2012-statement-by-professor-james-anaya [accessed 28/10/13] [hereinafter *Anaya* 2012].

[490] *Anaya* 2012.

Anaya demands a better understanding among indigenous peoples, governments and companies about indigenous peoples' rights and their implementation.[491]

5.2.4. Business sector

In the same way the *UN Guiding Principles* were criticized by the Civil Society, they were welcomed by the business sector. The business sector strongly endorsed the *UN Guiding Principles*. They appraised them as being universal, clear, flexible, practical, simple and stable.[492]

Especially the fact that the corporate responsibility entails different human rights and a different due diligence process for each company, depending on the specific context, was seen as an advantage. Of course, the fact that the principles did not create new international legal obligations and the state duty to protect remains in the focus for guaranteeing human rights was welcomed.[493]

Furthermore, the business sector would appreciate if they are given time to implement the *UN Guiding Principles* and research their effects. They are in favor of continuing the open, transparent, multi-stakeholder approach Ruggie implemented, focusing on the OHCHR as a facilitator between the key stakeholders.[494]

5.2.5. Are the UN Guiding Principles legally binding?

Ruggie made it clear in his first report that he rejected the norms, because of the lack of support in international law.[495] As discussed in chapter I there is no support in international law that existing human rights treaties are binding for corporations or any other non-state actors. Nevertheless, Ruggie knew that he had to base his work on already existing international law to get the support of all stakeholders. Ruggie himself says about the legal aspect of the norms:

> The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and

[491] *Id*.
[492] *IOE/ ICC/BIAC* (2011): Joint Statement on Business & Human Rights to the United Nations Human Rights Council. Available at http://www.uscib.org/docs/2011_05_30_business_human_rights.pdf [accessed 28/10/13] [hereinafter *IOE/ICC/BIAC* 2011].
[493] *Id.*
[494] *Id.*
[495] *Knox* 2011: 61.

> businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.[496]
>
> Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.[497]

According to Mares, it would be wrong to overlook the legal aspects of the *UN Guiding Principles* as the thinking of Ruggie was partly influenced by law.[498] He argues that the question of what role the law could and should play in international governance and in complex regulatory regimes is at the core of Ruggie's work.[499] Wherever possible, Ruggie leaned on human rights law to give his ideas "clarity, substance and weight."[500]

The answer to the question stated in the headline is simple: No, the *UN Guiding Principles* neither bind states, nor companies, but they can be used as a tool of guidance.

Keeping this in mind, my research question is not if the principles can be enforced to the case of the involvement of Andritz in Belo Monte, but if the *UN Guiding Principles* apply to this case and if and how they can be used as a tool of guidance.

[496] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): para. 14.
[497] *Id.*: General principles.
[498] *Mares* 2011: 2.
[499] *Id.*: 2.
[500] *Knox* 2012: 64.

Chapter IV: The *UN Guiding Principles* applied to the Involvement of Andritz in the Belo Monte hydropower scheme

1. General principles

All obligations of the *UN Guiding Principles* have to be interpreted in the light of the general principles, which are set at the beginning.[501]

When applying legal documents to specific cases, the first question is who is obliged by them. In the general principles of the *UN Guiding Principles* the scope of application is laid out: "These Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure."[502]

Austria and Brazil co-sponsored the *UN Guiding Principles* and Brazil endorsed them as member of the Human Rights Council[503] at the session on the 16th of June, 2011.[504] As mentioned in the introduction, Austria is currently working on a CSR strategy, which is partly based on the *UN Guiding Principles*.[505] The EU welcomed the new approach as well as an important step to bind business to human rights.[506] This suggests that Austria and Brazil are not only bound to the provisions as states, but also show great political will to implement them.

The principles apply to all enterprises. In the present case, Andritz Hydro supplies the equipment for Belo Monte. Andritz Hydro is a subsidiary of the Andritz Group.[507] The Andritz Group states on its homepage that the Andritz Group received the order to supply Belo Monte, suggesting that the Andritz Group as parent company is also involved in the project.[508] Hence, both legal entities are obliged to fulfil the *UN Guiding Principles* in the present case.

In this first section the issue of minority rights as part of the general human rights framework is introduced:

---

[501] *Backer* 2011: 145.
[502] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): General principles.
[503] *OHCHR:* Membership of the Human Rights Council 19 June 2010 - 18 June 2011 by year. Available at http://www.ohchr.org/EN/HRBodies/HRC/Pages/Year20102011.aspx [accessed on 18/11/13]
[504] *Business & Human Rights Resource Centre*: Background & history of Guiding Principles. Available at http://www.business-humanrights.org/UNGuidingPrinciplesPortal/BackgroundHistory [accessed on 18/11/13].
[505] *BMWFJ/BMLFUW* 2013: 5.
[506] *Gorska, Gosia* (2012): Mutual Influence: The Case of the EU and the UN Guiding Principles on Business and Human Rights. In: *Jahrbuch Human Rights,* 2012: 109-122: 115 [hereinafter *Gorska* 2012].
[507] *Graham&Whiteside. Cengage Learning* (2013): The Major Companies Database. Andritz Hydro GmbH.
[508] *Andritz Group* (2011).

> These Guiding Principles should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men.[509]

It becomes clear that states[510] have to pay attention to indigenous peoples' rights, even if they did not ratify conventions regarding this topic.

2. The state's duty to protect

The state duty to protect is dived into two foundational principles and eight operational principles. The subdivisions of the operational principles are *General State Regulatory and Policy Functions*, *The State-Business Nexus*, *Supporting Business Respect for Human Rights in Conflict-Affected Areas*[511] and *Ensuring Policy Coherence*.

Only the foundational principles are divided clearly in a host and home state obligation.[512] The other provisions can be applied to all states regardless of their status as home or host states.[513]

This section concentrates on whether Austria – as home state of Andritz – is fulfilling the state's duty to protect against human rights abuse by companies in general and in the case of Belo Monte. Apart from the parliamentary questions regarding Belo Monte from delegates of the green party to the ministry of finance[514] and their reply by the finance minister, Maria Fekter,[515] CSR policy frameworks from the EU and Austria are used to research the willingness of Austria to comply with and implement the *UN Guiding Principles*.

The commitment of Brazil to fulfil the *UN Guiding Principles* in the case of Belo Monte will not be analyzed. The state's duty focuses on preventing human rights abuse through business activities. Chapter II showed that the state Brazil ignored internationally recognized human rights while planning and constructing Belo Monte. So clearly Brazil has no intention to bind

---

[509] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): General principles.
[510] The question whether enterprises are bound by indigenous peoples' rights is addressed in more detail in the next chapter.
[511] This section is not relevant for the present case, because overall the human rights regime functions in Brazil. Brazil cannot be seen as a host state that is unable to protect human rights adequately. (Confirm with: *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Commentary to Principle 7.
[512] Also the section about human rights in conflicted areas concerns only home states.
[513] *Vandenhole, Wouter* (2012): Contextualising the State Duty to Protect Human Rights as Defined in the UN Guiding Principles on Business and Human Rights. In: *Revista de Estudios Jurídicos*, 12: 4. Available at http://revistaselectronicas.ujaen.es/index.php/rej/article/view/825/723 [accessed 18/11/13].
[514] *Parlamentarische Anfrage* 12504/J.
[515] *Beantwortung der parlamentarischen Anfrage* Nr 12294/AP.

Andritz and other involved enterprises to human rights, when the government itself fails to respect basic indigenous peoples' rights. Brazilian activities will not be subsumed under the *UN Guiding Principles*, because international treaties and the Brazilian Federal Constitution are more appropriate to hold Brazil responsible for their own violations. Only the first foundational principle, which concerns only host states, is applied to Brazil activities to demonstrate the importance of the distinction between the corporate responsibility to respect and the state's duty to protect.

2.1. Important Documents regarding CSR on the European and Austrian level

2.1.1. A renewed strategy 2011-14 for Corporate Social Responsibility

In 2011, the European Commission published a document called *A renewed strategy 2011-14 for Corporate Social Responsibility*. The Commission defines CSR as "the responsibility of enterprises for their impacts on society."[516] The strategy is inspired and formed by internationally recognised principles and guidelines. Namely the *OECD Guidelines for Multinational Enterprises*, the ten principles of the *UN Global Compact*, the *ISO 26000 Guidance Standard on Social Responsibility*, the *ILO Tri-partite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, and the *UN Guiding Principles* influenced the document.[517] According to the Commission, CSR entails the following areas: human rights, labour, employment practices, environmental issues, combating bribery and corruption, community involvement and development, the integration of disabled persons and consumer interests.[518] Through numerous measures on a European and national level the EU wants to push the CSR process forward. For example, the Commission invites member states to develop or update their own CSR plans and create a national plan for the implementation of the *UN Guiding Principles* by 2012.[519] However, the Commission points out that the development of CSR should be led by enterprises and that states should only play a supporting role.[520]

---

[516] *European Commission* (2011): Communication from the Commission to the European Parliament, the Council, the Euopean Economic and Social Committee and the Committee of the Regions. A renewed EU strategy 2011-14 for Corporate Social Responsibility. Brussels: 25.10.2011, COM(2011) 681 final: 6 [hereinafter *European Commission* (2011): COM(2011) 681 final].
[517] *Id*.: 6.
[518] *Id*.: 7.
[519] *Id*.: 13 et seq. So far only the UK developed a plan to implement the *UN Guiding Principles*.
[520] *Id*.: 7.

2.1.2. Draft: Nationaler Aktionsplan CSR (NAP CSR)

In spring 2013, Austria published a draft for a national CSR strategy. The *NAP CSR* serves as framework for a consequential and successful operationalization of CSR.[521] It is based on the European CSR strategy and relies on the same international documents as the European plan.[522] An example for the alignment between the European and the Austrian strategy is the identification of corporations as those primarily responsible for CSR.[523] The draft identifies social, ecological and economical aspects as the three pillars of social responsible corporations.[524] Priority areas are supply chains, innovation, incentives, promoting CSR, credibility and transparency.[525] In some aspects the Austrian draft can be characterized as ambitious.[526] For example, the issue of supply chain relationships has been dropped in the final version of the *UN Guiding Principles* but is an important issue in the NAP CSR. However, it seems possible that some ideas will be dropped throughout the political discourse.

2.2. Foundational principles

The first foundational principle under section I affirms that "[s]tates must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises."[527]

This duty is the only one that obligates just the host state and is a standard of conduct:[528]

> States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate punish and redress private actors' abuse.[529]

The black letter of the principle suggests that the state's duty only entails the duty to protect against human rights abuses by third parties. But the commentary implies a broader

[521] *BMWFJ/BMLFUW* 2013: 4.
[522] *Id.*: 11, 4 et seq.
[523] *Id.*: 4.
[524] *Id.*: 5 et seqq.
[525] *Id.*: 11.
[526] *Adelphi*: Comparative evaluation of the draft Austrian CSR action plan. Available at http://www.adelphi.de/en/projects/project_database/dok/43525.php?pid=648 [accessed 19/11/13].
[527] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Principle 1.
[528] *Vandenhole* 2012: 4.
[529] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Commentary to principle 1.

application by reaffirming that states themselves have to respect, protect and fulfil human rights according to international human rights law.[530]

In the case of Belo Monte, Brazil does not only fail to protect against human rights violations by third parties, but the government itself infringes on the human rights of indigenous peoples by ignoring the norms of international treaties and the Brazilian Federal Constitution. In conclusion Brazil fails to fulfil the duty to protect against human rights abuse laid out by the *UN Guiding Principles*, because the human rights abuse can be directly attributed to Brazil.

The fact that Brazil ignores indigenous peoples' rights in the present case shows the importance of the division and independence of the states' duty to protect and the corporations' duty to respect. Even if a host state ignores human rights, corporations still have the duty to respect human rights. Furthermore, the home state of a company could be in a position to support corporations in their efforts to strengthen CSR strategies.

The second foundational principle focuses on the extraterritoriality of the states duty to respect and concerns the home state of a company:[531] "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or Jurisdiction respect human rights throughout their operations."[532]

This obligation is construed much more weakly, which is mirrored in the comparison between the terms "set out clearly the expectation" to "must" in the first principle.[533] The commentary on the principle is cryptic and lets a big gap for interpretation.[534] According to Backer, it does not encourage extraterritorial jurisdiction at the same time it does not exclude aggressive interventions abroad.[535] It has to be kept in mind that allowing legislative power abroad could be used as a cover for the developed states to project their legislative agendas into less developed states.[536]

---

[530] *Backer* 2011: 145. cf. *Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Commentary to principle 1:
States' international human rights law obligations require that they respect, protect and fulfill the human rights of individuals within their territory and/or jurisdiction.

[531] cf. *Vandehole* 2012: 4; cf. *Backer* 2011: 145.

[532] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Principle 2.

[533] *Vandehole* 2012: 4.

[534] *Backer* 2011: 149.

[535] *Backer* 2011: 149; cf. *Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Commentary to principle 2:
At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis. Within these parameters some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction.

[536] *Backer* 2011: 149.

The Andritz AG and the Andritz Hydro GmbH are domiciled in Austria, making Austria the home state of both companies.[537] Austria is responsible to encourage Andritz to comply with human rights standards abroad. In the *NAP CSR*, the importance of business complying with human rights and labour rights is pointed out.[538] Especially the priority area "supply chains" clarifies the expectation the government has regarding business and human rights:

> Es gilt die Einhaltung der Menschenrechte und der international anerkannten ArbeitnehmerInnenrechte zu gewährleisten und die Verantwortung, aktiv für den Schutz natürlichen Lebensgrundlagen zu sorgen, adäquat sicher zu stellen. […] Mit dem NAP CSR will die Bundesregierung das Thema CSR in internationalen Wertschöpfungsketten verantwortlich aufnehmen […] und Unternehmen in der Übernahme ihrer Verantwortung entsprechend unterstützen. Diese Verantwortung zeigt sich insbesondere im Management internationaler Wertschöpfungsketten und im Bereich der Exportwirtschaft.[539]

In theory, Austria accepts the premise that human rights should be protected throughout all operations of every Austrian company. However, the ministry of finance made it clear that they are neither willing nor able to regulate Andritz's operations in Belo Monte.[540] This view is consistent with the statement in the Draft *NAP CSR* and the European strategy that the main responsibility for CSR falls on the corporations and not on the states.[541]

2.3. Operational principles

The operational principles have to be interpreted in the light of the foundational principles.[542] As mentioned above these obligations are applicable to home and host states.[543] The following section will apply the principles to Austria as home state.[544]

2.3.1. General State regulatory and policy functions

Principle 3 lists the general regulatory and policy functions of a state. According to letter (a) states should

---

[537] *Graham&Whiteside. Cengage Learning* (2013): The Major Companies Database. Andritz Hydro GmbH; *Graham&Whiteside. Cengage Learning* (2013): The Major Companies Database. Andritz AG.
[538] *BMWFJ/BMLFUW* 2013: 5.
[539] *Id*.: 12.
[540] *Beantwortung der parlamentarischen Anfrage* Nr 12294/AP.
[541] *BMWFJ/BMLFUW* 2013: 4.
[542] *Backer* 2011: 145.
[543] *Vandehole* 2012: 4.
[544] But it is necessary to bear in mind that Ruggie intended the host state as the main duty bearer of the states obligations (cf. *Vandehole* 2012: 5). The special circumstances of the Belo Monte case justify focusing on the home state. See chapter IV section 2.

> [e]nforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically assess the adequacy of such laws and address any gaps.[545]

Faracik argues that "enforcement of existing laws is the most obvious way to address the problem of low law compliance."[546] Austria and the EU follow this recommendation in their strategies:

> Wie die EU-Kommission in ihrer Mitteilung zur neuen EU-Strategie CSR betont, kann die gesellschaftliche Verantwortung von Unternehmen nur unter der Voraussetzung wahrgenommen werden, dass geltende Rechtsvorschriften eingehalten werden.[547]

The Austrian government plans to analyze and evaluate laws. The aims are closing possible gaps in the legal system and implementing the *UN Guiding Principles*.[548] To reach these objectives a panel of legal experts is employed. As first step, the legal framework regarding human rights, international labor laws and protection of natural living conditions is researched.[549] The hope is that greater legal certainty for enterprises can be reached.[550] It is recommended that Austrian enterprises align their business activities in third world countries with Austrian norms and standards and with European objectives.[551]
In the present case, the green party sees a possible need for a reform regarding the "Ausfuhrförderungsgesetz". This law dictates criteria for federal export guarantees granted by the OeKB, the Austrian export guarantee agency. Although the "Ausfurhförderungsgesetz" would be the perfect starting point to strengthen the responsibility of businesses for human rights, so far it seems there is no intention on a government level to change it.[552]

The provision 3 (c) is linked to 3 (a).[553] It asks states to "provide effective guidance to business enterprises on how to respect human rights throughout their operation".[554] The term "throughout their operation" is interpreted as a hint to home states.[555] States do not only have to react in isolated cases but are advised to develop a broader strategy of supporting business

[545] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): principle 3.
[546] *Faracik, Beata* (2011): The Role of the State in Implementing the UN Guiding Principles on Human Rights and Business with Special Consideration of Poland. In: *Polish Yearbook of International Law*, 31: 349-387: 371. [hereinafter *Faracik* 2011].
[547] *BMWFJ/BMLFUW* 2013: 15.
[548] *Id*.: 12 et seq..
[549] *Id*.: 14.
[550] *Id*.: 12.
[551] *Id*.: 15.
[552] The issue of the alignment of export guarantees with human rights will be discussed under chapter IV section 2.3.2.
[553] *Faracik* 2011: 372.
[554] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Principle 3.
[555] *Vandehole* 2012: 4; *Backer* 2011: 151.

in human rights questions through for example the implementing of guiding documents, sharing best practices and other means that could contribute to a systematic change.[556] Such documents should guide on human rights due diligence and consider issues of vulnerability and marginalization.[557]

Other then the commentary to the principle, the *NAP CSR* mentions the responsibility for supply chain operations explicitly.[558] The government aims to support and protect enterprises that engage in CSR strategies along supply chains.[559] The objective is to develop a CSR-Codex for corporations based in Austria with operations throughout the world.[560] It becomes clear that the Austrian draft is more committed to the management of supply chains than the final version of the *UN Guiding Principles*. But it has to be taken into account that the Austrian plan is just a draft. The commitment of Austria to develop a broad CSR strategy is put into question, seeing as the European strategy asked governments to submit a national plan by 2012 and until now the government did not follow this recommendation. It is doubtful that a CSR strategy will be implemented so quickly that it could influence the project of Belo Monte. Future projects of Andritz may underlie Austrian soft law initiatives like the CSR-Codex.

Principle 3b focuses on ensuring that laws and policies that shape the creation and ongoing operation of business enterprises enable the respect for human rights. An example is 172 (1) (d) of the UK Company Act of 2006 that requires directors to "have regard (among other matters) [...] to the impact of the company's operations on the community and the environment."[561] Austria has a corporate governance codex, but it does not entail rules regarding human rights, or environmental standards.[562] Furthermore, it is voluntary, so companies can but do not have to comply.[563] In conclusion, the management of Andritz does not even have a soft law obligation under Austrian law to regard the impact of human rights while conducting a project abroad.

---

[556] *Faracik* 2011: 372.
[557] *Vandehole* 2012: 4.
[558] *Backer* 2011: 151.
[559] *BMWFJ/BMLFUW* 2013: 12 et seqq.
[560] *BMWFJ/BMLFUW* 2013: 12.
[561] 172 (1) (d), UK Company Act.
Available at http://www.legislation.gov.uk/ukpga/2006/46/pdfs/ukpga_20060046_en.pdf [accessed 21/11/13]; cf. *Faracik* 2011: 372.
[562] *Lukas, Karin* (2005): Corporate Social Responsibility und Menschenrechte – was tut sich in Österreich? menschenrechtsrelevante Aktivitäten österreichischer CSR-Unternehmen. Ludwig Boltzmann Institut für Menschenrechte: 15.
[563] *Id*.

Principle 3 (d) asks states to "[e]ncourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts."[564] Existing EU legislation sets out standards on non-financial disclosure requirements in the Fourth Directive on annual accounts 2003/51/EC. Some enterprises are expected to analyze in their annual reports "environmental and social aspects necessary for an understanding of the company's development, performance or position."[565] In a proposal for a directive amending Council Directives 78/660/EEC and 83/349/EEC disclosure of non-financial information is recommended for bigger companies:

> In order to enhance consistency and comparability of non-financial information disclosed throughout the Union, companies should be required to include in their annual report a non-financial statement containing information relating to at least environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters. Such statement should include a description of the policies, results, and the risks related to those matters.[566]

So far, Austria did not yet implement any non-financial disclosure provisions. But in the *NAP CSR* Austria commits to strengthen transparency regarding human rights issues. According to the draft, big companies with more than 500 employees and pension funds should be required to publish a "policy statement" with their measures regarding human rights, social and ecological responsibility.[567] State-owned enterprises like the OeKB are also urged to comply with this standard.[568] Smaller companies should at least explain why they failed to publish a policy statement.[569] § 243 Abs 5 UGB and the Corporate Governance Codex should be reformed, so clear indicators ensure greater transparency on environmental and employment issues in the annual reporting.[570]

So far, the Andritz Group, although listed on the stock exchange, is not obliged to publish information about human rights risks regarding projects like Belo Monte.

---

[564] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Principle 3.
[565] cf. *Faracik* 2011: footnote 72.
[566] *European Commission* (2013): Directive of the European Parliament and of the Council amending Council Directives 79/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups, COM(2013) 207 final, 16/04/13; 2013/0110 (COD): 9.
[567] *BMWFJ/BMLFUW* 2013: 29.
[568] *Id.*: 15.
[569] *Id*.
[570] *Id.*: 29.

2.3.2. The State-Business Nexus

Principles 4 to 6 put the focus on the link between business and states. The most important of these three obligations for the present case is principle 4:

> States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.[571]

This principle asks states to lead by example. Seeing as there are 650 state-owned TNCs worldwide it is reasonable to ensure a new mode of conducting business through setting examples in state-controlled enterprises.[572]

The commentary clarifies that the rationale to ensure corporations responsibility to respect human rights becomes stronger when an enterprise relies on taxpayer support. In every state, numerous agencies that are in some way linked to the state provide support and services for business activities abroad. Export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions are listed in the commentary of the principle. The commentary sees especially the reputational risks as reason for governments to consider human rights in business operations that are linked to the state. Also financial deliberations are mentioned as a possible risk to be taken into account.[573] The commentary finds "[a] requirement for human rights due diligence most likely to be appropriate where the nature of business operations or operating contexts pose significant risk to human rights."[574]

Andritz is not a state-owned enterprise; however they received and still are receiving substantial support and services from the OeKB. The OeKB is a private stock company, which acts as representative of the Ministry of Finance. Therefore, all its actions are attributable to the Austrian state.[575] Most industrial countries aim to support export activities of companies through a system of financial services like export credits or export

[571] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Principle 4.
[572] *Faracik* 2011: 373.
[573] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Commentary to principle 4.
[574] *Vandehole* 2012: 4.
[575] *Baxewanos, Fabiane/Raza, Werner* (2013): Die Sozialverträglichkeitsprüfung im österreichischen Ausführforderungsverfahren. Umsetzungsoptionen anlässlich der Neufassung der OECD „Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence" vom 28.Juni 2012. In: Abteilung Wirtschaftswissenschaft und Statistik der Kammer für Arbeiter und Angestellte [ed.]: *Materialien zu Wirtschaft und Gesellschaft Nr. 118*: 15 [hereinafter *Baxeanos/Raza* 2013].

guarantees.[576] The OeKB is Austrian's main provider of those services.[577] The export guarantees Andritz received in the last five years amount to 1.7 Billion Euro.[578] Clearly, Andritz needs those guarantees to export their products and services to other countries giving the Austrian government leverage to ask Andritz to align with international human rights throughout their operations. So the question is whether Austria has plans to implement human rights due diligence process when granting export guarantees. In the *NAP CSR* the priority area about "incentives" for CSR highlights this problem. The objectives of a system of different incentives are the following:

> Mit dem Anreizsystem will der Staat (1) in die Rolle als Gestalter von Rahmenbedingungen, die eine breite CSR Umsetzung fördern, und (2) selbst in die Rolle als CSR Vorbild (über die Verwaltungen, die staatsnahen und staatlichen Unternehmen) gehen.[579]

Furthermore, the *NAP CSR* recommends that a consequential Socially Responsible Investment (SRI) strategy should be implemented. Stakeholders like export guarantee agencies should be going to be involved in the developing process.[580] CSR efforts of a company should be used as criteria for the decision whether a company gets a credit or not.[581] One aim is that those principles strengthen the awareness of investors and stakeholders for CSR. Another is that those measures influence companies as borrowers and are a possible example for other investors.[582]

However, the politicians fail to implement the ambitious ideas of the *NAP CSR*, which is seen in the lending criteria of the OeKB. Since 2001, national export guarantee agencies have to comply with the *OECD Common Approaches on the Environment and Export Credits* before granting a credit.[583] On basis of the *UN Guiding Principles* the *OECD Common Approaches* were extended by a social due diligence process in 2012.[584] The OeKB commits on their homepage to complying with the *OECD Common Approaches*. Hence, the OeKB commits as well to the high standard of the *UN Guiding Principles*. Although the bank is authorized by a treaty to assess the environmental and social acceptability of projects it finances, the social

---

[576] *Id.*: 1.
[577] *OeKB*: Homepage. Oesterreichische Kontrollbank AG (OeKB). Available at http://www.oekb.at/en/Pages/default.aspx [accessed 20/11/13].
[578] *Beantwortung der parlamentarischen Anfrage* Nr 12294/AP: 2.
[579] *BMWFJ/BMLFUW* 2013: 21.
[580] *Id.*: 21 et seq.
[581] *Id.*: 22.
[582] *Id.*
[583] *Id.*: 1.
[584] *Id.*: 2.

due diligence process is not transparent because the treaty is private and not accessible.[585] Therefore, the authors of a study on social due diligence and export credits in Austria recommend further institutional and operative measures:

> Zum einen ist eine Anpassung institutioneller Elemente des österreichischen Exportfördersystems notwendig […] Hier wird in den Empfehlungen insbesondere darauf abgestellt, dass (i) die inhaltlichen und prozeduralen Grundsätze des Verfahrens transparent und in nachvollziehbarer Weise gesetzlich normiert sind, (ii) die Kohärrenz zu anderen Politikfeldern gewährleistet ist, sowie (iii) derzeit nicht vorhandene, unabhängige Monitoring/Evaluierungs- und Beschwerdemechanismen eingeführt werden.
>
> Daneben bedarf es auch einer Reihe von operativen Maßnahmen, welche darauf abzielen, die Prüfung von menschenrechtlichen Aspekten im Zuge der Umwelt- und Sozialverträglichkeitsprüfung des Ausfuhrförderungsverfahrens in ausreichender Form sicherzustellen, sowie eine kontinuierliche Weiterentwicklung des Prüfinstrumentariums zu gewährleisten. Schließlich wird empfohlen, das Prüfverfahren der Common Approaches in analoger Weise auch auf Beteiligungen anzuwenden.[586]

By following this recommendations Austria would fulfil the requirements of principle 4 of the *UN Guiding Principles.*

But in the case of Belo Monte the OeKB is not involved because Andritz did not apply for a federal export guarantee for the project Belo Monte.[587] To influence the behavior of companies – domiciled in Austria – the OeKB could consider the whole CSR-profile of companies when assessing the admissibility for a federal export guarantee.[588] This would mean that the activities of Andritz in Belo Monte would influence export guarantees for their next project. When presented with this approach, former Finance minister, Maria Fekter dismissed it, arguing that this revised process would lead to a financial and administrative burden for exporters, banks, and export credit agencies:

> Nach den dem Bundesministerium für Finanzen vorliegenden Informationen verfahren in dieser Hinsicht alle multilateralen Entwicklungsbanken, alle internationalen Finanzierungsinstitutionen und alle Exportkreditagenturen gleich: Keine einzige Institution trifft Entscheidungen zu Projekten auf der Grundlage eines "Gesamtprofils" des Exporteurs. Aus diesen Gründen, aber auch wegen der damit verbundenen hohen Kosten und zusätzlich bürokratischen Belastung von Exporteuren, Banken und der Exportkreditagentur kann sich das Bundesministerium für Finanzen ebenso wie die OeKB die Implementierung eines „Gesamtprofil-Verfahrens" nicht vorstellen.[589]

Furthermore, economical interests of Austria outweigh the commitment to human rights abroad:

> Es ist daher anzunehmen, dass die Andritz-Gruppe ihre wirtschaftlichen Aktivitäten in Österreich durch ein derartiges Vorgehen erheblich einschränken würde. Das Bundesministerium für Finanzen bekennt

[585] *Baxeanos/Raza* 2013: 15.
[586] *Id*.: 25.
[587] *Id*.: 1.
[588] *Parlamentarische Anfrage* 12504/J: 3.
[589] *Beantwortung der parlamentarischen Anfrage* Nr 12294/AP: 3 et seq.

> sich gerade im Hinblick auf die Sicherung von Arbeitsplätzen und nachhaltigen Steuereinnahmen zu einer aktiven Industriestandortpolitik, zumal an Aufträgen industrieller Weltmarktführer auch eine Vielzahl von KMU-Zulieferbetrieben partizipiert.[590]

Clearly, the ministry of finance dismisses a socially responsible investment strategy proposed by the *NAP CSR* and the *OECD Common Approaches* and fails to take other steps to protect against human rights abuses by business enterprises that receive substantial support by the OeKB.

Provision 5 concerns oversight when the state contracts with, or legislates for, business enterprises to provide services that may impact upon the enjoyment of human rights.[591] Principle 6 regards the promotion of respect for human rights by enterprises with which states conduct commercial transactions. Both those provisions are worth mentioning, but seeing as they are not relevant for the complex of Belo Monte, Austria and Andritz I will not go into further detail.[592]

2.3.3. Ensuring policy coherence

Principles 8 to 10 focus on ensuring policy coherence.

> States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.[593]

The commentary clarifies that the tension between human rights obligations and business is not inevitable. Nevertheless, States have to balance interests to reconcile both issues. This balancing act can be achieved through straightening vertical policy coherence and horizontal policy coherence. The first focuses on the question which policies, laws and processes are in place to implement the international human rights law obligation, the latter on supporting and equipping departments and agencies, at both the national and sub-national levels, that shape business practices, to be informed of and act in a manner compatible with the Governments' human rights obligations.[594] All governmental institutions are implied, including executive, jurisdictional and legislative state organs.[595] Backer suggests that the principle implies the

[590] *Id.*: 4.
[591] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Principle 5.
[592] *Id.*: Principle 6.
[593] *Id.*: Principle 8.
[594] *Id.*: Commentary to principle 8.
[595] cf. *Backer* 2011: 160.

human rights obligations should be at the top of the State's agenda before the business interests.[596]

The *NAP CSR* is also ambitious in this area. Especially in the priority area "incentives" the idea of raising awareness for governmental departments, agencies and other State-based institutions is presented. The following practical approaches are put forward: The public procurement should be CSR-orientated, a SRI strategy should be implemented and the tax and public funding system should also align with CSR.[597]

As shown, it is highly doubtful that Andritz is going to lose funding or other advantages granted by the Austrian government, due to the fact that they are involved in the Belo Monte hydropower scheme. The fear to hurt the Austrian economy by implementing stricter rules for Austrian based businesses is greater than the will to strengthen human rights abroad.

Operational principle 9 offers guidance regarding the state's relationship between other states or business enterprises. The main objective should be maintaining an adequate domestic policy space to meet human rights obligations through investment treaties or contracts.[598] This obligation is mainly aimed at host states and therefore not relevant for this context.[599]

Principle 10 focuses on the states duty to protect human rights as member of multilateral institutions that deal with business-related issues.[600] International institutions should not restrain states and business enterprises to fulfill the *UN Guiding Principles*. Through technical assistance, capacity-building and awareness raising states should encourage institutions to promote business respect and encourage states to meet their duty to protect. Furthermore, the *UN Guiding Principles* should serve as standard to advance international cooperation.[601]

The principle wants states to develop a framework on an international level, which should be incorporated into domestic legal orders without threatening the sovereignty of a state.[602]

Backer sees that

> [t]he superiority of collective state action to the unilateral action of any single state (or group of powerful states), ought to be regarded as the better alternative, both for policing weak governance zones and for developing the set of duties to which states ought to be bound.[603]

[596] *Id.* As shown in the statement of the Ministry of Finance the economic interests stay at the top of the Austrian agenda.
[597] *BMWFJ/BMLFUW* 2013: 21.
[598] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Principle 9.
[599] *Vandehole* 2012: 4.
[600] *Id.*: 5.
[601] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Principle 10.
[602] *Backer* 2011: 162.

Apart from this advantage Backer lists also disadvantages. First of all, the principle is weak because it only applies to states that are already members of multilateral institutions that deal with business related issues. It does not force states to become members of these institutions.[604] Secondly, most of these organizations just combine the interests of each individual state, and lack a greater vision independent of those interests. Furthermore, the organizations could be used as a way of dominant states to coerce not dominant states.[605]
The *NAP CSR* shows the interest of the Austrian government to push the agenda forward in the EU and other international institutions:

> Die Bundesregierung selbst wird durch verstärktes Engagement und einer aktiven Rolle auf europäischer und internationaler Ebene die Gestaltung ambitionierter CSR – Rahmenbedingungen vorantreiben.[606]

Moreover, the government wants to campaign for a European information system. Enterprises should be able to find information about human rights risks and corruption, as well as ecological risks for countries and regions, where they conduct business. European indicators should be elaborated for high risk countries and products to show risk factors and recommendations. Also guidelines for "Responsible Supply Chain management" following the due diligence concept of John Ruggie should be created.[607]
For the case of Belo Monte, a European strategy regarding business and human rights would be advisable because all enterprises involved in the consortium are domiciled in the EU. Although the EU played a role not only in the development of the *Protect, Respect and Remedy Framework*, but also in creating the *UN Guiding Principles,* the EU does not protest against the construction of the dam in Belo Monte.[608]

3. The corporate responsibility to respect human rights

The corporate responsibility to respect human rights is divided into five foundational principles and eight operational principles. The subdivisions of the operational principles are *Policy commitment*, *Human rights due diligence*, *Remediation* and *Issue of context*.

---

[603] *Id.*: 161.
[604] *Id.*: 162.
[605] *Id.*
[606] *BMWFJ/BMLFUW* 2013: 10.
[607] *Id*.
[608] cf. *Gorska* 2012.

Whereas "[t]he state duty is couched in the language of law and policy. The corporate responsibility to respect is grounded in the language of due diligence."[609]

This section examines whether Andritz fulfils the responsibility to respect human rights in the case of Belo Monte. The documents used to determine if Andritz is committed to respect human rights in general and in the present case are the *Andritz Code of Business and Ethics* and newspaper articles. Andritz Hydro is member of the platform *respACT*, a leading Austrian initiative for corporate social responsibility and sustainable development.[610] As a member Andritz Hydro is obliged to accept and implement the CSR-Guidelines *Success and Social Responsibility. A Guide to Future-Proofing Your Business*.[611] Those guidelines are also part of the analysis.

3.1. Foundational principles

The foundational principles summarize in general the responsibilities of the corporations. The operational principles outline the concrete steps a company needs to take to fulfil the responsibility to respect.

Principle 11 states:

> Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.[612]

Same as the *UN Draft Norms*, the *UN Guiding Principle* impose positive obligations on corporations. Besides avoiding infringing on human rights, companies need to address adverse human rights impacts. The obligation of corporations exist "[...] independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations."[613] Backer argues that the commentary on the principle shows the autonomous normative system of corporations:

> The corporate responsibility, consist of its own normative system, one that may interact and overlap with the law system of states (and the international system) but one that remains separate form [sic]

[609] *Backer* 2011: 164.
[610] *Respact* 2013: Homepage: Mitglieder: http://www.respact.at/site/mitglieder/text/article/3468.html [accessed 25/10/13]; Über Uns: http://www.respact.at/site/about/ueberuns [accessed on 25/10/13]
[611] *Respact* 2013: Mitglieder/ Mitgliedschaft: http://www.respact.at/site/mitglieder/mitgliedschaft [accessed 25/10/13]
[612] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Principle 11.
[613] *Id.*: Commentary to principle 11.

> them as to sources of rules, the community that makes up the governance regimes subject to this autonomous responsibility, and the implementation of those governance norms.[614]

Furthermore, the corporate responsibility is measured by the "prevention, mitigation and, where appropriate, remediation"[615] and not by other means required by domestic law of states.[616]

Although Brazil is ignoring the human rights of indigenous peoples, the corporate responsibility of Andritz and other involved firms exist independently. Andritz may comply with all Brazilian legal provisions, but this does not release the company from their obligations set in the *UN Guiding Principles*.

Principle 12 lists a minimum of internationally recognized human rights that should be respected by business. That minimum consists of the International Bill of Human rights and the eight ILO's Declaration on Fundamental Principles and Rights at Work.[617] But the commentary clarifies that corporations may need to consider additional standards depending on circumstances:

> For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, there they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities, and migrant workers and their families.[618]

In chapter II, the internationally recognized human right treaties applicable to the situation in Belo Monte are listed. So the provisions of the UDHR, ACHR, ICESCR, ICCPR, ILO Convention 169 and the UNDRIP are relevant for the involvement of Andritz too. The Brazilian Federal Constitution is national law and cannot be subsumed under the term "internationally recognized human rights".

When confronted with a question regarding the expulsion of families in Belo Monte, Leitner answered: "Wir vertreiben niemanden und halten uns an das geltende Rechtssystem in Brasilien. Wenn man sich all dem beugen würde, dann hätten wir eine Diktatur der lauten Minderheit."[619] In the context of the *UN Guiding Principles* the fact that Andritz complies with Brazilian law is not relevant, because as shown above the principle aim of the *UN*

[614] *Backer* 2011: 166.
[615] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Commentary to principle 11.
[616] *Backer* 2011: 165.
[617] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Principle 12.
[618] *Id.*: Commentary to principle 12.
[619] *Kramer* 2013.

Guiding Principles is to encourage companies to respect internationally recognized human rights. Furthermore, the *UN Guiding Principles* want to pay particular attention to the rights and needs of people that are at heightened risk of becoming vulnerable or marginalized.[620] On the contrary to the statement above, Andritz should pay special attention to the rights of the indigenous peoples affected by Belo Monte.

Principle 13 lays out the consequences for businesses when their actions influence the human rights situation negatively:

> The responsibility to respect human rights requires that business enterprises:
>
> (a) Avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur;
>
> (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.[621]

The steps a company is obliged to take, vary depending upon the type of connection between the human rights impact and the activities of the corporation.[622] When the entity causes or contributes to human rights impacts, it needs to address the impact. When the company is directly linked to negative human rights impacts through a business relationship, they have to prevent or mitigate them. Principle 19 refines this approach.
For the purpose of determining if Andritz needs to address the impacts on the indigenous peoples in Belo Monte, first it is necessary to identify if they are causing or contributing to the adverse human rights impacts. This question will be answered in the course of outlining principle 19.

Principle 14 repeats that

> [t]he responsibility to respect human rights applies to all enterprise regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means

[620] cf. *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Commentary to general principles:
> These Guiding Principles should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men.

[621] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Principle 13.
[622] *Backer* 2011: 167.

> through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts.[623]

The interpretative guide on the *UN Guiding Principles* of the OHCHR clarifies that although all enterprises have the same human rights responsibilities, the corporations' size influences the possible consequences of their actions and the approaches they should take to address the human rights impacts.[624]

The number of Andritz Group employees (about 23,800 worldwide), the fact that the Group is listed on the stock market and that they conduct operations all over the world are factors which make it possible to characterize Andritz Group as a MNC. The Andritz Hydro GmbH operates as well in numerous countries worldwide. Those activities increase the number of their value chain relationships and lead to the possibility of human rights infringements linked to their operations. Clearly, Andritz Hydro and Andritz Group have different responsibilities then small and medium-sized enterprises which rarely conduct business in foreign states.

The second factor that influences the responsibilities of a company is the severity of an adverse human rights impact. The guide states that the severity of the human rights impact

> is the most important factor in determining the scale and complexity of the processes the enterprise needs to have in place in order to know and show that it is respecting human rights. The processes must therefore first and foremost be proportionate to the human rights risks of its operations.[625]

The severity is measured by scale, scope and the irremediable character.[626] Furthermore, the number of affected people and the gravity of the human rights impact need to be considered.[627]

As shown in chapter II, thousands of families in the area of Belo Monte are going to be affected by the dam. Especially for the indigenous peoples the effects of the dam are irreversible. The destruction of the whole ecosystem entails the loss of the indigenous peoples' territory and their typical way of life. It is not possible to compensate them through providing different land, because their whole livelihood is bound to the river and the special flora and fauna.

In conclusion, the process Andritz Group and Andritz Hydro needs to have in place in order to know and show that it is respecting human rights must consider the complexity and variety of

---

[623] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Principle 14.
[624] *OHCHR* 2012: 19.
[625] OHCHR 2012: 19.
[626] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Commentary to principle 14.
[627] cf. *OHCHR* 2012: 8

their business activities and the severe consequences for human rights linked to their activities.

Principle 15 describes the policies and processes business enterprises should have in place appropriate to their size and circumstances to meet their responsibility to respect. Listed are a policy commitment to meet their responsibility to respect human rights, a human rights due-diligence process and a process to enable the remediation of adverse human rights impacts they cause or to which a company contributes.[628] Those mechanisms are further elaborated in the following section about operational principles.

3.2. Operation principles

3.2.1. Policy commitment

According to principle 16, companies should implement a policy framework to embed their responsibility to respect human rights. This statement of policy should fulfil the following criteria:

> (a) Is approved at the most senior level of the business enterprise;
>
> (b) Is informed by relevant internal and/or external expertise;
>
> (c) Stipulates the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;
>
> (d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;
>
> (e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.[629]

Andritz published the *Andritz Code of Business Conduct and Ethics* in July 2010. It outlines "the values and business principles that apply to the entire Andritz Group and that are valid for everyone who works for or represents Andritz – focusing on integrity, respect, reliability and sustainability."[630] The Group Policy was signed and released by the entire Andritz Group

[628] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Principle 15.
[629] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Principle 16.
[630] *Andritz* 2013: Homepage: Sustainability. Available at http://www.andritz.com/group/gr-about-us/gr-sustainability.htm [accessed 29/10/13].

Executive Board and therefore approved by the most senior level of the enterprise. The *Andritz Code* is publicly available on the homepage of Andritz.[631] It was written by the compliance-committee, which is responsible for taking certain measures to ensure compliance with the outlined policy and conducting trainings to strengthen the awareness.[632] The values should also be understood by all business partners.[633] So it seems that the Andritz Group relied on internal expertise to write the code. The core values of the policy are Integrity (Ethics/Transparency/Compliance), Respect (Responsibility/Fairness/Respect/Teamwork/ Performance), Reliability (Respect/Customer Orientation/Quality) and Sustainability.[634]

For the case of Belo Monte some guidelines presented in the document are relevant. First of all, the respect for all people's values, cultures and the difference in people's thinking and backgrounds is laid down.[635] Under the section *In Our Communities* Andritz affirms the commitment "to promoting environmental protection and conserving natural resources."[636] Also the effort to comply with all environmental laws and regulations in every country in which they operate is addressed.[637] The respect for human rights is only mentioned in passing: "We respect human rights and support the principle of equal opportunities regardless of race, nationality, gender, sexual orientation, religion, disability, or age."[638] Regarding the compliance with national law, Andritz reaffirms that they

> are committed to operating with the highest level of ethical behavior and to complying with both the spirit and letter of all applicable laws and regulations of our home countries and of the other countries where we do business.[639]

In this context, the *Andritz Code* mentions the need for a due diligence process about a third party's ownership and reputation before entering into a business relationship; because when those third parties work with public officials on the behalf of Andritz, the company may be liable.[640]

---

[631] *Id*.
[632] *Compliance-Ausschuss der Andritz-Gruppe* (2010): Group Policy. Andritz Code of Business Conduct and Ethics. 1. Juli 2010: 4. Available at http://grz.g.andritz.com/c/com2011/00/01/32/13292/1/2/0/738925714/gr-grz-_3515840-v5-andritz_code_of_business_conduct_and_ethics_e.pdf [accessed 26/11/13]. [hereinafter *Compliance-Ausschuss* 2010]. The written notification of the executive board is only included in the German version of the Code, but not in the English version.
[633] *Id*.
[634] *Andritz* 2010a.
[635] *Id.*: 5.
[636] *Id.*: 13.
[637] *Id*.
[638] *Id.*: 14.
[639] *Id.*: 15
[640] *Id.*: 15.

At first glance, the policy commitment fulfils the standard demanded by the *UN Guiding Principles* but upon closer inspection, a big gap between the requirements of principle 16 and the *Andritz Code* becomes obvious. In the guide on *How to use the UN Guiding Principles in company research and advocacy*, indicators for a reliable policy statement are listed.

First of all, the company should endorse at least the International Bill of Human rights and the eight ILO core conventions plus other human rights standards relevant for their line of business.[641] The code fails to address the human rights issue stretching beyond the simple commitment to human rights. It is not clear which internationally recognized human rights are meant. Does the statement refer to the International Bill of Human Rights, or all of the internationally recognized human rights? Seeing as Andritz often conducts projects that affect human rights, it can be expected that they clarify which standards they mean.[642]

Furthermore, the human rights policy should be reflected in operational policies and procedures. The fact that there is a commitment-committee that should advise employees in human rights questions is – in my opinion – not an appropriate measure to embed the policy "from the top of the business enterprise through all its functions."[643] Especially, because the means through which enterprises meet that responsibility depends upon their size. Andritz is a MNC with projects that often have adverse impacts on human rights. This leads to the conclusion that they could not only afford but should set a broader range of measures to achieve compliance with human right through all company functions.[644]

Next, the commentary to the principle clarifies that the level of expertise depends upon the complexity of the business enterprise's operations.[645] Infrastructure projects are often complex and can entail a large number of problems for communities and individuals. Seeing as Andritz had problems not only in former projects in foreign countries but also in Austria, the company should be aware of those issues. It would be in Andritz' own interest to communicate rules and guidelines regarding their human rights responsibility.

Until now, Andritz failed to publish a code, which meets the criteria set out in principle 16. Important issues - although addressed - are not examined further. The language of the code is

---

[641] *Van Huijstee, Mariëtte (SOMO)/Ricco, Victor (CEDHA)/Ceresna-Chaturvedi, Laura (Cividep India)* (2012): How to use the UN Guiding Principles on Business and Human Rights in company research and advocacy. A guide for civil society organizations. SOMO/CEDHA/Cividep India: Amsterdam: 20 [hereinafter *Van Huijstee/ Ricco/ Ceresna-Chaturvedi* 2012] .

[642] cf. *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Principle 14.

[643] *Id.*: Commentary to principle 16.

[644] cf. *Id.:* Principle 14.

[645] *Id.*: Commentary to principle 14.

too general to serve as tool to guide employees when confronted with a human rights issue. In conclusion, the code can be seen as nothing more than a first small step in the right direction.

Andritz is part of the platform *respACT,* an initiative for corporate social responsibility and sustainable development. They published a guide called *Success and Business. A guide to future-proof your business*. Principle 16 does not demand that the statement of policy is written or published by the own company. However, the guidelines have the same flaws as the *Andritz Code*. The guide states that responsible businesses

> - respect human rights and seek to ensure that they are protected along the entire value chain
>
> - enable employees to exercise their right to free expression and their right to form labour unions and engage in collective bargaining
>
> - prohibit the use of child and forced labour throughout the value chain
>
> - protect minority groups in their own country and abroad and respect the cultures of different segments of the population
>
> - strive to achieve the right balance and appropriate interaction between the culture of the host country and their own culture.[646]

The glossary names the UDHR as main document defining human rights.[647] Interestingly, the *Protect, Respect and Remedy Framework* is listed as an international reference resource that was used to prepare the guidelines.[648]

Although this guide mentions at least the UDHR and the eight ILO core labour standards, it fails to go one step further and lay out operational policies or procedures that would be necessary to implement the respect for human rights in daily business activities.

So to conclude, there is no human rights policy in place, neither published by Andritz Group, nor the business platform *respACT* which fulfil principle 16. The public statements of Leitner regarding Belo Monte point to the conclusion that there will be no new policy any time soon.

---

[646] *respACT* (2010): *Success and Business. A guide to future-proof your business*: 23. Available at http://www.respact.at/leitbild/en/viewanddownload [accessed 26/11/13] [hereinafter *respACT* 2010].
[647] *Id*.: 51. The eight ILO Conventions are also mentioned.
[648] *Id*.: 58.

3.2.2. Human Rights due diligence

Backer defines the section about human rights due diligence as "the operational heart of the principles developing the corporate responsibility."[649] The commitment of Andritz to respect human rights can be measured by their human rights due diligence process.[650]

> In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings tracking responses and communicating how impacts are addressed.[651]

Identification, prevention, mitigation and accountability are the four broad objectives of due diligence. This due diligence must be directed to the four functions; assessing, integrating, acting and communicating.[652]

Principle 17(a) describes the scope of coverage of the due diligence process. The due diligence process should cover impacts that the business enterprise causes or contributes to through their activities, or which are linked to its operations, products or services by its business relationships.[653] The liability of companies is mitigated where the connection between the corporation and the entity responsible for the human rights impact is either too remote or where the corporation has no leverage over this entity.[654] The linkage between the human rights impacts, Brazil and Andritz will be topic when describing principle 19 (b).

Letter (b) clarifies that due diligence "will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations."[655] The commentary states:

> Where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved or other relevant considerations, and prioritize these for human rights due diligence.[656]

---

[649] *Backer* 2011: 171.
[650] cf. *Id.*: 171.
[651] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Principle 17.
[652] *Backer* 2011: 171.
[653] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Principle 17(a).
[654] cf. *Backer* 2011: 172.
[655] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): 17(b).
[656] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Commentary to principle 19.

The due diligence process should be initiated as early as possible and be ongoing because human rights risks may change while operations and the operating context evolve.[657]

The first question is whether the Norte Energia consortium is an entity that is part of the value chain of Andritz. The value chain does not only cover entities that supply a corporation, but also those who receive products or services from a corporation.[658] Clearly the Norte Energia consortium receives products from Andritz Hydro thus at least linking the activities of Andritz to the human rights infringement in Belo Monte. The Andritz Group and Andritz Hydro have a lot of entities in their value chains making it hard to conduct due diligence across them all. However, they could have identified general areas where the risk of adverse human rights impacts is most significant. Seeing as Andritz has problems with local communities in other projects too, they should have implemented a due diligence process which focuses on the involvement and consultation process of the local population. The *Andritz Code* implements a due diligence process for a third party's ownership and reputation, but not for adverse human rights impacts.[659]

Principle 18 describes the process to identify and assess actual or potential adverse human rights impacts a company may be involved with:

> (a) Draw on internal and/or independent external human rights expertise;
>
> (b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.[660]

The commentary clarifies that assessing the human rights context prior to a business activity includes:

> identifying who may be affected; cataloguing the relevant human rights standards and issues, and projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified.[661]

Special attention should be paid "to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization."[662] The OHCHR explains the importance of consulting with stakeholders. As an example they

[657] *Id.*: Principle 17(c), Commentary to principle 17.
[658] *OHCHR*: 8.
[659] *Andritz* 2010a: 15.
[660] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Principle 18.
[661] *Id.*: Commentary to Principle 18.
[662] *Id.*: Commentary to Principle 18.

describe that enterprises may have a different view on what constitutes a human rights impact than for example affected indigenous communities.[663] A corporation may think that expropriated land can be substituted by other land, whereas indigenous peoples may have a special bond to their territory.[664] So, only by talking to affected stakeholders can a company really identify and address adverse human rights impacts.[665] Furthermore, the consulting should take place directly and take into account language and other potential barriers. When it is not possible to talk directly to the stakeholders, companies should seek to consult credible, independent expert resources like human rights defenders or others from the civil society.[666] Furthermore, the assessments should be undertaken regularly.
Andritz never started a dialogue with affected stakeholders. Even after the publicly raised request of NGOs to start a consultation process:

> Es habe sich aber niemand die Mühe gemacht, sich die Umstände an Ort und Stelle anzuschauen: "Die riesigen Firmen hätten Abordnungen schicken sollen. Wir hätten den Leuten schon gezeigt, was los ist. Sie hätten sogar das Glück gehabt, dass der Bischof Deutsch spricht und sie keinen Dolmetscher brauchen."[667]

Andritz clearly is not interested in conducting a dialogue with the indigenous communities and other affected people in Belo Monte. Leitner ignores objections by stating that the minority should not dictate the majority.[668]

Principle 19 describes two steps how business enterprises can prevent and mitigate adverse human rights impacts. First, they should integrate the findings from their impact assessments across relevant internal functions and processes:

> (a) Effective integration requires that:
>
> (i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;
>
> (ii) Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts.[669]

[663] *OHCHR*: 44.
[664] *Id*.
[665] *Id.*
[666] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Commentary to Principle 18.
[667] *APA* 2013b.
[668] *Kramer* 2013.
[669] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Principle 19 (a).

As shown above, the Andritz Group has a Compliance-Committee, which is also responsible for compliance with anti-corruption rules and anti-trust laws.[670] So the issue is addressed, but human rights are not the focus of the Compliance-Committee. When studying the *Andritz Codex*, the articles about Andritz, and press releases by Andritz, it becomes clear that Andritz does not have any mechanisms in place to respond to such impacts.

In a next step principle 19 dictates companies to take appropriate action:

> (b) Appropriate action will vary according to:
>
> (i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;
>
> (ii) The extent of its leverage in addressing the adverse impact.[671]

It is important to identify the connection between the business activities and the adverse impacts on human rights because the expected reaction of the corporation depends upon it. The interpretative guide of the OHCHR gives examples of business activities that cause, contribute or are linked to adverse human rights impacts. "Routine racial discrimination by a restaurant in its treatment of customers" serves as an example for a business action that directly causes human rights infringements. "Performing construction and maintenance on a detention camp where inmates were allegedly subject to inhumane treatment" contributes to the human rights abuse. An example for the linkage of an enterprise's operation, product or service to an adverse impact is the "[u]se of scans by medical institutions to screen for female fetuses, facilitating their abortion in favor of boys."[672]

The guide for civil society organizations lists indicators for deciding whether a company causes, contributes or is linked to human rights abuse.[673] The following passage is based on those indicators.

In the present case, it is clear that there is no causal link between the delivery of equipment and the adverse impacts on indigenous peoples' rights in Belo Monte. The expulsion of people, the destruction of the livelihood of the indigenous peoples and the non-compliance with consultation rights in the area of Belo Monte, does not result directly from the actions of

[670] Andritz (2010b): Geschäftsbericht 2010. Unternehmensrisiken. Available at http://reports.andritz.com/2010/de/index/corporate-risks.html [accessed 30/11/13].
[671] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Principle 19(b).
[672] *OHCHR* 2012: 17.
[673] *Van Huijstee/ Ricco/ Ceresna-Chaturvedi* 2012: 44 et seq

Andritz personnel within the company's work facilities or surrounding areas.[674] Therefore, the activities of Andritz do not cause any adverse human rights impacts in Belo Monte.

So the question is whether the supplying of equipment contributes or is linked to the human rights abuse in Belo Monte. When the combination of the company's activities and that of a third party creates a negative human rights impact, the company contributes to a human rights abuse.[675] Another indicator named by the guide is that the corporations' actions and omissions are crucial for the commitment of the abuse by the third party.[676] In theory, Eletronorte could not build the dam without the equipment delivered by Andritz. Therefore, the combination between the activities of Andritz and Eletronorte is crucial for the creation of the negative human rights impact. Another element is that Andritz enables, encourages or facilitates the negative human rights impact in Belo Monte. The fact that Andritz supplies the dam without protesting against the behavior of the Brazilian government facilitates human rights infringements. It can be argued that the omission of Andritz or any other European company to protest against measures taken by the Brazilian government increases or exacerbates the adverse impact on human rights. The consortium would at least be able to influence the severity of the human rights infringements. Another indicator are "[t]he company's own policies which can reasonably be expected to motivate human rights abuses by its business relationship."[677] Seeing as Andritz has no sufficient policy regarding human rights abuse, it is reasonable to expect that Andritz does not decrease human rights abuses. All of the guiding questions for check are fulfilled: Andritz is aware of the negative human rights impact in Belo Monte; the impact is caused by a third party; Andritz facilitates the adverse human rights impact; Andritz is in a business relationship with Eletronorte/Brazil and they benefit from the human rights abuse. If Eletronorte would comply with all national and international human rights standards, chances are that the dam would not be built and Andritz would lose business.

Andritz is definitely linked to the human rights abuse in Belo Monte. The products and services delivered by Andritz hydro are connected to the human rights impact through their business relationship with Brazil. The crucial indicator is whether the adverse human rights impact occurs without any intended or unintended pressure from Andritz to do so.

Also the comparison between the example for contribution given above and Belo Monte indicates that Andritz contributes to the indigenous peoples violations. The construction firm

[674] *Id.*: 44.
[675] *Id.*: 45.
[676] *Id*.
[677] *Id*.

which repairs the building of a detention camp delivers services to a facility, which is the site of inhuman treatment. Andritz supplies a dam, which will influence the livelihood of thousands negatively when the construction is finished. The similarities lead to the conclusion that Andritz contributes to the adverse human rights impacts. Therefore, Andritz has to implement a process to actively engage in remediation.[678]

Principle 20 describes criteria to track the effectiveness of the enterprise's response to adverse human rights impacts. Principle 21 correlates with principle 20. It explains that enterprises should communicate their address on human rights impacts externally, especially when concerns are raised by or on behalf of affected stakeholders.[679] Andritz never addressed the human rights infringements in Belo Monte, although concerns have been raised by affected stakeholders and on behalf of them.

3.2.3. Remediation

Principle 22 states: "Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes."[680]

The commentary clarifies that where a business enterprises identifies that they caused or contributed to an adverse human rights impact, they are required to actively engage in remediation, by itself or in cooperation with other actors.[681] When the company's activities are linked to adverse human rights impacts, the enterprise may take a role in remediation, but is not required to do so.[682]

As shown above, Andritz' activities contribute directly to the human rights impacts in Belo Monte. Therefore, they should provide for remediation. However, it seems like Andritz is not going to implement any process to enable remediation. Further guidance on mechanisms of remediation is included in chapter III of the *UN Guiding Principles* on access to remedy.

[678] cf. *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Principle 22.
[679] *Id.*: Principle 21.
[680] *Id.*: Principle 22.
[681] *Id.*: Commentary to principle 22.
[682] *Id.*: Commentary to principle 22.

3.2.4. Issues of context

Principles 23 and 24 lay out criteria that should be respected in all contexts and all business enterprises:

> In all contexts, business enterprises should:
>
> (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;
>
> (b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;
>
> (c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.[683]

Paragraph (a) establishes "the primacy of the state and domestic law over international law where an enterprise is faced with conflicting requirements."[684] If complying with domestic law leads to a conflict with internationally recognized human rights, the company should seek a way to at least honour the principles of human rights.

In this particular case, the Brazilian government ignores the obligations set in the Brazilian federal constitution and international human rights which would apply to the case of Belo Monte. Eletronorte would have been obliged to implement a consultation process with the affected indigenous peoples before the beginning of the project and they should protect other substantive rights of the population, such as the right to health and food. In the present case there is no conflicting requirement between the internationally recognized human rights and the Brazilian domestic law. Eletronorte and Brazil just ignored their own legal provisions and decided to build the dam without a consulting process. In conclusion ,Andritz is not faced with conflicting requirements because Brazilian law and internationally recognized human rights comply at least on paper.

Principle 24 states:

> Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.[685]

[683] *Id.*: Principle 23.
[684] *Backer* 2011: 179.
[685] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Principle 24.

Andritz should seek a dialogue with the indigenous peoples and other affected stakeholders first. After the completion of the dam a consultation process would be senseless, especially because the indigenous peoples' territory will be lost forever. Some of the infringements on substantive human rights can be prevented and mitigated also after the dam has been built. For example, the right to health could be restored by giving the population of the area better health care. However, the infringements on rights that are connected with the indigenous peoples' territories can maybe be mitigated, but hardly be prevented after the completion of the dam.

So in conclusion, Andritz should start consulting with indigenous peoples now, because as longer they wait as more severe become the negative human rights impacts.

4. Access to Remedy

The third chapter of the *UN Guiding Principles* is divided into one foundational principle and six operational principles. The subdivisions of the operational principle are *State-based judicial mechanisms*, *State-based non-judicial grievance mechanisms*, *Non-state-based grievance mechanisms* and *Effectiveness criteria for non-judicial grievance mechanisms*.

The underlying idea is that

> […] state-based judicial and nonjudijial mechanisms […] form the foundations of a wider system of remedy for corporate-related human rights abuse. Within such a system, company-level grievance mechanisms […] provide early-stage recourse and possible resolution in at least some instances. Collaborative initiatives, whether industry-based or multistakeholder in character, would contribute in a similar manner.[686]

4.1. Foundational principles

The states duty to protect is weak as long as there are no effective measures to investigate and punish human rights abuse through businesses in place.[687] The main responsibility for "resolving disputes, settling claims and determining rights" according to this framework falls on states and not corporation.[688] The foundational principle therefore urges states to implement a wider system to ensure access to remedy:

[686] *Ruggie* 2013: 116.
[687] cf. *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): 22; *Ruggie* 2013: 116 et seq.
[688] *Backer* 2011: 182.

> As part of their duty to protect against business-related human rights abuse, 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.[689]

The commentary affirms the conventional Western thinking by splitting the provision in a procedural and a substantive part.[690] The range of possible substantive forms is wide. The commentary mentions "apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions [...], as well as the prevention of harm [...] through injunctions or guarantees of non-repetition."[691] "Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome."[692] Backer criticizes that the provision causes a wide range of procedural and substantive remedies, which are at odds with one another.[693] The commentary can be read as descriptive so states can choose which access to remedy fits best their domestic legal order.[694]

4.2. Operational principles

4.2.1. State-based judicial mechanisms

> States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.[695]

The commentary sees effective judicial mechanisms as the core of ensuring access to remedy.[696] Legal barriers arise for example "[w]here claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim" or "[w]here certain groups such as indigenous peoples and migrants are excluded from the same level of legal protection of their human rights that applies to the wider population."[697] Practical and procedural barriers that should be prevented regard mainly financial barriers like costs of claims or the prosecutor's lack of adequate resources.[698]

---

[689] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Principle 25.
[690] *Backer* 2011: 183.
[691] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Commentary to principle 25.
[692] *Id.*: Commentary to principle 25.
[693] *Backer* 2011: 183.
[694] *Id.*: 185.
[695] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Principle 26.
[696] *Id.*: Commentary to principle 26.
[697] *Id.*
[698] *Id.*

Courts blocked the project in Belo Monte twice, which indicates that the claimants do not face a denial of justice in Brazil. Austria has a fairly good legal system in place regarding human rights infringement on the territory of Austria, because most of the human rights duties have been transformed into civil law. Still, there is no way of holding companies or their CEOs responsible for human rights abuse committed by their enterprise abroad.

The Draft *NAP CSR* aims to improve access to remedy for human rights violation victims through the following strategy:

> Analyse und Evaluierung der bestehenden rechtlichen Rahmenbedingungen
>
> a) zur Verhinderung und Sanktionierung von Menschenrechtsverletzungen im Rahmen internationaler Geschäftstätigkeit sowie
>
> b) hinsichtlich der Beschwerde- und Entschädigungsmechanismen für Betroffene von Menschenrechtsverletzungen.[699]

Furthermore, criminal law should be revised:

> Nicht zuletzt auch im Interesse der Unternehmen und EntscheidungsträgerInnen wird eine umfassende Analyse der strafrechtlichen Verantwortlichkeit im Hinblick auf Menschenrechtsverletzungen im Rahmen ihrer Geschäftstätigkeit und entlang der internationalen Wertschöpfungskette angeregt. Weiters ist mit der Identifizierung allfälliger Regelunglücken und Hürden bei der Strafverfolgung in der Praxis eine Verbesserung der Rechtslage für mögliche Betroffene verbunden.[700]

On an international and European level, Austria also wants to recommend sanction mechanism. Human rights rules and labour law for business should be implemented in the WTO framework.[701]

4.2.2. State-based non-judicial grievance mechanisms

Although the state-based judicial mechanisms are the core of the provisions to access to remedy, it is acknowledged that "other non-judicial mechanisms play an essential role in complementing and supplementing judicial mechanisms."[702]
Mandate of existing mechanisms can be extended and new mechanisms can be installed. National human rights institutions play an important role according to the commentary.[703]

[699] *BMWFJ/BMLFUW* 2013: 13.
[700] *Id.*: 14.
[701] *Id*.
[702] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Commentary to principle 27.
[703] *Id.*: Commentary to principle 27.

The *NAP CSR* also sees an important role for NGOs and wants to support them regarding their ecological, social and development role in the sense of a watchdog-function.[704]

4.2.3. Non-State-based grievance mechanisms

States also have a role in non-State-based grievance mechanisms. They "should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms."[705]

The *NAP CSR* does not say anything about ways to facilitate access to non-State-based grievance mechanisms.

Principle 29 regards the responsibilities of corporations for non-state-based grievance mechanisms:

> To make it possible for grievances to be addressed early and remediated directly business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.[706]

So far, there is no sign that Andritz tries to engage in a dialogue either with individuals or communities.

Principle 30 is about industry, multi-stakeholder and other collaborative initiatives. They should be "based on respect for human rights-related standards [and] should ensure that effective grievance mechanisms are available."[707]

4.2.4. Effectiveness criteria for non-judicial grievance mechanisms

Non-judicial grievance mechanisms, State-based and non-State-based should be legitimate, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous

[704] *BMWFJ/BMLFUW* 2013: 14.
[705] *UN Guiding Principles*, UN Doc. A/HRC/17/31 (2011): Principle 28.
[706] *Id.*: Principle 29.
[707] *Id.*: Principle 30.

improvement.[708] It stays unclear, why these criteria are not applicable on state-based judicial mechanisms. For operational level mechanisms a special criteria is added. It should be based on engagement and dialogue.[709] Clearly Andritz is not available for engagement and dialogue.

[708] *Id.*: Principle 31(a) – (g).
[709] *Id.*: Principle 31(h).

Conclusion: Can the *UN Guiding Principles* be used as a tool of guidance for the case of the involvement of Andritz in Belo Monte?

The case of Andritz and its involvement in the Belo Monte hydropower scheme show that corporations need to consider human rights, especially when operating in foreign countries. Brazil/Eletronorte ignored indigenous peoples' rights through the whole process of constructing Belo Monte. The tensions between the affected indigenous peoples and the government are seen in the conflict-prone history of the development process. The government failed to initiate an appropriate consulting process with the indigenous communities leading to the current situation. However, not only procedural rights have been ignored, but also substantive human rights are or rather will be violated when the dam is completed. The indigenous peoples will lose their territory. This loss entails numerous human rights infringements, because indigenous peoples have a special bond to their territory. The right to life, health and food will be impaired. Furthermore, the protection of a particular way of life and the cultural heritage will be violated. So although the Brazilian Federal Constitution grants indigenous peoples these rights, the Brazilian government ignored them in the present case. Thus, the question was whether corporations involved in the project should/can be held responsible for these violations.

In the first chapter, it became clear that most corporations are accepting their human rights responsibilities by now; at least as a social norm. The *Andritz Codex* sees Andritz as part of society and demands respect for human rights from all their employees. This leads to the conclusion that Andritz accepts that human rights are relevant for their business operations. However, companies cannot be bound to fulfill human rights by traditional international legal instruments. Where those mechanisms fail, soft law instruments developed under the auspices of the UN are a relatively successful and new way to push the agenda forward. Soft law instruments have some kind of authority. The *UN Guiding Principles* are a soft law instrument which gets its authority from the number of states which endorsed them and the broad acceptance from the business sector and the NGO sector. The *UN Guiding Principles* were framed in a political and social debate over 20 years. In the 1990s the UN started to involve more actors, not only governments, to establish rules regarding human rights and business. This led to the *UN Global Compact,* a platform for enterprises to develop, implement and disclose sustainable corporate policies and practices. A comparison between the *UN Global Compact* and the *UN Norms* show that instruments which are base on a

voluntary basis are more appealing for enterprises. Still Andritz is not a participant of the *UN Global Compact* demonstrating the limits of voluntarism. The *UN Guiding Principles* combine aspects of both instruments. They oblige all states and all enterprises regardless of their willingness to participate, but they do not impose legal duties on corporations. They rather oblige corporations to respect human rights. The research questions that followed are: Are the *UN Guiding Principles* applicable to the involvement of Andritz in the Belo Monte hydropower scheme? Which of the 31 paragraphs are relevant and in what way? What are the consequences for Andritz and Austria?

As shown in detail in chapter IV, the *UN Guiding Principles* apply to Andritz and Austria. Also the relevance of these principles for the case of Belo Monte has been researched. The application shows primarily the gap between the ideal - outlined by the principles - and the political reality. Although Austria works on a partly very ambitious plan to strengthen human rights abroad and call Austrian domiciled companies to account for human rights violations, governmental institutions fail to implement these new ideas. Especially the case of Andritz shows that economical interests of the own country precede interests of indigenous peoples in foreign countries. It seems as if the political will to implement the *UN Guiding Principles* will not arise as long as accountability for human rights is seen as a competitive disadvantage. It is hard to argue that Austria would profit long-term if they would force Andritz to take responsibility for human rights infringements linked to their operations as long as other countries would not follow this example. This problem highlights the importance of the *UN Guiding Principles* as a worldwide standard. It is an aspect of soft law instruments that they are not implemented immediately, but that it takes time for all relevant stakeholders to implement them. Seeing as the *UN Guiding Principles* are only two years old, the fact that they are already considered in the *NAP CSR* can be seen as quite the accomplishment. Clearly, they will influence the Austrian politics regarding business and human rights in the future. Nevertheless they failed to influence the concrete Austrian politics in the case of Belo Monte.
Similar considerations are true regarding the application of the principles to Andritz. One of the greatest achievements of the *UN Guiding Principles* is that the responsibility of companies to respect human rights is independent of the states duty to protect. In the present case, this means Andritz cannot argue that Brazil/Eletronorte harm human rights and therefore those actors should be the only ones responsible for those infringements. Rather Andritz is responsible for the human rights infringements because supplying the dam with hydropower

equipment can be classified as contribution to the human rights abuse. The *UN Guiding Principles* oblige the companies to different measures. The obligation about the policy commitment can be more easily fulfilled than the human rights due diligence process because due diligence asks of corporation to act if specific cases arise. Clearly, Andritz fails to fulfill any of the operational principles. The *Andritz Codex* is a first step to a policy commitment to human rights but does not reach the objectives of the principle. They are not interested in assessing actual and potential human rights impacts, because they do not only ignore the situation for the indigenous peoples in Belo Monte but dismiss their problems publicly. So there is also no due diligence process in place.

In conclusion, the *UN Guiding Principles* may be a tool to push Austria to implement new rules regarding business and human rights, because states, especially the EU, apply pressure. Those new domestic rules may influence business activities of Austrian based companies in the future. But seeing as the *UN Guiding Principles* are based on voluntarism and constitute an international instrument, they will not influence the behavior of companies as long as they are not willing to respect human rights. However, if Andritz would decide to focus on the human right infringements their activities cause, the *UN Guiding Principles* would be a reasonable tool of guidance.

Abbreviations

ACHR	American Convention on Human Rights
AI	Amnesty International
Art.	Article
BIAC	Business and Industry Advisory Commission (OECD)
BMLFUW	Bundesministerium für Land- und Forstwirtschaft, Umwelt
BMWFJ	Bundesministerium für Wirtschaft, Familie und Jugend
CELS	Centro de Studios Legales y Sociales
CIMI	Conselho Indigenista Missionário (Indigenous Missionary Council)
Doc.	Document
ECCHR	European Center for Constitutional and Human Rights
ed.	editor
FIDH	Fédération international des ligues des droits de l'Homme (International Federation for Human Rights)
FUNAI	Fundação Nacional do Índio (National Indian Foundation)
HRW	Human Rights Watch
IACHR	Inter-American Commission on Human Rights
IBAMA	Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis (Brazilian Institute of Environment and Renewable Natural Resources)
ICC	International Chamber of Commerce
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights
Id.	Idem
ILO	International Labour Organization
IOE	International Organisation of Employers
MDG	Millennium Development Goals
MNC	Multinational Corporation

NGO	Non-governmental Organization
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
PAC	Programa de Aceleração do Crescimento (Growth-Accelaration Program)
para.	paragraph
seq/seqq	sequens/sequentes
SRSG	Special Representative of the Secretary-General for Business and Human Rights
TNC	Transnational Corporation
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
VCLT	Vienna Convention on the Law of Treaties
WB	World Bank
WTO	World Trade Organization

Bibliography

UN Documents

UN Doc. E/CN.4/Sub.2/1993/28

Daes, Erica-Irene: Discrimination against Indigenous Peoples. Study on the protection of the cultural and intellectual property of indigenous peoples.

UN Doc. CCPR/C/21/Rev.1/Add.5 (1994)

OHCHR: General Comment No. 23: The Rights of Minorities (Art. 27).

UN Doc. E/CN.4/Sub.2/Res/1998/8

Sub-Commission on Prevention of Discrimination and Protection of Minorities: The relationship between the enjoyment of economic, social and cultural rights and the right to development, and the working methods and activities of transnational corporations.

UN Doc. SG/SM 6681 (1999)

Annan, *Kofi*: Press Release: Secretary-General proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos.

UN Doc. E/CN.4/Sub.2/Res/2001/3

Sub-Commission on the Promotion and Protection of Human Rights: The effects of the working methods and activities of transnational corporations on the enjoyment of human rights.

UN Doc. E/CN.4/Sub.2/2001/21

Daes, Erica-Irene A.: Prevention of Discrimination and Protection of Indigenous Peoples and Minorities. Indigenous peoples and their relationship to land. Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes.

UN Doc. E/CN.4/Sub.2/2003/12/Rev.2

Sub-Commission on the Promotion and Protection of Human Rights: Economic, Social and Cultural Rights. Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights.

UN Doc. E/CN.4/Sub.2/2003/L.11, Res/2003/16

Sub-Commission on the Promotion and Protection of Human Rights: Draft Provisional Agenda and Agenda and Adoption of the Report. Draft report of the Sub-Commission on the Promotion and Protection of Human Rights.

Res/2003/16: Responsibilities of transnational corporations and other business enterprises with regard to human rights.

UN Doc. E/CN.4/Sub.2/2003/NGO/44

ICC, IOE: Joint written statement submitted by the International Chamber of Commerce and the International Organization of Employers, non-governmental organizations in general consultative status.

UN Doc. E/CN.4/Dec/2004/116

Commission on Human Rights: Responsibilities of transnational corporations and related business enterprises with regard to human rights.

UN Doc. CCPR/C/BRA/CO/2 (2005)

Human Rights Committee: Consideration of Reports Submitted by States Parties under Article 40 of the Covenant. Concluding observations of the Human Rights Committee. Brazil.

UN Doc. E/CN.4/2005/L.87

Commission on Human Rights: Promotion and Protection of Human Rights. Human rights and transnational corporations and other business enterprises.

UN Doc. E/CN.4/Res/2005/69

Commission on Human Rights: Human rights and transnational corporations and other business enterprises.

UN Doc. A/Res/60/251 (2006)

Generaly Assembly: Human Rights Council.

UN Doc. E/CN.4/2006/97

Ruggie, John: Promotion and Protection of Human Rights. Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.

UN Doc. A/HRC/4/35 (2007)

Ruggie, John Gerard: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. Business and human rights: mapping international standards of responsibility and accountability for corporate acts.

UN Doc. A/HRC/8/5 (2008)

Ruggie, John: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. Protect, Respect and Remedy: a Framework for Business and Human Rights.

UN Doc. A/HRC/Res/8/7 (2008)

Human Rights Council: Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises

UN Doc. A/HRC/12/34/Add.2 (2009)

Anaya, James: Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya Addendum: Report on the Situation of Human Rights of Indigenous Peoples in Brazil

UN Doc. E/C.19/2009/14

Permanent Forum on Indigenous Issues: Report on the eighth session (18-29 May 2009).

UN Doc. A/HRC/11/13 (2009)

Ruggie, John: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. Business and human rights: Towards operationalizing the "protect, respect and remedy" framework.

UN Doc. A/HRC/14/27 (2010)

Ruggie, John: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.

UN Doc. A/HRC/17/31 (2011) – UN Guiding Principles

Ruggie, John Gerard: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework.

Anaya, James (2012): Statement by Professor James Anaya Special Rapporteur on the rights of indigenous peoples Forum on Business and Human Rights. 05/12/12. Available at http://unsr.jamesanaya.org/statements/forum-on-business-and-human-rights2012statement-by-professor-james-anaya [accessed 28/10/13].

CEACR (2012): Observation 2012. Indigenous and Tribal Peoples Convention, 1989 (No. 169) – Brazil. Available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:2700476 [accessed at 24/10/13] [hereinafter *CEACR* 2012].

General Confederation of Workers of Peru (1998): Representation (article 24) - Peru - C169 – 1998: Report of the Committee set up to Examine the Representation on Alleging Non-Observance by Peru of the Indigenous and Tribal People's Convention, 1989 (No. 169), made under Article24 of the ILO Constitution. Available at http://www.ilo.org/dyn/normlex/en/f?p=1000:50012:0::NO:50012:P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507207,en:NO [accessed 03/11/13].

OHCHR (2012): The Corporate Responsibility to Respect Human Rights. An Interpretive Guide. Geneva, New York. HR/Pub/12/02.

Secretary General (2005): Secretary-General appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises. SG/A/934, 28/07/2005, Available at http://www.un.org/News/Press/docs/2005/sga934.doc.htm [accessed 28/10/13].

UN Global Compact Office (2011): Corporate Sustainability in the World Economy. United Nations Global Compact. Available at http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf [accessed 28/10/2013].

International Human Rights Instruments

ACHR

American Convention on Human Rights. OAS, Treaty Series, No. 36; UN Registration: 27/08/79, No. 17955.

ICCPR

International Covenant on Civil and Political Rights. UN Doc. A /6316 (1966).

ICESCR

International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political rights.

UN Doc. A/RES/21/2200 (XXI) (1966).

ILO-Convention 169

Convention concerning Indigenous and Tribal Peoples in Independent Countries.

UN Doc. C169 (1989).

UDHR

Universal Declaration of Human Rights .

UN Doc. A/RES/3/217 A (III) (1948).

UNDRIP

United Nations Declaration on the Rights of Indigenous Peoples.

UN Doc. A/RES/61/295 (2007).

VCLT

Vienna Convention on the Law of Treaties.

23 May, 1969. Available at United Nations, Treaty Series, vol. 1155, p. 331.

Documents of the Austrian Government and the European Union

BMWFJ, BMLFUW (2013): Draft. Nationaler Aktionsplan CSR (NAP CSR). Stand: 29.05.2013. Available at http://www.gemeinwohloekonomie.org/sites/default/files/NAP%20CSR%20Disskussionsgrundlage%202905013.pdf [accessed 01/11/13].

European Commission (2011): Press Release: Business and Human Rights: New United Nations Guidelines - European Commission. Available at http://ec.europa.eu/enterprise/newsroom/cf/itemdetail.cfm?item_id=5220&lang=en&tpa=0&displayType=news [accessed 28/10/13].

European Commission (2011): Communication from the Commission to the European Parliament, the Council, the Euopean Economic and Social Committee and the Committee of the Regions. A renewed EU strategy 2011-14 for Corporate Social Responsibility. Brussels: 25.10.2011, COM(2011) 681 final.

European Commission (2013): Directive of the European Parliament and of the Council amending Council Directives 79/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups, COM(2013) 207 final, 16/04/13; 2013/0110 (COD).

European Parliament (2003): Resolution on Guatemala, P5_TA(2003)0190/C 64 E/609

Fekter, Maria (2012): XXIV. GP.-NR 12294/AB, Beantwortung der Anfrage NR 12504/J, 10/09/12.

Glawischnig-Peisczek/Schwentner et al. (2012): XXIV. GP.-NR 12504/J, Anfrage betreffend Belo Monte – österreichische Förderung für naturzerstörendes Österreichisches Unternehmen, 11/07/12.

Gobbi Pontrioli, Francesco (2013): Belo Monte Dam project: an outline. Library Briefing. Library of the European Parliament. 12/06/13. Available at http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130565/LDM_BRI%282013%29130565_REV1_EN.pdf [accessed 01/11/2013].

Books

Alvarez, José E. (2005): International organizations as law-makers. Oxford: Oxford University Press.

Baxewanos, Fabiane/Raza, Werner (2013): Die Sozialverträglichkeitsprüfung im österreichischen Ausführforderungsverfahren. Umsetzungsoptionen anlässlich der Neufassung der OECD „Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence“ vom 28.Juni 2012. In: Abteilung Wirtschaftswissenschaft und Statistik der Kammer für Arbeiter und Angestellte [ed.]: *Materialien zu Wirtschaft und Gesellschaft Nr. 118.*

Bolewski, *Wielfried* (2007): Diplomacy and International Law in Globalized Relations. Heidelberg: Springer.

Bretschger, Roman (2010): Unternehmen und Menschenrechte. Elemente und Potenzial eines Informellen Menschenrechtsschutzes. Zürich, Basel, Genf: Schulthess.

Deva, Surya. (2012b): Regulating Corporate Human Rights Violations : Humanizing Business. Oxon: Routledge.

Gilbert, Jérémie (2006): Indigenous peoples' land rights under international law: from victims to actors. New York: Transnational Publishers.

Lukas, Karin (2005): Corporate Social Responsibility und Menschenrechte – was tut sich in Österreich? Menschenrechtsrelevante Aktivitäten österreichischer CSR-Unternehmen. Ludwig Boltzmann Institut für Menschenrechte.

Lukas, Karin/ Hutter, Franz-Josef (2009): Menschenrechte und Wirtschaft. Wien, Graz: Neuer Wissenschaftlicher Verlag.

Mayring, Philipp (2003): Qualitative Inhaltsanalyse. Grundlage Und Techniken. 8th ed. Weinheim, Basel: Beltz Verlag.

Paulus, Andreas L. (2001): Die Internationale Gemeinschaft im Völkerrecht. Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung. München: C.H. Beck.

Ruggie, *John Gerard* (2013): Just Business. Multinational Corporations and Human Rights. New York, London: W.W. Norton&Company.

Sagafi-nejad, Tagi/Dunning, John H. (2008): The UN and Transnational Corporations: From Code of Conduct to Global Compact. Indiana: Indiana University Press.

Zippelius, Reinhold (1994): Juristische Methodenlehre. München: Beck.

Journal articles

Bäcker, Carsten (2009): Der Syllogismus als Grundstruktur des jursitischen Begründens? In: *Rechtstheorie* 40: 404-424.

Backer, Larry Catá (2011): From Institutional Misalignments to Socially Sustainable Governance: The Guiding Principles for the Implementation of the United Nation's "Protect, Respect and Remedy" and the Construction of Inter-Systemic Global Governance. In: *Pacific McGeorge Global Business & Development Law Journal*: 101–216.

Baxter, R.R. (1980): International Law in "Her Infinite Variety". In: *The International and Comparative Law Quarterly* 25, 4: 549-566.

Carvalho, Georgia O. 2006: Environmental Resistance and the Politics of Energy Development in the Brazilian Amazon. In: *The Journal of Environment & Development* 15: 245-268.

Coleman, David (2003): The United Nations and Transnational Corporations: From an Inter-nation to a "Beyond-state" Model of Engagement. In: *Global Society* 17: 339–357.

Da Silva, Virgílio Afonso (2002): O proporcional e o razoável. In: *Revista dos Tribunais* 798: 23-50.

Deva, Surya (2004): UN's Human Rights Norms for Transnational Corporations and Other Business Enterprises: An Imperfect Step in the Right Direction? In: *ILSA Journal of International & Comparative Law* 10: 493-523.

Deva, Surya (2012): Guiding Principles on Business and Human Rights: Implications for Companies. In: *European Company Law* 9: 101–109.

Diamond, Sara/ Poirier, Christian (2010): Brazil's Native Peoples and the Belo Monte Dam: A Case Study. In: *NACLA Report on the Americas*: 25-29.

Ellis, *Jaye* 2012: Shades of Grey: Soft Law and the Validity of Public International Law. In: *Leiden Journal of International Law* 25: 313-334.

Faracik, Beata (2011): The Role of the State in Implementing the UN Guiding Principles on Human Rights and Business with Special Consideration of Poland. In: *Polish Yearbook of International Law* 31: 349-387.

Fearnside, Philip M. (2006): Dams in the Amazon: Belo Monte and Brazil's Hydroelectric Development of the Xingu River Basin. In: *Environmental Management* 38: 16 – 27.

Gorska, Gosia (2012): Mutual Influence: The Case of the EU and the UN Guiding Principles on Business and Human Rights. In: *Jahrbuch Human Rights* 109: 109–122.

Hall, Anthony/Branford, Sue (2012): Development, Dams and Dilma: The Saga of Belo Monte. In: *Critical Sociology* 38: 851 – 862.

Henkin, *Louis* (1999): The Universal Declaration at 50 and the Callenge of Global Markets. In: *Brooklyn Journal of International Law* 25.

Jaichand, Vinodh/Sampaio, Alexandre Andrade (2013): Dam and Be Damned: The Adverse Impacts of Belo Monte on Indigenous Peoples in Brazil. In: *Human Rights Quarterly* 35: 408-447.

Jerbi, Scott (2009): Business and Human Rights at the UN: What Might Happen Next? In: *Human Rights Quarterly* 31: 299–320.

Kell, Georg (2005): The Global Compact Selected: Experiences and Reflections. In: *Journal of Business Ethics* 59: 69–79.

Kell, Georg, Anne-Marie Slaughter, and Thomas Hale (2007): Silent Reform through the Global Compact. In: *UN Chronicle* 44: 26–31.

Mantilla, Giovanni (2009): Emerging International Human Rights Norms for Transnational Corporations - ProQuest. In: *Global Governance* 15: 279–298.

Mayring Philipp (2000): Qualitative Content Analysis. In: *Forum: Qualitatvie Social Research* 1, 2: Paragraphs 1–28.

McCormick, Sabrina (2010): Damming the Amazon: Local Movements and Transnational Struggles Over Water. In: *Society & Natural Resources: An International Journal* 24: 34-48.

Mendes, Gilmar (2001): O Princípio da proporcionalidade na Jurisprudência do Supremo Tribunal Federal: Novas Leituras. In: *Revista Diálogo Jurídico* 1, 5: 1-25.

Moog Rodrigues, Maria Guadalupe (2002): Indigenous Rights in Democratic Brazil. In: *Human Rights Quarterly* 24, 2: 487-512.

Nolan, Justine (2005): With Power Comes Responsibility: Human Rights and Corporate Accountability. In: *UNSW Law Journal* 28: 581–613.

Rasche, Andreas/Waddock, Sandra/McIntosh, Malcolm (2012): The United Nations Global Compact : Retrospect and Prospect. In: *Business & Society* 52: 6–30.

Seppala, Nina (2009): Business and the International Human Rights Regime: A Comparison of UN Initiatives. In: *Journal of Business Ethics* 87: 401–417.

Stocks, Anthony (2005): Too Much for Too Few: Problems of Indigenous Land Rights in Latin America. In: *Annual Review of Anthropology* 34: 85-104.

Vandenhole, Wouter (2012): Contexutalising the State Duty to Protect Human Rights as Defined in the UN Guiding Principles on Business and Human Rights. In: *Revista de Estudios Jurídicos* 12.

Weissbrodt, David/Kruger, Muria (2003): Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. In*: The American Journal of International Law* 97: 901–922.

Book sections

Buhmann, Karin 2011: The Development of the 'UN Framework': A Pragmatic Process Towards a Pragmatic Output. In: Mares, Radu [ed.]: *The UN Guiding Principles on Business and Human Rights. Foundations and Implementation.* Leiden, Boston: Martinus Nijhoff: 58-105.

Chandler, Alfred D./Mazlish, Bruce (2005): Introduction. In: Chandler, Alfred D./Mazlish, Bruce [ed.]: *Leviathans. Multinational Corporations and the New Global History.* Cambridge: Cambridge University Press: 1-15.

Gilbert, Jérémie/Doyle, Cathal (2011): A new Dawn over the Land: Shedding Light on Collective Ownership and Consent. In: Allen, Stephen/Xanthaki, Alexandra [ed.]: *Reflections on the UN Declaration on the Rights of Indigenous Peoples.* Oxford/Portland: Hart Publishing: 289-328.

Keller, Hellen (2008): Codes of Conduct and Their Implementation: The Question of Legitimacy. In: Von Bogdandy, Armin/Wolfrum, Rüdiger [ed.]: *Legitimacy in International Law, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht.* Heidelberg: Springer: 220-298.

Knight, Graham/Smith, Jackie (2008): The Global Compact and Its Critics: Activism, Power Relations, and Corporate Social Responsibility. In: Leatherman, Janie [ed.]: *Discipline and Punishment in Global Politics. Illusions of Control.* New York: Palgrave Macmillan: 191-213.

Knox, John H. (2011) The Ruggie Rules: Applying Human Rights Law to Corporations. In: Mares, Radu [ed.]: *The UN Guiding Principles on Business and Human Rights. Foundations and Implementation.* Leiden, Boston: Martinus Nijhoff: 51-83.

Koroma, Abdul G. (2009): The Effects of Globalization on the Development of International Law. In: Hobe, Stephan [ed.]: *Globalisation - the State and International Law.* Stuttgart: Franz Steiner Verlag: 25-33.

Mares, Radu (2011): Business and Human Rights After Ruggie: Foundations, the Art of Simplification and the Imperative of Cumulative Progress. In: Mares, Radu [ed.]: *The UN Guiding Principles on Business and Human Rights*. *Foundations and Implementation.* Boston: Martinus Nijhoff: 1-49.

Monks, Robert A.G. (2005): Governing the Multinational Enterprise. The Emergence of the Global Shareowner. In: Chandler, Alfred D./Mazlish, Bruce [ed.]: *Leviathans. Multinational Corporations and the New Global History.* Cambridge: Cambridge University Press: 189-201.

O'Connell, Mary Ellen (2000): The Role of Soft Law in a Global Order. In: Shelton, Dinah [ed.]: *Commitment and Compliance. The Role of Non-Binding Legal Norms in the International Legal System.* Oxford, New York: Oxford University Press: 100-114.

Quane, Helen (2011): The UN Declaration on the Rights of Indigenous Peoples: New Directions for Self-Determination and Participatory Rights? In: Allen, Stephen/Xanthaki, Alexandra [ed.]: *Reflections on the UN Declaration on the Rights of Indigenous Peoples.* Oxford and Portland: Hart. Publishing: 259-287.

Reinisch, August (2005): The Changing International Legal Framework. In: Alston, Philip [ed.]: *Non-State Actors and Human Rights.* New York: Oxford University Press: 37-89.

Shamir, Ronen (2005): Corporate Social Responsibility: A Case of Hegemony and Counter-Hegemony. In: De Sousa Santos, Boaventura/Rodríguez-Garavito, César A. [ed.]: *Law and Globalization from Below. Towards a Cosmopolitan Legality.* Cambridge Studies in Law and Society. New York: Cambridge University Press: 92-118.

Steinhardt, Ralph G (2005): Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria. In: Alston, Philip [ed.]: *Non-State Actors and Human Rights.* New York: Oxford University Press: 177-226.

Weissbrodt, David/Kruger, Muria (2005): Human Rights Responsibilities of Business as Non-State Actors. In: Alston, Philipp [ed.]: *Non-State Actors and Human Rights*. New York: Oxford University Press: 315-350.

Wiessner, Siegfried (2012): Indigenous Self-determination, Culture, and Land: a Reassessment in Light of the 2007 UN Declaration on the Rights of Indigenous

Peoples. In: Pulitano, Elvira [ed.]: *Indigenous Rights. In the Age of the UN Declaration.* New York: Cambridge University Press: 31-63.

Wilkins, Mira (2005): Multinational Enterprise to 1930. Discontinuities and Continuities. In: Chandler, Alfred D./Mazlish, Bruce [ed.]: *Leviathans. Multinational Corporations and the New Global History.* Cambridge: Cambridge University Press: 45-79.

Zemanek, Karl (2004): Das Völkervertragsrecht. In: Neuhold, Hanspeter/Hummer, Waldemar/Schreuer, Christoph [ed.]: *Österreichisches Handbuch des Völkerrechts. Textteil.* Wien: Manz: 45-78.

Cases

Human Rights Committee (1995): Jouni E. Länsman et. al. v. Finland, Communication. No. 671/1995, UN Doc. CCPR/C/58/D/671/1995 (1996).

Inter-American Court of Human Rights (2001): The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, (Ser. C) No. 79, Judgment 31/08/01.

Inter-American Commission of Human Rights (1985): Yanomami v. Brazil, Judgment, Resolution Nº 12/85, Case Nº 7615, Brazil.

Inter-American Court of Human Rights (2007): Saramaka people v. Suriname, Judgment 28/11/07.

Inter-American Court of Human Rights (2009): Indigenous and Tribal People's Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System Doc. No. 56/09, OEA/Ser.L/V/II.

Case before the IACHR – Indigenous Communities of the Xingu River Basin v. Brazil

American Commission of Human Rights (2011): Indigenous Communities of the Xingu River Basin, Pará, Brazil, PM 382/10. Available at http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp [accessed 04/11/13].

Federal Republic of Brazil (2011): Response from the State of Brazil: Indigenous Communities of the Xingu River Basin v. Brazil, Inter-American Commission of Human Rights, PM 382/10 .

Indigenous Communities (2010): Application for Precautionary Measures: Indigenous Communities of the Xingu River Basin v. Brazil, Inter-American Commission of Human Rights, PM 382/10 (2010).

Newspaper and Online Articles

APA (2013a): Fabrik in Bangladesch: Überlebende nach über zwei Wochen geborgen. In: *Der Standard.* 10/05/2013. Available at: http://derstandard.at/1363710594969/Fabrikeinsturz-im-April-Schon-ueber-1000-Tote [accessed on 24/10/2013].

APA (2013b): Belo-Monte-Staudamm: Kräutler wirft Brasilien Verfassungsbruch vor. In: *Der Standard.* 17/05/13. Available at http://derstandard.at/1363711345607/Belo-Monte-Staudamm-Bischof-Kraeutler-wirft-Brasilien-Verfassungsbruch-vor [accessed 05/11/13].

APA (2011): Vorläufiger Baustopp für Mega-Kraftwerk Belo Monte. In: *Der Standard.* 26/02/2011. Available at http://derstandard.at/1297819032783/Brasilien-Vorlaeufiger-Baustopp-fuer-Mega-Kraftwerk-Belo-Monte [accessed 04/01/14].

Cassuto, David (2011): Belo Monte: The Legal Waters Continue to Roil. In: *Jurist.* 09/12/11. Available at http://jurist.org/forum/2011/12/david-cassuto-brazil-dam.php [accessed 04/11/13].

Duckworth, *Catie* (2012): The Dangers of the Hemisphere Operating Without the IACHR's Guidance. In: *Council on Hemispheric Affairs*. 25/07/12. Available at http://www.coha.org/the-dangers-of-the-hemisphere-operating-without-the-iachrs-guidance/ [accessed 02/11/13].

Hurwitz Zachary (2010): A Partial Installation License for Belo Monte? Entirely Illegal. 11/11/2010. Available at http://www.internationalrivers.org/blogs/258/a-partial-installation-license-for-belo-monte-entirely-illegal [accessed 04/01/2014].

Kramer, Angelika (2013): Interview with Andritz CEO Leitner: „Ich rechne mir nicht ständig aus, wie viel mein Aktienpaket gerade wert ist." In: *Format*. 22/05/2013. Available at http://www.format.at/articles/1321/525/358714/ich-aktienpaket [accessed 05/11/13].

OTS (2011): Andritz: Stellungnahme zum Wasserkraftwerksprojekt Belo Monte: 02/03/11. Available at http://www.ots.at/presseaussendung/OTS_20110302_OTS0268/andritz-stellungnahme-zum-wasserkraftwerksprojekt-belo-monte [accessed 05/11/13].

Picq, Manuela (2012): Is the Inter-American Commission of Human Rights Too Progressive? In: *AlJazeera English.* 09/06/12. Available at http://www.aljazeera.com/indepth/opinion/2012/06/2012658344220937.html [accessed 02/11/13]

Pontes, Felício (2011): O Custo de Belo Monte. In: *Jornal O Globo*. 18/04/11. Available at http://oglobo.globo.com/ece_incoming/o-custo-de-belo-monte-2901172 [accessed 02/11/13].

Steiermark. ORF (2013): Andritz-Gewinn um die Hälfte zurückgegangen.07/07/13. Available at http://steiermark.orf.at/m/news/stories/2596874/ [accessed 05/11/13].

The Associated Press (2012): Brazil: Court Allows Dam Construction to Resume in Brazil. In: *The New York Times*. 28/08/12. Available at http://www.nytimes.com/2012/08/29/world/americas/court-allows-dam-construction-to-resume-in-brazil.html?_r=0 [accessed 02/11/14].

The Economist (2007): Doing the Wrong Thing. Human-rights Activist Fall Out over How to Deal with Companies. 25.10/07. Available at: http://www.economist.com/node/10026724/print?story_id=10026724 [accessed 28/10/13].

The Economist (2013) Dams in the Amazon: The Rights and Wrongs of Belo Monte. In: *The Economist*. 04/05/13. Available at http://www.economist.com/news/americas/21577073-having-spent-heavily-make-worlds-third-biggest-hydroelectric-project-greener-brazil [accessed 05/11/13].

Watts, Jonathan (2012): Belo Monte Dam Construction Halted by Brazilian Court. In: *The Guardian*. 16/08/12. Available at http://www.theguardian.com/world/2012/aug/16/belo-monte-dam-construction-suspended [accessed 02/11/13].

Materials of NGOs and others

AI/HRW/CDES et. al. (2006): Joint Letter in Response to Interim Report: 1. Availabe at http://germanwatch.org/tw/ruggie06.pdf [accessed 28/10/13]

AI/CESR/HRW et al. (2011): Joint Civil Society Statement on the draft Guiding Principles on Business and Human Rights. January 2011:

http://www.fidh.org/IMG/pdf/Joint_Civil_Society_Statement_on_the_draft_Guiding_Principles_on_B_and_HR.pdf [accessed 28/10/13].

AI/FIDH/RAID et al. (2011): Joint Civil Statement to the 17th Session of the Human Rights Council http://www.hrw.org/news/2011/05/30/joint-civil-society-statement-17th-session-human-rights-council [accessed 28/10/13] [accessed *AI/FIDH/RAID et al.* 2011].

AI/HRW/ICJ et al. (2008): Written statement for the eighth session of the United Nations Human Rights Council. Available at http://www.hrw.org/news/2008/05/19/joint-ngo-statement-eighth-session-human-rights-council [accessed 28/10/13].

Amnesty International (2004): The UN Human Rights Norms For Business: Towards Legal Accountability. London: Amnesty International Publications. Available at http://www.amnesty.org/en/library/asset/IOR42/002/2004/en/c17311f2-d629-11dd-ab95-a13b602c0642/ior420022004en.pdf [accessed 28/10/13].

Andritz (2010a): Andritz Code of Business Conduct and Ethics. July 2010: 5 et seq. Available at http://grz.g.andritz.com/c/com2011/00/01/32/13292/1/1/0/800923192/gr-grz-_3515840-v5-andritz_code_of_business_conduct_and_ethics_e.pdf [accessed 26/11/13].

Andritz (2010b): Geschäftsbericht 2010. Unternehmensrisiken. Available at http://reports.andritz.com/2010/de/index/corporate-risks.htm [accessed 30/11/13].

Andritz Hydro (2013): Company Presentation. April 2013.

Compliance-Ausschuss der Andritz-Gruppe (2010): Group Policy. Andritz Code of Business Conduct and Ethics. 1. Juli 2010: 4. Available at http://grz.g.andritz.com/c/com2011/00/01/32/13292/1/2/0/738925714/gr-grz-_3515840-v5-andritz_code_of_business_conduct_and_ethics_e.pdf [accessed 26/11/13].

DKA (2012): Das Staudammprojekt 'Belo Monte' in Brasilien. Die indigenen Völker am Xingu leisten Widerstand. Fact-Sheet.

ECCHR/FIDH/CELS (2011): Companies' obligations to respect human rights abroad Joint Statement. Available at http://www.business-humanrights.org/media/documents/ruggie/fian-ngo-joint-statement-re-guiding-principles-companies-obligations-to-respect-jan-2011.pdf [accessed 04/11/13].

Graham&Whiteside. Cengage Learning (2013): The Major Companies Database. Andritz Hydro GmbH;

Graham&Whiteside. Cengage Learning (2013): The Major Companies Database. Andritz AG.

Greenpeace, DKA, attac et al (2010): Offener Brief an Andritz AG. 26/02/2010.

HRW (2004): The UN Norms. Towards Greater Corporate Accountability. Available at http://www.hrw.org/news/2004/09/29/un-norms-towards-greater-corporate-accountability [accessed 28/10/13].

ICC/IOE (2004): Joint views of the IOE and ICC on the draft "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights". Available at http://www.google.at/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CDIQFjAA&url=http%3A%2F%2F198.170.85.29%2FIOE-ICC-views-UN-norms-March-2004.doc&ei=Xc5uUvTRH4iHswb_hoDgCg&usg=AFQjCNEGjOv50ZMfM9x3BGTuK_Rj3R7wWQ&bvm=bv.55123115,d.Yms [accessed 28/1013].

IOE/ ICC/BIAC (2011): Joint Statement on Business & Human Rights to the United Nations Human Rights Council. Available at http://www.uscib.org/docs/2011_05_30_business_human_rights.pdf [accessed 28/10/13]

Kenan Institute for Ethics 2011: The UN Guiding Principles on Business and Human Rights. Analysis and Implementation. Duke University. Available at http://kenan.ethics.duke.edu/wp-content/uploads/2012/07/UN-Guiding-Principles-on-Business-and-Human-Rights-Analysis-and-Implementation.pdf [accessed 04/11/13].

Network Social Responsibility (NeSoVe) (n.d): Nominated for the eyesore of the year 2012. Andritz AG in the Belo Monte dam project in Brazil.

CIMI - Indigener Missionsrat (2009): Info-Brief 892. Indigene Gemeinschaften vom Xingu fordern mehr Diskussionen über Kraftwerk Belo. Available at http://www.amk.or.at/cimi_info/wp-content/uploads/2009/12/info-892.doc [accessed at 24/10/13].

De Castro, Nivalde José/da Silva Leite, André Luis/de A. Dantas, Guilherme (2011): Análise comparativa entre Belo Monte e empreendimentos alternativos : impactos ambientais e competitividade econômica. Universidade Federal do Rio de Janeiro. Grupo de Estudos do Sector Eléctrico. http://www.nuca.ie.ufrj.br/gesel/TDSE35.pdf [accessed 02/11/13].

respACT (2010): *Success and Business. A guide to future-proof your business*: 23. Available at http://www.respact.at/leitbild/en/viewanddownload [accessed 26/11/13] [hereinafter *respACT* 2010].

Van Huijstee, Mariëtte (SOMO)/Ricco, Victor (CEDHA)/Ceresna-Chaturvedi, Laura (Cividep India) (2012): How to use the UN Guiding Principles on Business and Human Rights in company research and advocacy. A guide for civil society organizations. SOMO/CEDHA/Cividep India: Amsterdam

Webpages

Adelphi: Comparative evaluation of the draft Austrian CSR action plan. Available at http://www.adelphi.de/en/projects/project_database/dok/43525.php?pid=648 [accessed 19/11/13].

*Amazon Watch (*2011): Federal Judge Suspends Partial License for Construction of the Belo Monte Dam in Brazilian Amazon. 25/2/2011. Available at http://amazonwatch.org/news/2011/0225-judge-suspends-partial-license-for-construction-of-the-belo-monte-dam [accessed 04/01/2014].

Andritz 2013: Homepage: Sustainability. Available at http://www.andritz.com/group/gr-about-us/gr-sustainability.htm [accessed 29/10/13].

Andritz Group (2011): Andritz News. Andritz to Supply Major Equipment for Belo Monte Hydropower Plant. Available at http://www.andritz.com/hydro/hy-news/hy-news-detail.htm?id=5589 [accessed at 24/10/2013].

Andritz: Homepage: Andritz Group: About us: http://www.andritz.com/group/gr-about-us.htm [accessed 24/10/2013].

Andritz: Homepage: Andritz Hydro: http://www.andritz.com/hydro.htm [accessed 24/10/13].

Buarque de Hollanda, Jayme/Poole, Alan Douglas (n.d.): Sugarcane as an Energy Source in Brazil. Instituto Nacional de Eficiéncia Energética. Available at http://www.inee.org.br/down_loads/about/SUGARCANE&ENERGY.pdf [accessed 04/11/13].

Business & Human Rights Resource Centre: Background & history of Guiding Principles. Available at http://www.business-humanrights.org/UNGuidingPrinciplesPortal/BackgroundHistory [accessed on 18/11/13].

Eletrobras 2010: Homepage. About us. Eletrobras's role

Halbmayer 2010: Homepage: Einführung in die empirischen Methoden der Kultur- und Sozialanthropologie. Qualitative Inhaltsanalyse. Available at http://www.univie.ac.at/ksa/elearning/cp/ksamethoden/ksamethoden-91.html [accessed on 24/10/2013].

ILO: Homepage. Supervision. Available at http://www.ilo.org/indigenous/Conventions/Supervision/lang--en/index.htm [accessed 23/10/2013].

Martens, Jens (2004): Precarious "Partnerships". Six Problems of the Global Compact. *Global Policy Forum*. Available at http://www.globalpolicy.org/component/content/article/225/32252.html [Accessed 28/10/13].

Ministério das Minas e Energia/Eletrobrás (1987): Plano Nacional de Energia Elétrica 1987/2010. Plano 2010. Relatório Executivo. Rio de Janeiro. Available at http://www.planalto.gov.br/ccivil_03/decreto/1980-1989/anexo/and96652-88.pdf [accessed on 24/10/2013].

Norte Energia S.A. (2013): Homepage. Shareholding Structure. Available at http://norteenergiasa.com.br/site/ingles/shareholding-structure/ [accessed 02/11/13].

OeKB: Homepage. Oesterreichische Kontrollbank AG (OeKB). Available at http://www.oekb.at/en/Pages/default.aspx [accessed 20/11/13].

OHCHR: Homepage: First annual United Nations Forum on Business and Human Rights, 3-5 December 2012. Available at http://www.ohchr.org/EN/Issues/Business/Forum/Pages/2012ForumonBusinessandHumanRights.aspx [accessed 04/11/13].

RespACT (2013): Homepage: Mitglieder: http://www.respact.at/site/mitglieder/text/article/3468.html [accessed 25/10/13];

RespACT (2013): Über Uns: http://www.respact.at/site/about/ueberuns [accessed on 25/10/13]

RespACT (2013): Mitglieder/ Mitgliedschaft: http://www.respact.at/site/mitglieder/mitgliedschaft [accessed 25/10/13].

UN Global Compact (2013): Homepage: UN Global Compact Participants. Available at http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html [accessed 28/10/13].

White Steven 2012: The Top 175 Global Economic Entities, 2011. Available at http://dstevenwhite.com/2012/08/11/the-top-175-global-economic-entities-2011/ [accessed on 24/10/2013].

Xingu Vivo (2011): Se Não for Controlado, Desmatamento Indireto Causado Por Belo Monte Pode Passar de 5 Mil Km^2. 26/04/11. Available at http://www.xinguvivo.org.br/2011/04/26/se-nao-for-controlado-desmatamento-indireto-causado-por-belo-monte-pode-passar-de-5-mil-km%C2%B2/ [accessed 02/11/13].

Annex

1. Abstracts

1.1. Zusammenfassung

Die Zustimmung des UN-Menschenrechtsrats zu den *UN Guiding Principles on Business and Human Rights* im Juni 2011 stellt einen Meilenstein dar für die Weiterentwicklung der Unternehmensverantwortlichkeit für Menschenrechtsverletzungen. John Ruggie, UN Sonderbeauftragter für Unternehmen und Menschenrechte, entwickelte das erste *soft law* Instrument, das dieses Thema behandelt und von Regierungen unterstützt wird. Die 31 Prinzipien der *UN Guiding Principles* beruhen auf drei Säulen. Das Fundament ist die staatliche Pflicht Menschenrechte zu stützen, die zweite Säule ist die Verantwortung für den Respekt von Menschenrechten durch Unternehmen, und das dritte tragende Element ist der Zugang zu Rechtsbehelfen.

Das Ziel der Arbeit ist es die *UN Guiding Principles* auf einen spezifischen Fall anzuwenden und zu elaborieren ob die Prinzipien ein Werkzeug sein können um Menschenrechtsverletzungen durch Unternehmen zu adressieren. Konkret soll die Beteiligung einer österreichischen Turbinen- und Generatorenfirma, Andritz, an einem Wasserkraftwerksbau in Belo Monte, Brasilien, untersucht werden. Der Damm am Xingu Fluss wird der drittgrößte weltweit werden und wird unter anderem kritisiert, weil er die Verletzung von indigenen Rechten zur Folge hat. Da Österreich Andritz regelmäßig Subventionen für diverse Projekte zukommen lässt, stellt sich auch die Frage, ob das offizielle Österreich Verantwortung für die Tätigkeiten von Andritz im Ausland übernehmen sollte.

Daraus ergeben sich folgende Forschungsfragen: Sind die *UN Guiding Principles* anwendbar auf die Beteiligung von Andritz am Belo Monte Staudamm? Welche der 31 Prinzipien sind relevant und in welcher Form? Was sind die Konsequenzen für Österreich und Andritz?

Die Arbeit legt dar, dass viele der Prinzipien sowohl auf Österreich als auch auf Andritz im konkreten Fall anwendbar sind.
Es zeigt sich, dass Österreich zwar gewisse Initiativen setzt, um die Unternehmensverantwortlichkeit für Menschenrechte zu stärken, aber dass die *UN Guiding Principles* die österreichische Politik bezogen auf Belo Monte nicht beeinflussen. Es scheint vielmehr, dass der politische Wille die Prinzipien umzusetzen nicht entstehen wird, solange die Einhaltung von Menschenrechten als Wettbewerbsnachteil gesehen wird. Dies verdeutlicht auch die Wichtigkeit der *UN Guiding Principles* als weltweit umzusetzender Standard. Zusammenfassend kann gesagt werden, dass die *UN Guiding Principles* ein Werkzeug sein könnten um Österreich zur Umsetzung von weiteren Regulierungen zu bewegen, da vor allem die EU Druck auf Österreich ausübt. Diese neu implementierten Regelungen könnten in Zukunft eventuell die Unternehmensstrategien und –aktivitäten beeinflussen.
Eine ähnliche Problematik stellt sich bei der Umsetzung der Prinzipien durch Unternehmen. Da die *UN Guiding Principles* auf Freiwilligkeit beruhen, vermögen sie das Verhalten von Unternehmen nicht zu beeinflussen, solange diese nicht aus eigenem Antrieb Menschrechte respektieren möchten. Dennoch könnten die Prinzipien durchaus als Anleitung dienen, falls Andritz sich entscheiden würde, im Fall Belo Monte oder bei zukünftigen Projekten, Menschenrechte mehr in den Vordergrund zu stellen.

1.2. Abstract

The endorsement of the *UN Guiding Principles on Business and Human Rights*by the Human Rights Council in June 2011 marked an important milestone in the process of binding business to some human rights standards. John Ruggie, the UN Secretary-General's Special Representative for Business and Human Rights, developed the first instrument to address the issue accepted by governments. The 31 principles of the *UN Guiding Principles* rest on three pillars. The first one – the bedrock – is the state duty to protect human rights, the second one

is the corporate responsibility to respect human rights, and the third one is the access to remedy.

The aim of this thesis is to apply the *UN Guiding Principles* to a specific case and elaborate if the principles can be a practical tool to address the involvement of a multinational corporation in human rights violations. The case is the involvement of Andritz, a global supplier of electro mechanical systems and services for hydropower plants and generators, in the Belo Monte hydropower scheme in Brazil. The Belo Monte dam on the Xingu River will be the third biggest dam in the world. Local and international non-governmental organizations (NGOs) criticize the project; mainly, because the construction of the dam lead to the infringement on indigenous peoples' rights. Seeing as Andritz receives regularly subventions from the Austrian state, the question is if Austria should take responsibility for the activities of Andritz abroad.

The research questions that follow are: Are the *UN Guiding Principles* applicable to the involvement of Andritz in the Belo Monte hydropower scheme? Which of the 31 principles are relevant and in what way? What are the consequences for Andritz and Austria?

The thesis shows that most of the principles are applicable to Austria as well as to Andritz. Although Austria works on a partly very ambitious plan to strengthen human rights abroad governmental institutions fail to implement these new ideas when dealing with questions regarding the case Belo Monte. It seems as if the political will to implement the *UN Guiding Principles* will not arise as long as accountability for human rights is seen as a competitive disadvantage. This problem highlights the importance of the *UN Guiding Principles* as a worldwide standard. In conclusion, the *UN Guiding Principles* may be a tool to push Austria to implement new rules regarding business and human rights, because states, especially the EU, apply pressure. Those new domestic rules may influence business activities of Austrian based companies in the future.

Similar considerations are true regarding the application of the principles to corporations. Seeing as the *UN Guiding Principles* are based on voluntarism they will not influence the behavior of companies as long as they are not willing to respect human rights. However, if Andritz would decide to focus on the human right infringements their activities cause, the *UN Guiding Principles* would be a reasonable tool of guidance.

2. Curriculum Vitae

Mag. jur. Verena Hinteregger - Education

September 2008 - present	Studies of *Development Studies* at the University of Vienna Title of diploma thesis: *The UN Guiding Principles on Business and Human Rights applied to the involvement of ANDRITZ in the Belo Monte hydropower scheme*
2007 – 2013	Studies of *Law* at the faculty of law at the University of Vienna Topics of special interest: *Human Rights, International Law, Philosophy*
1999 – 2007	Secondary School: Gallusstraße, Bregenz Focus: *humanistic education and languages*
Juni 2007	Graduation with honors

3. *UN Guiding Principles on Business and Human Rights*[710]

A/HRC/17/31

Advance Edited Version

Distr.: General
21 March 2011

Original: English

Human Rights Council
Seventeenth session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie

Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework

Summary

This is the final report of the Special Representative. It summarizes his work from 2005 to 2011, and presents the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" for consideration by the Human Rights Council.

[710] Available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/121/90/PDF/G1112190.pdf?OpenElement [accessed 04/01/2013]

Contents

Introduction to the Guiding Principles

1. The issue of business and human rights became permanently implanted on the global policy agenda in the 1990s, reflecting the dramatic worldwide expansion of the private sector at the time, coupled with a corresponding rise in transnational economic activity. These developments heightened social awareness of businesses' impact on human rights and also attracted the attention of the United Nations.

2. One early United Nations-based initiative was called the Norms on Transnational Corporations and Other Business Enterprises; it was drafted by an expert subsidiary body of what was then the Commission on Human Rights. Essentially, this sought to impose on companies, directly under international law, the same range of human rights duties that States have accepted for themselves under treaties they have ratified: "to promote, secure the fulfilment of, respect, ensure respect of and protect human rights".

3. This proposal triggered a deeply divisive debate between the business community and human rights advocacy groups while evoking little support from Governments. The Commission declined to act on the proposal. Instead, in 2005 it established a mandate for a Special Representative of the Secretary-General "on the issue of human rights and transnational corporations and other business enterprises" to undertake a new process, and requested the Secretary-General to appoint the mandate holder. This is the final report of the Special Representative.

4. The work of the Special Representative has evolved in three phases. Reflecting the mandate's origins in controversy, its initial duration was only two years and it was intended mainly to "identify and clarify" existing standards and practices. This defined the first phase. In 2005, there was little that counted as shared knowledge across different stakeholder groups in the business and human rights domain. Thus the Special Representative began an extensive programme of systematic research that has continued to the present. Several thousand pages of documentation are available on his web portal (http://www.business-humanrights.org/SpecialRepPortal/Home): mapping patterns of alleged human rights abuses by business enterprises; evolving standards of international human rights law and international criminal law; emerging practices by States and companies; commentaries of United Nations treaty bodies on State obligations concerning business-related human rights abuses; the impact of investment agreements and corporate law and securities regulation on both States' and enterprises' human rights policies; and related subjects. This research has been actively disseminated, including to the Council itself. It has provided a broader and more solid factual basis for the ongoing business and human rights discourse, and is reflected in the Guiding Principles annexed to this report.

5. In 2007, the Council renewed the mandate of the Special Representative for an additional year, inviting him to submit recommendations. This marked the mandate's second phase. The Special Representative observed that there were many initiatives, public and private, which touched on business and human rights. But none had reached sufficient scale to truly move markets; they existed as separate fragments that did not add up to a coherent or complementary system. One major reason has been the lack of an authoritative focal point around which the expectations and actions of relevant stakeholders could converge. Therefore, in June 2008 the Special Representative made only one recommendation: that the Council support the "Protect, Respect and Remedy" Framework he had developed following three years of research and consultations. The Council did so, unanimously "welcoming" the Framework in its resolution 8/7 and providing, thereby, the authoritative focal point that had been missing.

6. The Framework rests on three pillars. The first is the State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedy, both judicial and non-judicial. Each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse.

7. Beyond the Human Rights Council, the Framework has been endorsed or employed by individual Governments, business enterprises and associations, civil society and workers' organizations, national human rights institutions, and investors. It has been drawn upon by such multilateral institutions as the International Organization for Standardization and the Organization for Economic Cooperation and Development in developing their own initiatives in the business and human rights domain. Other United Nations special procedures have invoked it extensively.

8. Apart from the Framework's intrinsic utility, the large number and inclusive character of stakeholder consultations convened by and for the mandate no doubt have contributed to its widespread positive reception. Indeed, by January 2011 the mandate had held 47 international consultations, on all continents, and the Special Representative and his team had made site visits to business operations and their local stakeholders in more than 20 countries.

9. In its resolution 8/7, welcoming the "Protect, Respect and Remedy" Framework, the Council also extended the Special Representative's mandate until June 2011, asking him to "operationalize" the Framework – that is, to provide concrete and practical recommendations for its implementation. This constitutes the mandate's third phase. During the interactive dialogue at the Council's June 2010 session, delegations agreed that the recommendations should take the form of "Guiding Principles"; these are annexed to this report.

10. The Council asked the Special Representative, in developing the Guiding Principles, to proceed in the same research-based and consultative manner that had characterized his mandate all along. Thus, the Guiding Principles are informed by extensive discussions with all stakeholder groups, including Governments, business enterprises and associations, individuals and communities directly affected by the activities of enterprises in various parts of the world, civil society, and experts in the many areas of law and policy that the Guiding Principles touch upon.

11. Some of the Guiding Principles have been road-tested as well. For example, those elaborating effectiveness criteria for non-judicial grievance mechanisms involving business enterprises and communities in which they operate were piloted in five different sectors, each in a different country. The workability of the Guiding Principles' human rights due-diligence provisions was tested internally by 10 companies, and was the subject of detailed discussions with corporate law professionals from more than 20 countries with expertise in over 40 jurisdictions. The Guiding Principles addressing how Governments should help companies avoid getting drawn into the kinds of human rights abuses that all too often occur in conflict-affected areas emerged from off-the-record, scenario-based workshops with officials from a cross-section of States that had practical experience in dealing with these challenges. In short, the Guiding Principles aim not only to provide guidance that is practical, but also guidance informed by actual practice.

12. Moreover, the text of the Guiding Principles itself has been subject to extensive consultations. In October 2010, an annotated outline was discussed in separate day-long sessions with Human Rights Council delegations, business enterprises and associations, and civil society groups. The same document was also presented at the annual meeting of the International Coordinating Committee of National Human Rights Institutions. Taking into account the diverse views expressed, the Special Representative then produced a full draft of the Guiding Principles and Commentary, which was sent to all Member States on 22 November 2010 and posted online for public comment until 31 January 2011. The online consultation attracted 3,576 unique visitors from 120 countries and territories. Some 100 written submissions were sent directly to the Special Representative, including by Governments. In addition, the draft Guiding Principles were discussed at an expert multi-stakeholder meeting, and then at a session with Council delegations, both held in January 2011. The final text now before the Council is the product of this extensive and inclusive process.

13. What do these Guiding Principles do? And how should they be read? Council endorsement of the Guiding Principles, by itself, will not bring business and human rights challenges to an end. But it will mark the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments.

14. The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved. Each Principle is accompanied by a commentary, further clarifying its meaning and implications.

15. At the same time, the Guiding Principles are not intended as a tool kit, simply to be taken off the shelf and plugged in. While the Principles themselves are universally applicable, the means by which they are realized will reflect the fact that we live in a world of 192 United Nations Member States, 80,000 transnational enterprises, 10 times as many subsidiaries and countless millions of national firms, most of which are small and medium-sized enterprises. When it comes to means for implementation, therefore, one size does not fit all.

16. The Special Representative is honored to submit these Guiding Principles to the Human Rights Council. In doing so, he wishes to acknowledge the extraordinary contributions by hundreds of individuals, groups and institutions around the world, representing different segments of society and sectors of industry, who gave freely of their time, openly shared their experiences, debated options vigorously, and who came to constitute a global movement of sorts in support of a successful mandate: establishing universally applicable and yet practical Guiding Principles on the effective prevention of, and remedy for, business-related human rights harm.

Annex

Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework

General principles

These Guiding Principles are grounded in recognition of:

(a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;

(b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;

(c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

These Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.

These Guiding Principles should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.

Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.

These Guiding Principles should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men.

I. The State duty to protect human rights

A. Foundational principles

1. States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

Commentary

States' international human rights law obligations require that they respect, protect and fulfil the human rights of individuals within their territory and/or jurisdiction. This includes

the duty to protect against human rights abuse by third parties, including business enterprises.

The State duty to protect is a standard of conduct. Therefore, States are not per se responsible for human rights abuse by private actors. However, States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures, including policies, legislation, regulations and adjudication. States also have the duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency.

This chapter focuses on preventative measures while Chapter III outlines remedial measures.

2. States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

Commentary

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

There are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State itself is involved in or supports those businesses. The reasons include ensuring predictability for business enterprises by providing coherent and consistent messages, and preserving the State's own reputation.

States have adopted a range of approaches in this regard. Some are domestic measures with extraterritorial implications. Examples include requirements on "parent" companies to report on the global operations of the entire enterprise; multilateral soft-law instruments such as the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development; and performance standards required by institutions that support overseas investments. Other approaches amount to direct extraterritorial legislation and enforcement. This includes criminal regimes that allow for prosecutions based on the nationality of the perpetrator no matter where the offence occurs. Various factors may contribute to the perceived and actual reasonableness of States' actions, for example whether they are grounded in multilateral agreement.

B. Operational principles

General State regulatory and policy functions

3. In meeting their duty to protect, States should:

(a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;

(b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;

(c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;

(d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

Commentary

States should not assume that businesses invariably prefer, or benefit from, State inaction, and they should consider a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights.

The failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice. Such laws might range from non-discrimination and labour laws to environmental, property, privacy and anti-bribery laws. Therefore, it is important for States to consider whether such laws are currently being enforced effectively, and if not, why this is the case and what measures may reasonably correct the situation.

It is equally important for States to review whether these laws provide the necessary coverage in light of evolving circumstances and whether, together with relevant policies, they provide an environment conducive to business respect for human rights. For example, greater clarity in some areas of law and policy, such as those governing access to land, including entitlements in relation to ownership or use of land, is often necessary to protect both rights-holders and business enterprises.

Laws and policies that govern the creation and ongoing operation of business enterprises, such as corporate and securities laws, directly shape business behaviour. Yet their implications for human rights remain poorly understood. For example, there is a lack of clarity in corporate and securities law regarding what companies and their officers are permitted, let alone required, to do regarding human rights. Laws and policies in this area should provide sufficient guidance to enable enterprises to respect human rights, with due regard to the role of existing governance structures such as corporate boards.

Guidance to business enterprises on respecting human rights should indicate expected outcomes and help share best practices. It should advise on appropriate methods, including human rights due diligence, and how to consider effectively issues of gender, vulnerability and/or marginalization, recognizing the specific challenges that may be faced by indigenous peoples, women, national or ethnic minorities, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families.

National human rights institutions that comply with the Paris Principles have an important role to play in helping States identify whether relevant laws are aligned with their human

rights obligations and are being effectively enforced, and in providing guidance on human rights also to business enterprises and other non-State actors.

Communication by business enterprises on how they address their human rights impacts can range from informal engagement with affected stakeholders to formal public reporting. State encouragement of, or where appropriate requirements for, such communication are important in fostering respect for human rights by business enterprises. Incentives to communicate adequate information could include provisions to give weight to such self-reporting in the event of any judicial or administrative proceeding. A requirement to communicate can be particularly appropriate where the nature of business operations or operating contexts pose a significant risk to human rights. Policies or laws in this area can usefully clarify what and how businesses should communicate, helping to ensure both the accessibility and accuracy of communications.

Any stipulation of what would constitute adequate communication should take into account risks that it may pose to the safety and security of individuals and facilities; legitimate requirements of commercial confidentiality; and variations in companies' size and structures.

Financial reporting requirements should clarify that human rights impacts in some instances may be "material" or "significant" to the economic performance of the business enterprise.

The State-business nexus

4. States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.

Commentary

States individually are the primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime. 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. Moreover, the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State's policy rationale becomes for ensuring that the enterprise respects human rights.

Where States own or control business enterprises, they have greatest means within their powers to ensure that relevant policies, legislation and regulations regarding respect for human rights are implemented. Senior management typically reports to State agencies, and associated government departments have greater scope for scrutiny and oversight, including ensuring that effective human rights due diligence is implemented. (These enterprises are also subject to the corporate responsibility to respect human rights, addressed in Chapter II.)

A range of agencies linked formally or informally to the State may provide support and services to business activities. These include export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions. Where these agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk – in reputational, financial, political and potentially legal terms – for supporting any such harm, and they may add to the human rights challenges faced by the recipient State.

Given these risks, States should encourage and, where appropriate, require human rights due diligence by the agencies themselves and by those business enterprises or projects receiving their support. A requirement for human rights due diligence is most likely to be appropriate where the nature of business operations or operating contexts pose significant risk to human rights.

5. States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.

Commentary

States do not relinquish their international human rights law obligations when they privatize the delivery of services that may impact upon the enjoyment of human rights. Failure by States to ensure that business enterprises performing such services operate in a manner consistent with the State's human rights obligations may entail both reputational and legal consequences for the State itself. As a necessary step, the relevant service contracts or enabling legislation should clarify the State's expectations that these enterprises respect human rights. States should ensure that they can effectively oversee the enterprises' activities, including through the provision of adequate independent monitoring and accountability mechanisms.

6. States should promote respect for human rights by business enterprises with which they conduct commercial transactions.

Commentary

States conduct a variety of commercial transactions with business enterprises, not least through their procurement activities. This provides States – individually and collectively – with unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the terms of contracts, with due regard to States' relevant obligations under national and international law.

Supporting business respect for human rights in conflict-affected areas

7. Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:

(a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;

(b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;

(c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;

(d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

Commentary

Some of the worst human rights abuses involving business occur amid conflict over the control of territory, resources or a Government itself – where the human rights regime cannot be expected to function as intended. Responsible businesses increasingly seek guidance from States about how to avoid contributing to human rights harm in these difficult contexts. Innovative and practical approaches are needed. In particular, it is important to pay attention to the risk of sexual and gender-based violence, which is especially prevalent during times of conflict.

It is important for all States to address issues early before situations on the ground deteriorate. In conflict-affected areas, the "host" State may be unable to protect human rights adequately due to a lack of effective control. Where transnational corporations are involved, their "home" States therefore have roles to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse, while neighboring States can provide important additional support.

To achieve greater policy coherence and assist business enterprises adequately in such situations, home States should foster closer cooperation among their development assistance agencies, foreign and trade ministries, and export finance institutions in their capitals and within their embassies, as well as between these agencies and host Government actors; develop early-warning indicators to alert Government agencies and business enterprises to problems; and attach appropriate consequences to any failure by enterprises to cooperate in these contexts, including by denying or withdrawing existing public support or services, or where that is not possible, denying their future provision.

States should warn business enterprises of the heightened risk of being involved with gross abuses of human rights in conflict-affected areas. They should review whether their policies, legislation, regulations and enforcement measures effectively address this heightened risk, including through provisions for human rights due diligence by business. Where they identify gaps, States should take appropriate steps to address them. This may include exploring civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses. Moreover, States should consider multilateral approaches to prevent and address such acts, as well as support effective collective initiatives.

All these measures are in addition to States' obligations under international humanitarian law in situations of armed conflict, and under international criminal law.

Ensuring policy coherence

8. States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.

Commentary

There is no inevitable tension between States' human rights obligations and the laws and policies they put in place that shape business practices. However, at times, States have to make difficult balancing decisions to reconcile different societal needs. To achieve the appropriate balance, States need to take a broad approach to managing the business and

human rights agenda, aimed at ensuring both vertical and horizontal domestic policy coherence.

Vertical policy coherence entails States having the necessary policies, laws and processes to implement their international human rights law obligations. Horizontal policy coherence means supporting and equipping departments and agencies, at both the national and sub-national levels, that shape business practices – including those responsible for corporate law and securities regulation, investment, export credit and insurance, trade and labour – to be informed of and act in a manner compatible with the Governments' human rights obligations.

9. States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.

Commentary

Economic agreements concluded by States, either with other States or with business enterprises – such as bilateral investment treaties, free-trade agreements or contracts for investment projects – create economic opportunities for States. But they can also affect the domestic policy space of governments. For example, the terms of international investment agreements may constrain States from fully implementing new human rights legislation, or put them at risk of binding international arbitration if they do so. Therefore, States should ensure that they retain adequate policy and regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection.

10. States, when acting as members of multilateral institutions that deal with business-related issues, should:

(a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;

(b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;

(c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.

Commentary

Greater policy coherence is also needed at the international level, including where States participate in multilateral institutions that deal with business-related issues, such as international trade and financial institutions. States retain their international human rights law obligations when they participate in such institutions.

Capacity-building and awareness-raising through such institutions can play a vital role in helping all States to fulfil their duty to protect, including by enabling the sharing of information about challenges and best practices, thus promoting more consistent approaches.

Collective action through multilateral institutions can help States level the playing field with regard to business respect for human rights, but it should do so by raising the

performance of laggards. Cooperation between States, multilateral institutions and other stakeholders can also play an important role.

These Guiding Principles provide a common reference point in this regard, and could serve as a useful basis for building a cumulative positive effect that takes into account the respective roles and responsibilities of all relevant stakeholders.

II. The corporate responsibility to respect human rights

A. Foundational principles

11. Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

Commentary

The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.

Addressing adverse human rights impacts requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation.

Business enterprises may undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights. But this does not offset a failure to respect human rights throughout their operations.

Business enterprises should not undermine States' abilities to meet their own human rights obligations, including by actions that might weaken the integrity of judicial processes.

12. The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.

Commentary

Because business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights. In practice, some human rights may be at greater risk than others in particular industries or contexts, and therefore will be the focus of heightened attention. However, situations may change, so all human rights should be the subject of periodic review.

An authoritative list of the core internationally recognized human rights is contained in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights), coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work. These are the benchmarks against which other social actors assess the human rights impacts of business enterprises. The responsibility of business enterprises to respect human

rights is distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions.

Depending on circumstances, business enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families. Moreover, in situations of armed conflict enterprises should respect the standards of international humanitarian law.

13. The responsibility to respect human rights requires that business enterprises:

(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

(b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

Commentary

Business enterprises may be involved with adverse human rights impacts either through their own activities or as a result of their business relationships with other parties. Guiding Principle 19 elaborates further on the implications for how business enterprises should address these situations. For the purpose of these Guiding Principles a business enterprise's "activities" are understood to include both actions and omissions; and its "business relationships" are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.

14. The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts.

Commentary

The means through which a business enterprise meets its responsibility to respect human rights will be proportional to, among other factors, its size. Small and medium-sized enterprises may have less capacity as well as more informal processes and management structures than larger companies, so their respective policies and processes will take on different forms. But some small and medium-sized enterprises can have severe human rights impacts, which will require corresponding measures regardless of their size. Severity of impacts will be judged by their scale, scope and irremediable character. The means through which a business enterprise meets its responsibility to respect human rights may also vary depending on whether, and the extent to which, it conducts business through a corporate group or individually. However, the responsibility to respect human rights applies fully and equally to all business enterprises.

15. In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

(a) A policy commitment to meet their responsibility to respect human rights;

(b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;

(c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

Commentary

Business enterprises need to know and show that they respect human rights. They cannot do so unless they have certain policies and processes in place. Principles 16 to 24 elaborate further on these.

B. Operational principles

Policy commitment

16. As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:

(a) Is approved at the most senior level of the business enterprise;

(b) Is informed by relevant internal and/or external expertise;

(c) Stipulates the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;

(d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;

(e) Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.

Commentary

The term "statement" is used generically, to describe whatever means an enterprise employs to set out publicly its responsibilities, commitments, and expectations.

The level of expertise required to ensure that the policy statement is adequately informed will vary according to the complexity of the business enterprise's operations. Expertise can be drawn from various sources, ranging from credible online or written resources to consultation with recognized experts.

The statement of commitment should be publicly available. It should be communicated actively to entities with which the enterprise has contractual relationships; others directly linked to its operations, which may include State security forces; investors; and, in the case of operations with significant human rights risks, to the potentially affected stakeholders.

Internal communication of the statement and of related policies and procedures should make clear what the lines and systems of accountability will be, and should be supported by any necessary training for personnel in relevant business functions.

Just as States should work towards policy coherence, so business enterprises need to strive for coherence between their responsibility to respect human rights and policies and procedures that govern their wider business activities and relationships. This should include, for example, policies and procedures that set financial and other performance incentives for personnel; procurement practices; and lobbying activities where human rights are at stake.

Through these and any other appropriate means, the policy statement should be embedded from the top of the business enterprise through all its functions, which otherwise may act without awareness or regard for human rights.

Human rights due diligence

17. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;

(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

Commentary

This Principle defines the parameters for human rights due diligence, while Principles 18 through 21 elaborate its essential components.

Human rights risks are understood to be the business enterprise's potential adverse human rights impacts. Potential impacts should be addressed through prevention or mitigation, while actual impacts – those that have already occurred – should be a subject for remediation (Principle 22).

Human rights due diligence can be included within broader enterprise risk-management systems, provided that it goes beyond simply identifying and managing material risks to the company itself, to include risks to rights-holders.

Human rights due diligence should be initiated as early as possible in the development of a new activity or relationship, given that human rights risks can be increased or mitigated already at the stage of structuring contracts or other agreements, and may be inherited through mergers or acquisitions.

Where business enterprises have large numbers of entities in their value chains it may be unreasonably difficult to conduct due diligence for adverse human rights impacts across them all. If so, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers' or clients' operating context, the particular operations, products or services involved, or other relevant considerations, and prioritize these for human rights due diligence.

Questions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties. Complicity has both non-legal and legal meanings. As a non-legal matter, business enterprises may be perceived as being "complicit" in the acts of another party where, for example, they are seen to benefit from an abuse committed by that party.

As a legal matter, most national jurisdictions prohibit complicity in the commission of a crime, and a number allow for criminal liability of business enterprises in such cases. Typically, civil actions can also be based on an enterprise's alleged contribution to a harm, although these may not be framed in human rights terms. The weight of international criminal law jurisprudence indicates that the relevant standard for aiding and abetting is knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime.

Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse. However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.

18. In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:

(a) Draw on internal and/or independent external human rights expertise;

(b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.

Commentary

The initial step in conducting human rights due diligence is to identify and assess the nature of the actual and potential adverse human rights impacts with which a business enterprise may be involved. The purpose is to understand the specific impacts on specific people, given a specific context of operations. Typically this includes assessing the human rights context prior to a proposed business activity, where possible; identifying who may be affected; cataloguing the relevant human rights standards and issues; and projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified. In this process, business enterprises should pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization, and bear in mind the different risks that may be faced by women and men.

While processes for assessing human rights impacts can be incorporated within other processes such as risk assessments or environmental and social impact assessments, they should include all internationally recognized human rights as a reference point, since enterprises may potentially impact virtually any of these rights.

Because human rights situations are dynamic, assessments of human rights impacts should be undertaken at regular intervals: prior to a new activity or relationship; prior to major decisions or changes in the operation (e.g. market entry, product launch, policy change, or wider changes to the business); in response to or anticipation of changes in the operating environment (e.g. rising social tensions); and periodically throughout the life of an activity or relationship.

To enable business enterprises to assess their human rights impacts accurately, they should seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement. In situations where such consultation is not possible, business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society.

The assessment of human rights impacts informs subsequent steps in the human rights due diligence process.

19. In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.

(a) Effective integration requires that:

(i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;

(ii) Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts.

(b) Appropriate action will vary according to:

(i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;

(ii) The extent of its leverage in addressing the adverse impact.

Commentary

The horizontal integration across the business enterprise of specific findings from assessing human rights impacts can only be effective if its human rights policy commitment has been embedded into all relevant business functions. This is required to ensure that the assessment findings are properly understood, given due weight, and acted upon.

In assessing human rights impacts, business enterprises will have looked for both actual and potential adverse impacts. Potential impacts should be prevented or mitigated through the horizontal integration of findings across the business enterprise, while actual impacts—those that have already occurred – should be a subject for remediation (Principle 22).

Where a business enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact.

Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm.

Where a business enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products or services by its business relationship with another entity, the situation is more complex. Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences.

The more complex the situation and its implications for human rights, the stronger is the case for the enterprise to draw on independent expert advice in deciding how to respond.

If the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it. And if it lacks leverage there may be ways for the enterprise to increase it. Leverage may be increased by, for example, offering capacity-building or other incentives to the related entity, or collaborating with other actors.

There are situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage. Here, the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so.

Where the relationship is "crucial" to the enterprise, ending it raises further challenges. A relationship could be deemed as crucial if it provides a product or service that is essential to the enterprise's business, and for which no reasonable alternative source exists. Here the severity of the adverse human rights impact must also be considered: the more severe the abuse, the more quickly the enterprise will need to see change before it takes a decision on whether it should end the relationship. In any case, for as long as the abuse continues and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences – reputational, financial or legal – of the continuing connection.

20. In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should:

(a) Be based on appropriate qualitative and quantitative indicators;

(b) Draw on feedback from both internal and external sources, including affected stakeholders.

Commentary

Tracking is necessary in order for a business enterprise to know if its human rights policies are being implemented optimally, whether it has responded effectively to the identified human rights impacts, and to drive continuous improvement.

Business enterprises should make particular efforts to track the effectiveness of their responses to impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization.

Tracking should be integrated into relevant internal reporting processes. Business enterprises might employ tools they already use in relation to other issues. This could include performance contracts and reviews as well as surveys and audits, using gender-disaggregated data where relevant. Operational-level grievance mechanisms can also provide important feedback on the effectiveness of the business enterprise's human rights due diligence from those directly affected (see Principle 29).

21. In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should:

(a) Be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences;

(b) Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved;

(c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.

Commentary

The responsibility to respect human rights requires that business enterprises have in place policies and processes through which they can both know and show that they respect human rights in practice. Showing involves communication, providing a measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders, including investors.

Communication can take a variety of forms, including in-person meetings, online dialogues, consultation with affected stakeholders, and formal public reports. Formal reporting is itself evolving, from traditional annual reports and corporate responsibility/sustainability reports, to include on-line updates and integrated financial and non-financial reports.

Formal reporting by enterprises is expected where risks of severe human rights impacts exist, whether this is due to the nature of the business operations or operating contexts. The reporting should cover topics and indicators concerning how enterprises identify and address adverse impacts on human rights. Independent verification of human rights reporting can strengthen its content and credibility. Sector-specific indicators can provide helpful additional detail.

Remediation

22. Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.

Commentary

Even with the best policies and practices, a business enterprise may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent.

Where a business enterprise identifies such a situation, whether through its human rights due diligence process or other means, its responsibility to respect human rights requires active engagement in remediation, by itself or in cooperation with other actors. Operational-level grievance mechanisms for those potentially impacted by the business enterprise's activities can be one effective means of enabling remediation when they meet certain core criteria, as set out in Principle 31.

Where adverse impacts have occurred that the business enterprise has not caused or contributed to, but which are directly linked to its operations, products or services by a

business relationship, the responsibility to respect human rights does not require that the enterprise itself provide for remediation, though it may take a role in doing so.

Some situations, in particular where crimes are alleged, typically will require cooperation with judicial mechanisms.

Further guidance on mechanisms through which remediation may be sought, including where allegations of adverse human rights impacts are contested, is included in Chapter III on access to remedy.

Issues of context

23. In all contexts, business enterprises should:

(a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;

(b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;

(c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.

Commentary

Although particular country and local contexts may affect the human rights risks of an enterprise's activities and business relationships, all business enterprises have the same responsibility to respect human rights wherever they operate. Where the domestic context renders it impossible to meet this responsibility fully, business enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard.

Some operating environments, such as conflict-affected areas, may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors (security forces, for example). Business enterprises should treat this risk as a legal compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility. In addition, corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses.

In complex contexts such as these, business enterprises should ensure that they do not exacerbate the situation. In assessing how best to respond, they will often be well advised to draw on not only expertise and cross-functional consultation within the enterprise, but also to consult externally with credible, independent experts, including from governments, civil society, national human rights institutions and relevant multi-stakeholder initiatives.

24. Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.

Commentary

While business enterprises should address all their adverse human rights impacts, it may not always be possible to address them simultaneously. In the absence of specific legal guidance, if prioritization is necessary business enterprises should begin with those human rights impacts that would be most severe, recognizing that a delayed response may affect

remediability. Severity is not an absolute concept in this context, but is relative to the other human rights impacts the business enterprise has identified.

III. Access to remedy

A. Foundational principle

25. As part of their duty to protect against business-related human rights abuse, 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.

Commentary

Unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless.

Access to effective remedy has both procedural and substantive aspects. The remedies provided by the grievance mechanisms discussed in this section may take a range of substantive forms the aim of which, generally speaking, will be to counteract or make good any human rights harms that have occurred. Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome.

For the purpose of these Guiding Principles, a grievance is understood to be a perceived injustice evoking an individual's or a group's sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities. The term grievance mechanism is used to indicate any routinized, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought.

State-based grievance mechanisms may be administered by a branch or agency of the State, or by an independent body on a statutory or constitutional basis. They may be judicial or non-judicial. In some mechanisms, those affected are directly involved in seeking remedy; in others, an intermediary seeks remedy on their behalf. Examples include the courts (for both criminal and civil actions), labour tribunals, National Human Rights Institutions, National Contact Points under the Guidelines for Multinational Enterprises of the Organization for Economic Cooperation and Development, many ombudsperson offices, and Government-run complaints offices.

Ensuring access to remedy for business-related human rights abuses requires also that States facilitate public awareness and understanding of these mechanisms, how they can be accessed, and any support (financial or expert) for doing so.

State-based judicial and non-judicial grievance mechanisms should form the foundation of a wider system of remedy. Within such a system, operational-level grievance mechanisms can provide early-stage recourse and resolution. State-based and operational-level mechanisms, in turn, can be supplemented or enhanced by the remedial functions of collaborative initiatives as well as those of international and regional human rights

mechanisms. Further guidance with regard to these mechanisms is provided in Guiding Principles 26 to 31.

B. Operational principles

State-based judicial mechanisms

26. States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

Commentary

Effective judicial mechanisms are at the core of ensuring access to remedy. Their ability to address business-related human rights abuses depends on their impartiality, integrity and ability to accord due process.

States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable. They should also ensure that the provision of justice is not prevented by corruption of the judicial process, that courts are independent of economic or political pressures from other State agents and from business actors, and that the legitimate and peaceful activities of human rights defenders are not obstructed.

Legal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed can arise where, for example:

- The way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability;
- Where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim;
- Where certain groups, such as indigenous peoples and migrants, are excluded from the same level of legal protection of their human rights that applies to the wider population.

Practical and procedural barriers to accessing judicial remedy can arise where, for example:

- The costs of bringing claims go beyond being an appropriate deterrent to unmeritorious cases and/or cannot be reduced to reasonable levels through government support, 'market-based' mechanisms (such as litigation insurance and legal fee structures), or other means;
- Claimants experience difficulty in securing legal representation, due to a lack of resources or of other incentives for lawyers to advise claimants in this area;
- There are inadequate options for aggregating claims or enabling representative proceedings (such as class actions and other collective action procedures), and this prevents effective remedy for individual claimants;
- State prosecutors lack adequate resources, expertise and support to meet the State's own obligations to investigate individual and business involvement in human rights-related crimes.

Many of these barriers are the result of, or compounded by, the frequent imbalances between the parties to business-related human rights claims, such as in their financial resources, access to information and expertise. Moreover, whether through active discrimination or as the unintended consequences of the way judicial mechanisms are designed and operate, individuals from groups or populations at heightened risk of vulnerability or marginalization often face additional cultural, social, physical and financial impediments to accessing, using and benefiting from these mechanisms. Particular attention should be given to the rights and specific needs of such groups or populations at each stage of the remedial process: access, procedures and outcome.

State-based non-judicial grievance mechanisms

27. States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.

Commentary

Administrative, legislative and other non-judicial mechanisms play an essential role in complementing and supplementing judicial mechanisms. Even where judicial systems are effective and well-resourced, they cannot carry the burden of addressing all alleged abuses; judicial remedy is not always required; nor is it always the favoured approach for all claimants.

Gaps in the provision of remedy for business-related human rights abuses could be filled, where appropriate, by expanding the mandates of existing non-judicial mechanisms and/or by adding new mechanisms. These may be mediation-based, adjudicative or follow other culturally-appropriate and rights-compatible processes – or involve some combination of these – depending on the issues concerned, any public interest involved, and the potential needs of the parties. To ensure their effectiveness, they should meet the criteria set out in Principle 31.

National human rights institutions have a particularly important role to play in this regard.

As with judicial mechanisms, States should consider ways to address any imbalances between the parties to business-related human rights claims and any additional barriers to access faced by individuals from groups or populations at heightened risk of vulnerability or marginalization.

Non-State-based grievance mechanisms

28. States should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms.

Commentary

One category of non-State-based grievance mechanisms encompasses those administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group. They are non-judicial, but may use adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes. These mechanisms may offer particular benefits such as speed of access and remediation, reduced costs and/or transnational reach.

Another category comprises regional and international human rights bodies. These have dealt most often with alleged violations by States of their obligations to respect human

rights. However, some have also dealt with the failure of a State to meet its duty to protect against human rights abuse by business enterprises.

States can play a helpful role in raising awareness of, or otherwise facilitating access to, such options, alongside the mechanisms provided by States themselves.

29. To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.

Commentary

Operational-level grievance mechanisms are accessible directly to individuals and communities who may be adversely impacted by a business enterprise. They are typically administered by enterprises, alone or in collaboration with others, including relevant stakeholders. They may also be provided through recourse to a mutually acceptable external expert or body. They do not require that those bringing a complaint first access other means of recourse. They can engage the business enterprise directly in assessing the issues and seeking remediation of any harm.

Operational-level grievance mechanisms perform two key functions regarding the responsibility of business enterprises to respect human rights.

- First, they support the identification of adverse human rights impacts as a part of an enterprise's on-going human rights due diligence. They do so by providing a channel for those directly impacted by the enterprise's operations to raise concerns when they believe they are being or will be adversely impacted. By analyzing trends and patterns in complaints, business enterprises can also identify systemic problems and adapt their practices accordingly
- Second, these mechanisms make it possible for grievances, once identified, to be addressed and for adverse impacts to be remediated early and directly by the business enterprise, thereby preventing harms from compounding and grievances from escalating.

Such mechanisms need not require that a complaint or grievance amount to an alleged human rights abuse before it can be raised, but specifically aim to identify any legitimate concerns of those who may be adversely impacted. If those concerns are not identified and addressed, they may over time escalate into more major disputes and human rights abuses.

Operational-level grievance mechanisms should reflect certain criteria to ensure their effectiveness in practice (Principle 31). These criteria can be met through many different forms of grievance mechanism according to the demands of scale, resource, sector, culture and other parameters.

Operational-level grievance mechanisms can be important complements to wider stakeholder engagement and collective bargaining processes, but cannot substitute for either. They should not be used to undermine the role of legitimate trade unions in addressing labour-related disputes, nor to preclude access to judicial or other non-judicial grievance mechanisms.

30. Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.

Commentary

Human rights-related standards are increasingly reflected in commitments undertaken by industry bodies, multi-stakeholder and other collaborative initiatives, through codes of conduct, performance standards, global framework agreements between trade unions and transnational corporations, and similar undertakings.

Such collaborative initiatives should ensure the availability of effective mechanisms through which affected parties or their legitimate representatives can raise concerns when they believe the commitments in question have not been met. The legitimacy of such initiatives may be put at risk if they do not provide for such mechanisms. The mechanisms could be at the level of individual members, of the collaborative initiative, or both. These mechanisms should provide for accountability and help enable the remediation of adverse human rights impacts.

Effectiveness criteria for non-judicial grievance mechanisms

31. In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

(a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;

(b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;

(c) Predictable: providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;

(d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;

(e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;

(f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;

(g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

(h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

Commentary

A grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it and are able to use it. These criteria provide a benchmark for designing, revising or assessing a non-judicial grievance mechanism to help ensure that it is effective in practice. Poorly designed or implemented grievance mechanisms can risk compounding a sense of grievance amongst affected stakeholders by heightening their sense of disempowerment and disrespect by the process.

The first seven criteria apply to any State-based or non-State-based, adjudicative or dialogue-based mechanism. The eighth criterion is specific to operational-level mechanisms that business enterprises help administer.

The term "grievance mechanism" is used here as a term of art. The term itself may not always be appropriate or helpful when applied to a specific mechanism, but the criteria for effectiveness remain the same. Commentary on the specific criteria follows:

(a) Stakeholders for whose use a mechanism is intended must trust it if they are to choose to use it. Accountability for ensuring that the parties to a grievance process cannot interfere with its fair conduct is typically one important factor in building stakeholder trust;

(b) Barriers to access may include a lack of awareness of the mechanism, language, literacy, costs, physical location and fears of reprisal;

(c) In order for a mechanism to be trusted and used, it should provide public information about the procedure it offers. Timeframes for each stage should be respected wherever possible, while allowing that flexibility may sometimes be needed;

(d) In grievances or disputes between business enterprises and affected stakeholders, the latter frequently have much less access to information and expert resources, and often lack the financial resources to pay for them. Where this imbalance is not redressed, it can reduce both the achievement and perception of a fair process and make it harder to arrive at durable solutions;

(e) Communicating regularly with parties about the progress of individual grievances can be essential to retaining confidence in the process. Providing transparency about the mechanism's performance to wider stakeholders, through statistics, case studies or more detailed information about the handling of certain cases, can be important to demonstrate its legitimacy and retain broad trust. At the same time, confidentiality of the dialogue between parties and of individuals' identities should be provided where necessary;

(f) Grievances are frequently not framed in terms of human rights and many do not initially raise human rights concerns. Regardless, where outcomes have implications for human rights, care should be taken to ensure that they are in line with internationally recognized human rights;

(g) Regular analysis of the frequency, patterns and causes of grievances can enable the institution administering the mechanism to identify and influence policies, procedures or practices that should be altered to prevent future harm;

(h) For an operational-level grievance mechanism, engaging with affected stakeholder groups about its design and performance can help to ensure that it meets their needs, that they will use it in practice, and that there is a shared interest in ensuring its success. Since a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome, these mechanisms should focus on reaching agreed solutions through dialogue. Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.

4. Draft *NAP CSR*[711]

DRAFT

Nationaler Aktionsplan CSR (NAP CSR)

Stand: 29.5.2013

[711] Available at http://www.gemeinwohl-oekonomie.org/sites/default/files/NAP%20CSR%20Disskussionsgrundlage%2029052013.pdf [accessed 04/01/2013]

Inhalt:

Präambel

Corporate Social Responsibility (kurz CSR) ist – nach der Definition der EU Kommission - die Verantwortung der Unternehmen für ihre Auswirkungen auf die Gesellschaft. Damit wird klar, dass CSR nur ein Beitrag, wenn auch ein wichtiger, zur Bewältigung zentraler gesellschaftlicher und wirtschaftlicher Herausforderungen für das 21. Jahrhundert sein wird. Es braucht auch andere Strategien, etwa die österreichische Nachhaltigkeitsstrategie und Aktionspläne, etwa den Nationalen Aktionsplan Behinderung 2012 bis 2020 oder den Österreichischen Aktionsplan zur nachhaltigen öffentlichen Beschaffung (2010), die übergreifend und vernetzt wirken und zur nachhaltigen Entwicklung beitragen müssen. Der Anspruch an die Entwicklung, die durch den NAP CSR unterstützt werden soll, ist vom Bild der drei Dimensionen geprägt. Die Entwicklung muss wirtschaftlich erfolgreich, sozial gerecht und ökologisch verträglich sein.

Der NAP CSR orientiert sich an internationalen Entwicklungen und an Entwicklungen auf europäischer Ebene. Grundlage ist die Mitteilung der Kommission vom 25.10.2011: Eine neue EU-Strategie (2011-14) für die soziale Verantwortung der Unternehmen (CSR).

Vollständige CSR-Definition der EK
Die Kommission legt eine neue Definition vor, wonach CSR „die Verantwortung von Unternehmen für ihre Auswirkungen auf die Gesellschaft" ist. Nur wenn die geltenden Rechtsvorschriften und die zwischen Sozialpartnern bestehenden Tarifverträge eingehalten werden, kann diese Verantwortung wahrgenommen werden. Damit die Unternehmen ihrer sozialen Verantwortung in vollem Umfang gerecht werden, sollten sie auf ein Verfahren zurückgreifen können, mit dem soziale, ökologische, ethische, Menschenrechts- und Verbraucherbelange in enger Zusammenarbeit mit den Stakeholdern in die Betriebsführung und in ihre Kernstrategie integriert werden (EC 2011, S. 7).

Auf dieser Basis kann die Bundesregierung den Rahmen für eine konsequente und erfolgreiche Umsetzung von CSR schaffen. Die Entwicklung von betrieblichen CSR-Strategien und Maßnahmen ist dabei eine primär unternehmerische Gestaltungsaufgabe. Die Behörden erfüllen eine wichtige Funktion, damit eine sinnvolle Kombination aus Freiwilligkeit, einem Anreizmodell und regulativen Ansätzen wirksam wird. Dabei werden immer die Ziele, die Transparenz und Glaubwürdigkeit von CSR erhöhen, Marktanreize für gesellschaftlich verantwortliches unternehmerisches Handeln schaffen sowie die Einhaltung gesellschaftlicher Grundinteressen verfolgt. Die Einhaltung von normativen Regeln und Schutzfunktionen ist Basis und Voraussetzung, um darüber hinausgehende ökologische, soziale und andere gesellschaftliche Ansprüche zu erfüllen. CSR erfordert demnach ein hohes Engagement der wirtschaftlichen AkteurInnen, das durch geeignete Maßnahmen unterstützt werden muss.

Mit dem NAP CSR verbindet die Bundesregierung weiters zwei Herausforderungen und Rollen staatlicher AkteurInnen. Erstens ist die Gestalterrolle zu übernehmen, in der Rahmenbedingungen für die CSR Umsetzung geschaffen werden. Zweitens ist die Rolle des Vorbildes wahrzunehmen, in der der öffentlichen Verwaltung, den öffentlichen Organisationen und den staatsnahen Unternehmen verstärkt CSR-Maßnahmen zur Umsetzung vorgeschlagen werden. Die Grundstrategie lautet: Der Staat als CSR-Gestalter und als CSR-Vorbild.

Ergänzend zur EU-Strategie wird die CSR-Entwicklung in Österreich auf folgende Strategien und Leitlinien eingehen und sinnvoll in Einklang gebracht. Dabei werden nicht nur demokratisch legitimierte politische Ordnungsrahmen, sondern auch Instrumente mit hoher faktischer Relevanz, berücksichtigt:

- Die OECD - Leitsätze für multinationale Unternehmen
- Die dreigliedrige Grundsatzerklärung des Internationalen Arbeitsamtes (IAA) über multinationale Unternehmen und Sozialpolitik
- Die zehn Grundsätze des Global Compact der vereinten Nationen
- Die United Nation Guiding Principles on Business and Human Rights
- Die ISO Norm 26000 zur gesellschaftlichen Verantwortung
- Die Global Reporting Initiative (GRI) als Grundlage für die Berichterstattung

Mit dem NAP CSR wird in Österreich ein nationaler CSR-Roundtable-Prozess (Startegieumsetzungs- und Weiterentwicklungsprozess) initiiert, der diese Grundlinien aufgreift, operationalisiert und angepasst weiter entwickelt.

Die gesellschaftliche Verantwortung von Unternehmen hat in Österreich eine lange Tradition. Sie zeigt sich in - im internationalen Vergleich - hohen verbindlichen Standards, in einer aktiven Sozialpartnerschaft und in vielfältigen Beiträgen von Unternehmen aller Größen zu nachhaltiger Entwicklung in ökologischer und sozialer Hinsicht. Österreich kann auch auf zahlreiche erfolgreiche CSR Initiativen, Netzwerke und Plattformen aufbauen, die durch den NAP CSR weiter gestärkt werden.

Trotz der guten Ausgangslage stellen uns die Entwicklungen der letzten Jahre und die globalen Trends vor eine Vielzahl neuer Herausforderungen, die noch größere Anstrengungen von wirtschaftlichen AkteurInnen verlangen. CSR ist dabei eine Strategie, diese Herausforderungen zu meistern und der NAP CSR der Rahmen, um die Unternehmen bei ihren Aufgaben entsprechend zu unterstützen. Das erfordert ein Zusammenspiel aller Kräfte von Gesellschaft und Wirtschaft.

Der strategische Ansatz des NAP CSR ist grundsätzlich wirkungsorientiert. Die im CSR-Roundtable-Prozess weiter entwickelten Handlungsansätze müssen in der Praxis spürbare Wirkungen erzielen und tatsächlich gemessen werden.

Drei Säulen gesellschaftlicher Verantwortung

Soziale Aspekte gesellschaftlicher Verantwortung von Unternehmen

CSR als ganzheitliche und langfristige Strategie ist nur dann erfolgreich, wenn es von der Organisations- bzw. Unternehmensführung ausgehend in die Organisations- bzw. Unternehmenskultur integriert wird. Die Stärkung der sozialen Dimension von CSR kann wesentlich dazu beitragen, soziale Nachhaltigkeit im Sinne von Armutsbekämpfung, sozialem Ausgleich und sozialer Sicherheit zu bewirken. Von zentraler Bedeutung sind in diesem Zusammenhang – neben der unabdingbaren Einhaltung von Menschenrechten und ArbeitnehmerInnenrechten entlang der gesamten Wertschöpfungskette (vgl. Handlungsfeld 1) – Aspekte wie die Berücksichtigung der Interessen von ArbeitnehmerInnen und KonsumentInnen, die Förderung von Nichtdiskriminierung, Chancengleichheit, Gleichstellung und Diversität sowie die Entwicklung des lokalen und regionalen sozialen Umfeldes.

Zudem haben Maßnahmen in diesen Bereichen, die über das gesetzliche Mindestmaß hinausgehen, auch einen positiven Effekt auf den wirtschaftlichen Erfolg von Unternehmen. Soziale Maßnahmen auf betrieblicher Ebene wirken sich beispielsweise positiv auf die Arbeitszufriedenheit und Motivation der MitarbeiterInnen aus. Die Stärkung von MitarbeiterInnen und KonsumentInnen ermöglicht es Unternehmen, sich als attraktive ArbeitgeberInnen zu positionieren, nachhaltige

Wettbewerbsvorteile zu generieren, KonsumentInnen und MitarbeiterInnen langfristig zu binden und nicht zuletzt geschäftsschädigende Risiken zu vermeiden.

Es ist daher im Interesse des Staates, Unternehmen dazu anzuregen und darin zu bestärken, soziale Maßnahmen zu implementieren bzw. auszubauen. Betriebliche Maßnahmen sollten generell allen MitarbeiterInnen unabhängig von der Position im Unternehmen zur Verfügung stehen, alter(n)s- sowie geschlechtergerecht sein und den unterschiedlichen Bedürfnissen entsprechend ausgestaltet sein. Sie sollten auf Inklusion abzielen, die Wertschätzung von Differenzen und die Aufhebung jeglicher Diskriminierungen.

Die Bundesregierung unterstützt betriebliche Maßnahmen für MitarbeiterInnen und Maßnahmen in Bezug auf KonsumentInnen, die deutlich über gesetzliche und kollektivvertragliche Mindeststandards hinausgehen, beispielsweise in folgenden Bereichen:

- Schaffung von existenzsichernden und diskriminierungsfreien Arbeitsplätzen sowie angemessen entlohnten Ausbildungsverhältnissen
- Förderung der Beschäftigung von Personen mit Schwierigkeiten bei der beruflichen Integration (z.B. Supervision und Trainings für Vorgesetzte und MitarbeiterInnen)
- Förderung der Nichtdiskriminierung, Chancengleichheit und Diversität innerhalb und außerhalb des Unternehmens (z.B. Sensibilisierungs- und Antidiskriminierungsmaßnahmen, diskriminierungsfreie Kommunikation unternehmensintern und nach außen)
- Förderung der Gleichstellung von Frauen und Männern innerhalb und außerhalb des Unternehmens (z.B. Frauenquoten, Frauenförderung, gleicher Lohn für gleiche Arbeit)
- Diversity-Management in Bezug auf alle Dimensionen[1] und Umsetzung von Gender Mainstreaming/Gender Budgeting
- Förderung von Menschen mit Behinderungen und der Barrierefreiheit (z.B. innovative Arbeitsplatzgestaltung, Quotenregelungen)
- Förderung alter(n)sgerechter Arbeitsbedingungen und von Generationengerechtigkeit und -management
- Vereinbarkeit von Beruf und Privatleben/ Beruf und Familie für beide Geschlechter (z.B. Förderung der Inanspruchnahme der Väterkarenz, Sabbaticals)
- Förderung der psychischen und körperlichen Gesundheit und der Sicherheit am Arbeitsplatz (z.B. Coaching, Supervision)
- Ausbau betrieblicher Sozialleistungen (z.B. Zukunftsvorsorge, erweiterter Versicherungsschutz)
- Förderung der betrieblichen Mitbestimmung (z.B. partizipative Organisationsmodelle, Förderung von ArbeitnehmerInnenvertretungen, Einbindung der MitarbeiterInnen bei der Planung und Umsetzung von CSR-Maßnahmen)
- Förderung des Zugangs zu relevanter beruflicher und persönlicher Aus- und Weiterbildung für alle MitarbeiterInnen (z.B. Förderung externer und interner Fortbildung)

[1] Diversity Management wird definiert als „strategischer Managementansatz zur gezielten Wahrnehmung und Nutzung der Vielfalt von Personen und relevanten Organisationsumwelten bzw. Stakeholdern, um strukturelle und soziale Bedingungen zu schaffen, unter denen alle Beschäftigten ihre Leistungsfähigkeit und -bereitschaft zum Vorteil aller Beteiligten und zur Steigerung des Organisationserfolges entwickeln und entfalten können“ (ÖNORM S 2501, S. 5).
In seiner engsten Definition umfasst Diversität die sechs Kerndimensionen Alter, Behinderung, ethnische Zugehörigkeit, Geschlecht, Religion oder Weltanschauung und sexuelle Orientierung.

- Angebot von Produkten und Dienstleistungen unter verstärkter Berücksichtigung der Interessen von KonsumentInnen (z.B. erweiterte Produkt- und Dienstleistungshaftung, KonsumentInnenschutz und –sicherheit) - vgl. auch Handlungsfeld 4 („Stärkung nachhaltiger Lebensstile und nachhaltigen Konsums“)

Ökologische Aspekte gesellschaftlicher Verantwortung von Unternehmen

Die Stärkung der ökologischen Dimension von CSR eröffnet Unternehmen einerseits neue Marktchancen und schafft angesichts von stetig wachsenden Knappheiten und steigenden Preisen von energetischen und stofflichen Produktionsgrundlagen langfristig krisensichere Perspektiven ebenso wie neue Arbeitsplätze im Wachstumssegment der „Green Jobs“. Anderseits können mit mitarbeiterInnenorientierten, umweltbezogenen, innerbetrieblichen Maßnahmen die Identifikation mit dem Unternehmen, die Motivation sowie die Arbeitsplatzqualität nachhaltig verbessert werden.

Eine ökologische Optimierung von Lieferketten, Produktionsprozessen, Produkten und Dienstleistungen wird mehr und mehr zum Erfolgsfaktor in der Unternehmenslandschaft avancieren. Die Übernahme ökologischer Verantwortung und ein innovatives, energie- und ressourcenschonendes Wirtschaften werden für Unternehmen der Zukunft immer mehr zur Selbstverständlichkeit werden.

Die Bundesregierung unterstützt entsprechende betriebliche Initiativen , die deutlich über gesetzliche Mindeststandards hinausgehen, beispielsweise in folgenden Bereichen:

- MitarbeiterInnenorientierte, umweltbezogene, innerbetriebliche Maßnahmen (z.B. ökologisch optimierte Mobilitätskonzepte für MitarbeiterInnen, bewusstseinsbildende Maßnahmen wie der ökologische Fußabdruck/Carbon Footprint, Partnerschaftsmodelle in der Zusammenarbeit mit UmweltNGOs)
- Ökologische Optimierung des Ressourcen- und Energieverbrauchs, Carbon Offsetting
- Ökologische Optimierung von Produkten, Produktion und Transportdienstleistungen, Entwicklung vom Produktkonsum hin zur Inanspruchnahme von Dienstleistungen
- Mitwirkung an der Entwicklung von validen Bewertungs- und Kennzeichnungssystemen im Bereich des ökologischen Fußabdrucks (CO_2; Flächenverbrauch; Wasserverbrauch; Energie- und Ressourcenintensität) von Produkten und Dienstleistungen
- Sichtbarmachung des ökologischen Rucksacks im Zusammenhang mit der Lieferkette ebenso wie im Bereich der Produktentwicklungspolitik und der Vermarktung von Produkten und Dienstleistungen, sowie Minimierung/Optimierung der Rohstoff- bzw. Sekundärrohstoffverbräuche sowie der Material-, Energie- und Entsorgungskosten durch betriebliche Ressourcen-/Stoffbuchhaltung, Erfassung nicht-finanzieller, ökologischer Leistungsindikatoren im Rahmen unternehmerischer Berichterstattung und Rechnungslegung, Lebenszyklusanalysen von Produkten und Dienstleistungen, Orientierung der Einkaufslogistik an ökologischen Beschaffungsleitlinien
- Schaffung neuer/zusätzlicher Arbeitsplatzpotenziale im Wachstumsbereich der „Green Jobs“, neue Angebote an KundInnen/KonsumentInnen wie Leasing/Sharing/Einsparcontracting als nachfrageseitige Optimierungen mit unternehmerischem Nutzen
- Entwicklung stofflicher Kreislaufschließungsmodelle und Lukrierung dementsprechender Kosteneinsparungspotenziale im Einklang mit der Verringerung des ökologischen Fußabdrucks durch überbetriebliche logistische Ansätze im Business-to-Business-Bereich

- Systematischer Ersatz bedenklicher/humantoxikologisch bzw. hinsichtlich des Umweltgefährdungspotenzials kritischer Stoffe und Zubereitungen durch weniger belastende/unbedenkliche Alternativen
- Vermeidung geplanter Obsoleszenz von Produkten, Reparaturfreundlichkeit.

Wirtschaftliche Aspekte gesellschaftlicher Verantwortung von Unternehmen

Die ökonomische Dimension von CSR umfasst v.a. den sogenannten "business case" von CSR, d.h. den Umstand, dass unternehmerische Maßnahmen, die der Wahrnehmung gesellschaftlicher Verantwortung dienen, mittel- und langfristig betriebswirtschaftlich rentabel sein können. Neue Marktchancen, wachsende Motivation der Arbeitnehmer, bessere Identifikation mit dem Unternehmen, mehr Planungssicherheit können von Vorteil für verantwortungsvolle Unternehmen sein. Auf makroökonomischer Ebene kann ethisches Unternehmensverhalten beitragen, die aktuelle Vertrauenskrise in das marktwirtschaftliche System aufzulösen sowie einen Mehrwert in der Reputation einer Volkswirtschaft als gesamtes zu schaffen.

Verantwortungsorientierte Unternehmen haben kurzfristig häufig Wettbewerbsnachteile gegenüber Konkurrenten, welche keine Verantwortung für die Einhaltung sozialer und ökologischer Mindeststandards übernehmen. Insbesondere KMUs benötigen Unterstützung hinsichtlich der Analyse und Bewertung von sozialen und ökologischen Gefahren. Ihnen muss daher Know-how zur Verfügung gestellt werden.

Forschungs- und Innovationstätigkeit für CSR zählt deshalb zu den “Schwerpunktthemen mit strategischer Relevanz für Österreich“ (FTI 2011).

Aber auch Verbraucher haben großen Einfluss auf das Verhalten von Unternehmen. Gesellschaftlich verantwortungsvolles Handeln von Unternehmen wird zunehmend zum kaufentscheidenden Faktor für Konsumenten. Unternehmen, KundInnen und institutionelle Investoren haben eine Schlüsselrolle hinsichtlich der Verbreitung von CSR. Die öffentliche Hand kann über gezielte Anreizgestaltung die wirtschaftlichen Aktivitäten ökonomischer Akteure in gesellschaftlich wünschbare Bahnen lenken.

Die Bundesregierung unterstützt entsprechende Initiativen beispielsweise in folgenden Bereichen:

- Die Bundesregierung unterstützt Forschung und Entwicklung im Bereich "CSR/Unternehmerische Nachhaltigkeit“.
- Die Bundesregierung beabsichtigt die transdisziplinäre Bündelung von Forschungsaktivitäten im Bereich CSR und unternehmerischer Nachhaltigkeit durch Information, Anbahnung von Kooperationen, finanzielle Unterstützung etc. Dabei werden CSR-AkteurInnen aus Praxis und Wissenschaft eingebunden.
- Die Bundesregierung motiviert, unterstützt und fördert wissenschaftliches Bemühen, die Grundlagen und die Umsetzung von CSR in Unternehmen weiter voranzutreiben.
- Die Bundesregierung legt den Schwerpunkt in diesem Bereich auf die Erforschung und Weiterentwicklung von Instrumenten zur Messung sozialer Aspekte der CSR (auch im Rahmen des Accounting), zur öffentlichen Sichtbarmachung von CSR-Engagement (Zertifizierung, Gütezeichen etc.); zur Erforschung von Auswirkungen unternehmerischen Handelns auf Gesellschaft, natürliche und kulturelle Umwelt.

- Die Bundesregierung hält die Fördergeber dazu an, bei Vergabe von Fördermitteln durch Vorgabe geeigneter Kriterien sicherzustellen, dass die Wahrnehmung gesellschaftlicher Verantwortung durch Unternehmen vorangetrieben wird.
- Die Bundesregierung unterstützt und belohnt freiwilliges Engagement („Volunteering“) von Unternehmen und ihren MitarbeiterInnen in ökologischen, sozialen und entwicklungspolitischen Belangen, und zwar im unternehmerischen Kerngeschäft und darüber hinaus.
- Fortführen von Programmen und Initiierung von Projekten zur Förderung eines verantwortungsvollen Verbraucherverhaltens.

Resümeé

Die übliche Darstellung der Aspekte gesellschaftlicher Verantwortung von Unternehmen entlang der drei Dimensionen – sozial, ökologisch, wirtschaftlich – zeigt gleich zu Beginn des NAP CSR die wichtigsten Ansätze für eine erfolgreiche CSR Entwicklung für Unternehmen auf. Es ist jedoch wichtig, dass CSR von einer ineinandergreifenden Betrachtung und Umsetzung aller drei Dimensionen ausgeht und in den folgenden Handlungsfeldern daher die integrierte Zugangsweise gewählt wurde.

Die Intentionen des NAP CSR

Die komplexen Herausforderungen machen einen Dialog notwendig, der alle relevanten gesellschaftlichen und wirtschaftlichen AkteurInnen auf nationaler Ebene einbezieht und gleichzeitig die Hauptrichtungen internationaler Entwicklungen integriert. Hier gilt es, aus verschiedenen Perspektiven und Standpunkten gemeinsam getragene Lösungen abzuleiten. Der NAP CSR hat die Intention, auf Basis einer guten Ausgangssituation, einen langfristigen und zielgerichteten Umsetzungsprozess zu initiieren, der vorhandene Widersprüche mit guten und gemeinsam getragenen Lösungen versorgen kann.

Über klar festgelegte Handlungsfelder werden für die folgende Umsetzung übergeordnete Zielsetzungen und Fokusfragen definiert. Innerhalb der fünf Handlungsfelder zeigt der NAP CSR auf, welche Handlungsansätze auf Regierungsseite aufgegriffen werden und für die Umsetzung vorgesehen sind, und welche Handlungsansätze für die wirtschaftlichen AkteurInnen und andere Stakeholdergruppen zur Umsetzung empfohlen werden.

Wichtige Zielgruppen

Aus der CSR Definition folgend, ist die Hauptzielgruppe die Wirtschaft, also die Unternehmen und Organisationen. CSR bietet dabei den multinationalen Konzernen ebenso Chancen wie den KMUs oder den Kleinstunternehmen. Den Kapazitäten der Unternehmen entsprechend werden die CSR Anforderungen nach deren Größe unterschiedlich aufwendig sein. Die wirtschaftlichen Zielgruppen sollen die Flexibilität erhalten, ein innovatives und den Möglichkeiten entsprechendes CSR Konzept zu erarbeiten, gleichzeitig aber auch Rahmenbedingungen mit Klarheit aufgezeigt bekommen, zentrale Aspekte sozialer Verantwortung effizient in die Umsetzung zu bringen. Die Messbarkeit eigener CSR - Strategien und Leistungen im Sinne ausgewogener Wettbewerbsbedingungen („level playing fields“) ist ein Wunsch der Unternehmen und soll im Rahmen des NAP CSR-Roundtable-Prozesses entwickelt werden.

Mit dem NAP CSR will die Bundesregierung mit den öffentlichen Verwaltungen und Organisationen, aber auch mit staatsnahen Unternehmen, in die Vorbildrolle gehen. Dazu werden für die Zielgruppe der politischen EntscheidungsträgerInnen, für die Verwaltung und für VerantwortungsträgerInnen in Wirtschaftsunternehmen im NAP CSR klare Entwicklungs- und Handlungsmöglichkeiten aufgezeigt.

Eine wichtige Zielgruppe des NAP CSR sind ArbeitnehmerInnen- und ArbeitgeberInnen-Interessensvertretungen, Netzwerke und Plattformen (Beispiele: respACT und NeSoVe) und andere AkteurInnen die sich, teils aus eigenem Antrieb (z.B. NGOs), für die Etablierung, Gestaltung und Umsetzung von CSR einsetzen. Sie agieren als VordenkerInnen, GestalterInnen, PromotorInnen und auch KritikerInnen des Konzeptes oder bringen wichtige Aktivitäten in die Umsetzung. Mit ihrem Engagement unterstützen sie die Ausarbeitung effektiver CSR Strategien und Aktivitäten. Mit dem NAP CSR richtet sich die Bundesregierung an diese Organisationen, indem sie zur aktiven Unterstützung einlädt und gleichzeitig Unterstützung anbietet.

Der NAP CSR richtet sich weiter an die BürgerInnen als KonsumentInnen und als TrägerInnen der Gesellschaft. Sie sind als MitarbeiterInnen direkte StakeholderInnen der Unternehmen, tragen durch ihre Kauf- und Anlageentscheidungen zum Erfolg CSR orientiert handelnder Unternehmen auf dem Markt bei (EC 2011, S. 9) und engagieren sich als verantwortungsvolle BürgerInnen für Nachhaltige Entwicklung.

Der NAP CSR richtet sich auch an Forschungs- und Bildungsinstitutionen, insbesondere im Bereich der wirtschaftsbezogenen Aus-, Fort- und Weiterbildungsmechanismen, das CSR Thema intensiver aufzugreifen.

Übergeordnete Zielsetzungen

Mit dem NAP CSR will die Bundesregierung den Wirtschaftsstandort Österreich durch stärkere Verankerung gesellschaftlicher Verantwortung in der Wirtschaft und im öffentlichen Sektor – zum Nutzen der Gesellschaft – langfristig glaubwürdig positionieren und sichern.

Mit dem NAP CSR werden durch geeignete Rahmenbedingungen jene Unternehmen und Organisationen unterstützt, die in integrierter Form die ökologische, soziale und wirtschaftliche Dimension gesellschaftlicher Verantwortung wahrnehmen und durch einen kontinuierlichen Verbesserungsprozess dauerhaft wirksam in die Umsetzung bringen.

Dazu bietet der NAP CSR politische Rahmenbedingungen an, die auf Qualität, Transparenz und Glaubwürdigkeit von CSR in Österreich abstellen. Diese Rahmenbedingungen werden im CSR-Roundtable-Prozess weiter konkretisiert und operationalisiert.

Über die Handlungsfelder im NAP CSR will die Bundesregierung aufzeigen, welche Möglichkeiten CSR bietet und welche Maßnahmen gesetzt werden können.

Darüber hinaus will die Bundesregierung mit dem NAP CSR einen konkreten Beitrag zur nachhaltigen Entwicklung der Wirtschaft in Österreich leisten und darüber hinaus gewährleisten, dass Menschenrechte, ILO-Normen und der Schutz der natürlichen Lebensgrundlagen nicht nur eine Selbstverständlichkeit für Unternehmen in Österreich und für Auslandsstandorte österreichischer Unternehmen sind, sondern auch in den internationalen Wertschöpfungsketten eingehalten werden.

Die Bundesregierung selbst wird durch verstärktes Engagement und einer aktiven Rolle auf europäischer und internationaler Ebene die Gestaltung ambitionierter CSR – Rahmenbedingungen vorantreiben.

Festgelegte Handlungsfelder

Mit ihrer Mitteilung KOM(2011) 681 veröffentlichte die Europäische Kommission eine neue EU-Strategie (2011-14) für die soziale Verantwortung der Unternehmen (CSR) (EC 2011, S. 10ff.) und einen Aktionsplan 2012-2014. Der NAP CSR definiert auf dieser Basis **fünf Handlungsfelder** und fasst damit einige der im EU Aktionsplan definierten Bereiche zusammen, konkretisiert sie und beschreitet in der Umsetzung innovative Wege. Neu ist der Fokus auf die mit der gesellschaftlichen Verantwortung von Unternehmen einhergehenden innovationspolitischen Herausforderungen (siehe Tabelle 1.).

Fünf Handlungsfelder im NAP CSR 2013-2015	**Weitgehend entsprechende Handlungsfelder in der EU CSR Strategie „Aktionsplan 2012-2014“**
Handlungsfeld 1: „Wertschöpfungsketten“ CSR systematisch in internationalen Wertschöpfungsketten verankern	• UN Principles für Unternehmen und Menschenrechte umsetzen (4.8.2.) • Bedeutung von CSR für die Beziehungen mit anderen Ländern und Regionen der Welt hervorheben (4.8.3)
Handlungsfeld 2: „Innovationen“ Innovationspotenziale von CSR systematisch fördern und nutzen	• (keine Entsprechung)
Handlungsfeld 3: „Anreize“ CSR durch Anreize forcieren – Schaffung eines starken Business Case für verantwortliches Handeln von Unternehmen	• CSR durch den Markt stärker belohnen (Verbrauch, Öffentliches Auftragswesen, Investitionen) (4.4)
Handlungsfeld 4: „CSR verwesentlichen“ CSR „verwesentlichen“ – die Wahrnehmung und Akzeptanz durch die Wirtschaft und Gesellschaft stärken und verbreitern	• CSR ins Blickfeld rücken und bewährte Verfahren verbreiten (4.1) • CSR stärker in Aus- und Weiterbildung sowie Forschung integrieren (4.6) • Bedeutung v. CSR-Strategien auf nationaler/subnationaler Ebene hervorheben (4.7)
Handlungsfeld 5: „Glaubwürdigkeit und Transparenz“ Glaubwürdigkeit und Transparenz stärken	• Unternehmen entgegengebrachtes Vertrauen verbessern/dokumentieren (4.2) • Offenlegung sozialer und ökologischer Informationen durch Unternehmen verbessern (4.5)

Die Umsetzung der Handlungsfelder beruht im österreichischen NAP CSR wie im europäischen Aktionsplan auf der Basis international anerkannter CSR-Grundsätze und –Leitlinien (EU Aktionsplan 2011, 4.8.1.) sowie auf einer Kombination aus Marktanreizen, anspruchsvollen Koregulierungsprozessen, rechtlichen Verpflichtungen und freiwilligen Maßnahmen (EU Aktionsplan 2011, 4.3.).

Handlungsfeld 1:

CSR systematisch in internationalen Wertschöpfungsketten verankern

Begründung

Mit der Globalisierung der Wirtschaftsbeziehungen und der damit einhergehenden Komplexität rechtlicher Regulierungsprozesse sowie der Beschaffungs-, Produktions- und Absatzketten sehen sich Unternehmen, Politik und die Gesellschaft als Ganzes vor neue Herausforderungen gestellt.

Besonders Unternehmen, deren Produktionsketten sich über internationale Wertschöpfungsketten erstrecken, sehen sich mit sehr komplexen Anforderungen konfrontiert. Es gilt die Einhaltung der Menschenrechte und der international anerkannten ArbeitnehmerInnenrechte zu gewährleisten und die Verantwortung, aktiv für den Schutz natürlicher Lebensgrundlagen zu sorgen, adäquat sicher zu stellen. Der Staat muss dafür die Rahmenbedingungen schaffen, die Unternehmen unterstützen und gleichzeitig die Einhaltung der Standards und Schutzziele gewährleisten.

Mit dem NAP CSR will die Bundesregierung das Thema CSR in internationalen Wertschöpfungsketten verantwortlich aufnehmen, die Rechtslage prüfen, erkennbare Regulierungslücken schließen und Unternehmen in der Übernahme ihrer Verantwortung entsprechend unterstützen. Diese Verantwortung zeigt sich insbesondere im Management internationaler Wertschöpfungsketten und im Bereich der Exportwirtschaft.

Die Implementierung CSR-orientierter organisatorischer Maßnahmen und geeigneter Managementinstrumente zur Vermeidung von Rechtsverletzungen oder der Verletzung von Schutzbestimmungen dient nicht zuletzt auch der Risikovermeidung für die Unternehmen selbst. Imageschäden und Haftungsansprüche, wie sie aus mangelnder Rechtssicherheit entstehen, können großen wirtschaftlichen Schaden bewirken und, beispielsweise im Falle von Unfällen, sowohl Mensch und Natur massiv belasten. Es ist besonders im Sinne der engagierten Unternehmen wichtig, dass jene Unternehmen, die diese Verantwortung negieren oder nicht vollständig übernehmen, sanktioniert werden und somit unfaire Wettbewerbsverzerrungen vermieden werden.

Zielsetzungen

Mit dem NAP CSR werden folgende Zielsetzungen verfolgt:

- Die Bundesregierung will jene Unternehmen stärken und schützen, die in internationalen Wertschöpfungsketten CSR engagiert umsetzen und eine Vorbildrolle übernehmen. Das umfasst grundlegende soziale Mindestanforderungen (Menschenrechte, ILO-Kernarbeitsnormen, existenzsichernde Löhne, Gleichberechtigung) und den Schutz natürlicher Lebensgrundlagen.
- Es sind Initiativen zu setzen, um über menschenrechtliche, soziale und ökologische Mindestanforderungen hinausgehend einen CSR-Verhaltenskodex für die internationale Geschäftstätigkeit österreichischer Unternehmen zu entwickeln.
- Sollten durch mangelnde Verantwortungsübernahme oder Fahrlässigkeit Schutzziele, Normen oder Standards verletzt werden, dann wird die Bundesregierung über ihre Organe ihre Pflicht wahrnehmen, die Verursacher sanktionieren und den Betroffenen den Zugang zu wirksamen Rechtsbehelfen gewähren.
- Im Zuge der NAP CSR Umsetzung will die Bundesregierung vorhandene Rechtsinstrumente analysieren, mögliche Defizite erkennen und damit verbundene Lücken schließen. Ziel ist es, eine größere Rechtssicherheit für international agierende Unternehmen aber auch für mögliche Betroffene von Beeinträchtigungen zu erreichen.

- KMUs, deren Einfluss- und Gestaltungsmöglichkeiten in internationalen Wertschöpfungsketten begrenzt sind, sollen durch eine Verbesserung der Informationsbasis unterstützt werden. Dazu gehört der Know-how Aufbau, um CSR entlang der Wertschöpfungskette zu implementieren und das vorhandene Potenzial bestmöglich zu nutzen.

Der NAP CSR zeigt dabei folgende Handlungsansätze auf:

1. Unterstützung österreichischer Unternehmen bei der Umsetzung und Verankerung gesellschaftlicher Verantwortung entlang internationaler Wertschöpfungsketten.
2. Analyse und Evaluierung der bestehenden rechtlichen Rahmenbedingungen
   a) zur Verhinderung und Sanktionierung von Menschenrechtsverletzungen im Rahmen internationaler Geschäftstätigkeit sowie
   b) hinsichtlich der Beschwerde- und Entschädigungsmechanismen für Betroffene von Menschenrechtsverletzungen.
3. Analyse und Evaluierung geltender Rechtsvorschriften als Grundlage für CSR im Sinne eines Bekenntnisses zum umfassenden Rechtsschutz.
4. Erhöhung der Transparenz unternehmerischen Handelns entlang internationaler Wertschöpfungsketten.

1. Unterstützung bei der Umsetzung von CSR entlang internationaler Wertschöpfungsketten

Unternehmen müssen in ihrem Bemühen um eine verantwortungsbewusste Organisation ihrer internationalen Wertschöpfungsketten unterstützt werden. Verantwortungsorientierte Unternehmen haben häufig Wettbewerbsnachteile gegenüber solchen, die ihre Verantwortung für die Einhaltung menschenrechtlicher, sozialer und ökologischer Mindeststandards nicht vollständig übernehmen.

Insbesondere KMUs benötigen Unterstützung hinsichtlich der Analyse und Bewertung von menschenrechtlichen, sozialen und ökologischen Risiken und Schädigungspotentialen in Drittländern, inklusive auch der Gefahr der Korruption, und zwar bezogen auf die eigene Situation als auch auf die der GeschäftspartnerInnen.

Mit dem NAP CSR sollen folgende Punkte aufgegriffen werden:

- Die Bundesregierung setzt sich für den Aufbau eines europäischen Informationssystems ein, welches Unternehmen darin unterstützt, Menschenrechts- und Korruptionsrisiken sowie ökologische Risiken für Länder und Regionen, in denen sie aktiv sind, zu identifizieren;
- besonders für Hochrisiko-Länder und -Produktgruppen wird die Erarbeitung eines europäischen Indikatorenregimes empfohlen, das relevante Risikofaktoren abbilden kann und Empfehlungen bereit stellt.
- Weiters wird die Entwicklung von Guidelines und eines Indikatorenkataloges für „Responsible Supply Chain Management“ – aufbauend auf John Ruggies Konzept der Sorgfaltspflicht – empfohlen.

2. Analyse und Evaluierung bestehender Rechtsinstrumente

a) zur Verhinderung und Sanktionierung von Menschenrechtsverletzungen im Rahmen internationaler Geschäftstätigkeit

Unternehmen und deren EntscheidungsträgerInnen tragen bei transnationalen Unternehmensaktivitäten eine hohe Verantwortung in Bezug auf die Einhaltung internationaler Normen und Rechtsvorschriften. Beispielsweise kann eine Menschenrechtsverletzung strafrechtliche Relevanz für EntscheidungsträgerInnen erlangen. Es ist daher auch im Interesse der Unternehmen, eine Analyse und Evaluierung bestehender Rechtsinstrumente vorzunehmen und mögliche Graubereiche zu beseitigen. Wichtige Fragen sind dabei die Möglichkeiten und Grenzen der Verantwortlichkeit bzw. der unternehmerischen Sorgfaltspflichten.

Mit dem NAP CSR sollen folgende Punkte aufgegriffen werden:

- Es wird die Einsetzung einer juristischen ExpertInnengruppe zur Umsetzung der UN Guiding Principles on Business and Human Rights („Ruggie Framework"), mit dem Ziel der Analyse und Evaluierung bestehender rechtlicher Rahmenbedingungen hinsichtlich der Einhaltung der Menschenrechte, internationaler ArbeitnehmerInnenrechte und des Schutzes natürlicher Lebensgrundlagen empfohlen.
- Nicht zuletzt auch im Interesse der Unternehmen und EntscheidungsträgerInnen wird eine umfassende Analyse der strafrechtlichen Verantwortlichkeit im Hinblick auf Menschenrechtsverletzungen im Rahmen ihrer Geschäftstätigkeit und entlang der internationalen Wertschöpfungskette angeregt. Weiters ist mit der Identifizierung allfälliger Regelungslücken und Hürden bei der Strafverfolgung in der Praxis eine Verbesserung der Rechtslage für mögliche Betroffene verbunden.
- Die Bundesregierung bekennt sich dazu, die wichtige Rolle der NGOs in ökologischen, sozialen und entwicklungspolitischen Bereichen im Sinne einer Watchdog-Funktion zu unterstützen.

Die Bundesregierung wird sich auf EU Ebene verstärkt dafür einsetzen, in internationalen und bilateralen Handels- und Investitionsabkommen die Einhaltung der Menschenrechte, grundlegender ArbeitnehmerInnenrechte, Umwelt- und Sozialstandards als Mindestanforderung zu verankern und geeignete Sanktionsmechanismen zu implementieren. Weiters wird angestrebt, dass völkerrechtlich verbindliche Regeln für Unternehmen in Bezug auf die Einhaltung von Menschenrechten und grundlegenden ArbeitnehmerInnenrechten verabschiedet und im WTO-Rahmen integriert werden.

b) hinsichtlich bestehender Beschwerde- und Entschädigungsmechanismen für Betroffene von Menschenrechtsverletzungen

Unter dem Stichwort „remedy" fordern die UN Guiding Principles effektive Beschwerde- und Entschädigungsmechanismen für Betroffene von Menschenrechtsverletzungen. Das österreichische Zivilrecht bietet die Möglichkeit, Schäden, die rechtswidrig und schuldhaft verursacht wurden, als Schadenersatzansprüche gerichtlich geltend zu machen. Allerdings ist – wie die UN Guiding Principles in ihren Erläuterungen ausführen – bei Entschädigungsmechanismen auf rechtliche und tatsächliche Barrieren zu achten (z.B. Haftungsbegrenzungen durch Gesellschaftskonstrukte, fehlende Gruppenklage, hohe Vereinskosten etc.).

Mit dem NAP CSR soll folgender Punkt aufgegriffen werden:

- Eine umfassende Analyse und Evaluierung bestehender Beschwerde- und Entschädigungsmechanismen sowie der Zugangsmöglichkeiten von Geschädigten oder ihren VertreterInnen zur österreichischen Gerichtsbarkeit wird angeregt.

3. Analyse und Evaluierung geltender Rechtsvorschriften

Wie die EU-Kommission in ihrer Mitteilung zur neuen EU-Strategie CSR betont, kann die gesellschaftliche Verantwortung von Unternehmen nur unter der Voraussetzung wahrgenommen werden, dass geltende Rechtsvorschriften eingehalten werden. Unternehmen müssen daher sicherstellen, dass – insbesondere auch im Rahmen ihrer Unternehmensaktivitäten in Entwicklungsländern und Konfliktregionen – rechtswidriges Verhalten verhindert werden kann. Im Falle von KMUs sind dabei deren Möglichkeiten und Grenzen der Einflussnahme zu berücksichtigen.

Mit dem NAP CSR sollen folgende Punkte aufgegriffen werden:

- Eine Analyse und Evaluierung erforderlicher Mechanismen, die Legal Compliance sicher stellen (z.B. Risikoanalysen, die Entwicklung und Implementierung von Verhaltensleitlinien, interne Kontroll- und Aufsichtsmaßnahmen, MitarbeiterInnenschulungen etc.), wird angeregt.
- Es wird empfohlen, dass österreichische Unternehmen bei ihren Aktivitäten auf Standorten in Entwicklungs- und Schwellenländern, sich an den ambitiösen österreichischen Normen und Standards bzw. an den EU Schutzzielen orientieren.

4. Erhöhung der Transparenz entlang internationaler Wertschöpfungsketten

Transparentes unternehmerisches Handeln ist nicht primär eine Belastung für Unternehmen, sondern liegt auch wesentlich in deren Interesse. Unternehmen können sich damit als verantwortungsbewusste AkteurInnen und attraktive ArbeitgeberInnen am Markt vorteilhaft positionieren. Ein solches Handeln ermöglicht es KonsumentInnen, InvestorInnen und ArbeitnehmerInnen, sich bewusst für ein Unternehmen zu entscheiden.

Mit dem NAP CSR sollen folgende Punkte aufgegriffen werden:

- Börsennotierte Unternehmen, große Unternehmen ab 500 Beschäftigten und die Pensionsfonds sollen dazu angehalten werden, ein explizites „policy statement“ (eine Selbstverpflichtung) in Hinblick auf ihre menschenrechtliche, soziale und ökologische Verantwortung in ihren internationalen Wertschöpfungsketten und Investitionsstrategien zu verabschieden. Das umfasst auch die Offenlegung der in diesen Bereichen gesetzten Maßnahmen. Kleine und mittlere Unternehmen sollen bei Nichterfüllung eine entsprechende Begründung formulieren.
- Im hoheitlichen Bereich ist diesem Anliegen ebenso zu entsprechen, in dem für die Österreichische Bundesfinanzierungsagentur (OeBFA) und für die Exportfinanzierungen durch die OeKB[2] ein gleicher Maßstab vorzusehen ist.

[2] OeKB, Bundesfinanzierungsagentur … ist noch zu klären!

Handlungsfeld 2:

Innovationspotenziale von CSR systematisch fördern und nutzen

Begründung

CSR bietet zahlreiche Innovationsmöglichkeiten, die zum Vorteil von Gesellschaft und Wirtschaft umfassender genutzt werden sollen. Das CSR Innovationspotenzial geht dabei über technologische Innovationen weit hinaus und umfasst Innovationen in sozialen, ökologischen und wirtschaftlichen Bereichen. Beispiele im sozialen Bereich sind Innovationen, die über Normen und Standards der Arbeitspolitik, Gender- und Diversityfragen klar hinausgehen. Beispiele im ökologischen Bereich sind Innovationen wie ökologische Produktgestaltung, Ressourcennutzung oder der Wachstumsbereich Green Jobs. Im wirtschaftlichen Bereich sind das Innovationen im Geschäftsmodell, also beispielsweise gemeinwohlorientierte Modelle oder im Ertragsmodell der Unternehmen, also beispielsweise „nutzen statt besitzen".

Besonders im Zentrum des Interesses steht dabei die integrative Betrachtung von CSR Innovationen, die alle drei Dimensionen gleichzeitig umfasst und Synergien hervorbringt. Hinzu kommen Systeminnovationen in der Wertschöpfungskette, in regionalen Kontexten oder Innovationen durch Netzwerke und Kooperationen mit dem dritten Sektor, die soziale und solidarwirtschaftliche Strukturen entstehen lassen. Es sind dies also nicht soziale Innovationen innerhalb eines Unternehmens, wie sie im Kapitel „Soziale Aspekte gesellschaftlicher Verantwortung von Unternehmen" beschrieben sind, sondern Innovationen, die über die reinen Unternehmensgrenzen hinausreichen.

Innovationen im CSR Kontext

Weil CSR ein noch neuer Ansatz ist, kann es bereits als eine Innovation verstanden werden, wenn sich ein Unternehmen erstmals mit dem CSR Thema ernsthaft auseinander setzt und dabei relevante Aspekte integriert und umsetzt. Dabei beginnt CSR im Unternehmen mit einer Verhaltensinnovation in der Unternehmensführung. Hier zeigt CSR den Weg einer *Kultur der Verantwortlichkeit* auf, die sich im Umgang mit Menschen, mit StakeholderInnen und mit der Natur positiv auswirkt. Unternehmen steht darüber hinaus die gesamte Bandbreite an bekannten Innovationen zur Verfügung, die alle einen sinnvollen CSR Bezug beinhalten. Wichtige Aspekte sind die Integration von CSR Kriterien in das Management, die Unternehmensorganisation, die Produktionsverfahren, in die Gestaltung der Produkte und Dienstleistungen, in die gesamte Architektur der Wertschöpfungskette, wie das in Handlungsfeld 1 beschrieben wurde und in das gesamte System der PartnerInnen-, Kooperations- und Stakeholderlandschaft. All diese Innovationen können sehr unterschiedlich weit reichen und unterschiedlich stark wirken (inkrementelle und radikale Innovationen).

Die innovationspolitische Dimension durch verstärkte Wahrnehmung gesellschaftlicher Verantwortung in Unternehmen zieht sich durch alle fünf Handlungsfelder des NAP CSR.

Zielsetzungen

Mit dem NAP CSR werden folgende Zielsetzungen verfolgt:

- Über die Forschungspolitik soll CSR als F&E Thema verstärkt aufgegriffen und vertieft werden, um noch bessere Grundlagen und Argumentationen – besonders im Bereich der sozialen Innovationen – und evidenzbasierte CSR Business Cases zu entwickeln.

- In der Wirtschaft soll CSR als relevante und zukunftssichernde Innovationsaufgabe verbreitet wahrgenommen werden, um einerseits die Wettbewerbsfähigkeit der Unternehmen zu sichern und andererseits einen gesellschaftlichen Mehrwert zu erzeugen.
- Im dritten Sektor sollen Innovationen verstärkt werden, die sich nicht aus dem wirtschaftlichen Erlös sondern aus dem gesamtgesellschaftlichen Mehrwert definieren. Weiters sind Systeminnovationen, die sich aus der Zusammenarbeit von wirtschaftlichen AkteurInnen mit dem dritten Sektor ergeben, zu initiieren.

In Handlungsfeld 2 sind jene Rahmenbedingungen zu schaffen, die einem Klima der *Innovation mit gesellschaftlicher Verantwortung* in Österreich dienen und Unternehmen und Organisationen, die besonders weitreichende oder hoch wirksame CSR Innovationen umsetzen wollen, entsprechend unterstützen.

Der NAP CSR zeigt dabei folgende Handlungsansätze auf:

1. Die Forschung und Entwicklung im CSR Bereich ist über die strategische Ausrichtung und die Art der Umsetzung der Forschungs- und Innovationspolitik zu stärken.
2. Eine CSR-orientierte Innovationskultur in Unternehmen ist über die Förderpolitik und andere Anreizsysteme in ihrer Weiterentwicklung zu unterstützen.
3. Die Umsetzung von CSR-Innovationen ist für die Zielgruppen des NAP CSR zu erleichtern und durch Unterstützungsleistungen zu ermöglichen.
4. Die Innovationen im Dritten Sektor mit gesamtgesellschaftlichem Mehrwert und Systeminnovationen mit Schwerpunkt solidar- und sozialwirtschaftlicher und regionalentwicklungsorientierter Unternehmen und Kooperationen sind über geeignete Anreizssysteme zu fördern.

1. Stärkung der Forschung und Entwicklung im CSR Bereich

In der österreichischen Forschungslandschaft ist das Gebiet CSR nur unzureichend abgedeckt. Hier sollen aufgrund der großen Herausforderungen und der hohen Komplexität der Materie eine Intensivierung und eine Verbreiterung der Forschung und Entwicklung stattfinden. Besondere Schwerpunkte in der Forschung bilden dabei die integrierten Innovationen im unternehmerischen System. Um „Innovation Leader“ zu werden, braucht es laut FTI 2011 (Strategie der Bundesregierung für Forschung, Technologie und Innovation) einen breiten Innovationsansatz, der gesellschaftliche, also soziale, ökologische und ökonomische Innovationen beinhaltet.

Mit dem NAP CSR sollen folgende Punkte aufgegriffen werden:

- Das CSR Thema ist an Forschungseinrichtungen, auf Universitäten und Fachhochschulen intensiver aufzugreifen.
- Bei der Vergabe von Fördermitteln ist auf einen integrierten Innovationsansatz, der technologische und ebenso ökologische, soziale und ökonomische Innovationen beinhaltet, zu achten. Weiters sind verstärkt CSR Kriterien für das österreichische Förderregime zu entwickeln und bei der Vergabe der Mittel zu berücksichtigen.
- Besonders die Erforschung und Weiterentwicklung von vorhandenen Mechanismen und Instrumenten zur Messung und Bilanzierung relevanter CSR-Aspekte, zur öffentlichen Sichtbarmachung und zur Qualitätssicherung von CSR-Engagement soll einen Schwerpunkt in der CSR Forschung darstellen.

Ein möglicher Einsatz von Mitteln für die CSR-Forschung muss wirkungsorientiert sein, sich daher an klaren Zielen ausrichten und über entsprechende Kriterien gesteuert und gemessen werden.

2. Eine CSR-orientierte Innovationskultur in Unternehmen unterstützen

Eine gesellschaftlich verantwortliche Innovationskultur in Unternehmen zu ermöglichen, ist eine wichtige Herausforderung, der sich der NAP CSR annimmt. Gezielte Bewusstseinsarbeit, Anreizsysteme und der Abbau von Innovationsbarrieren zählen zu den relevanten Ansätzen, die auch in anderen Handlungsfeldern adressiert werden.

Die Leitidee ist dabei folgende: CSR beinhaltet Erwartungen aus gesellschaftlichen Ansprüchen, die über die reine Einhaltung von regulativen Normen und Standards hinausgehen, also die staatlichen Mindesterwartungen an Unternehmen übertreffen. Aus dem CSR-Innovationskalkül hingegen eröffnen sich unternehmerischen AkteurInnen Chancen für eine erfolgreiche Unternehmensentwicklung. Daraus ergibt sich die Option, CSR als Entwicklungsstrategie wahrzunehmen, die dem Unternehmen neue Perspektiven, Entwicklungsspielräume und Marktchancen bietet.

Mit dem NAP CSR sollen folgende Punkte aufgegriffen werden:

- Die CSR-Bewusstseinsarbeit, die CSR als Quelle der Innovation forciert, muss verstärkt werden (siehe dazu das Handlungsfeld 4: „CSR verwesentlichen").
- Des Weiteren ist besonders auf positive Anreize für Unternehmen zu setzen (beispielsweise durch konkrete Vorteile durch eine CSR-orientierte öffentliche Beschaffung – siehe das Handlungsfeld 3: „Anreize").
- In enger Abstimmung mit der FTI-Strategie ist der Abbau von wirtschaftlichen Innovationsbarrieren bei CSR-relevanten Innovationen voranzutreiben.
- Über die FördergeberInnen ist bei der Vergabe von Fördermitteln durch die Aufbereitung geeigneter Kriterien sicherzustellen, dass die Wahrnehmung gesellschaftlicher Verantwortung durch die Unternehmen vorangetrieben wird. Ansatzpunkte sind beispielsweise die Frauenförderung, die Integration älterer ArbeitnehmerInnen, die Work-Life-Balance, der Klimaschutz und die Ressourceneffizienz.

3. Die Umsetzung von CSR-Innovationen ist zu ermöglichen

Mit dem CSR Ansatz wird einerseits ein Schutzinteresse der Gesellschaft vor möglichen negativen Auswirkungen wirtschaftlichen Handelns verfolgt. Andererseits will der NAP CSR auch das Innovationsinteresse ansprechen, weil mit den CSR Innovationen ebenso ein relevantes öffentliches Interesse verbunden ist. Alle genannten CSR-Innovationen, von Produktionsinnovationen, Produkt- und Dienstleistungsinnovationen bis zu Geschäftsmodellinnovationen sind mit entsprechenden Programmen zu unterstützen. Soziale Innovationen, die Unterstützung neuer Formen der Unternehmensführung, Social Entrepreneurship, Kooperationen mit dem Dritten Sektor etc. sind ebenfalls zu forcieren und durch geeignete Initiativen zu ermöglichen.

Mit dem NAP CSR sollen folgende Punkte aufgegriffen werden:

- Die konkreten Handlungsansätze sind weitgehend im Handlungsfeld 3 „Anreize" und in anderen Handlungsfeldern abgedeckt und brauchen an dieser Stelle nur einen weitergehenden Aspekt.

- Die Umsetzung und die Verbreitung von CSR-Innovationen profitiert vom bekannten „best practice“ Ansatz, der ebenso in anderen Handlungsfeldern ausreichend bedient wird. Im Handlungsfeld 2: „Innovation“ hingegen soll besonders auch der „next practice“ Ansatz forciert und gefördert werden. Hier geht es um radikalere Innovationen, deren Umsetzung einen erheblichen Entwicklungsschritt einleiten und die über CSR Einzelmaßnahmen hinausgehen. Als Beispiel können hier echte Geschäftsmodell-Innovationen genannt werden, deren Umsetzung positive Wirkungen auf die Produkte, die Wertschöpfungsarchitektur und das Ertragsmodell – in allen drei Dimensionen von CSR – haben.

4. Soziale Innovationen und der Dritte Sektor

CSR verlangt nach einem umfassenden Verständnis sozialer Innovationen. Damit verbunden sind auch notwendige Innovation im Dritten Sektor, die zu den Systeminnovationen gehören. Mit dem NAP CSR sollen soziale Innovationen besonders auf überbetrieblicher Ebene angeregt und in der Umsetzung unterstützt werden:

- Innovationen durch gemeinwohlorientierte Unternehmensformen
- Innovative Formen der Unternehmensführung und Social Entrepreneurship
- Innovative Kooperationsformen mit dem Dritten Sektor
- Innovationen entlang internationaler Wertschöpfungsketten mit Entwicklungsländern

Mit dem NAP CSR sollen folgende Punkte aufgegriffen werden:

- Mit dem NAP CSR sollen Innovationen in den Strukturen sozialwirtschaftlicher, demokratischer, partizipations- und regionalentwicklungsorientierter Unternehmen unterstützt werden.
- Weiters soll geprüft werden, wie gemeinwohlorientierte Unternehmen steuerrechtlich etabliert und unterstützt werden können. Auch eine mögliche Integration von Social Business- und Social Entrepreneurship-Förderung in die traditionelle Wirtschaftsförderung ist anzustreben.
- Wenn Unternehmen oder Social Entrepreneurs ein nicht gelöstes gesellschaftliches Problem aufgreifen und daraus ein innovatives Geschäftsmodell entwickeln, ist das ein wünschenswerter Beitrag zur gesellschaftlichen Verantwortung, der entsprechende Unterstützung erfahren soll. Die Unterstützungsidee zielt dabei in gleicher Weise auf Unternehmen wie Non Profit Organisationen.
- Der Dritte Sektor umfasst neben Non / Not-for-Private / Profit Organisationen auch die Zivilgesellschaft. Deren wertvolle Beiträge für die Gesellschaft sollen durch Kooperationen mit der Wirtschaft in ihrer Wirkung verstärkt werden. Hierzu werden Unternehmen, im Besonderen die staatsnahen und staatlichen Betriebe aufgefordert, mit dem dritten Sektor innovative Kooperationsformen zu entwickeln.
- Die in Handlungsfeld 1: „Wertschöpfungsketten“ beschriebenen Handlungsansätze werden hier durch den Innovationsaspekt ergänzt. Auf Basis bestehender Aktivitäten sollen innovative Formen der Zusammenarbeit mit Einrichtungen in Entwicklungsländern unterstützt werden.

Handlungsfeld 3:

CSR durch Anreize forcieren – Schaffung eines starken Business Case für verantwortliches Handeln von Unternehmen

Begründung

Mit diesem Handlungsfeld soll gesellschaftlich verantwortliches Handeln von Unternehmen unterstützt und ein Korridor für das damit verbundene soziale und ökologische Engagement wirtschaftlicher Akteure für Zielsetzungen der nachhaltigen Entwicklung abgesteckt werden. Die positiven Auswirkungen von CSR sollen Vorteile für beide Seiten, die AkteurInnen der Wirtschaft und der Gesellschaft erzeugen. Wie „best practice" Beispiele in der österreichischen Wirtschaftslandschaft (etwa anhand der Initiativen von TRIGOS- oder SozialMarie-PreisträgerInnen) zeigen, gelingt es Unternehmen zunehmend besser, die mit CSR verbundenen prozesshaften und thematischen Herausforderungen nicht allein als gesellschaftliche Verpflichtung sondern ebenso als wettbewerbliche Perspektive und unternehmerische Chance wahrzunehmen und in vielen Fällen auch einen starken Business Case zu entwickeln.

Der Business Case ist eine Win-Win /"shared value"-Situation, in der Verantwortung für die Gesellschaft auch zum wirtschaftlichen Vorteil für das Unternehmen wird. Der Ansatz ist aus ethischen Gesichtspunkten kritisierbar, gilt aber als pragmatisch gangbarer Weg mit vielen Evidenzbeispielen. Gesellschaftlich verantwortliches Handeln ist nicht ausschließlich Anspruch, den die Gesellschaft an Unternehmen richtet. Es zahlt sich auf Märkten aus, es bringt den Unternehmen langfristige Wettbewerbsvorteile und eröffnet neue Chancen.

Der CSR Business Case ist nicht für alle Unternehmen in gleicher Weise darstellbar. Unterschiedliche Wettbewerbssituationen und unterschiedliche Ausgangssituationen und Rahmenbedingungen für die Entwicklung der Unternehmen, können es erleichtern oder erschweren, Engagement für CSR auch unmittelbar betriebswirtschaftlich zu argumentieren. Hinzu kommt das öffentliche Interesse, unternehmerische Beiträge und Leistungen für die Gesellschaft nicht allein über rechtliche Anforderungen zu normieren und deren Nichterfüllung zu sanktionieren, sondern Anreizsysteme einzusetzen, um über rechtliche Verpflichtungen hinausgehendes Engagement für gesamtgesellschaftliche Zielsetzungen zu honorieren und möglichen Wettbewerbsnachteilen CSR-orientierter Unternehmen entgegenzuwirken. Unter bestimmten Bedingungen kann die Anreizgestaltung der öffentlichen Hand auch die Form von Förderungen annehmen. Die wichtige Frage ist dabei die Möglichkeit zur Differenzierung von CSR-Leistungen von Unternehmen, um die Förderwürdigkeit rechtfertigen zu können. Dazu braucht es klare Grundsätze und Kriterien, die im CSR-Roundtable-Prozess zu entwickeln sind.

Ebenen gesellschaftlicher Verantwortung

Ebene 1: „Doing no harm"

Die unternehmerischen Aktivitäten erfolgen im Einklang mit geltenden Rechtsvorschriften. Dort, wo keine Rechtsvorschriften vorhanden sind, liegt die unternehmerische Intention darin, die *negativen Auswirkungen* auf Gesellschaft und Umwelt zu minimieren und bestmöglich zu vermeiden. Das bildet die Minimalanforderung des gesellschaftlich verantwortlichen Handelns.

Ebene 2: „Doing good"

Eine im öffentlichen Interesse besonders unterstützungswürdige Form gesellschaftlich verantwortlichen Handelns geht über das bloße Vermeiden von schädigenden Einflüssen deutlich hinaus. Hier wird von den wirtschaftlichen AkteurInnen eine proaktive Rolle übernommen und ein

besonderes Engagement in sozialen und ökologischen Belangen geboten. Es geht darum, die *positiven Auswirkungen* auf die Gesellschaft zu optimieren. Dazu braucht es Innovationen, bei denen alle drei Dimensionen ergänzend wirksam werden und, im Sinne von „next practice", pionierhafte, radikalere Lösungen entstehen (siehe Handlungsfeld 2: „Innovationen"). Für Unternehmen bedeutet das, eine ernsthafte, professionelle und langfristige CSR Entwicklung als strategisches Unternehmensziel zu verfolgen.

Die Anreizgestaltung des NAP CSR fokussiert auf „Doing good". Hier sind CSR Anreize als Belohnung für pionierhaftes unternehmerisches Wirken zu verstehen. In erster Linie setzt der NAP CSR dabei auf den Business Case, weil sich damit CSR wirtschaftlich bezahlt macht. Es muss aber auch Anreize mit einer Korrekturwirkung geben, die dem „Doing no harm" zuzuordnen sind. Hier sollen CSR Anreize Schwächen im Markt kompensieren und Wettbewerbsnachteile für Unternehmen mit ambitionierteren CSR Leistungen, die sich „auf den Weg machen", ausgleichen.

Zielsetzungen

Mit dem NAP CSR werden folgende Zielsetzungen verfolgt:

- Mit dem Anreizsystem des NAP CSR soll die Idee des CSR Business Case forciert werden, um eine möglichst hohe Anschlussfähigkeit und Verbreitung von CSR in Unternehmen zu erreichen. Das Anreizsystem soll aber dort greifen, wo wettbewerbliche Nachteile für Unternehmen zu erwarten sind und daher über Anreize motiviert bzw. kompensiert werden muss.
- Mit dem Anreizsystem will der Staat (1) in die Rolle als Gestalter von Rahmenbedingungen, die eine breite CSR Umsetzung fördern, und (2) selbst in die Rolle als CSR Vorbild (über die Verwaltungen, die staatsnahen und staatlichen Unternehmen) gehen.
- Das Anreizsystem des NAP CSR will die gesamte Bandbreite möglicher Anreize nutzen, um mit geringstem Aufwand die größtmögliche Wirkung zu erzielen. Hierzu zählen direkte und indirekte Anreize für die Zielgruppen aber auch immaterielle und materielle Anreizsysteme.
- Mit dem Anreizsystem sollen wirtschaftliche Zielgruppen sowohl direkt angesprochen als auch mittelbar über die BürgerInnen und KonsumentInnen aktiviert werden.

Der NAP CSR zeigt dabei folgende Handlungsansätze auf:

1. Ein direkter Anreiz soll durch die Verbreitung und Weiterentwicklung eines CSR-orientierten Beschaffungswesens erfolgen.
2. Ein direkter Anreiz soll durch eine konsequente Socially Responsible Investment (SRI) Strategie geschaffen werden. Die betroffenen AkteuerInnen (beispielsweise die Exportkreditsicherung) sind in die Weiterentwicklung (im Rahmen des CSR-Roundtable-Prozesses) einzubeziehen.
3. Ein direkter Anreiz soll durch eine CSR orientierte Förder- und Steuerpolitik ausgeübt werden (siehe auch das Handlungsfeld 2: „Innovationen").

1. Ein CSR-orientiertes Beschaffungswesen

Mit dem NAP CSR wird der Grundsatz vertreten, dass Anreizsysteme klare Orientierungsmaßstäbe brauchen. Diese Maßstäbe müssen sich sowohl auf internationale Richtlinien und Regelungen beziehen als auch im CSR-Roundtable-Prozess auf nationaler Ebene diskutiert, weiter entwickelt und bei Bedarf konkretisiert werden. Des Weiteren ist der Aspekt der Selbstverpflichtung der öffentlichen Hand, um glaubwürdig in die Vorbildrolle gehen zu können, für den Erfolg von CSR sehr wichtig.

Der Staat ist daher gefordert, das öffentliche Beschaffungswesen weiter auf CSR Kriterien ausrichten. Zu nennen sind hier die Aktivitäten zur Umsetzung des „Österreichischen Aktionsplans zur nachhaltigen öffentlichen Beschaffung 2010" und eine aktuell tätige Arbeitsgruppe, die Vorschläge

für „Soziale Kriterien in der öffentlichen Beschaffung“ entwickelt und die Arbeitsgruppe „Innovation und Beschaffung“.

Auf EU Ebene gilt es, die Aktivitäten zur Modernisierung der Beschaffungsrichtlinien der EU-Kommission (Modernisation of EU public procurement Directives – Proposals of the commission EU procurement Directives , 2011) dahingehend zu unterstützen. Sinngemäß sind alle Gebietskörperschaften angehalten, eine entsprechende Vorbildrolle zu übernehmen. Dabei sollten das Bestbieterprinzip und die Bewertung der Lebenszykluskosten durchgängig zur Anwendung kommen.

Mit dem NAP CSR sollen folgende Punkte aufgegriffen werden:

- Im Rahmen des NAP CSR ist die Umsetzung des „Österreichischen Aktionsplans zur nachhaltigen öffentlichen Beschaffung 2010“ (naBE) zu forcieren und sicher zu stellen, dass über den bisherigen Kriterienkatalog hinausgehend, soziale und ökologische Kriterien integriert werden. Dieser Katalog soll durch eine Weiterentwicklung der entsprechenden Grundlagen im Bundesvergabegesetz künftig eine verbindliche Grundlage im öffentlichen Beschaffungswesen darstellen.
- Für die Umsetzung eines nachhaltigen öffentlichen Beschaffungswesens sind quantitative Ziele zu erarbeiten und entsprechende Ressourcen bereit zu stellen.
- Es ist entsprechend darauf zu achten, dass im nationalen Einflussbereich liegende gesellschaftliche Zielsetzungen über das öffentliche Beschaffungswesen systematisch umgesetzt werden (z.B. Energie- und Ressourceneffizienz. Klimaschutz, Artenvielfalt, Anti-Diskriminierung, familien- und altersgerechtes Arbeiten, Inklusion, Diversität, regionale Entwicklung).
- Es ist weiters anzustreben, dass zukünftig die öffentliche Beschaffung systematisch die Einhaltung von Kernnormen internationaler Abkommen im Menschenrechts-, Arbeitnehmerschutz- und Umweltbereich mitberücksichtigt (Implementierung der UN-Guiding Principles on Business and Human Rights).
- Es ist sicherzustellen, dass Beschaffungsverantwortliche und Beschaffungsbehörden auf allen Ebenen, über einen einfachen Zugang zu klaren Richtlinien und anderen grundlegenden Informationen über die Nachhaltigkeitskriterien für die öffentliche Beschaffung verfügen.
- Die Sanktionsmöglichen des öffentlichen Beschaffungswesens für mögliche Fälle der Irreführung oder Vertragsverletzung im Zusammenhang mit CSR-orientierten Zielsetzungen, sind auszubauen.

Diese Leitlinien für die öffentliche Beschaffung sollen sinngemäß auch den Orientierungsrahmen für unternehmerische Einkaufs- und Beschaffungsvorgänge bilden.

2. Anreize durch Socially Responsible Investment (SRI)

Mit dem NAP CSR verbindet die Bundesregierung die Zielsetzung , dass der Staat seine Aktivitäten in den Rollen als Kreditgeber, Investor und in der Sicherung von Exportkrediten, deutlicher auf CSR Kriterien ausrichten und diese verstärkt als Entscheidungskriterien heranziehen soll. Dazu braucht es klare Prinzipien, die zweierlei Wirkungen zeigen. Erstens erhöhen solche Prinzipien die Sensibilität bei InvestorInnen und AnlegerInnen für CSR Anliegen. Zweitens wirken solche Maßnahmen richtungsweisend auf den Unternehmenssektor in der Rolle als KreditnehmerInnen als auch in der Rolle als Vorbild für andere institutionelle und private InvestorInnen- und AnlegerInnengruppen.

Mit dem NAP CSR sollen folgende Punkte aufgegriffen werden:

- Es wird angestrebt, die aktive Gestaltungsrolle aufzugreifen und die entsprechenden Rahmenbedingungen zur Ausgestaltung staatlicher Subventionen, Zuschüsse und Förderungen für Finanzanlagen, Pensionskassen und Betriebliche Vorsorgekassen zu entwickeln. Mit dem NAP CSR wird die stufenweise Einbeziehung von SRI Kriterien und Standards nach internationalen Prinzipien und Transparenzregeln (beispielsweise EUROSIF, UN-Principles for Responsible Investment (UNPRI)) unterstützt.
- Ebenso wird angestrebt, in den Veranlagungsportfolios der öffentlichen Hand und der staatsnahen und staatlichen Unternehmen, verstärkt SRI Kriterien und Standards einzubeziehen und des Weiteren im Pensionskassengesetz zu verankern.
- Die verstärkte Bewerbung und Verbreitung des Österreichischen Umweltzeichens für Grüne Fonds ist zu forcieren.
- Die öffentliche Hand sollte in ihren Geschäftsbeziehungen mit Versicherungsunternehmen und Investment-Banken voraussetzen, dass sich diese zumindest den Prinzipien der UNPRI (inklusive Erweiterung um die relevanten Themenfelder zu unternehmen, zu denen sich die Republik Österreich bereits international verpflichtet hat (ILO-Normen, Menschenrechtsabkommen, Klima-Protokoll) unterwerfen oder systematisch soziale und ökologische Standards in ihrem Kerngeschäft implementieren.
- Weiters wird die Einrichtung einer ExpertInnengruppe zur Ausarbeitung eines SRI Kodex mit entsprechenden SRI Qualitätsstandards und Transparenzregeln für Finanzmarktinstitutionen in Aussicht genommen.

3. Eine CSR-orientierte Förder- und Steuerpolitik

Mit dem NAP CSR unterstreicht die Bundesregierung die Notwendigkeit von Förderanreizen für gesellschaftlich verantwortliches Handeln. Mit diesen sehr direkt wirkenden Anreizen sollen folgende wichtige Wirkungen erzielt werden:

- Durch eine CSR-orientierte Förderlandschaft wird eine größere Verbreitung von CSR Aktivitäten ermöglicht.
- Unternehmen, die bereits CSR-Vorbilder sind, können zusätzliche Aktivitäten (weiterführende Innovationen im Sinne von „next practice“) in die Umsetzung bringen und dabei mögliche wettbewerbliche Risiken minimieren.
- In Branchen, in denen CSR Themen bisher noch wenig Wirkung entfalten konnten, können Förderanreize erstmalig entsprechende Aktivitäten anstoßen und somit neue Aktivitätsfelder für gesellschaftlich verantwortungsvolles Handeln eröffnen.

Mit dem NAP CSR sollen folgende Punkte aufgegriffen werden:

- Das vielfältige Portfolio der öffentlichen Förderungen soll stärker richtungsweisend für CSR Zielsetzungen genutzt werden. Dazu sind – analog zu den Zielsetzungen im Rahmen der Forschungsförderung – CSR Kriterien in die Richtlinien und -vergabeentscheidungen der umwelt-, sozial- und wirtschaftspolitischen Beihilfenregime aufzunehmen. Entsprechende Rahmenbedingungen und Kriterien sind im CSR-Roundtable-Prozess im Einklang mit internationalen Entwicklungen zu erarbeiten.
- Ebenso sind im Rahmen des CSR-Roundtable-Prozesses allfällige weitere fiskale Anreizinstrumente insbesondere auch abgaben- und steuerrechtlicher Natur zu analysieren.

Handlungsfeld 4:

CSR „verwesentlichen" – die Wahrnehmung und Akzeptanz durch die Wirtschaft und Gesellschaft stärken und verbreitern

Begründung

Es ist ein Ziel des NAP CSR, das Prinzip gesellschaftlicher Verantwortung von Unternehmen in der betrieblichen Wahrnehmung wie auch im öffentlichen Bewusstsein stärker zu verbreitern und intensiver zu verankern. Nur wenn CSR in den „Hauptstrom" der Aufmerksamkeit der relevanten Zielgruppen aufgenommen wird, wird eine breite Umsetzung gesellschaftlicher Verantwortung möglich. Das gilt für große, multinationale Konzerne als auch für alle anderen Unternehmen und Organisationen und nicht zuletzt auch den öffentlichen Sektor. Die erfolgreiche CSR Umsetzung bedarf weiters der Aufmerksamkeit der KonsumentInnen und BürgerInnen, damit CSR als Leistung von Unternehmen erkannt, wertgeschätzt und aktiv nachgefragt wird. Erst aus dieser Nachfrage heraus kann sich für die Wirtschaft der CSR Business Case ergeben.

Die dafür notwendige Informations- und Kommunikationsarbeit wird zu einer begleitenden Aufgabe im CSR-Roundtable-Prozess.

Zielsetzungen

Mit dem NAP CSR werden folgende Zielsetzungen verfolgt:

- Um die CSR-Umsetzung erfolgreich zu machen, muss die CSR-orientierte Informations- und Kommunikationsarbeit verstärkt werden. Dazu soll der unmittelbare Zusammenhang von Nachhaltigkeit in umfassender Sicht und CSR als Nachhaltigkeit auf unternehmerischer Ebene deutlicher und intensiver dargestellt werden.
- Die Information und Kommunikation muss den „Hauptstrom der Aufmerksamkeit" aller Zielgruppen des NAP CSR erreichen. Inhalt der Kommunikation ist die gesellschaftliche Verantwortung (CSR) von Unternehmen als deren Beitrag zur Nachhaltigkeit, und die damit verbundenen Ansprüche, Ziele und Leistungen.
- Gesellschaftliche Verantwortung von Unternehmen muss als wichtiges Zukunftsthema auch verstärkt in der Bildungslandschaft der Hochschulen und in der beruflichen Aus- und Weiterbildung positioniert werden.

Der NAP CSR zeigt dabei folgende Handlungsansätze auf:

1. Verstärkte CSR-Informations- und Kommunikationsarbeit für die Zielgruppe der Unternehmen und Organisationen mit Schwerpunkt KMUs
2. Verstärkte CSR-Informations- und Kommunikationsarbeit für die Zielgruppe der KonsumentInnen
3. Verbesserte Integration von CSR in die gesamte Bildungslandschaft.

1. CSR-Kommunikation für die Wirtschaft, Schwerpunkt KMUs

Begleitende CSR Information und Kommunikation will möglichst viele Unternehmen und Organisationen ansprechen und mit spezifischen CSR Inhalten erreichen. Ziel ist die Steigerung des Bewusstseins über die Bedeutung von gesellschaftlicher Verantwortung im wirtschaftlichen Handeln.

Viele Aktivitäten, die mit dem NAP CSR initiiert werden, leisten einen Beitrag zu dieser Bewusstseinsschärfung. Schwerpunkte finden sich im Handlungsfeld 2: „Anreize“ (beispielsweise die Ansätze im nachhaltigen Beschaffungswesen und einer CSR-orientierten Förder- und Steuerpolitik) und im Handlungsfeld 5: „Glaubwürdigkeit und Transparenz“ (beispielsweise die dort behandelten Berichterstattungsmodalitäten und Qualitätsauszeichnungsmechanismen).

Im Handlungsfeld 4: „CSR verwesentlichen“ werden Aktivitäten aufgezeigt, die dazu ergänzende, positive Wirkungen erzielen können. Hierzu zählen CSR-Öffentlichkeitsarbeit in Form von Kampagnen, eine verstärkte mediale Aufarbeitung des Themas CSR, die Bereitstellung von Austauschformaten (wie etwa der jährlich durchgeführte CSR-Tag) und CSR-Konferenzen, Unternehmensplattformen (beispielsweise respACT) Netzwerke (beispielsweise NeSoVe), und Kooperationen zwischen Unternehmen und dem dritten Sektor (wie etwa die „Brückenschlag“ – Initiativen).

Mit dem NAP CSR sollen folgende Punkte aufgegriffen werden:

- Organisationen und Multistakeholderplattformen, die als Informationsdrehscheibe CSR-Bewusstsein schaffen, CSR-Themen in die Wirkschaft tragen und AkteurInnen vernetzen, sind in ihrem Fortbestand zu unterstützen. Dabei sind vorhandene, erfolgreich agierende Plattformen besonders zu stärken.
- Eine wirkungsorientierte CSR Öffentlichkeitsarbeit durch CSR-Kampagnen im Zuge der Umsetzung des CSR-Roundtable-Prozesses (in Zusammenarbeit mit entsprechenden StakeholderInnengruppen) auf Seiten der hier primär berührten Ressorts und im Rahmen der Interessenvertretungen ist zu forcieren.
- Die Vernetzung von WirtschaftsakteurInnen durch entsprechende Austauschformate und Web 2.0 Applikationen zu CSR Themenstellungen ist zu verstärken. Hierzu zählen Konferenzen, Workshops, „best practice“ Veranstaltungen, CSR Trainings und andere Formate.
- Gezielte, öffentlichkeitswirksame Kooperationen sektorübergreifender Natur (beispielsweise Kooperationen von Unternehmen und Bildungs-/Forschungseinrichtungen, zivilgesellschaftlichen Organisationen und sozialwirtschaftlichen Unternehmen) sind wünschenswert.
- Eine verstärkte Analyse, Dokumentation und Weiterentwicklung von CSR-Maßnahmen (best practice, next practice Beispiele) dient dem Verbreitungsanliegen und wird daher unterstützt.

Im Rahmen der Umsetzung im CSR-Roundtable-Prozess ist zu prüfen, welche Möglichkeiten bestehen, besonders die Zielgruppe der kleinen und mittleren Unternehmen mit geeigneten Informations- und Kommunikationsangeboten anzusprechen und für eine CSR-Strategie zu gewinnen. Hier wäre aus Sicht des NAP CSR ein besonderer Schwerpunkt zu setzen.

2. Verstärkte CSR-Informations- und Kommunikationsarbeit für die Zielgruppe der KonsumentInnen

Gesellschaftlich verantwortlicher Konsum bei der privaten Nachfrage nach Produkten und Dienstleistungen erfordert klare Entscheidungsmöglichkeiten auf Basis ausreichender, nachvollziehbarer und glaubwürdiger Informationen (Handlungsfeld 5: Glaubwürdigkeit und Transparenz).

Diese bereitzustellen ist zum einen eine wesentliche Anforderung an die Unternehmen selbst. Zum andern ist die Schärfung des KonsumentInnenbewusstseins in diesem Bereich auch eine wichtige öffentliche Gestaltungsaufgabe. Unverzichtbar ist hier schließlich auch der Beitrag der AkteurInnen und Organisationen des dritten Sektors im Bereich des KonsumentInnenenschutzes. Es geht

insgesamt um faktenbasierte Aufklärung mit klaren Informationen, damit kritische Abwägungen möglich werden, um Sensibilisierung der Öffentlichkeit und nicht zuletzt um die Erhöhung der Eigenverantwortung der KonsumentInnen.

Mit dem NAP CSR sollen folgende Punkte aufgegriffen werden:

- Mit dem NAP CSR sind die öffentlich-rechtlichen Medien gefordert, CSR-Inhalte zur Aufklärung über nachhaltige Produkte und Dienstleistungen und über gesellschaftliche Verantwortung von Unternehmen verstärkt in die Programmgestaltung aufzunehmen, um das Bewusstsein für nachhaltiges Konsumieren zu stärken (siehe $4(1)14 e3w ORF Gesetzes[3])
- Laufende Programme und Projekte der Ressorts zur Förderung eines verantwortungsvollen Verbraucherverhaltens durch sachbezogene Informationskampagnen, durch die Sichtbarmachung von „best practice" und „next practice" Beispielen und durch die Etablierung und Finanzierung von kooperationsorientierten Projekten sind weiter zu führen und zu stärken.
- Mit dem NAP CSR werden privatwirtschaftliche und zivilgesellschaftliche Initiativen bei der Entwicklung und Umsetzung von Programmen zur Weckung des Bewusstseins für „nachhaltigen Konsum" unterstützt.
- Informationskampagnen durch Aktivierung und Vernetzung von KonsumentInnen-Organisationen (beispielsweise des VKI) und Organisationen des dritten Sektors, insbesondere den NGOs, sind umzusetzen. Weiters werden bestehende Plattformen für nachhaltiges Konsumieren (beispielsweise Reparaturnetzwerke) und die Nutzung von Web 2.0 Applikationen unterstützt.
- Auszeichnungssysteme für bewusstes Kaufen und andere vorhandene Instrumente sowie konsumentenschutzorientierte Organisationen, die solche Anliegen forcieren, sind zu stärken und zu fördern.
- Ein Anliegen des NAP CSR ist die Information und das Bewusstsein über Produkt-Lebenszyklusauswirkungen zu verbessern, die Langlebigkeit von Produkten zu erhöhen, und „geplante Obsoleszenz" zu verhindern.
- Die CSR-Kommunikation der Unternehmen (siehe Handlungsfeld 5: „Glaubwürdigkeit und Transparenz") ist in Hinblick auf ihre Verständlichkeit und Nachvollziehbarkeit für KonsumentInnen zu verbessern.

3. Integration von CSR in die gesamte Bildungslandschaft

Die Integration von CSR-Themen in die Forschung und Entwicklung wurde in Handlungsfeld 2: „Innovation" beschrieben. Die Integration von CSR-Inhalten in die bildungspolitischen Strukturen und Mechanismen stellt einen wichtigen Teil der umfassenden Nachhaltigkeitsbildung dar. Die österreichische Strategie zur Bildung für nachhaltige Entwicklung (2008) versteht Bildung als integralen Bestandteil nachhaltiger Entwicklung und verfolgt ebenso das Ziel der Bewusstseinsbildung bei Lehrenden und Lernenden. CSR-Orientierung in der Bildung muss besonders auch die berufliche Aus- und Weiterbildung umfassen und neue Schwerpunkte setzen.

Mit dem NAP CSR sollen folgende Punkte aufgegriffen werden:

- Mit dem NAP CSR werden Universitäten und Hochschulen aufgefordert, entsprechend dem Kommissionspapier 2011, die UN Principles for Responsible Management Education zu unterzeichnen und umzusetzen.

[3] „die Information über Themen der Gesundheit und des Natur-, Umwelt- sowie Konsumentenschutzes unter Berücksichtigung der Förderung des Verständnisses über die Prinzipien der Nachhaltigkeit"

- Eine stärkere Verankerung von CSR-Themen im Bildungssystem ist in Abstimmung mit der „Österreichischen Strategie zur Bildung für nachhaltige Entwicklung“ anzustreben. Mit dem NAP CSR sollen insbesondere Hochschulen und Universitäten motiviert und unterstützt werden, CSR-Studiengänge einzurichten und dem Thema insbesondere im Rahmen der wirtschaftspolitischen Curricula verstärkt Rechnung zu tragen. Der „Sustainability Award“ des BMWFJ und des BMLFUW als Auszeichnungs-Mechanismus für Projekte und Programme österreichischer Hochschulen ist weiterzuführen.
- Die Verankerung von CSR-Themen in der beruflichen Aus- und Weiterbildung stellt einen Schwerpunkt in der CSR-Bildung dar. Hier ist die Integration von CSR-Inhalten in die Lehrpläne der Berufsschulen zu forcieren. Die berufsbildenden Institutionen sind aufgerufen, CSR-Themen in die Entwicklung neuer Aus- und Weiterbildungsprogramme aufzunehmen.
- Die Schaffung von Netzwerken und Kooperationen für CSR Bildung ist anzustreben. Schnittstellen zwischen Hochschulen, Universitäten und wirtschaftlichen AkteurInnen sind wünschenswert.

Handlungsfeld 5:

Glaubwürdigkeit und Transparenz

Begründung

Engagierte Unternehmen sollen von CSR Strategien langfristig ebenso profitieren können, wie die Gesellschaft. Das setzt voraus, dass CSR ernsthaft und werthaltig betrieben und im unternehmerischen Handeln verstetigt wird und dieses Engagement am Markt von den KonsumentenInnen und anderen Stakeholdern auch genau so wahrgenommen und eingestuft wird.

Die Transparenz und Nachvollziehbarkeit der CSR Leistungen von Unternehmen ist eine zentrale Voraussetzung für die Glaubwürdigkeit und Würdigung dieses Engagements durch die Anspruchsgruppen der Unternehmen. Dementsprechend wichtig ist es, im NAP CSR die Rahmenbedingungen zu den Themen Berichterstattung und Kommunikation, zu Qualitätsstandards für CSR und zur Hintanhaltung irreführender Werbung zu definieren. Je klarer und nachvollziehbarer die CSR/Nachhaltigkeitsberichterstattung mittels Reporting-Richtlinien und je besser und transparenter die Qualität des unternehmerischen Engagements auf Grundlage adäquater CSR-Standards und CSR-Indikatoren wird, desto mehr Akzeptanz werden die Aktivitäten der Unternehmen langfristig finden. Dem Staat kommt in der Frage *Glaubwürdigkeit und Transparenz* eine unterstützende, qualitätssichernde und regulierende Rolle zu.

Zielsetzungen

Mit dem NAP CSR werden folgende Zielsetzungen verfolgt:

- Österreichische Unternehmen sollen zu einem proaktiven Zugang zu einer gesellschaftlich verantwortlichen Unternehmensführung ermutigt werden und Ihre CSR Leistungen nachvollziehbar gestalten und kommunizieren.
- Die CSR/Nachhaltigkeitsberichterstattung soll in ihrer Qualität und Glaubwürdigkeit erhöht und in ihrer Nachvollziehbarkeit verbessert werden, um ehrliches CSR Engagement von Unternehmen besser sichtbar zu machen.
- Hierzu sollen Unternehmen entsprechend qualitätsgesicherte Informationen aufbereiten, um für KonsumentInnen, öffentliche AuftragnehmerInnen, die breite Öffentlichkeit und den business-to-business-Bereich gute Entscheidungsgrundlagen zur Verfügung stellen zu können.
- Ergänzend sind Mechanismen für eine unabhängige Überprüfung und Validierung derartiger Informationen zu schaffen und die Instrumente zum Schutz vor irreführender Werbung in der CSR Kommunikation weiter zu entwickeln.
- Es sollen mehr Unternehmen – besonders ab einer bestimmten Größenordnung – mit entsprechenden Regeln für die CSR/Nachhaltigkeitsberichterstattung gewonnen werden, um mit CSR mehr Breitenwirkung und Aufmerksamkeit zu erzielen.

Der NAP CSR zeigt dabei folgende Handlungsansätze auf:

1. Mit Berichterstattungspflichten für große Unternehmen und Unternehmen in staatlichen/staatsnahen Bereichen soll insgesamt mehr Transparenz über CSR-Leistungen der Wirtschaft erreicht werden.
2. Um die Werthaltigkeit von CSR-Engagement zu sichern, sind aussagekräftige CSR-Standards und glaubwürdige Gütezeichen, unter Berücksichtigung bestehender Ansätze und internationalen Entwicklungen, weiterzuentwickeln.

3. Um die Glaubwürdigkeit zu stärken, ist ein wirksamer Schutz vor irreführender Werbung in der CSR Kommunikation aufzubauen.

1. Berichterstattungspflichten für bestimmte Unternehmen

Unter der CSR/Nachhaltigkeitsberichterstattung wird schwerpunktmäßig das „non-financial reporting" verstanden. Mit geplanten Berichterstattungspflichten beabsichtigt die Bundesregierung im Einklang mit internationalen Diskussionen und dem im April 2013 von der EU-Kommission vorgelegten Legislativvorschlag zu Berichtspflichten für Unternehmen in Bezug auf ihre sozialen und ökologischen Auswirkungen zunächst jene Unternehmen einzubeziehen, die bereits zuvor mit umfassenden Berichterstattungsrichtlinien konfrontiert wurden und daher auf diese Aufgabe vorbereitet sind. Es sind dies besonders die börsennotierten Unternehmen und Unternehmen mit mehr als 500 MitarbeiterInnen. Um aktiv die Vorbildrolle einzunehmen, wird die Bundesregierung weiters die staatlichen und staatsnahen Unternehmen in diese Berichterstattungspflichten einbeziehen.

Mit dem NAP CSR sollen folgende Punkte aufgegriffen werden:

- Im Einklang mit den Entwicklungen auf EU-Ebene soll die Ausweitung des verpflichtenden „non-financial-reporting" nach klaren Reportingstandards für börsennotierte Unternehmen und Unternehmen mit mehr als 500 Beschäftigten auf national-staatlicher Ebene vorangetrieben werden. Die hierzu notwendigen Kriterien sollen von den Richtlinien der GRI (Global Reporting Initiative) ausgehen und sind im Rahmen des CSR-Roundtable-Prozesses zu konkretisieren.
- Die Ergänzung des Rechnungslegungsänderungsgesetzes, um den vom Gesetzgeber angestrebten Informationszweck zu erfüllen, wird beabsichtigt. Die im § 243 Abs 5 UGB normierte Berichterstattung über den Umweltbereich sowie über ArbeitnehmerInnenbelange ist zu konkretisieren und durch klare Indikatoren zu ergänzen, ebenso der Corporate Governance Kodex.
- Um der Vorbildfunktion des Staates Rechnung zu tragen, ist es beabsichtigt, Unternehmen im Staatsbesitz (oder mit Kontrollmehrheit der öffentlichen Hand) zu einer an GRI-orientierten CSR/Nachhaltigkeitsberichterstattung zu verpflichten.
- Unternehmen jedweder Größe und Rechtsform sind zur Teilnahme an den nationalen Preisauszeichnungsregimen für gesellschaftliche Verantwortung wie insbesondere dem TRIGOS und dem ASRA zu motivieren.
- Weiters sind insbesondere kleine und mittlere Unternehmen darin zu unterstützen, ihr CSR-Engagement systematisch in die Unternehmenspolitik zu integrieren und die entsprechenden Kommunikations- und Berichterstattungsmechanismen weiterzuentwickeln.

2. Entwicklung von CSR-Standards und Gütezeichen

Standards und Gütezeichen für CSR-Engagement sollen eine Orientierungshilfe für Unternehmen darstellen, an welchen Maßstäben sich das gesellschaftlich verantwortungsbewusste Verhalten konkretisiert und welche Kriterien besonders wichtig sind. Ebenso sollen sie den Anspruchsgruppen Richtungssicherheit über die für ihre Einstellungen und Entscheidungen auf Grundlage wesentlicher unternehmerischer Ziele und Leistungen in Bereich der gesellschaftlichen Verantwortung eröffnen.

Standards und Gütezeichen sollen belegen, dass die Wahrnehmung gesellschaftlicher Verantwortung mit gleicher Professionalität im Management verankert wird, wie dies bei wirtschaftlichen Zielen der Fall ist. Immer geht es dabei um Zieldefinitionen, um die Messung der Zielerreichung, die Ressourcenbereitstellung und um dialogorientierte Kommunikationsprozesse. Standards und Gütezeichen erleichtern es Unternehmen, sich in der StakeholderInnenlandschaft sichtbar und glaubwürdig mit ihrem CSR-Engagement zu positionieren.

Damit werden folgende Ziele verfolgt:

- Die glaubwürdige und nachvollziehbare Hervorhebung besonderer Leistungen von Unternehmen
- Die klare und transparente Aufbereitung gesellschaftlich erwünschter Verhaltensweisen

Mit dem NAP CSR sollen folgende Punkte aufgegriffen werden:

- Mittels eines österreichischen CSR-Gütesiegels sollen Mindesterwartungen an gesellschaftlich wünschenswerte Verhaltensweisen und Maßstäbe in den wesentlichen ökologischen, sozialen und mitarbeiterInnenbezogenen Anliegen, im Bereich der Menschenrechte und hinsichtlich der Hintanhaltung von Korruption definiert/standardisiert und dabei auch eine ebenso unabhängige wie glaubwürdige Qualitätssicherung durch Dritte vorgesehen werden. Dabei soll auf die bestehenden österreichischen Vorarbeiten (NeSoVe- Indikatorenkatalog zur sozialen Verantwortung von Unternehmen, Branchenleitfäden von respACT) und Normen (ONR 192500) und die internationalen Leitfäden und Prinzipien in diesem Bereich zurückgegriffen werden.
- Die Entwicklung und strategische Ausrichtung dieses Instrumentariums (Standards/Gütesiegel für Organisationen, für Produkte etc.), seine konkrete Ausgestaltung auf Kriterienebene, seinen Wirkungsbereich und seine Systemgrenzen im Zusammenhang mit der Wertschöpfungskette sowie die Mechanismen zur Validierung und Qualitätssicherung durch Dritte (klar, kosteneffizient, marktnah und ohne Monopolbildungen), sind im CSR-Roundtable-Prozess unter Einbeziehung aller wichtigen StakeholderInnengruppen vorzunehmen.

3. Schutz vor irreführender Werbung in der CSR Kommunikation

Im Sinne der Glaubwürdigkeit des unternehmerischen CSR-Engagements ist es im gemeinsamen Interesse der Gesellschaft und der Wirtschaft, absichtliche Irreführung („Greenwashing“) zu verhindern. Dieser Gefahr ist einerseits durch ein kritisches Monitoring („Watchdog-Funktion“ von konsumentenpolitischen Einrichtungen wie dem VKI und Organisationen im NGO-Bereich) zu begegnen. Andererseits kann auch durch die rechtlichen Sanktionsmöglichkeiten im Zusammenhang mit dem Tatbestand der irreführenden Werbung entgegengetreten werden.

Der CSR-Roundtable als Umsetzungs-mechanismus des NAP CSR

Begründung

Mit dem NAP CSR will die Bundesregierung die Wahrnehmung gesellschaftlicher Verantwortung durch die wirtschaftspolitischen AkteurInnen stärken. Um die damit verbundenen sozialen, ökologischen und sektorpolitisch ebenso wie volkswirtschaftlich vorliegenden Herausforderungen und Chancen aufzuzeigen, wurden im NAP CSR zunächst wichtige Handlungsfelder definiert, die den Orientierungsrahmen für die mit CSR verbundenen politischen Gestaltungsziele abstecken. Die fünf Handlungsfelder geben die Themen vor, an denen im Rahmen der Umsetzung weiter gearbeitet werden muss. Dabei gilt es sowohl die inhaltliche Tiefe als auch die Qualität des damit verbundenen Dialog-Prozesses weiterzuentwickeln. Die Bundesregierung wird zu diesem Zweck einen nationalen **CSR-Roundtable als zentralen Umsetzungsmechanismus konstituieren.**

Ohne einen intensiven und breiten Dialog verschiedener Stakeholdergruppen, den der NAP CSR initiieren will, kann weder auf der Metaebene noch in den einzelnen Handlungsfeldern ein nachhaltiger Erfolg erzielt werden. In der Initiierung und konsequenten Fortsetzung des Dialog-Prozesses liegt daher eines der Hauptanliegen des NAP CSR für die Umsetzung. Die Ziele sind dabei die Schaffung eines tiefergehenden inhaltlichen CSR-Verständnisses auf möglichst breiter Basis und die Lösung prinzipieller Konflikte des Diskurses für eine erfolgreiche Umsetzung.

Hintergrund

Je nach Interessenslage wird CSR aus sehr unterschiedlichen Perspektiven betrachtet und interpretiert. Der Diskurs beginnt vielfach mit konträren Ansprüchen und Ausgangslagen. Die Widersprüche und Konflikte sind ebenso vielfältig wie die beteiligten Gruppen und nicht *a priori* machtpolitisch per Entscheidung lösbar. Eine erfolgreiche Umsetzung kann sich nur abzeichnen, wenn ein ebenso breiter wie transparenter Dialog eröffnet wird, der verschiedene Interessenslagen aufnehmen, fixe Standpunkte auflösen, Synergien aufzeigen und die Kraft von allen Seiten für eine gemeinsame Lösung nutzen kann.

Zielsetzungen

Für den CSR-Roundtable-Prozess wird festgelegt:

- Der in der Ausarbeitung des NAP CSR begonnene Stakeholder-Dialog ist als CSR-Roundtable-Prozess zu intensivieren und in die Breite zu bringen. Ziel ist es, ein breiteres, gemeinsam getragenes Verständnis von CSR und den damit verbundenen Gestaltungszielen zu erwirken. Dazu bedarf es der Einbindung aller relevanten Stakeholdergruppen „auf Augenhöhe“, entsprechender Ressourcen, politischer Verantwortlichkeiten und effektiver Prozessmanagement- und Entscheidungsstrukturen.
- Die inhaltlichen Perspektiven sind entlang der fünf definierten Handlungsfelder des NAP CSR zu vertiefen und maßnahmenseitig zu konkretisieren. Dabei ist an internationale Diskurse anzuschließen und insbesondere auf die Entwicklungen auf EU-Ebene Bedacht zu nehmen..

Ein permanentes Multistakeholderforum

Mit dem nationalen CSR-Roundtable konstituiert die Bundesregierung permanentes Multistakeholderforum , das sich aus VertreterInnen der primär betroffenen Ministerien, der Interessenvertretungen und zivilgesellschaftlicher Organisationen und Plattformen zusammensetzen soll und folgende Aufgaben zu erfüllen hat:

- **Ausarbeitung von klaren, quantifizierbaren Zielen für die Umsetzung des NAP CSR**: Der gesamte Umsetzungsprozess muss wirkungsorientiert geführt werden. Dazu sind inhaltliche und zeitliche Prioritäten, Wirkungsziele, Indikatoren, Evaluierungsmechanismen und Berichterstattungspflichten festzulegen.
- **Festlegung von jährlichen Arbeitsprogrammen:** Dazu sind im Rahmen des Multistakeholderforums zeitlich befristete thematische Arbeitsgruppen einzurichten, die sich der Schwerpunktthemen entlang der fünf definierten Handlungsfelder des NAP CSR annehmen. Bereits bestehende ExpertInnengruppen sind bestmöglich zu integrieren.
- **Einbindung der breiten Öffentlichkeit durch geeignete Kommunikationsmechanismen:** Der CSR-Roundtable-Prozess muss den Kriterien des NAP CSR entsprechen, also transparent, glaubwürdig und nachvollziehbar gestaltet und von einer CSR Kommunikationsarbeit durch die primär verantwortlichen Ressorts begleitet werden. Dazu gehören auch die Einrichtung einer NAP CSR Website und die Nutzung von Web 2.0 Plattformen.