



Permanent Mission
of the Federal Republic of Germany
to the Office of the United Nations and
to the other International Organizations
Geneva

Ref.: Pol-10 381.70 / JAL DEU 5/2024

(please quote when answering)

Note No.: 268 /2024

Note Verbale

The Permanent Mission of the Federal Republic of Germany to the Office of the United Nations and to the other International Organizations in Geneva presents its compliments to the Office of the High Commissioner of Human Rights and has the honour to refer to a communication sent by the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur in the field of cultural rights and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on 12 September.

The Permanent Mission of the Federal Republic of Germany is pleased to transmit herewith the answer of the Federal Republic of Germany.

The Permanent Mission of Germany to the Office of the United Nations and to the other International Organizations in Geneva avails itself of this opportunity to renew to the Office of the High Commissioner of Human Rights the assurances of its highest consideration.

Geneva, 6 November 2024



To the
Office of the High Commissioner of Human Rights
Palais Wilson
Geneva

Response of the Federal Republic of Germany

to the

Joint Communication from Special Procedure - Office of the High Commissioner for Human Rights

Ref.: AL DEU 5/2024

Remembering the atrocities committed during German colonial rule and the suffering of the Nama and Herero peoples in what was then known as German South West Africa is of particular importance to Germany. The German Government acknowledges its historical, moral and political responsibility for these crimes. As mentioned in the Joint Declaration by the Federal Republic of Germany and the Republic of Namibia “United in Remembrance of Our Colonial Past, United in Our Will to Reconcile, United in Our Vision of the Future”, initialled in May 2021, Germany is aware that during German colonial rule in what was then known as German South West Africa “German authorities created concentration camps, notably at Swakopmund, Shark Island and Windhoek (Alte Feste)”. They bear testimony to the atrocities committed by German colonial troops, which have to be called genocide. In this context, Germany would like to expressly refer once more to its response of 1 June 2023 to the seven UN Special Rapporteurs.

According to the information available to Germany, the Hyphen consortium is planning – in connection with the Hyphen project and planned exports of green ammonia produced – to construct a liquid ammonia refueling terminal for ships on the other side of the bay (several kilometers opposite Shark Island) at Angra Point to export green ammonia. Germany has no information that Shark Island would be directly affected by this.

As far as Germany is aware, the Namibian Government is also discussing the expansion of an existing port (Robert Harbour), which lies in the town of Lüderitz close to the peninsula where Shark Island is located. Responsibility for planning and authorisation on how this area can be utilised lies solely with the Namibian Ports Authority and the Namibian Government.

Regarding the questions:

[Question 1]:

The wording on page 3 of the text: “The development project in Lüderitz aims to expand the site of the seaport to double its cargo handling capacity [...]” most likely relates to the plans discussed on the expansion of the existing Robert Harbour by the Namibian Ports Authority (Namport).

The “large-scale hydrogen production facility, using wind-powered turbines to generate hydrogen for export” referred to in the same sentence, on the other hand, seems to relate not to the expansion of Robert Harbour (in the town of Lüderitz close to Shark Island) but to the Hyphen project, which is to be developed at a location quite a distance from Lüderitz. The information on the project contained in the text is imprecise: According to the information available to Germany, the Hyphen project is intended to generate green hydrogen using wind power and photovoltaics as an energy source. This green hydrogen, in turn, is to be converted into ammonia for export. Furthermore, as far as Germany is aware, Hyphen and the Namibian Government are discussing whether Hyphen – in addition to

producing green hydrogen and ammonia – can feed renewably generated electricity into the Namibian or even transnational grid.

According to the information available to Germany, the Hyphen consortium is planning to construct a liquid ammonia refueling terminal for ships on the other side of the bay (several kilometers opposite Shark Island) at Angra Point to export green ammonia.

Irrespective of the mixing up of these two different projects under the auspices of Namport and Hyphen contained in the text, to the best of Germany's knowledge, the claim that the Namibian Ports Authority and Hyphen are engaged in a joint venture is incorrect.

Therefore, the Hyphen project is not legally linked to the expansion of Robert Harbour under discussion, nor is there any geographical proximity between the Hyphen project and Shark Island.

[Question 2]:

Germany attaches great importance to worldwide protection and promotion of human rights. It expects companies to respect human rights in their business dealings. Companies are required to follow the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct (OECD Guidelines) and to fulfil their human rights due diligence obligations in accordance with the German National Action Plan for the Implementation of the UN Guiding Principles on Business and Human Rights (UN Guiding Principles).

Through the National Action Plan for Business and Human Rights (NAP), Germany wishes to contribute to improving the human rights situation worldwide and to giving globalisation a social dimension in accordance with the 2030 Agenda for Sustainable Development. It identifies thereby the following core elements of enterprises' due diligence as Germany's expectation towards all companies regardless of their size and sector in the field of human rights which apply along the entire value chain:

A human rights policy statement to address human rights issues of particular relevance to the enterprise and/or the sector in which it operates, citing the international reference instruments in the field of human rights and to describe the procedure used by the enterprise to exercise human rights due diligence.

Procedures for the identification of actual or potential adverse impact on human rights that serve to identify, to prevent or to mitigate potentially adverse effects of corporate activity on human rights. It is not – or not only – a matter of considering risks to the company's own business activity but is primarily about risks to the human rights of those who may be affected by corporate activity, such as employees of the enterprise itself or of other companies in the supply chain, local populations and customers. Contextual circumstances such as the political framework and the presence of vulnerable groups of people (indigenous populations, for instance) should be factored into the analysis.

On the basis of the results of the analysis, measures should be identified and incorporated into business activity.

Enterprises should keep information at their disposal and communicate it, where appropriate, to external recipients in order to demonstrate that they are aware of the actual and potential impact of their corporate activity on human rights and are taking appropriate steps to address the situation. The form in which this information is communicated should be tailored to its recipients. Enterprises whose business activity poses a particularly high risk of adverse impacts should issue regular public reports

on that subject. Such reporting may be done in the framework of the company's existing reporting format or take the form of separate reports focused on human rights.

For the early identification of (actual or potential) adverse impacts, enterprises should either establish their own grievance procedures or play an active part in external procedures. The mechanism should be structured to match the target group. Accordingly, the target group should be consulted when the procedure is being devised. When new mechanisms are established as well as when existing mechanisms are used, care should be taken to ensure that they provide a fair, balanced and predictable procedure which is accessible to all those who might be affected (for instance by eliminating linguistic or technical barriers). The grievance mechanism of each enterprise and its whole process of corporate due diligence should be subjected to regular practice-based reviews to assess their effectiveness.

The detailed procedure for assessing applications for the provision of export credit guarantees, guarantees for direct investments abroad and untied loan guarantees was reinforced as regards respect for human rights, which are treated as a separate point in project assessments. The aim is to ensure that enterprises which avail themselves of foreign-trade promotion instruments exercise due diligence. In particular, this includes participation in grievance proceedings initiated against them before the German National Contact Point for the OECD Guidelines for Multinational Enterprises.

In 2021 the German Parliament passed the Act on Corporate Due Diligence Obligations in Supply Chains (Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten, LkSG). The responsibility of German enterprises to respect human rights in global supply chains is thereby put on a legal footing.

The Act places enterprises in Germany under the obligation to respect human rights by implementing defined due diligence obligations. To fall within the scope of the law, enterprises must have their central administration, principal place of business, administrative headquarters, statutory seat or branch office in Germany. The Act applies to enterprises in Germany with at least 1,000 employees.

The Federal Office for Economic Affairs and Export Control (Bundesamt für Wirtschaft und Ausfuhrkontrolle, BAFA) has the necessary enforcement instruments to monitor an enterprise's supply chain management. In this context BAFA has far-reaching supervisory powers. It is permitted, for example, to enter business premises, demand information and inspect documents. BAFA can further require enterprises to take concrete action to fulfil their obligations and enforce this by imposing financial penalties.

The core elements of the due diligence obligations include the establishment of a risk management system to identify, prevent or minimize the risks of human rights violations and damage to the environment. The Act sets out the necessary preventive and remedial measures, makes complaint procedures mandatory and requires regular reports.

The due diligence obligations apply to an enterprise's own business area, to the actions of a contractual partner and to the actions of other (indirect) suppliers. This means that an enterprise's responsibility no longer ends at its own factory gate but applies along the entire supply chain.

The Supply Chain Act contains an exhaustive list of eleven internationally recognized human rights conventions. The legal interests protected in those conventions are used to derive behavioural requirements or prohibitions for corporate action in order to prevent a violation of protected legal positions. These include, in particular, the prohibition of child labour, slavery and forced labour, the disregard of occupational safety and health obligations, withholding an adequate wage, the disregard

of the right to form trade unions or employee representation bodies, the denial of access to food and water as well as the unlawful taking of land and livelihoods.

If enterprises fail to comply with their legal obligations, administrative fines may be imposed. These can amount to up to 8 million euros or up to 2 % of annual global turnover. The fines system based on turnover applies only to enterprises with an annual turnover of more than 400 million euros. Moreover, if an administrative fine is imposed above a certain minimum level, enterprises may be excluded from the award of public contracts.

Germany helps companies implement human rights due diligence. In this context, it provides for various forms of implementation support, which provide companies with the necessary know-how and offer assistance with concrete challenges (<https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Implementation-support/implementation-support.html>)

[Questions 3 and 4]:

Financial institutions can fall within the scope of application of the LkSG just like companies from all other sectors. However, due diligence obligations relate only to the upstream supply chain. This covers, for example, the procurement of external services, such as in IT or human resources. The Federal Office of Economics and Export Control (BAFA) has clarified that the provision of money is neither a service nor a supply within the meaning of the LkSG. In addition, the due diligence obligations should not extend to customers for whom banking or insurance transactions are carried out. However, where there is a specific, traceable purpose link between a financial service and the products or services of a company covered by the LkSG, financing transactions of companies of the real economy can be considered part of the supply chain.

On 25 July 2024, the EU Directive on corporate sustainability due diligence (Directive 2024/1760, CSDDD) entered into force. The CSDDD will affect companies of more than 1 000 employees with a turnover of more than €450 million, and their activities ranging from the upstream production of goods or the provision of services, to the downstream distribution, transport, or storage of products. Companies affected by the legislation will have to take and implement a risk-based system to monitor, prevent or remedy human rights or environmental damages identified by the directive. The directive requires companies to ensure that human rights and environmental obligations are respected along their chain of activities. If a violation of these obligations is identified, companies will have to take the appropriate measures to prevent, mitigate, bring to an end or minimise the adverse impacts arising from their own operations, those of their subsidiaries and those of their business partners in their chain of activities. Companies can be held liable for the damage caused and will have to provide full compensation. Member States have to transpose the Directive into national law and communicate the relevant texts to the Commission by 26 July 2026.

Under the CSDDD, for regulated financial undertakings, the definition of the term 'chain of activities' does not include downstream business partners that receive their services and products. Therefore, as regards regulated financial undertakings, only the upstream but not the downstream part of their chains of activities is covered by the CSDDD. However, it was agreed that the Commission should periodically report to the European Parliament and to the Council on the implementation of the CSDDD and its effectiveness in reaching its objectives, in particular in addressing adverse impacts. At the earliest possible opportunity after the date of entry into force of this Directive, but no later than two

years after that date, the Commission should also submit a report to the European Parliament and to the Council on the necessity of laying down additional sustainability due diligence requirements tailored to regulated financial undertakings with respect to the provision of financial services and investment activities, and the options for such due diligence requirements as well as their impacts, in line with the objectives of this Directive, while taking into account other Union legislative acts that apply to regulated financial undertakings. That report should be accompanied, if appropriate, by a legislative proposal (see Art. 36 para. 1 and recital 98).