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Völkerrechtsblog
INTERNATIONAL LAW & INTERNATIONAL LEGAL THOUGHT

BOFAXE

What Are Human Rights Worth to Bayer? (PART 1)

An Analysis of the Pending OECD Mechanism and Its Influences on National Supply Chain Acts

"Respect for human rights is a task for society as a whole, for which we all – governments and companies as well as individuals – must take responsibility," states Bayer, a German multinational, which is one of the world's largest pharmaceutical and biotechnology companies, itself in its position on human rights (Policy Paper). At the same time, this position appears to be an empty promise if one takes a closer look at Bayer's corporate activities related to soya cultivation in Latin America. In the following sections, after introducing the Case of Sabrina Obitz within the OECD mechanism, the relevant legal frameworks will be examined before taking a closer look at the German Supply Chain Law (LkSG). The result of this analysis will be used to draw conclusions, as the outcome of the analysis has an indicative effect on the pending OECD complaint.

Obitz vs. Bayer – The Pending OECD Complaint

Bayer's human rights position appears to be an empty promise if one takes a closer look at its corporate activities related to soya cultivation in Latin America. The case of Sabrina Obitz from Argentina just recently shed light on those activities and raised the question of whether the company really intends to fulfil its responsibility towards humans and the environment. Obitz and her family lived in Pergamino, a village surrounded by pesticide-contaminated soy fields. Legal proceedings identified these pesticides, produced by Monsanto (a Bayer subsidiary), as the cause of serious health issues, including miscarriages, heart attacks, bone cysts, and respiratory problems. Bayer claimed ignorance of the case, but the Argentine court ordered a halt to pesticide use and mandated buffer zones around communities. This situation prompts the question: was this an isolated incident or a sign of a broader systematic failure by Bayer?This question was investigated by the German non-governmental organisation European Centre for Constitutional and Human Rights (ECCHR). The Obitz case as well as other cases from Paraguay, Brazil and Bolivia gave grounds to criticise the systematic human rights violations in the context of an OECD complaint against Bayer in April of this year. The decision on the OECD complaint will be issued by the German National Contact Point (NCP) this month, which is the competent national contact point. In their complaint, the ECHHR argues that Bayer's corporate activities along the supply chain led to severe damage to health, the displacement of indigenous peoples from their land and the pollution of drinking water. The complaint must be addressed to the state where the company is seated or where the violation occurred and in the present case, Bayer is headquartered in Germany. This is the reason why an international case can be decided by the German NCP. This complaint mechanism can be initiated by both natural and legal persons if a violation of the OECD Guidelines is suspected, regardless of whether the complaints themselves are affected. Even though the Guidelines are not binding in nature, they stipulate that companies should respect human rights in their global supply chains. In this context, we will have to wait and see how the Federal Ministry for Economic Affairs as the NCP will decide. Beyond this, the question is which other legal frameworks are relevant.

Relevant International Law Documents

The traditional, state-centred human rights understanding still rejects the idea of corporate human rights obligations. The UN Guiding Principles on Business and Human Rights (UNGP) serve as the first starting point for our legal assessment. Although these are primarily non-binding in nature, they arguably have contributed significantly to the progressive development of the law. The framework is also flanked by the OECD Guidelines. Even though these are also non-binding, they generate political pressure because of their inherent complaint mechanism. This pressure has the greatest potential to influence the actions of companies but can also be used to positively determine a breach of obligations within the context of national supply chain laws. At a national level, the LkSG is particularly worthy of mention in this context, which has now been extensively reproduced at a European level in the form of the Corporate Sustainability Due Diligence Directive (CSDDD). Following the adoption of the CSDDD a few months ago, Germany, as a member state, must implement this directive within two years, which could result in an adjustment of the national supply chain law, especially when it comes to the implementation of a civil law enforcement mechanism and the explicit inclusion of a downstream supply chain within the LkSG. This shows even more clearly that the different rules, whether binding or not, have a direct or indirect influence on each other and contribute to the development of the responsibility of companies.

The German LkSG and its Coexistence With the OECD Mechanism

In the following, the case of Obitz and the other cases of the complaint are subsumed under the LkSG. Even if this has no direct impact on the OECD complaint, the result can be used as an indication of the outcome of the OECD proceedings. Because the German legislator has not addressed the question to what extent downstream supply chains, i.e. the use of products after distribution, fall under the scope of the LkSG, a legal debate has since emerged. While some voices assume that the legislator intentionally excluded downstream supply chains, there are also voices in the legal literature that argue in favour of inclusion and draw a comparison with the financial services sector. Even if the last view in the article is to be given priority, since the adoption of the CSDDD, a 'preliminary' interpretation in conformity with the EU directive should also be considered. The idea that member states may not take action that would frustrate the aim and purpose of the directive must be taken into account. According to § 3 (1) LkSG, companies are obliged to prevent, minimise, or even eliminate risks. This obligation extends to human rights and environmental risks. These risks are further defined in § 2 LkSG. In the present case, § 2 (2) lit. 9 and § 2 (2) lit. 10 LkSG are particularly relevant, as they refer to damage to health caused by harmful soil changes, water and air pollution as well as the prohibition of unlawful deprivation of land. The German provisions therefore reflect the human rights enshrined in Article 12 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The CESCR-Committee has also repeatedly stated that the right to land is necessary for the substantive guarantee of other human rights enshrined in the ICESCR – as would also be the case in the present matter with Article 12 ICESCR. The current state of the debate on the human right to land has already been outlined several times by Robin Ramsahye (see here and here). The binding regulations of the German provisions have their counterpart as non-binding regulations in the OECD Guidelines. The duty of care to prevent, minimise or eliminate human rights and environmental risks (§ 3 LkSG) can be found in parallel in the Commentary on Chapter 2 General Policies (para. 22) in conjunction with Chapter 4 Human Rights of the OECD Guidelines.

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What Are Human Rights Worth to Bayer? (PART 2)

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In the present case, the prohibition of bringing about harmful environmental changes (§ 2 (2) lit. 9) and the prohibition of unlawful eviction and the prohibition of unlawful seizure of land (§2 (2) lit. 10) are particularly relevant. The use of glyphosate, as illustrated by the Obitz case, was also discussed before Argentinian courts. Among other things, three soya farmers were accused as offenders for the crime of 'polluting the environment in a manner dangerous to health through the use of qualified hazardous waste'. Even if the individual guilt is to be clarified, objectively the pollution of the environment is not in question. In addition to the pollution of the environment, the usage also results in the displacement of three Avá-Guaraní indigenous communities. Here, the usage of glyphosate near their villages of Y'Hovy, Pohã Renda and Ocoy means that their harvests are failing and their food sources are being destroyed. This also ends in their displacement to an ever smaller area.

These human rights and environmental obligations are further flanked by preventive measures in accordance with § 6 LkSG. §6(2) lit. 2 LkSG stipulates that companies are obliged to take appropriate preventive measures. According to § 6 (2) LkSG, this includes the submission of a policy paper. Bayer has issued such a policy paper. This contains a detailed strategy for the company and includes the points relating to health (4.1.7) and the right to land (4.2).

On closer examination of the health aspects, it becomes clear that Bayer refers to the health of "employees, contractors, visitors and neighbours around the world", which also includes those who use the company's products. This responsibility is ensured by the product stewardship standards, which contain product monitoring and training programmes on appropriate usage. However, it should be noted that the protection of the health of neighbourhoods close to soy fields and local communities is not specifically addressed in this context. Although the phrase "neighbours around the world" could cover local communities and neighbouring communities, it is so vague that it is not suitable for appropriate prevention, as intended by the legislator. In this respect, the company is not fulfilling its due diligence obligation in accordance with § 3 (1) lit. 4 in conjunction with § 6 (2) LkSG. Although the policy paper provides a more concrete description of the health aspects, it proves difficult to identify the right to land and the associated aspects relating to land use. Although Bayer addresses indigenous and vulnerable groups in Sections 4.2.1 and 4.2.2 of its policy paper, the problems associated with the excessive use of land for soya plantations and their consequences for these groups are not addressed. Naming the land displacement of indigenous groups because of cultivation is urgently needed for this to be part of an appropriate preventive measure. Due to the absence of such naming, a violation of the obligation under § 3 (1) lit.4 in conjunction with § 6 (2) LkSG is also evident.

Conclusion

While international law still does not impose sufficient obligations on companies along their supply chain and the existing regulations are only non-binding in nature, certain national and regional regulations represent a promising approach to tackle supply chain accountability. A closer look at the German provisions shows that Bayer does not fulfil its binding and stricter due diligence obligations and fails to take appropriate preventive measures. While a violation of the LkSG does not necessarily mean that a violation of the OECD Guidelines can be found simultaneously, the outcome of this analysis gives hope, that the NCP will accept the complaint. However, this must also mean that the German authorities must initiate official proceedings based on such a decision, as their discretion must be reduced ("Ermessensreduzierung auf Null"). Nevertheless, the current proceedings illustrate the deficiencies of the current international regulations: As the OECD complaints mechanism does not provide for sanctions, it is to be hoped that at the international level, corporate responsibility will no longer be just a theoretical concept in the future but can also be enforced vigorously at the legal level. National and regional regulations represent a crucial step and must be applied in a harmonised manner so that, at least at a national level, the binding regulations are more likely to take effect and be enforced.

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