

Redactions made under Art. 4.1.B.

EU Expert meeting: preparation for an EU position regarding further developments on Business and Human Rights

On 29 January 2018 the EEAS organized an expert meeting to discuss Business and Human Rights. Following this example, another expert meeting is organized on 7-8 June 2018 to contribute to ongoing work aimed at developing an EU position on the possibility of developing a legally binding instrument.

The expert meeting aims to:

- 1) Take stock of the challenges/governance gaps in the field of business and human rights where the EU/MS want to move forward on the implementation of the UN Guiding Principles on Business and Human Rights (UNGPs).
- 2) Take stock of international legal instruments (existing or under negotiation) and decisions of international courts (such as ECHR Nait-Liman) that are of relevance to business and human rights issues, in particular concerning the remedy pillar and explore if and how additional legally binding norms could potentially contribute to a solution and to a more effective global level playing field in the interest of EU business and stakeholders.
- 3) Provide insight into what the various options would mean in the EU/MS context, what are advantages and disadvantages of different measures, in order to advance towards a common EU position.

The discussion will build on the UNGPs pillars and existing practices to identify the challenges which we want to address collectively. From there we can examine whether and how a potential legally binding instrument or new norms on Business and Human Rights could possibly complement the current implementation of the UN Guiding Principles on Business and Human Rights. The below is an overview of potential challenges / governance gaps.

Pillar 1 duty to protect

Governments around the world do not always fulfill their responsibility to protect human rights¹. In the words of [REDACTED]: "Each legally distinct corporate entity is subject to the laws of the countries in which it is based and operates. Yet States, particularly some developing countries, may lack the institutional capacity to enforce national laws and regulations against transnational firms doing business in their territory even when the will is there, or they may feel constrained from doing so by having to compete internationally for investment. Home States of transnational firms may be reluctant to regulate against overseas harm by these firms because the permissible scope of national regulation with extraterritorial effect remains poorly understood, or out of concern that those firms might lose investment opportunities or relocate their headquarters".

¹ <http://www.undocs.org/A/HRC/8/5>

Pillar 2 responsibility to respect

More and more companies operate internationally, where respect for human rights is not adequately integrated in national legal systems and/or the law is not adequately enforced. This creates challenges for companies to fulfill their responsibility to respect, especially when their business models are linked to these legal or governance gaps in production countries, such as absent or inadequate standards on fundamental rights at work, decent working conditions or on minimum wage². While some companies have made significant progress over the past period, a large number of companies are still not aware of the UN Guiding Principles on Business and Human Rights or have failed to operationalize them due to a number of constraints.

Pillar 3 access to remedy

Victims of business-related human rights violations can face multiple problems when trying to get access to remedy. For example, victims do not have the means and connections to take large companies with extensive legal teams to court. 'Home state' courts do not provide remedy because of corruption or lack of local legislation and 'host state' courts cannot/do not establish jurisdiction³.

² In the words of [REDACTED]: "some companies have made themselves and even their entire industries targets by committing serious harm to human rights, labour standards, environmental protection, and other social concerns." <http://www.undocs.org/A/HRC/8/5>

³ The Council called for progress in the field of access to remedy: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/council_conclusions_on_business_and_human_rights_foreign_affairs_council.pdf and requested the EU Fundamental Rights Agency to study the gaps: <http://fra.europa.eu/en/opinion/2017/business-human-rights>

Draft Program

Day 1 - Examining issues regarding access to remedy

08.45 – 09.15 welcome and coffee

09.15 – 09.30 Introduction – aims of the expert meeting

Lotte Knudsen – Managing Director EEAS

09.30 – 10.30 Removing legal barriers: collective action, 'no cure no pay', legal aid, disclosure of evidence and 'burden of proof reversal'

██████████ - DG JUSTICE

██████████ - Associate Fellow Chatham House

10.30 – 10.45 break

10.45 – 12.00 Discussion

12.00 – 12.45 Lunch

12.45 – 13.30 Extraterritorial jurisdiction – examples of other mechanisms (crimes against humanity, corruption) applied to BHR

██████████ - DG JUSTICE

██████████ - Associate Fellow Chatham House

13.45 – 15.00 Discussion

15.00 – 15.30 break

15.30 – 16.00 Strengthening international state-based non-judicial mechanisms such as the OECD NCPs and the ILO tripartite MNE Declaration

██████████ - OECD Working Party on Responsible Business Conduct and Chair of the network of NCPs

██████████ - ILO

16.15 – 17.00 Discussion

17.00 – 17.15 break

17.15 – 17.45 International cooperation: improve accountability and access to remedies for victims – example of the ILO Maritime Labour Convention inspection and certification system

██████████ - ILO

17.45 – 18.30 Discussion + wrap up

⁴ https://sites.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf

Day 2 - Examining issues regarding the duty to protect & responsibility to respect

08.45 – 09.15 welcome and coffee

09.15 – 09.45 issues regarding due diligence – what would consequences of mandatory due diligence in UN Treaty be? What can we expect in terms of implementation?

██████████ – OECD Due Diligence Expert

09.45 – 10.45 Discussion

10.45 – 11.15 break

11.15 – 12.00 interaction between NAPs, implementation of the UNGPs and a potentially legally binding instrument

██████████ ██████████ – Danish Institute for Human Rights

██████████ – German National Human Rights Institute (DIMR)

12.00 – 13.00 Discussion

13.00 – 13.45 Lunch

13.45 – 14.30 Lessons learned from treaty negotiations on the International Criminal Court and United Nations Convention Against Corruption, what works and doesn't work? What form should a potential legally binding instrument have?

██████████ ██████████ – UN Working Group on BHR

14.30 – 15.30 Discussion

15.30 – 16.00 Break

16:00 – 16.45 Issues to be taken into account from a trade and investment perspective –

██████████ – DG TRADE

16.45 – 17.45 Discussion + wrap up

⁵ <https://www.humanrights.dk/projects/human-rights-business-treaty-question>

⁶ http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/Stellungnahmen/Position_Paper_Building_on_the_UN_Guiding_Principles_towards_a_Binding_Instrument_on_Business_and_Human_Rights_2018_03_20.pdf

⁷ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736813