Summary report - EU Expert meeting

Preparation for an EU position regarding further developments on Business and Human Rights

7-8 June 2018

The EEAS organized an expert meeting 7-8 June 2018 to contribute to ongoing work aimed at developing an EU position on the possibility of developing a legally binding instrument. Participants included EEAS and COM representatives (JUST, TRADE, DEVCO, GROW, EMPL), member states delegations (BE, CZ, DE, DK, ESP, EL, FR, FI, HU, LT, MT, PL, PT, UK), experts from OHCHR, OECD, ILO, National Human Rights Institutes (DK, DE) and the UN working group on Business and Human Rights. Below is a short summary of the discussions and lessons learned for a possible EU position. The EEAS will not circulate full minutes of the event since it was held under Chatham house rules.

Day 1 - Examining issues regarding access to remedy

The first session focussed on removing legal barriers to access to remedy. DG JUST highlighted the **current legal framework**, including Charter for Fundamental Rights, the Hague convention, Rome II and Brussels I, highlighting the possibility of reform of the latter with regard to **increasing provisions for extraterritorial jurisdiction**, a report on which will be published in 2022, and the Hague process as a vehicle for harmonisation Art 4.1.b from the OHCHR accountability and remedy project highlighted some key findings in their report on collective action, no win no fee, legal aid, disclosure of evidence and burden of proof reversal. Key big picture lessons included the necessity of taking account of the **diversity of jurisdictions**, the need to see reforms as a package rather an in isolation and the importance of **defining desired outcomes** and working back from those. In the discussion some member states highlighted examples of domestic laws with extraterritorial reach (such as the UK modern slavery act) as well as domestic work looking at the aforementioned barriers (such as NL work to look at class action). There was also debate around the need for a **judicial level playing field** and the necessity of understanding access remedy within the **wider context of tort law**. Member states highlighted good practise in this discussion which it was suggested would benefit from being collated.

The second session focused more heavily on extraterritorial jurisdiction. DG JUST presented the EU acquis, highlighting the **lack of EU competence in criminal law,** the **mutual recognition of judgments** and supporting **minimum standards**, as well as the issue with both **positive and negative conflicts of jurisdiction**, which could lead to multiple trials for one case or buck passing respectively. The concepts of prosecuting cross border were discussed in relation to **European arrest warrants** and **investigation orders**, as well as the EU level **procedural rights** for both the suspect and victims. Art.4.1.b spoke of the importance of extraterritorial reach in ensuring that corporations do not **circumvent legal liability** and the difficulty in that international law only dictates what states *can* do not what they *must* do, arguing that while **treaties can fill these gaps** but **significant policy and regulatory challenges** must be overcome. These were outlined in detail and covered among others, issues of scope, interactions with domestic law of the host and **direct assertion** versus domestic legislation with **extraterritorial impact**. Discussion centred around examples where member states had accepted extraterritorial cases, and usefulness of the **European Court of Human Rights** as a model and **level playing fields**.

The session on non-judicial mechanisms focussed on the ILO grievance mechanism and the OECD National

Contact Points (NCPs). Art.4.1.b from the ILO spoke about the need for a twofold process that also focusses on **preventing conflict** and dealing with systemic issues, highlighting the role of government in ensuring **freedom of association** and the role of enterprise in preventing conflict through **due diligence**. An example of a **tripartite process** in the electronics sector in Vietnam was shared with a reflection on the need for leverage in these non-judicial cases. Art.4.1.b from the OECD reflected on the value of the NCP grievance process, highlighting that, while 48 countries have an NCP, cases have come from over **100 countries through supply chain links.** Statistics on the outcome of these cases were shared as well as some specific examples of previous cases. Discussion focussed around the merits of non-judicial mechanisms and whether they were enough to negate the need for a legally binding instrument.

The final session of the day explored the **ILO maritime convention** as a **working example** of a legally binding instrument in the business and human rights field. Art.4.1.b spoke extensively on the convention explaining how it worked from **accountability, access to remedy** and practical points of view, highlighting in particular how a **race to the top** has been created in international maritime law through it. Discussion then focussed on the **applicability of this** to a legally binding instrument and weather the convention could be used as a model; some member states felt that it was useful to see an operable instrument such as this while others pointed out that it does not cover the topic of extension of liability of parent companies for subsidiaries/suppliers, linking to earlier discussions on remedy and extraterritoriality.

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

Art.4.1.b from OECD outlined that various **factors that motivate businesses** to implement due diligence, such as market access, regulation, and investors & consumers, expressing that businesses were beginning to understand the **business case for due diligence**. **Robust reporting requirements** in combination with a modification/clarification of the applicable civil law were advocated for, as well as the need to **clarify the liability of parent companies** for subsidiaries and suppliers. It was also expressed that having proper due diligence measures in place this should be a **legal defence for businesses** and also the need for **positive incentives**, for example tax breaks. Member states shared their own practices, such as France's *loi de vigilance* and Germany's NAP which includes the possibility of regulation if there is not enough voluntary compliance. There was debate **on the possible form of legal measures** as, while the UNGPs make clear that if businesses realize their measures are not creating results they must change them, a legal measure outlining such a requirement is hard to specify.

Art. 4.1.b **(Danish Institute for Human Rights)** argued that the reason the UNGPs took their form as 'guidelines' and not as a treaty was because of the complexity of the issues. Whilst other international legal regimes offer us examples, their scope is usually far more limited than the broad human rights scope. It was highlighted that further legal developments should take the good progress (including from EUMS) of NAPs into account, as well as **not undermine the UNPG** process.
The WHO tobacco convention was highlighted as a possible model as it is a framework convention: broad principles supplemented by additional protocols and formal guidance Art 4.1.b **(German National Human Rights Institute)** argued that the call for a Treaty comes from lack of progress in pillar 3 of the UNGPs and that this is what the EU must address. Art.4.1.a third indent

. While others seem worth engaging on, particularly those regarding pillar 3.

The third session of the day was concerned with the possible forms that a treaty could take, and Art.4.1.b

spoke about existing instruments and treaties in order to examine possible models. The success of the anti-corruption treating was attributed to the fact that the private sector championed the treaty, creating a **race to the top,** but the issue of the complexity and **broadness of the business and human rights** field and the need to hone in were noted. This linked to previous comments from Art.4.1.b which were again echoed when it was noted that treaties work well when the **means of implementation are not specified**. For this reason, the idea of a **framework convention** was again highlighted, and it was pointed out that this can work in **conjunction with a precision instrument**. Discussion at this point centred on current thoughts around options.

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The final session considered the investment perspective on a legally binding instrument, highlighting some contextual information related to investor-State disputes that involved human rights issues. DG TRADE highlighted the **need for a level playing field** in any legally binding instrument to **prevent a race to the bottom,** also expressing the need to ensure there is **no discrimination of companies** because they are foreign owned, and asserting the importance of **not** imposing on companies obligations more burdensome that those applicable to State actors. The discussion also focussed on how a legally binding instrument could interact with pre-existing obligations in international investment agreements (IIAs) and the need to exercise caution in defining a relationship between the LBI and IIAs.