EU Roadmap to Business and Human Rights

Conference – 11 May 2016

Summary of discussions

EU 2016

mvoplatform

ENNHRI
European Network of
National Human Rights Institutions

ECCJ
European Coalition
for Corporate Justice

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Introduction

To advance the implementation of the European Union and its Member States' Business and Human Rights agenda, European civil society and the Kingdom of the Netherlands jointly organised a pan-European, multi-stakeholder conference in Amsterdam during the Dutch presidency of the EU on May 11, 2016.

The Dutch presidency of the EU coincided with the fifth anniversary of the United Nations Guiding Principles on Business and Human Rights (UNGPs). The Netherlands was one of the first states to publish a National Action Plan on Business and Human Rights, and is a strong supporter of the UNGPs. This created momentum to push human rights and business up the EU's agenda with a follow up to the 2012 conference hosted by the Danish Presidency of the EU.[1]

The conference was organised by MVO Platform the Netherlands[2] (main organiser), the European Coalition for Corporate Justice Brussels, the Kingdom of the Netherlands and the European Network of National Human Rights Institutes (ENNHRI). Other partners and steering committee members were CNV International, the Danish Institute for Human Rights, Frank Bold and SOMO.

A wider circle of organisations (NGOs, trade unions, governments and think tanks/ academia) were responsible for (co) organising the plenary and parallel sessions. An overview of the organisations involved in each session is available in Annex one.

Participation

In line with the underlying principle of the UNGPs, the organisers sought to involve all stakeholders to ensure the necessary support for implementing the conference outcomes. The main target groups were policy makers from EU and Member States (representatives from national governments, EU institutions and parliaments) alongside other stakeholders from the business and human rights debate: businesses, civil society organisations, trade unions, think tanks/ academia and lawyers.

Over 350 people pre-registered for the conference, showing there was considerable interest in the issue. The organisers managed to increase the capacity for the event, allowing around 240 people to participate (including organisers). There was interest from all stakeholder groups, and all groups were well represented. Approximately 20% of the participants were from academia or from national human rights institutions, 25% represented business, investors and law firms, 25% represented Member States or the EU and 30% were from civil society, including trade unions. The participants came from 21 different EU Member States, plus Canada, Chile, Colombia, Ecuador, Ghana, Japan, Macedonia, Mexico, Mongolia, Norway, Switzerland and the US.

Content

As there has been less attention on the development of the first pillar of the UN Guiding Principles on Business and Human Rights (the duty to protect by governments) and even less on the third pillar (access to remedy for victims) over the last five years, the conference paid special attention to these two interconnected pillars.

Three plenary sessions were organised:

[1] http://csrgov.dk/news/485818

[2] The MVO Platform is a Dutch network of civil society organisations and trade unions that are active in the area of corporate accountability. The MVO Platform is the Dutch member of the European Coalition for Corporate Justice (and also one of the founding and steering group members). The MVO Platform consists of around 30 NGOs, trade unions and sustainable investors all striving towards greater social responsibility and accountability by companies. For more information on the MVO platform, please visit our website at http://mvoplatform.nl/?set_language=en.

- an opening session on the need for an EU Business and Human Rights roadmap;
- a plenary session on human rights due diligence and the role of states;
- a closing session to collect recommendations and conclusions from the day.

To make sure participants at the conference were fully aware of the human rights and business issues, and of their impact on the daily lives of victims in- and outside Europe, a film, made for the conference, was shown during the opening session.[3] In addition, in the concluding plenary session human rights activist and Secretary General of the International Federation for Human Rights (FIDH) Debbie Stothard made a visionary statement highlighting the special responsibilities of the EU on behalf of victims of business-related human rights abuses.

Parallel sessions were held on:

- Business and human rights within Europe
- National Action Plans: evaluating progress and charting next steps in Europe
- Corporate governance and capital market policies
- Responsible business conduct in (post) conflict areas; what is the role of EU Member States?
- Human rights reporting for companies
- Access to remedy: effectiveness of non-judicial grievance mechanisms
- Complementarity between the UNGPs and the UN binding instrument?
- Human rights due diligence in the supply chain
- Public procurement: eliminating human rights abuses from government supply chains
- A perfect storm: implementing the UNGPs in the context of the 2030 Agenda for Sustainable Development
- Access to judicial remedies
- Policy coherence for business and human rights: trade & sustainability in Free Trade Agreements

In each of the sessions different stakeholder groups were represented. The victims' perspective was either represented by a member of an affected community or an NGO working on the consequences of negative human rights impacts.

Each of the parallel sessions dealt with the state of play, the role of the EU and tried to come up with concrete recommendations.

Summary of discussions

A short summary of the recommendations and discussions for each of the plenary and parallel sessions can be found below. Video of the three plenary sessions is also available online.[4]

It is important to note that the recommendations in the discussion summary below do not reflect the opinions of the conference organisers. These recommendations were made during discussions in the sessions and were put forward by different participants. For this reason, some of the recommendations may be contradictory. The official conference conclusions from the hosts are available on the website.[5]

[3] https://vimeo.com/166171548

[4] www.eu-roadmap.nl/reportsoftheconference
[5] www.eu-roadmap.nl/reportsoftheconference

Plenary Session 1: Opening

After a short introduction from the opening session moderator (Caroline Rees from Shift), a specially-produced film by Kim van Haaster was shown to illustrate the potential consequences of negative human rights impacts.[6]

The conference was then officially opened by Marten van den Berg, Director General for Foreign Economic Relations for the Dutch Ministry of Foreign Affairs. He introduced a video message from the Minister for Foreign Affairs, Bert Koenders, who said he was proud that the Dutch Government had organised this conference together with civil society, and that business came out in force to make the conference a true multi-stakeholder event.

"We have to work together with all stakeholders to prevent human rights abuse. And when it does take place, victims need access to remedy. The Netherlands would like the EU to lead by example." - **Bert Koenders.**

[6] the film can be viewed on https://vimeo.com/166171548

The Director General said that the Dutch Government strongly rejects the notion that the economic success of a Dutch company should come at the expense of human rights. Responsible business conduct is therefore a cornerstone of Dutch policies. The Dutch Government has developed a new approach in which stakeholders, including business, civil society and the Government, are challenged to join in international CSR covenants in at least 10 high risk sectors. The Ministry has acknowledged that this might not be enough. Victims of business-related human rights abuses need and deserve access to remedies. Therefore, the Dutch Government has commissioned a study to research opportunities to strengthen access to remedy in the Netherlands. The Netherlands would like to lead by example on this topic, he concluded. This ambition was also stated by the Minister,

This was followed by a panel discussion. The panelists were asked to share what, in their view, should be the top priority for the EU and for its Member States?

Moderator: Caroline Rees (Shift)

Contribution by: Marten van den Berg (Netherlands Ministry of Foreign Affairs)

Panelist:

- Stravros Iambrinidis (EU Special Representative Human Rights)
- Dante Pesce (Chair of the UN Working Group on BHR)
- Linda Kromjong (Secretary-General of the Organization International Organization of Employers)
- Jeffrey Vogt (Director Legal Unit ITUC)

Organized by: MVO Platform, the Netherlands Ministry of Foreign Affairs and Oxfam Novib

Discussion

Stravros Lambrinidis said that as the UNGPs are not legally binding, it was the EU's obligation to give the principles teeth. An action plan on how to do this was needed and was currently being developed by Commissioner Bienkowska's office. The new EU directive on non-financial reporting should

also be fully implemented. Businesses should receive similar instructions across Europe and European civil society should have the capacity to review these reports. Furthermore, he said there should be a focus on remedy. All countries worldwide should at least have laws in place to punish companies that violate human rights. "The EU should put her money where her mouth is" and export its own expertise to stimulate the development of these laws worldwide, he said. Finally, he added, European companies should be educated on the UNGPs.

The UNGPs are not about 'traditional' CSR: *"Business and Human Rights is not about how companies use the money they make, but about how they make it".* – **Stravros Lambrinidis.**

Linda Kromjong had a different perspective, suggesting that not just businesses, but also governments needed to have their houses in order. Rules and regulations should first be put in place before the next step is taken by companies. And she argued that a lot has changed already. "We have to be a bit prouder of what business already has achieved in the past five years," she said. In terms of priorities, we first need to make sure that every country has a National Action Plan and then we need to reach out to smaller companies so that they also understand what is on the table. Companies cannot control their entire supply chain, she said. Companies are focusing on business and human rights more but one single organisation cannot solve so many issues and it is not fair to expect business to do so.

From a trade union perspective, Jeffrey Vogt said it was unacceptable for companies not to be able to control their entire supply chain. Companies have sourcing policies, and their own policies contribute to abuses in the supply chain. So it is their responsibility to control their supply chain. The ITUC wants to change the international labour rights system to catch up with the new reality of production and sourcing taking place across multiple countries and of people having multiple jobs.

Dante Pesce stressed the role of the EU beyond Europe. Europe and the European countries are more advanced on this issue, and should use their leverage more actively and more ambitiously. Outside of Europe there is only one country with an action plan. Not a lot of states are leading by example. It is not very difficult, and actually very practical to at least demand that human rights are respected in all economic activities under the control of the State (such as export credits, state-owned enterprises, etc.).

In the past five years there has been an acceptance of the UNGPs and of their language. But implementation needs to be scaled-up from just the pioneers to achieve a critical mass worldwide. In Europe there might be some leadership, but it is absent in the rest of the world according to Pesce. This race to the bottom all around the world in most business and government practices needs to be stopped and conditions need to be created for a race to the top!

"The credibility of the EU to work outside of the European Union on human rights depends dramatically on its ability to demonstrate it can do so internally. So part of the work should focus on what is happening inside the European Union". – **Stravros Lambrinidis.**

Lambrinidis made some concluding remarks:

- The EU, with its 28 Member States and all of its institutions, is united on this issue. The EU for example always discusses business and human rights in its human rights dialogues with 140 countries around the world;

- The UNGPs have managed to change the debate and make human rights an issue.
- European businesses around the world can be and are a major force for 'good impact'. But they can also be a source of negative human rights impact;
- The vast majority of workers today are hired and abused by domestic companies, and not by multinationals;
- The EU should fully support Human Rights Defenders either politically, financially or otherwise;
- The UNGPs can and should be integrated in other agenda's like the 2030 Agenda.
- The EU should fight for development based on equality and quality of the environment, labour rights, education, human rights, etc. which will lead to sustainability. Inequality leads to a race to the bottom;
- All stakeholders bear some responsibility, but governments are the only ones with the responsibility to protect, and the EU is taking this responsibility very seriously.

Session 11 - Business & human rights issues for workers & communities within Europe

From human trafficking in the Netherlands, to forced labour in the UK and environmental degradation affecting people's health and livelihoods in the Czech Republic, workers and communities in Europe continue to face serious human rights abuses linked to private sector activities.

This session emphasised the need to address and prevent human rights and environmental abuses, and improve access to justice and remedy for victims. Participants explored some of the steps taken by civil society, business and governments in dealing with these issues, and drew lessons for further action.

Recommendations put forward in the session by the participants:

- The European Union and its Member States should properly implement existing rules and regulations and the UNGPs, including within their own territories;
- The European Union and its Member States should include a domestic dimension in their National Action Plans on Business and Human Rights;
- The European Union and its Member States should invest in disclosing meaningful information on companies' human rights policies and performance;
- European governments should support civil society to provide meaningful research on data to measure companies' human rights performance;
- The European Union and its Members States should introduce requirements for reporting on human rights for stock exchanges;
- European businesses should put their human rights policies into action, and focus on reporting that goes beyond legal compliance and that drives better human rights performance;
- The UK Government should (1) make available a list all companies that are required to act under the UK Modern Slavery Act; (2) develop an official online repository for company statements and (3) take action taken against companies who do not comply;
- European citizens and other parties should use article 9.3 from the Aarhus Convention to challenge acts and omissions by private individuals and public authorities which contravene environmental law and so violate human rights;
- The European Union and its Member States should investigate how they can make better use of their power in the market, for example by adapting the sanctions used to combat illegal fishing to issues of forced labour.

Moderator: Phil Bloomer (Business & Human Rights Resource Centre)

Panelists:

- Marilyn Croser (CORE Coalition);
- Sandra Claassen (FairWork);
- Pavel Cerny (Frank Bold);
- Anna Pot (APG Asset Management);

Respondents:

- Nicola Jägers, (Netherlands National Human Rights Commission)
- Lucia Van Westerlaak, (FNV, Netherlands Trade Union Confederation)

Organized by: Business and Human Rights Resource Centre, the Dutch Human Rights Institute, FNV and Frank Bold

Discussion

Phil Bloomer introduced the session by emphasising that the EU cannot be complacent in its own countries. There is a need to uphold and ensure a high standard for companies' human rights performance. This will strengthen the EU's position when advocating for higher standards internationally. Special attention should be paid to migrant workers (in agriculture, construction, car washing, mining).

There is a real sense of promise in the EU: sector-based approaches in the Netherlands, the Modern Slavery Act in UK, a due diligence bill in France, a popular initiative calling for a

due diligence bill in Switzerland and many other initiatives by companies, including the recently launched Leadership Group for Responsible Recruitment.

The panellists then elaborated on a number of business and human rights issues inside the European Union.

Sandra Claassen from FairWork focused on labour exploitation in the Netherlands. There is grey area between decent work and trafficking, she explained. It can be found in a diverse range of sectors and it happens to labour migrants, within and from outside the EU, as well as to Dutch workers. Often labour migrants are offered package deals which include transport, housing and work. This creates a huge dependency on the agency. Contracts are often in a foreign language which workers do not understand and contain unreasonable and non-transparent fees. Workers are subjected to excessive hours, low pay and a precarious housing situation and may also face bullying, aggression, sexual harassment and discrimination.

> *"One of the main challenges is the identification of labour exploitation, with limited access by government enforcement agencies – there is a role for civil society and public involvement in detection of abusive conditions".* **– Sandra Claassen**

Many workers are also unaware that they have the same rights as Dutch workers. Therefore, there is an important role for trade unions and NGOs to raise awareness about their rights and advocate for better enforcement. Sandra concluded by calling on the Dutch Government and companies to better implement existing structures and commitments.

Marilyn Croser from the CORE Coalition discussed the UK Modern Slavery Act. Seventy per cent of UK companies surveyed believe there is a likelihood of forced labour in their supply chain. The UK Modern Slavery Act is the Government's response to this issue – it requires annual reporting on what companies are doing to combat forced labour. CORE has recently issued guidance for companies to go beyond a compliance-only approach in their reporting. The Act has the potential of being a game-changer in transparency. Marilyn recommended that a list of companies required to comply with the Act should be published, that there should be an official online repository for company reports, and that actions should be taken against companies that do not comply. Finally, she emphasised that a level playing field across the EU would be useful. The EU could use its market weight to encourage governments in producer countries to raise standards on forced labour – possibly applying the yellow card approach to tackle forced labour issues.

Pavel Cerny, an attorney with Frank Bold, described the potential offered by the Aarhus Convention when it comes to human rights abuses linked to environmental issues. The Aarhus Convention is a binding international treaty implementing Principle 10 of the UN Rio Declaration on Environment and Development (1992). It has three main pillars: access to information, public participation in environmental decision-making and access to justice in environmental matters. Article 9.3 of the Convention provides an opportunity for the public to challenge acts and omissions by private individuals or public authorities which contravene environmental law (referenced in the European Commission recommendation on collective redress mechanisms). Cerny examined four cases more closely, two from the Czech Republic (the Mittal factory and the Hyundai case) and two from Poland (A4 and the Gubin mine).

Anna Pot, from APG Asset Management stressed the importance of corporate transparency and disclosure on human rights for pension funds such as APG that want to ensure people secure a good return on their pension through responsible investments. The APG Investment Team takes a risk-based approach, focusing on human rights allegations against companies in high risk sectors and on engagement. It uses its influence to encourage companies to improve their human rights practices. Although there has been great progress in disclosing and reporting, one of the main challenges is that data is still scattered and not always reliable.

"There should be meaningful reporting and data gathering on human rights performance - not only box checking - including on challenges companies face." – **Anna Pot**

Anna called on European governments to consider investing in initiatives such as the Corporate Human Rights Benchmark to drive better corporate performance through meaningful data.

Nicola Jägers from the Netherlands National Human Rights Commission was asked to respond to the presentations and she stressed the importance of keeping a spotlight on the human rights situation inside EU Member States, which is often overlooked. She emphasised that there were challenges in the Netherlands including labour exploitation, trafficking, and discrimination. Out of the issues raised with the Netherlands Human Rights Commission's complaints system, half are about discrimination (on race, nationality, age, disability). The internal dimension should be more explicitly part of National Action Plans.

Lucia van Westerlaak (FNV) responded from a trade union perspective, arguing that the living wage is a real issue, but also sharing the position of trade unions. They are losing membership, but if society wants labour rights, it needs trade unions. Unions try to support migrant labourers but the challenge is that many of them are not members.

Other issues raised were the rights of indigenous peoples within Europe (in the context of extractive and renewable energy projects constructed on their lands), inclusion of fair trade in EU trade agreements to trigger bottom-up change and the need to improve coordination between labour inspection and enforcement.

Session 12 - National Action Plans: Evaluating Progress and Charting Next Steps in Europe

During this session participants and panellists from government, business and civil society shared experiences of National Action Plans (NAPs) on Business and Human Rights. Concrete proposals were discussed on how to improve the impact of NAPs on the prevention and remedy of business-related human rights abuses. The session also considered how regional review processes based on NAPs could enhance government and business accountability, including to the standards expressed in the UNGPs.

Recommendations put forward in the session by the participants

- The EU has the potential to be an international "game changer" when it comes to business and human rights. It also has a specific role, because of the large number of European companies involved in global value chains. To fulfil their responsibilities, all Member States should develop National Action Plans (NAPs) and the EU should facilitate peer learning around NAPs. A coherent strategy to implement the UNGPs at the EU level is also needed. This strategy could be integrated into the EU Action Plan on Responsible Business Conduct that is reported to be currently under development;
- The EU and Member States should start the process of developing National Action Plans despite obstacles such as internal differences between government departments. Even if it takes time and resources, the process of developing a NAP is itself valuable. It can build cross-government support for the UNGPs and for measures to implement them, as well as providing an opportunity to strengthen capacity within government, business and other stakeholders;
- The EU and Member States should develop NAPs that are strategic and connect those with other global frameworks, such as those linked to climate change and the 2030 Sustainable Development Goals (SDGs);
- It must be acknowledged that NAPs should accommodate local priorities and high risk issues for the country in question, rather than taking a "one size fits all" approach.
- The EU and Member States should seize the opportunity presented by the NAP process to translate the UNGPs into business language, to set expectations for business and involve business in the process. European businesses expect NAPs to help create a "level playing field" and accordingly want the EU and Member States to speak with one voice;
- The EU and Member States should involve civil society organisations (CSOs) when writing NAPs. However, it should also be acknowledged that such involvement carries resource implications and CSOs may require support to facilitate effective engagement. CSOs, moreover, expect NAPs to have meaningful content, with concrete actions and targets, including with regards to remedy for victims, and to be participatory and transparent regarding their process of development.
- The EU and Member States should ensure that NAPs address impacts on specific groups at risk of vulnerability or marginalisation e.g. children, people with disabilities.
- The EU and Member States should regularly review and update existing NAPs in light of evolving evidence of the effectiveness of measures taken and the need for a "smart regulatory mix".

Moderator: Claire Methven O'Brien (The Danish Institute for Human Rights)

Panelists:

- Kees van Baar (Human Rights Ambassador, Netherlands);
- Catie Shavin (GBI);
- Jerome Chaplier (ECCJ);
- Pedro Ortun (European Commission);
- Michael Addo (UN Working Group on Business and Human Rights);
- Stephen Lowe (Foreign & Commonwealth Office UK).

Organized by: Danish Institute for Human Rights and Netherlands Ministry of Foreign Affairs

Michael Addo from the UN Working Group on BHR opened the discussion by recognising that despite much government goodwill towards the UNGPs, and despite wide recognition that NAPs can promote a level playing field, progress towards national implementation, including through NAPs, has been slow. He suggested two broad approaches to NAPs could be seen among governments: i) the auditing model, where governments comprehensively review business and human rights issues; and ii) the facilitation and advancement model, where governments emphasise existing actions and strengths.

The Dutch Human Rights Ambasador Kees van Baar explained that the Netherlands was one of the first states to develop a NAP, which it did with encouragement from a variety of stakeholders, including business. In total developing the NAP took 1.5 years. Although this might seem a long period, he said the process was as important as the end product. It is of utmost importance that all stakeholders are on board and can eventually speak with one voice. Through the process, the language of the UNGPs was translated so as to be understandable to the private sector. A lesson learned in the Dutch process was the importance of interviews with all stakeholders to identify the most pertinent risks, needs and issues, and the need to involve small and medium-sized enterprises (SMEs).

Stephen Lowe from the UK Foreign & Commonwealth Office said that the UK was the first country to develop a NAP, prompted by a strong political commitment. Two departments had led the process: the foreign and trade ministries. The UK has recently reviewed its NAP and discovered that the business and human rights environment is changing rapidly. He emphasised that, based on the UK experience, developing a NAP is not as difficult as governments may expect. A NAP should capture and build on existing regulatory measures and initiatives. The EU had a potentially important role to play in facilitating dialogue and learning between countries, and this could help to identify pertinent approaches and issues across the region.

Issues raised by participants: NAPs should both consolidate existing measures and contain new actions; how do NAPs on business and human rights relate to other policies and action plans (e.g. the SDGs, CSR, human rights); the value of NAPs for business in clarifying expectations, promoting a level playing field within and between countries; and the importance of context-specific NAPs so that they are relevant, credible and legitimate amongst rights-holders and stakeholders.

Pedro Ortun from the European Commission highlighted the need for engagement and commitment across institutions and organisations within governments, and the importance of stake-holder involvement which would also facilitate capacity building. He noted that there were still not enough leading companies and that peer dialogue exercises were needed to review and adapt NAPs to address all three “Pillars”.

Jerome Chaplier from the European Coalition for Corporate Justice said that although civil society sees NAPs as a key part of implementation of the UNGPs, there have been extensive delays by EU Member States in delivering NAPs, and there are weaknesses in those NAPs already published. While cross-government involvement and stakeholder participation was crucial, transparency vis a vis stakeholders during NAPs processes and national baseline assessments was lacking. Access to remedy was also neglected in published NAPs.

“If NAPs continue to focus too much on the state of play, rather than on concrete actions, they tend to give the impression that the UNGPs ‘lack teeth’.” **– Jerome Chaplier**.

Catie Shavin from the Global Business Initiative said that from a business perspective, government involvement was key to advancing the UNGPs, so strengthening government capacity and increasing the UNGPs’ visibility

within government was important. Secondly it should be recognised that implementing the UNGPs in complex organisations, whether public or private, would take time, so patience was required.

Issues raised by the audience: the need for NAPs to deliver changes on the ground; the need to include sufficient focus on vulnerable groups and on remedy; and the importance of peer review/ learning across the European region.

Session 13 - Corporate governance and capital market policies

There is increasing recognition of the links between corporate governance and human rights, both as an ethical issue and as part of business risk management. This session explored how EU corporate governance could encourage greater respect for human rights and discourage practices which exacerbate the risk of human rights abuses. Speakers debated what should be expected of boards and investors to ensure adequate oversight for risk management and mitigation.

This session also explored opportunities for business and policies to mitigate pressure on companies to focus on short-term financial results. These have been criticised for encouraging an excessive focus on quarterly results and the externalisation of costs. The session examined the relationship between companies' long-term success and their ability to consider their purpose, and to include respect for human rights and sustainability in their strategy and decision-making.

Recommendations put forward in the session by the participants:

- Pressure on companies and investors to focus on short-term financial results should be mitigated in order to attract longer-term investors and so promote greater respect for human rights and sustainability as factors in business decisions.

Moderator: Paige Morrow (Frank Bold)

Panelists:

- Herman Mulder (True Price Foundation, Dutch NCP and TEEB Advisory Board);
- Marcello Palazzi (B Lab);
- Rosl Veltmeijer (Head of Research at Triodos Investment Management);
- Jeroen Veldman (Cass Business School)

Organized by: Frank Bold

Discussion

Moderator Paige Morrow started by explaining the traditional understanding of the connection between corporate governance and human rights. It's generally considered to be the role of the board to oversee human rights compliance as part of its risk management role, or as an element of its responsibility to create an ethical organisation.

She noted that an increasing number of entrepreneurs and companies are going further to ask how they can make a positive contribution to the fulfilment of human rights and sustainable development by developing goods and services that are produced in safe and decent working conditions, that serve bottom-of-the-pyramid consumers and/or give back to local communities.

Jeroen Veldman from the Cass Business School pointed out that pressure to generate short-term returns is a relatively recent phenomenon associated with the rise of shareholder primacy as a principle of business and law in Anglo-Saxon jurisdictions since the 1970s. This has serious consequences for companies: executive pay is increasingly tied to short-term financial performance through pay packages that are weighted towards stock grants and shareholders have begun to expect the diversion of capital from productive uses such as Research & Development to dividend pay-outs, as well as large-scale share buybacks (which artificially inflate short-term share price).

This also creates pressure on the value chain to extract the maximum amount of value while externalising costs by depressing wages and failing to invest in sustainability. The wealth of the company is redistributed to shareholders, not invested in the company and its employees. This contributes to lower GDP

growth and increasing inequality.

Herman Mulder (True Price Foundation, Dutch NCP and TEEB Advisory Board) stressed that companies need to realise that they have an important responsibility for their external impacts. Corporate governance codes, including over the entire value chain, need to be more ambitious with respect to companies' responsibilities. He added that there was increasing support from the business community for the SDG agenda, but all leading companies say that governments need to step in. According to Mulder, acceleration and mainstreaming is needed, and business should take the lead.

In the experience of Rosl Veltmeijer from Triodos Bank, "human rights" is a very abstract concept for many companies. They often only talk about labour rights and it takes a long time for companies to really understand human rights and take action. In its engagement with investee companies, Triodos makes topics as specific as possible. Companies need a sense of urgency and must identify clearly what they can and should do.

"Companies should be forced to do human rights impact assessments to identify and thereby manage social risks. … It should not be left to the market to self-regulate". **– Rosl Veltmeijer.**

She concluded by saying that governments should intervene when there is huge controversy; it should not be left to the market to self-regulate. With a team of six researchers, Triodos is able to monitor and engage with its investee companies, suggesting that it is possible for much larger investors to take a similarly active role. Veltmeijer said that the obligations of institutional investors, such as pension funds, to their beneficiaries (their so-called 'fiduciary duties') are clearly broad enough to allow environmental and social matters to be considered but these obligations should be expanded so that such considerations are required.

Marcello Palazzi from B-Lab spoke about B Corps, which he described as corporations that are pushing the boundaries of what companies can do for society. B Lab is a non-profit that has created an independent certification scheme evaluating corporate performance on a range of issues to provide consumers with informed choices, including on labour standards, pay inequality and environmental impact. Until now, B Corps have primarily been small, innovative companies such as Ben & Jerry's ice cream, but B Lab has launched an advisory council to explore how the idea can be expanded to multinationals such as Danone and Unilever. Danone decided to pursue B Corp certification following a two-hour conversation with the CEO, demonstrating the importance of leadership.

"Businesses think about meeting human needs, rather than using a human rights lens". – Marcello Palazzi.

Meeting human needs is central to B Corps and other progressive companies, Palazzi said. He suggested that universal standards on issues such as corruption and child labour are, in practice, applied differently depending on the context. Herman Mulder disagreed, suggesting that global standards must be applied universally, even when operating in countries with dysfunctional governments. If companies cannot meet these obligations, they should withdraw.

A number of different questions were raised by the audience. Erinch Sahan from Oxfam asked how in the proposed power shift, stakeholders could acquire structural power from shareholders. According to Veltmeijer, NGOs are often human rights experts, have the capacity to verify company claims, and may already be in dialogue with companies. Within the B-Corp system, all stakeholders need to work together, and there is open engagement. There is a lot happening around the question of who has and should have power within companies.

A number of participants noted the lack of policy coherence on human rights issues. For example, the OECD Principles for Corporate Governance recognise the importance of

stakeholders but focus primarily on the role of shareholders, and although they now reference the OECD Guidelines for Multinational Enterprises, more could be done to align the two instruments.

Session 14 - Responsible business conduct in (post-)conflict areas; what is the role of EU Member States?

Based on UNGPs Principles 7 and 8, EU Member States should help ensure the coherence and effectiveness of European efforts to prevent corporate involvement in gross human rights abuses in conflict-affected zones. This session discussed the role of Member States and the EU under the UNGPs in engaging with businesses on the risks and opportunities for responsible business activity in (post-)conflict situations.

Bringing together a variety of perspectives from the EU, civil society and the private sector, the session shared experiences and explored opportunities for promoting enhanced due diligence in conflict-affected areas, and a number of concrete actions were identified that could further the implementation of the UNGPs.

Recommendations put forward in the session by the participants:

- The EU and its Member States should support weak governments by strengthening capacity and raising awareness in a consistent and coordinated way, aiming for long term effects and incentives;
- The EU and its Member States and European businesses should put the interests of local communities at the forefront when operating in conflict areas;
- Sectoral agreements could help businesses to operate with respect for human rights in conflict areas;
- The EU and its Member States should provide reliable and authoritative information to companies operating in conflict areas. They should urge companies to comply and develop branch-specific regulations and assistance, based on the risk factors of those branches.

Moderator: Dewi van de Weerd (Netherlands Ambassador to Albania)

Panelists:

- Dante Pesce (UN Working Group on Business and Human Rights);
- Yves Nissim (Orange);
- Elly Rijnierse (Cordaid);
- Annika van Baar (Vrije Universiteit Amsterdam)

Organized by: SOMO and the Netherlands Ministry of Foreign Affairs

Discussion

Dante Pesce from the UN Working Group on Business and Human Rights reflected on the implementation of the UNGPs in risk zones. Just because all governments have endorsed the guiding principles does not mean that all governments understand the effects of the endorsement. He observed that beyond Europe, governments don't seem to have the appetite to implement the guiding principles. In places outside of the EU where there are no accountability platforms, affected people are left with nothing. "Why push for human rights when that shows ugliness about their own society," he said. The easiest way for companies to minimise risk is to avoid working in certain countries, risky regions, or with certain suppliers. But it is not a solution for the systemic problem, and would only lead to the alienation of people who are already poor and marginalised.

"Weak governments should be supported by strengthening capacity and raising awareness, but in a consistent and coordinated way, in a systemic manner. These governments are bombarded with projects without coordination." **– Dante Pesce.**

Many countries say that the Sustainable Development Goals are just another set of actions plans on top of CSR, which has never been followed up on. The EU has to think long term and implement consistent and coherent policies. We have to bear in mind that states signing on to relevant standards does not

imply there is the will and the capacity to implement.

Elly Rijnierse explained that Cordaid works in the most fragile states, looking at structural change.

> *"In conflict-affected states the authority and power of foreign governments is an essential factor for opening and closing the doors for companies."* **– Luke Patev, quoted by Elly Rijnierse.**

She explained the work of Cordaid in South Sudan over the last few years in communities disrupted by the oil industry and gold mining which led to a report on 'Mining in South Sudan: opportunities and risks for local communities'. Local communities need to be put first, she said. They are often not involved, and nothing is left for them when the oil drilling or mining is finished. Home governments of the companies are key in shaping the context for companies operating in fragile States. Therefore, stability and peace should be prioritized over geopolitical interests. Home countries can and should set the stage for development. One way to do this could be by integrating the UNGPs into the New Deal for Engagement in Fragile States.

Yves Nissim from the telecom company Orange outlined the dilemmas his company faces. He said the company operated in a number of countries which had experienced a revolution in the last five years. The company had received various problematic requests from government, ranging from a request to shut down networks or share customer data, to sending out text messages glorying the regime or shutting down roaming. Governments are our direct counterparts, he said, and we can only operate in a country under a license operating agreement with a government.

> *"When receiving requests from governments of countries where we operate, we have to deal with contradictions between our obligations towards the authorities, and respecting human rights."* **– Yves Nissim**

In some cases, he said, Orange refused to comply, which meant the case would go to court. He said the company was obliged to comply with a court order eventually. Such requests show that there is a political problem, he said. It is like an indicator of the political situation. Would Orange pull out of a country if asked? He said pulling out would mean a financial loss to the company and would lead to a non-human rights compliant telecommunication company taking their place. He said Orange was working with 13 companies to improve human rights through the Telecommunications Industry Dialogue. This called for a clear and accountable process which should be followed by governments when asking for information. It also called for government transparency regarding their demands (number and type of requests made, etc.).

Moderator Dewi van der Weerd stressed the importance of sectoral agreements.

Annika van Baar, a PhD student at the Vrije Universiteit Amsterdam, is studying how and why corporations become involved in international crimes, e.g. genocide, war crimes and crimes against humanity committed by state or non-state actors. She said companies generally do not want to commit crimes but are looking for profit. They are rarely direct perpetrators. In authoritarian and totalitarian regimes, governments can force companies to engage in international crimes. In many cases regimes work with business, so they can reach their own goals. Companies often pay the only security forces in the area. Sectors that are particularly affected include oil/ natural

resource companies (as these are found in conflict ridden areas, and tend to lots of people on the ground), security forces (problem with hiring practices and the fact that they carry arms), financial sector (extortion by non-state actors and/ or governments, but geographically removed) and manufacturing (through their technology e.g. the company that built the ovens in Nazi Germany). Companies are involved in providing products / services / technology, providing capital/finance, providing/hiring security and carrying out government policies or otherwise legitimising the regime (for example in South Africa during the apartheid era). Companies often do not receive reliable information, do not take information seriously, or are wilfully blind (wishful thinking).

"EU Member States can assist these companies by providing reliable and authoritative information. They should urge companies to comply with relevant standards, and develop sector-specific regulations and assistance, based on the risk factors of those branches." – **Annika van Baar.**

Other issues raised by the participants included the position of the International Organisation of Employers (IOE). Some companies present do not feel represented by the IOE (too passive), others thought they were an excellent partner in pushing the implementation of the UNGPs), the need for political leverage when implementing the UNGPs, the need for transparency to be able to control implementation (due diligence), subcontracting (what if companies work with perpetrators), engagement of women (example of factories in Myanmar where women had to work overtime and walk home late and so were vulnerable to sexual assault) and the need for a mind set change (very new area and it scares companies).

Session 15 - Human Rights Reporting for Businesses

This session looked at the critical role of good human rights reporting in advancing implementation of the UN Guiding Principles. It introduced the UNGPs Reporting Framework: the first comprehensive framework for companies to report on how they respect human rights in practice.

The session explained how the Reporting Framework helps companies meet regulatory requirements and investor expectations on disclosure, while also encouraging improvements in their processes and practice, whatever the company's size, sector or starting point. It offered insights into the various ways in which governments are also using the Reporting Framework.

Recommendations put forward in the session by the participants

- European companies should avoid a tick-box approach with regards to reporting and their reporting should reflect how they address actual and potential impacts on people on the ground.
- The EU and its Member States should push for reporting in line with the UNGPs Reporting Framework and, include it in guidance for companies;

Moderator: Caroline Rees (Shift) and Richard Howitt (MEP)

Panelists:

- Bertrand Janus (Total);
- Sofie Nystrom (H&M);
- Dominic Burke (Hermes EOS);
- Filip Gregor (Frank Bold).

Organized by: Shift and Fairfood

Discussion

Maddalena Neglia from FairFood reflected on the importance of reporting using a case study about agricultural workers in Morocco. FairFood found limited freedom of association, low wages and difficult conditions for women workers (e.g. no support for child care). The organisation tried to tackle the situation with a collaborative approach and were successful at a local level because local stakeholders were willing to sit together. A collaborative approach was essential to achieve success. She said that reporting can play a role in supporting such initiatives. It helps multinational companies explain complex problems in global supply chains and talk about how they are addressing them, which in turn facilitates local dialogues by providing information to different stakeholders. Reporting should not only be a tick-box exercise. There has to be a balance between form and substance. Otherwise reporting is waste of time.

Caroline Rees, President of Shift, underlined that human rights reporting should be about meaningful communication of how a company is advancing respect for human rights and setting a platform for better engagement. She presented the UN Guiding Principles Reporting Framework developed by Shift and Mazars and launched in February 2015. It asks companies to report on how they govern human rights risks, what their "salient human rights issues" are (the human rights at risk of the most severe negative impact through their operations and value chain) and how those issues are managed. The central idea of "salience" is that companies should focus on the greatest risks to people, not just risks to the business itself. She underlined that human rights reporting should not be seen as a burden – done properly, the process supports and reinforces good human rights due diligence and becomes an investment in better risk management.

For more information on the UNGP Reporting Framework please see the film and presentation on the website: http://eu-roadmap.nl/background-information/human-

rights-reporting-for-companies or www.UNGPreporting.org.

Richard Howitt then moderated a panel discussion.

Betrand Janus from Total explained that in France companies are used to legally mandated reporting for non-financial information. Since 2012 it has been mandatory for larger companies to include information on human rights in their annual reports, audited by an external party. “It is not frightening to report,” he said. However, he noted that a legal ‘comply or explain’ reporting requirement can lead to tick-box reporting with companies producing very general reports. There is a need for more space to get deeper into the real issues, to show more of the practical reality of what has been done on human rights. Therefore, Total has decided to publish separate reports on climate change and human rights this year. The latter report will use the UNGPs Reporting Framework.

Sofie Nystrom from H&M explained that H&M saw the UNGPs Reporting Framework as an opportunity to check whether or not they were working on the right human rights issues. Human rights due diligence is a learning process, she said. There are always new issues to tackle. Examples of risks in the H&M supply chain are child labour, fair living wage and health and safety. Using the UNGPs Reporting Framework helped the company identify areas in which it is not so advanced. It showed them their strengths and weaknesses. Initially, she said, using the Reporting Framework was time consuming, as the company had partial information and had to work out how to structure it and fill gaps. The first step was to sit down internally and ask “what are the issues, and where do they occur?” H&M organised an internal dialogue, which was key to get everyone understand the range of relevant issues. The process really helped get the buy-in needed to improve practices as well. Now, after reporting, H&M is thinking about renewing its policy and reviewing its due diligence.

Human rights are a risk for companies and have to be managed, argued Dominic Burke from the investor, Hermes EOS. He said Hermes EOS is increasingly moving to a more holistic approach to its investments and takes into account the sort of society being created by investment decisions. Shareholders do read companies’ reports, including on human rights and other non-financial information. It is useful to see where the gaps are. Companies are disclosing more information, partly to reduce negative media attention from NGOs. Investors like Hermes use their engagement with companies to push for progress, he said. “We are going in the right direction”.

Janus added that Total has been asked by its investors what it is doing on human rights as well as climate change, and stressed the importance of addressing these questions as part of the company’s licence to operate.

According to Filip Gregor from Frank Bold, it is nearly always possible to treat regulations as a tick-box exercise. The UNGPs Reporting Framework focuses companies on the quality of information and opens a door to evaluation and assurance. It is difficult to do a tick-box exercise within this framework. There is also a need to be aware of the limits of reporting. It is primarily a tool for managing a company. States could clarify what to expect from companies and show more clarity and guidance on the concept of ‘salient risks’. This would help companies to select risks. One big issue is how companies present their data. There needs to be at least a comparable structure so that investors can look for the relevant data in an annual report or separate report.

Other issues that were discussed were the relationship between reporting on human rights and on action under Agenda 2030/SDGs; how to take realities on the ground into account (what a company sees as severe is not always the same as what communities see as an issue for concern); managing stakeholder relations, publishing human rights impact assessments and making them readily accessible, and how far down the supply chain a company should look.

In conclusion, Richard Howitt reflected on the discussion:

- There were discussions on the positive dynamics that using the Reporting Framework can trigger within companies, doing gap analyses and then going further once this has been embraced by the company;
- Companies seem to be more comfortable now about disclosing risks, for example of forced labour, compared to five years ago. There was an exchange of views on disclosing impact assessments;
- A critical question was raised regarding the disclosure of actual negative impacts on victims.
- There was a question as to how far materiality can go regarding the relationship between financial and non-financial reporting. This remained an open question and one on which governments need to help.
- A holistic approach towards reporting on different frameworks and policy goals (SDGs) was discussed;
- And lastly a more personal observation that was not mentioned in the discussions so far: the EU could do more to encourage a fair living wage.

Session 16 - Access to Remedy: The Effectiveness of Non-Judicial Grievance Mechanisms

The Access to Remedy pillar of the UN Guiding Principles on Business and Human Rights (UNGPs) clarifies that "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". Based on existing insights about the functioning of non-judicial grievance mechanisms, the panel in this session discussed how the EU can improve the effectiveness of non-judicial grievance mechanisms in providing remedy for victims of business related human rights abuses.

Recommendations put forward in the session by the participants:

- Non-judicial grievance mechanisms function best alongside well-functioning judicial systems. The EU and Member States should take steps to remove legal, procedural, and institutional barriers within Europe that prevent victims of business-related human rights abuse from gaining access to judicial remedy in both transnational and domestic cases. The Council of Europe and UN recommendations on Human Rights and Business provides useful guidance in this regard;
- The EU and Member States should support local communities that are negatively affected by business in the use of grievance mechanisms, and should help them in overcoming barriers, such as lack of information, language and other cultural barriers;
- The EU and Member States should strengthen and harmonise the National Contact Points (NCPs) in accordance with the UNGPs effectiveness criteria and promote the establishment of NCPs beyond OECD members;
- The EU and Member States should use their leverage on the boards of development finance institutions to strengthen those institutions grievance mechanisms in accordance with the UNGPs effectiveness criteria;
- The EU and Member States should increase awareness among European companies on the importance of Non-Judicial Grievance Mechanisms and attach consequences for companies if they do not participate in them in good faith;

The EU and Member States should fund research and education on how to develop local, rights-based operational-level mechanisms for local problems, as well as on their relationship with other non-judicial and judicial mechanisms.

Moderator: Mariëtte van Huijstee (SOMO)

Panelists:

- Roel Nieuwenkamp (OECD Responsible Business Working Party);
- Roberto Rando (Accountability Mechanism of the European Investment Bank);
- Alice Pedretti (CSR Europe);
- Sukhgerel Dugersuren (OT Watch).

Organized by: SOMO

Discussion

Moderator Mariëtte van Huijstee from SOMO provided a brief introduction to the topic: One of the three pillars of the UNGPs addresses Access to Remedy. Mechanisms that can provide remedy in cases where victims are harmed by business conduct can be state-based, non-state based, judicial or non-judicial. In an ideal world, non-judicial grievance mechanisms (NJGMs) would supplement judicial mechanisms. The reality is that in many jurisdictions, judicial remedies are ineffective or non-existent, and non-judicial grievance mechanisms are in practice the only option for those affected by business-related human rights abuses. However, recent research shows that many non-judicial grievance mechanisms do not yet comply with the effectiveness criteria set out in UNGP 31, and so do not yet live up to their potential.[7]

[7] A recent report titled Remedy Remains Rare analysed 215 complaints filed with NCPs around the

The panellists discussed different types of non-judicial grievance mechanisms: NCPs, complaint mechanisms connected to development finance institutions, and company level grievance mechanisms.

Roberto Rando is responsible for handling complaints with the European Investment Bank (EIB). He explained that the EIB-Complaints Mechanism is a two-tier mechanism (with an internal Complaints Mechanism Division in the EIB - and an external tier in the form of the European Ombudsman) created in 2008 and revised in 2010, following public consultation. The mechanism is currently under review. The EIB-CM covers compliance review, mediation, advise, and monitoring. It takes a problem solving oriented approach. Both the internal and external tier of the EIB have very low thresholds for submitting a complaint.

Given its two-tier structure which enables complainants to submit an appeal to the European Ombudsman if they are not satisfied with the outcome of the inquiry by the internal tier, it is possible to measure complainants' level of satisfaction with the mechanism's outcomes. In addition, the EIB-CM (contrary to other IFI's independent accountability mechanisms) has a monitoring function, enabling the EIB-CM to follow-up on the implementation of its recommendations.

Important issues:

1. The role of the European Union outside of Europe: The mechanism is based on the fundamental right of all stakeholders to appeal. There is no need to prove direct individual concern in order to file a complaint. Based on the Memorandum of Understanding between the EIB and the European Ombudsman, the latter has committed to use its own-initiative power to open an inquiry. The only reason not to inquire into a complaint alleging maladministration by the EIB is that the complainant is not a citizen or resident of the EU.
2. There is some interaction between the EIB-CM, mechanisms at the operational level and other non-judicial mechanisms. Operational-level grievance mechanisms for project-affected people can be an effective means of addressing concerns as close as possible to the community where the *harm* occurred. The predictability of such mechanisms is very important. Predictability and effectiveness are important factors to ensure the process and outcomes are fair.
3. It is important to strengthen the protection for complainants in order to ensure that grievance mechanisms can be accessed by concerned stakeholders without fear of reprisal.

Roel Nieuwenkamp, chair of the OECD working party on responsible business conduct, discussed the system of OECD National Contact Points that, according to him, give "teeth" to the UN Guiding Principles. Forty six governments agreed to the complaints mechanisms. It has global scope and covers supply chains. There is no limit as long as there is some kind of link to a value chain. The OECD decision on NCPs is a binding legal decision. That means that governments are legally bound to set up a national contact point. This, he said, is quite unique. This comprehensive government backed complaints mechanism is also a B&HR promotion mechanism. This is how it works: when a complaint comes in, it is filtered. If serious: there will be an offer for mediation. If the offer fails, then a statement of recommendation is issued. If a company gets a negative statement, governments often cannot align with them. For example Canada said that if a company does not work with the NCP or has a negative statement they will withdraw all enhanced diplomacy support. So the OECD Guidelines and NCP system are not legally binding for business, but still important. How can the OECD guidelines be promoted beyond OECD countries? That is not easy. Governments like China will not likely become members. But more countries than just OECD

world between 2001-2015. Only 14% have had a beneficial outcome for the complainants, and compensation was not given. Another recent report (Glass Half Full?) assessed 11 complaint mechanisms connected to development finance institutions. Out of 684 complaints, only 19% produced an outcome for complainants. This shows there is an urgent need to improve these types of mechanisms.

countries are already members: Brazil, Argentina, Colombia, but also Morocco for example. But in order to create a global level playing field China and India should also have NCPs.

Nieuwenkamp explained the system using two cases. The first looked at a complaint by WWF against Soco concerning oil exploration in a world heritage site. The second was a complaint against a drug company Mylan that produced a drug that was used for lethal injections for the death penalty.

Sukhgerel Dugersuren from OT (Oyu Tolgo) Watch (Mongolia) monitors the operations and impacts of UK company Rio Tinto's Oyu Tolgoi mine, as well as other large mines in Mongolia. OT Watch has used mechanisms provided by financial institutes such as the International Financial Corporation (IFC) and the European Bank for Reconstruction and Development (EBRD) as well as the NCP system to support local communities to seek redress for the impacts caused by big mines.

OT Watch has access to international civil society expertise on non-judicial grievance mechanisms (NJGMs) and therefore can improve the chances of local communities when filing complaints. Local communities need access to national and international expertise to be able to use NJGMs. They also face language and cultural barriers. When the NJGMs is provided by a financial institution it is not perceived by the affected communities as an independent mechanism offering an unbiased process, often resulting in a lack of trust in non-judicial mechanisms. Furthermore, NJGMs are mainly focused on providing mediation between parties, instead of providing remedy for the impacted communities.

> *"The outcomes of the complaints processes we have supported have been rather disappointing."* **- Sukhgerel Dugersuren.**

For example, OT Watch filed a complaint with the Canadian NCP, but the local community questioned the independence of the NCP which resulted in the local community losing interest in pursuing the case through the NCP mechanism. International civil society experts questioned the fairness of the NCP decision not to start a mediation.

Sukhgerel said that in their experience, the EBRD project complaint mechanism is too slow. Herders filed a complaint in 2013 with the EBRD but by 2016 there was still only a draft compliance report in review. So it takes three years before there is any outcome. Furthermore, the mediation process was refused because of poor relations between the Bank and the company, which had a further negative impact on the community.

The complaint process with the Compliance Advisor Ombudsman (IFC) has been the best experience so far, but still provided little remedy. The parties started the mediation yelling and shouting at each other. After two years a tri-partite council was established. But even this relatively successful process does not necessarily lead to a remedy. It is process for the sake of a process. In one example, a large mine in a desert region depleted all the wells used by nomadic herders nearby. In response to the complaint, the mine and its financiers brought in water in metal containers as a remedy. But the water was rusty, and because it is heated by the desert sun, it leads to health problems for the animals and people drinking it. This is not an adequate remedy in terms of either quality or quantity and is also not culturally appropriate, or a long term solution to the herders' lost access to water.

Alice Pedretti from CSR Europe has developed and tested a tool to manage the complaints within companies, focusing on operational level grievance mechanisms[8]. She reported that while some companies are shifting towards an approach of continuous improvement, challenges remain. Companies need to invest sufficient time and resources in to designing such mechanisms, and these need to be set up in dialogue with the intended users (employees and/or local communities) and relevant stakeholders (e.g. governments, NGOs). Overcoming cultural differences is

[8] See: Assessing the effectiveness of company grievance mechanisms.

another challenge and multinationals have difficulties adapting global policies to different local/regional needs. The EU and Member States can improve the effectiveness of NJGMs in relation to operational grievances by supporting capacity building especially at the local level and promoting useful tools to improve the effectiveness of NJGMs. But the EU should also exercise their convening powers to support the implementation of the third pillar of the UNGPs as well as using its leverage to foster and support policy developments outside the EU.

Other issues that were raised following these presentations were: problems with NCPs that do not always function well; the need for due diligence in public procurement (states should practice what they preach); the need for local solutions for local issues; and the importance of a functioning judicial system as a backbone for NJGMs.

Plenary Session 2: Human Rights Due Diligence: the Role of States

This session looked at ways states can require or encourage corporations to carry out human rights due diligence. The session explored government approaches for ensuring corporate responsibility with respect to human rights using a concept of due diligence from a holistic perspective. These included administrative, civil and company law developments, and contracts between states and industries involved in activities with significant human rights' risks, designed both to support due diligence and improve access to remedy for victims.

This part of the conference was part of the Human Rights in Business training session.[9]

Moderator: Filip Gregor (Frank Bold)

Contributions by:

- Mark Taylor (FAFO);
- Cees van Dam (Human Rights in Business Project, Maastricht University, Rotterdam School of Management/ Erasmus University, King's College London);
- Dominique Potier (Deputy of the 5th constituency of Meurthe-et-Moselle in the National Assembly, France);
- Femke Den Hartog (InRetail);
- Gerard Oonk (India Committee of the Netherlands/ Stop Child Labour)
- Richard Howitt (European Parliament Rapporteur on Corporate Social Responsibility)

Organised by: Frank Bold and Human Rights in Business Project

9 The Human Rights in Business project, funded by the EU, was designed to tackle the challenge of how to provide justice for human rights violations by transnational corporations in the European Union, Several training events were organised, including this session. More information can be found on the website: http://humanrightsinbusiness.eu/.

Discussion

Filip Gregor introduced the main question of the session: how can states ensure that corporations carry out human rights due diligence (HRDD) and in doing so fulfil their responsibility to respect human rights? The panellists brought different possible solutions.

Mark Taylor, research director at FAFO, was asked in 2012, together with Prof. Oliver de Schutter, Prof. Anita Ramasastry, and Robert C. Thompson to establish the extent to which states' legal systems already make use of due diligence regulations - to ensure that businesses respect established standards - and to describe a range of regulatory options policymakers might use to take the next steps to ensure businesses respect human rights.

This project ultimately obtained more than 100 examples of due diligence regimes in more than 20 states. These examples were drawn from labour, consumer and environmental protection laws, but very few explicitly addressed how businesses should respect to human rights.

Since then human right due diligence has begun to be reflected in regulation, as for example in the 2014 EU directive on non-financial reporting.

The project found that states have used due diligence in four different ways which can also be employed to ensure human rights due diligence activities by business. These are: 1) as a way to comply with rules or standards, 2) as a way to gain access to incentives of benefits that are provided by the state, 3) in transparency or disclosure rules and 4) in a combination of all of above by clustering law around a specific issue.

Due diligence in state regulation is evidence of state practice and it can be evidence of enforcement (of human rights protection), but this is not always the case. State practice doesn't tell the whole story.

Due diligence is both about prevention and compliance. In the regulatory context, it is used as a standard to assess compliance, to make regulations more effective (it asks those directly involved to justify the nature of their involvement and responsibility) and it is cheaper (it allows effectiveness to be assessed from a regulator's or consumer's point of view).

Mark Taylor recommended states start by injecting human rights due diligence in to their relationships with business, including procurement, regulation, investment, and other forms of ownership. States should make it clear that respect for human rights is a minimum requirement.

Femke den Hartog from InRetail represents Dutch businesses in the garment sector, where there has been a tremendous sense of urgency to deal with the human rights problems in supply chains because of the sector's negative image. The sector wanted to avoid regulation and so organised a multi-stakeholder initiative to devise an action plan to address the problem. The initiative identified several issues as being important: child labour, health and safety, bonded labour, circular economy, due diligence, purchasing practices, living wage, freedom of association, water chemicals, energy and raw materials. This resulted in an action plan that made these issues and human rights more tangible for businesses. Although 150 parties signed up to the action plan, only a few were really active. This meant there was a need for a stricter requirement, so the Dutch Minister for Foreign Trade and Development pushed for a covenant on Textiles and Garments.

Gerard Oonk from the India Committee of the Netherlands/ Stop Child Labour took part in the negotiations on the covenant as an NGO stakeholder. He explained that in answer to NGOs' constant demand for global supply chain analysis, the Dutch Minister for Foreign Trade and Development decided to do this analysis to determine which sectors of Dutch businesses were involved in HR and environmental violations. The Minister then asked these sectors to come with multi-stakeholder agreements to promote and enforce due diligence. The first one that materialized was the Textiles and Garment Covenant. The Dutch NGOs agreed to sign the covenant provided that individual textile companies, rather than their associations, signed up.

> *"The big difference with other multi-stakeholder initiatives is that there is now a national consensus on the minimum requirements in terms of operationalisation of the UNGP and OECD."* **– Gerard Oonk.**

Elements of the covenant include:

- Mandatory DD to assess the full supply chain in a period of five years;
- Independent covenant staff to check individual companies' action plans and due diligence;
- Governance involving all parties;
- Nine thematic focus areas including for example child labour, bonded labour, but also animal rights;
- Collective action around these nine issues, so companies create more leverage to achieve change in the supply chains
- The action plans should also set targets, but not initially
- Binding dispute and complaints mechanisms
- Aggravated reports on actions and impacts and from the third year individual reporting;

- Evaluation of impact after three years

Furthermore the Dutch government has agreed to become more active through its diplomacy and in its own procurement.

Gerard Oonk pointed towards several risks, including the possibility of too little support from companies, and not enough companies joining. But the Minister had said that if this happened, she would not be afraid to introduce legislation mandating the new standard. Oonk concluded by stating that he believed that a legislative framework is needed and that it is important that companies show that effective due diligence is possible in practice.

Professor Cees van Dam is part of the European research project Human Rights in Business, a collaboration between leading European academic institutions and funded by the European Union's Civil Justice Programme. The research project is focused on researching and resolving problems associated with access to justice for HR violations in business, the HR context and advancing standards of care in tort/civil law. Cees van Dam presented some preliminary conclusions from the research. These suggested three possible scenarios to improve human rights protection and responsibility to respect human rights in the context of tort law and companies' duty of care:

1. Right to evidence regarding control of the parent company over subsidiaries
   issue: victim's access to information about control in realm of company
   ***scenario*:** civil law jurisdictions could introduce specific disclosure obligations in civil court procedures with respect to the control a parent company exercises over its subsidiaries and contractors and its involvement in the specific case inasmuch as this information is relevant for assessing the company-defendant's duty of care.

2. Rebuttable presumption of control over subsidiaries
   ***issue*:** victim's access to information about control in realm of company
   ***scenario*:** accept prima facie evidence that company exercises control over its subsidiaries or other business partners; then shift burden of proof to company to prove that it did not exercise control

3. Statutory duty to conduct human rights due diligence (HRDD)
   issue: difficult to establish a duty of care for parent companies
   scenario*:* make HRDD compulsory by creating statutory duties to identify, prevent, mitigate and cease HR violations for which a company is directly or indirectly responsible, that is, those caused by its business partners, over which the company can exercise control, and by providing remedies (damages, injunctions) in cases where one or more of such duties are breached. The company's liability might be initially limited to subsidiaries over which it exercises control or to specific human rights risks before it would be extended further. To improve the position of victims, the burden of proof may be reversed for the breach of the duty or for the causation between the failure to conduct HRDD and the damage.

Dominique Potier is member of the French Parliament for Meurthe-et-Moselle. He is the rapporteur for a proposed new law in France on duty of care. French parliamentarians, trade unions, NGOs, academics and lawyers have been working for three years on this law designed to respect human dignity against the prevailing low cost competitive business strategy, and against a backdrop of political and economic uncertainty. The law builds on established European standards in international trade, companies existing engagement in corporate social responsibility

and the growing consumer preference for ethical purchasing. The law requires companies to effectively implement a duty of care plan to address the risk of impacts on human rights, the environment and corruption. It strengthens access to justice and remedy for victims by enhancing the chain of causality. Furthermore, a company that does not produce a plan will face an administrative fine of up to 10 million EUR and publication of the court's decision. The law has gone 'back and forth' between the National Assembly and the Senate. It was adopted unanimously by the National Assembly, but the Senate opposed it. It needs to be fully adopted before the end of the 2016 session. Potier emphasised that this new standard should be harmonised at the EU level through an EU law. The legislative proposal on the duty of care of parent companies (n° 2578) is available on the website of the French National Assembly : http://www.assembleenationale.fr/14/dossiers/devoir_vigilance_entreprises_donneuses_ordre.asp.

Richard Howitt, member of the European Parliament and the European Parliament Rapporteur on Corporate Social Responsibility, concluded the session. He pointed out that the EU directive on non-financial reporting builds on the due diligence concept and stressed the need to implement it well and in good spirit as a first step. He mentioned that it was important to realise that due diligence as a concept is not new, as Mark Taylor had pointed out.

Furthermore, states have multiple opportunities to implement due diligence and it is important to bear in mind that there is not one single silver bullet that will provide a solution.

"Governments should look first at their own procurement and export credits and implement human rights due diligence as a requirement here." **– Richard Howitt.**

Howitt reminded the conference that Prof. John Ruggie emphasised this in the six years of his mandate and five years later, it still has not happened. A big test for the EU is the conflict minerals legislation that is being negotiated. The US has championed the EU on this issue. Howitt concluded by stressing the need to engage companies and hear their concerns in this discussion, pointing to the process of negotiating the EU directive on non-financial reporting, as a good example which resulted in a good final text. "We are seeing individual EU Member States passing mandatory due diligence requirements, including in France, Switzerland, the Netherlands, and the UK, which makes a compelling case for a harmonised EU standard," he said.

Session 21- Complementarity between the UNGPs and a binding UN Instrument

On 24-28 October 2016 the UN Intergovernmental Working Group (UN IGWG) on transnational corporations and other business enterprises with respect to human rights will meet in Geneva for its second session to work towards elaborating an international legally binding instrument. Some civil society organisations, a number of which are engaged both in the implementation of the UN Guiding Principles (UNGPs) and in Treaty discussions, as well as some academics argue that the UNGPs and a new Treaty can be complementary. Differing views still exist among governments and business on the possible added value of a new Treaty.

This session brought together different perspectives to consider how an international treaty could potentially help to address recognised gaps in current frameworks, particularly in relation to the EU priorities of access to justice and protection of human rights defenders in the UN context, and to discuss prospects for the UN process and how Europe might contribute.

Recommendations put forward in the session by the participants

- The EU and Member States should not be scared of the process to establish a UN binding instrument, but they should not wait for it to improve access to remedy for victims in the short term;
- The EU and Member States need to realise that multinational companies are more powerful than many states, and this can inhibit the effectiveness of national legal systems. There is a need for an accessible and just international system of justice;
- The EU and Member States should use their power and leverage and take a leading role in the process to establish a legally binding instrument.

Moderator: Denise Auclair (CIDSE)

Panelists:

- Pablo Fajardo (litigator Chevron case Ecuador);
- Gilles Goedhart (Ministry of Foreign Affairs, the Netherlands);
- Debbie Stothard (FIDH);
- Arjen Boekhold (Tony's Chocolonely);
- Mark Taylor (FAFO).

Organized by: SOMO, CIDSE, Friends of the Earth Europe and TNI

Discussion

After a short introduction by the moderator Denice Auclair, Mark Taylor from FAFO opened the panel by explaining that the UNGPs are not binding, but that there are different understandings of what 'binding' means. Usually we mean binding for states. International law, until now, has never been binding for companies, and this creates a challenge for the treaty under negotiation. In general treaties rarely create new law, instead they usually codify customary law. Taylor made a strong plea to focus the discussion in the treaty by making it limited in substantive scope, by restricting its jurisdiction to certain actors and by limiting the modes on responsibility (extraterritorial). The treaty could be enforced by the principle of complementarity between national legal systems and in the end the International Court. But there needs to be political will to enforce, otherwise business will still find a way to avoid responsibility.

Pablo Fajardo, who is a litigator in the Chevron case in Ecuador, pointed out that there is a recognition that there have been systematic human rights violations by transnational corporations (TNCs) in the framework of an architecture that ensure their impunity. Indeed, in this context, neither the UN Guiding Principles, nor the National Action Plans have been able to hold TNCs to account. They have failed to provide affected communities with a strong, enforceable mechanism which ensures they have access to justice, and which ensures that any judgement or verdict on their case will be also implemented. He stressed the urgent

need for something to change. In the last 22 years in Ecuador, 30,000 indigenous people have been affected by oil companies. These companies have built 365 oil pits, knowingly spilled oil and intoxicated indigenous peoples. As a result, two indigenous groups have vanished. Many suffer from cancer and leukaemia.

Fajardo explained how Chevron had tried to evade liability using different legal strategies. The case was initiated in New York 22 years ago, but following a request from Chevron, the judges in NY transferred the case to Ecuador. Then the company said that the judges were not competent. In 2011 the court ruled that Chevron needed to pay US$ 9 billion in damages, but Ecuador had no means to enforce the judgement and make them pay, because Chevron had pulled out of the country. So now the case is recurred to courts in other countries (Brazil, Argentina, and Canada). Chevron has alleged that the judges in these countries do not have the competence or jurisdiction to take up the case. There was a victory in the Canadian Supreme Court in 2015, but Chevron still has not paid any damages. Chevron has been working on a lobby and media campaign to discredit the Ecuadorian legal system, portraying Chevron as a victim of the legal system. Fajardo argued that it was crucial to have a legal system where everybody has the same opportunity to access justice. We need a treaty to ensure that TNCs are obliged to respect human rights, he said. He added that thanks to the coordinated work of social movements worldwide, the will of some countries at the UN and hundreds of HR NGOs, the process has begun with the UN Human Rights Council resolution 26/09.

"It is time for UN Member States to rule over transnational corporations, and not to be ruled by them. And the European Union should support this process, rather than trying to derail it as it has done until now." **- Pablo Fajardo**.

Fajardo ended by stressing that human rights are not negotiable and should be recognised by the UN and all states as above corporate interests.

Debbie Stothard from FIDH reiterated that the experiences of the indigenous peoples in Ecuador and other parts of the world, including Asia, show the need for a binding instrument. The current mechanisms are not strong enough to protect HR defenders. She described human rights defenders depending only on the UNGPs to fight impunity as "fighting tanks with forks". She added that it was hard to explain to her students why there was no law on Business and Human Rights as there is on child labour. She also criticised the EU for its position in the negotiations on the binding instrument.

Arjen Boekhold works for the Dutch chocolatemaker Tony's Chocolonely, which was established with the vision not only to make its own chocolate slave-free, but all chocolate worldwide. As no chocolate company wanted to talk about what was happening in their supply chain 10 years ago, Tony's Chocolonely was founded to change the industry. He said that consumers have normally no idea where their cocoa comes from, and that 90% of all cocoa producers in West Africa are living under the poverty line. According to the company, voluntary guidelines and multi-stakeholder agreements have failed until now to end child labour, slavery and poverty. Boekhold said it was important that there are voluntary standards, but these should go accompanied by legal measures. Governments should force companies to be transparent about their supply chains. In the end consumers and producers will reward the company, as the company's business case shows. The company thinks it is strange that they have to provide detailed information on their bars about the possibility of there being traces of peanuts, but nothing

about the risk on potential slavery and child labour. The fact that the treaty process has started will help to speed up the implementation of the UNGPs and the EU should take a leading role, by making due diligence and transparency in supply chains law.

Gilles Goedhart from the Dutch Ministry of Foreign Affairs said that it was inaccurate to say the EU was not interested in a binding instrument. The EU has been sceptical because they are unsure about what this treaty would add to existing obligations, and they have been sceptical about the process so far. For the EU, the most important problem is limiting the scope to TNCs. The treaty should cover all companies, including domestic and state-owned enterprises.

> *"It is important not to wait for a treaty before taking action. It could take 10-15 years before the treaty is negotiated. Meanwhile, we need to strengthen access to remedy."* **– Gilles Goedhart.**

He said that the Netherlands, for example, was already taking measures, based on a comprehensive study of its legal system, to make it easier to hold Dutch companies liable in court if they are involved with HR abuses outside the Netherlands. Part of the Dutch ambition for the EU presidency was for the European Commission to take similar measures in the upcoming Action Plan on Responsible Business Conduct.

Denise Auclair, who had asked the question at the start as to whether we should be afraid of the Treaty concluded that the answer from the session was "No, the EU should not be scared of the process of developing the Treaty, but the EU also should not wait for the Treaty to improve access to remedy in the short run. She thanked the Dutch Government for supporting this space for an open discussion on the Treaty process.

Fajardo and Stothard ended the session with strong pleas to ensure access to justice for everybody on an equal footing and for the EU to use its power and leverage to try and move the discussion forward.

Session 22 - Human Rights Due Diligence in the Supply Chain

This session considered the on-going work at the OECD with respect to due diligence in supply chains. The OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector and the development of OECD General Guidance on risk-based Due Diligence for Responsible Business Conduct were discussed. The session identified crucial issues that emerged on the development of due diligence guidance at the OECD and enabled a dialogue between the OECD and its institutional partners to provide their perspective on these issues.

Recommendations put forward in the session by the participants

- Due diligence is not the answer but is an essential question and is about preventing, mitigating and remediating negative impacts. Today, the OECD is the main forum where these questions are being addressed;
- The EU and Member States should promote the OECD sectoral and general due diligence guidance, as they have already done with the minerals guidelines; they should ensure that EU NCPs use the guidance when handling complaints; they should ensure resources and seek to create a level playing field, for example seeking to get China on board;
- The EU and Member States should be clear and realistic as to what is expected from companies;
- The new OECD guidelines on due diligence should not set further obligations or new rules, but should be in line with language of existing OECD guidelines and take into account the complexity of the supply chain;
- The EU and Member States should promote the OECD guidelines hand in hand with the UNGPs to build coherence within the OECD and UN;
- The EU and Member States should reach out to SMEs on the implementation of the OECD guidelines and the UNGPs;

Moderator: Joris Oldenziel (Bangladesh Accord Foundation)

Panelists:

- Roel Nieuwenkamp (OECD Working Party);
- Dwight Justice (ITUC);
- Joseph Wilde (OECD Watch);
- Rebekah Smith (BIAC)

Organised by: The International Trade Union Confederation (ITUC)

Discussion

This session was moderated by Joris Oldenziel from the Bangladesh Accord Foundation. The Bangladesh Accord is legally binding and covers more than 1600 factories, with more than 220 brands, importers and retailers signed up. The Accord undertakes inspections, identifies risks in these factories and works with the factories and brands to develop Corrective Action Plans to prevent and mitigate risks. The Accord is an example of implementation of HR Due Diligence in the supply chain, focusing on a particularly high-risk area. The OECD is developing guidance on due diligence, including for the garment and footwear sectors. This session explored this OECD initiative.

Roel Nieuwenkamp, chair of the OECD Working Party on Responsible Business Conduct, acknowledged that the Bangladesh Accord is innovative, and that other initiatives have learned a lot from it. Within the OECD (and always in cooperation with the ILO and UN), a multilateral agreement on the meaning of supply chain responsibility was reached in 2011. The OECD started working with high risks sectors. Governments feel they have more “teeth”, and are more and more attached to using OECD complaints mechanisms. One third of the issues brought forward through OECD complaints mechanisms relate to human rights issues. In its sectoral work on conflict minerals, for example, the OECD tackles the most serious HR abuses. The European Parliament is now debating whether or not it will become mandatory (in the meantime the Parliament secured mandatory

due diligence for importers[10]). There is currently a document out for public consultation on the garment and textile sector, and the agricultural guidelines were finalised in December. The OECD is now working on the finance sector and institutional investors' responsibilities, and on overall due diligence guidelines, as even the OECD cannot tackle hundreds of other sectors. The EU should promote these guidelines, as they have already done with the minerals guidelines where they invested a lot of resources. The EU could play a role in creating a level playing field, for example by getting China on board. Supply chain due diligence has a development impact and offers huge potential for achieving the SDGs.

Rebekah Smith, speaking on behalf of BIAC, added that for businesses, global supply chains are an opportunity in terms of investment, technology and employment, and a challenge as global supply chains are complex. The OECD is important in the context of creating an enabling environment for companies. Their guidance is concrete and the instrument is widely accepted. Support in the business community is key and the current consensus should not be broken. It is important to be clear and realistic on what is expected from companies. The due diligence guidance that is being developed should not set further obligations or new rules, but should be in line with language of existing OECD guidelines and take into account the complexity of the supply chain.

One main question is whether due diligence should be seen as a process or as an outcome according to Joseph Wilde-Ramsing of OECD Watch. It is important to move beyond seeing due diligence as a tick-the-box exercise. Due diligence should be an outcome-oriented process identifying impact and using the leverage of the company to mitigate impact. Companies can increase their leverage by cooperating with their peers in the sector. If a point is reached where all leverage has been exercised but suppliers fail to make adequate progress, then the relationship should be terminated. Companies should consider disengagement more seriously.

Oldenziel added that the Bangladesh Accord is a good example of how a company's individual leverage can be increased through cooperation. Through their collective leverage the signatory companies are working with their supplier factories factories toward remediation of the identified safety hazards. Signatory companies were thus far required to terminate their relationships with 25 suppliers as they failed to make adequate remediation progress despite the support offered by the Accord signatories. The Accord is working with trade union partners and brands to make reasonable efforts to offer alternative employment at safe factories for affected workers.

Dwight Justice of the ITUC said the UNGPs provide a lens, a conceptual basis. Issues that need to be dealt with include the structure and concept (what does it mean to prevent and mitigate), the language (needs to be in line with other instruments), the concept of salience (risks identified by the organisation not always the same as to the affected people) the concept of grievances and whether it is a process or an outcome (the two are inseparable). Due diligence should not be limited to first or second tier, but it has to be based on relationship: has the company caused, contributed to or is it indirectly linked? Due diligence should not be limited to larger companies. It is not about the size of enterprises, but about the risk involved.

Several issues were raised by the audience:

- Should companies decide what salient risks are: Smith (BIAC) said that companies and stakeholders need to do a mapping together do define salient risks. But if companies have long supply chains, it is not easy to have that interaction. Also one framework is needed, and there are now different requirement, globally and nationally;
- Does the due diligence process depend on the size of the firm or the risk: Justice from ITUC replied that it was a chicken and egg question. Due diligence is a dynamic process. Companies might discover other impacts not being taken into account, sometimes adverse impacts are already known;
- Is a risk to right holders also always a financial risk? Nieuwenkamp from the OECD acknowledged that sometimes the risks coincide, but the OECD guidelines concern the human rights risks. Wilde from OECD Watch added that material risks to a company were not always the same as human rights

[10] Please see the press release of 16 June 2016: www.europarl.europa.eu/news/en/news-room/20160625IPR32320/Conflict-minerals-MEPs-secure-mandatory-due-diligence-for-importers

risks. Due diligence must include stakeholder engagement. It should really be about impacts in the supply chain and about being transparent as to how risks are identified.

- How to create a level playing field in the EU;
- What about outreach and the importance of involving SME's? In the EU 90% of the SMEs have never heard of OECD guidelines. Nieuwenkamp argued that good CSR managers should have heard of the OECD guidelines or the UNGPs. But he acknowledged that not all NCPs work hard to promote awareness. The OECD guidelines should be promoted hand in hand with the UNGPs to ensure coherence within the OECD and UN. It is essential to reach out to SMEs.

Session 23 - Public Procurement: Eliminating Human Rights Abuses from Government Supply Chains.

The UNGPs call on states to ensure respect for human rights when they purchase goods and services. However, few steps have been taken so far at national or EU level to safeguard respect for human rights from public suppliers and contractors. In this session opportunities were identified to "scale up and speed up" efforts by public buyers to eliminate human rights abuses from their supply chains.

Recommendations put forward in the session by participants

- The EU and Member States have to lead by example. There is currently a disconnect between their 'commitments' to the UN Guiding Principles and public procurement practices;
- The EU and Member States must use opportunities to integrate human rights into public procurement under the new EU public procurement directives;
- The EU should provide guidance for those responsible for public procurement on integrating human rights into their processes. This is particularly important given the lack of coherent approaches across public authorities at a national level and because buyers fear legal challenges from suppliers;
- The EU and Member States should make resources available for capacity building among public procurement officials and for monitoring contract terms. They should address impacts on workers in low pay sectors who work under government contracts inside the EU (e.g. contract cleaning, security guards, catering, care personnel);
- A paradigm shift in the EU is needed when sourcing from occupied territories, from optional social criteria to human rights criteria;
- The EU and Member States should take note of encouraging examples of appropriate contract terms and disclosure (e.g. Electronics Watch).

Moderator: Claire Methven O'Brien (The Danish Institute for Human Rights)

Panelists:

- Dante Pesce (UN Working Group on Business and Human Rights);
- Theo Jaekel (Swedwatch);
- Diewertje Heyl (Stop Child Labour);
- Olga Martin Ortega (University of Greenwich/Learning Lab on Public Procurement and Human Rights);
- David Hansom (Veale Wasbrough Vizards)

Organized by: Danish Institute for Human Rights, Swedwatch and the Stop Child Labour Coalition

Discussion

Moderator Claire Methven O'Brien opened the session. She highlighted that public purchasing accounts for a major share of the overall economy, representing 17% of GDP on average in OECD countries, with public sector purchasing dominating many sectors. The UNGPs, G7 Leaders Declaration, 2030 Sustainable Development Goals and new Council of Europe Recommendation on business and human rights all highlight that the state's duty to protect human rights extends to public procurement. Yet to date public procurement had been neglected in UNGPs implementation efforts. This is a result of a number of key challenges, including uncertain legal frameworks, a lack of policy coherence and restricted knowledge, resources and capacity among public sector buyers.

Dante Pesce from the UN Working Group on Human Rights and Business (UNWG) suggested that, in terms of promoting implementation of the UNGPs, most governments have so far focused on private businesses rather than state-owned enterprises. Only six UN Member States had responded to a survey by the UN Working Group on public procurement, and only three indicated that there was a clear link between their international duties and national procurement practises in their country. There is a "disconnect" between the diplomatic and the operational world. In Europe, only six

governments have so far transposed the new EU public procurement directives into law. There is a clear lack of ownership in national government over this aspect of business and human rights policy.

David Hansom (Veale Wasbrough Vizards) emphasised the importance of public procurement within the economy, representing EUR 425 billion per year in the EU for example. Historically procurement law focused on securing the lowest price, but the new EU directives establish some scope for linking procurement to human rights: for example, companies may be excluded on grounds of a conviction relating to human rights abuses. On the other hand, persisting challenges include the fact that tender evaluation criteria have to be "linked to the subject matter" and that buyers unduly fear litigation.

Olga Martin Ortega from the University of Greenwich/Learning Lab on Public Procurement and Human Rights said that the Learning Lab had surveyed 17 jurisdictions, including EU Member States, the US and South Africa. The survey found no jurisdiction had legal measures explicitly identifying governments' responsibility to respect human rights in the area of public procurement, although some countries had frameworks covering specific issues (e.g. labour market integration of disadvantaged groups etc.). Practical guidance on public procurement and human rights was scarce, and there was a tendency to stretch the concept of sustainable procurement to cover human rights. There was also a lack of policy coherence across government on public procurement, which undermines human rights as procurement laws are fragmented across jurisdictions. In terms of remedy, there is a lack of mechanisms to address failures of protection connected to procurement. Where social conditions are in place in contracts, public bodies find it difficult to monitor their implementation. Procurement authorities lack knowledge and capacity to look into human rights issues in their supply chains.

Participants raised several points, asking whether there was scope to use or learn from green procurement practices; whether there were inconsistencies in approach between Member States; how to address procurement from occupied territories; and also raising the fact that there is currently very little monitoring by public sector buyers of levels of implementation by business, even where there are good guidelines or contract terms.

Dante Pesce added that procurement officers lack the knowledge and resources needed to evaluate tenders based on human rights criteria. According to David Hansom, clients may see social value as being supplementary, rather than part of the value of the goods or services contracted for.

> *"Social factors are often seen as discretionary for public bodies, while in reality they are not optional for governments, taking into account their obligations under human rights laws."* **- Claire Methven O'Brien.**

Theo Jaekel from Swedwatch reported that in Sweden a scandal on the procurement of surgical implements and clothing from Pakistan kicked off a debate about public procurement. Now all Swedish county councils apply the same code of conduct for procuring such goods and together employ a national coordinator to support implementation. This approach evaluates suppliers after the contract has been awarded. It remains a challenge that procurement law does not permit businesses from being excluded beforehand, so many public bodies still buy what is cheapest. In another case from Sweden, when NGOs found that working conditions in the DELL supply chain were poor, their government contracts were frozen and DELL was required by the public sector buyers to introduce an audit and improve transparency over its supply chain, as well as having to renegotiate their contracts.

Diewertje Heyl (Stop Child Labour) commented on the example of natural stone, used for public buildings, and mostly imported from India and China, where there are many human rights issues in the quarries. She said that although a policy on social conditions in procurement was introduced in 2005, these social conditions have rarely been applied.

"Suppliers of stone are frustrated at the lack of interest and support from public buyers in improving supply chain conditions." – **Diewertje Heyl.**

There is now a process in Holland to develop a sector agreement on natural stone; this should include steps on procurement.

Further comments: A new framework agreement for Apple IT products for London University includes social conditions clauses; companies struggle because authorities in different EU Member States have different interpretations of the EU directives; the Europe 2020 agenda should provide a platform to address social factors; in some countries within the EU, e.g. Poland, there are so many internal human rights issues relating to public procurement (e.g. low pay for contracted-out workers) that these should be the primary focus; in practice, government agencies may lack the resources needed to investigate secondary suppliers and beyond, so they should perhaps be encouraged to focus on major subcontractors.

In conclusion: EU and Member State public authorities should lead by example in identifying and addressing supply chain human rights risks in order to promote respect in the private sector

Session 24 - A Perfect Storm: Implementing the UNGPs in the context of the 2030 Agenda for Sustainable Development

The session explored the implications of the 2030 Sustainable Development Agenda for policy makers and practitioners working with business and human rights at national and EU level. More specifically, the session looked at how Member States and EU institutions should take into account the 2030 Agenda in the context of the EU Strategy and the National Actions Plans on Business and Human Rights. The following questions were addressed:

- Where can the UNGPs contribute to the achievement of specific sustainable development goals and targets?
- What role can the UNGPs play in generating the means to finance and implement the 2030 Agenda?
- How should implementation of the UNGPs be reflected in national, regional and global follow-up and review mechanisms of the 2030 Agenda?
- What are the implications of these linkages for the EU Strategy and the National Actions Plans on Business and Human Rights?

Recommendations put forward in the session by the participants

- EU Member States should include implementation of the UNGPs as an integral part of their national voluntary reviews under the 2030 Agenda, and in their ongoing tracking of progress towards 2030;
- The EU and Member States should integrate and seek coherence between efforts to implement the UNGPs and the SDGs, underlining the complementarity and interconnectedness of the two agendas;
- EU Member States should consider treating the presence and implementation of a National Action Plan for UNGPs implementation as one of their national indicators for achieving Goal 17.
- The EU and Member States should ensure that global and regional UNGPs implementation is regularly tracked as part of the regional and global follow-up and review of Goal 17 and of the Addis Ababa Action Agenda on Financing for Development;
- The EU and Member States should actively promote initiatives for peer exchange on implementation of the UNGPs through regional and global fora related to the follow-up and review of the 2030 Agenda. This should include promotion of responsible business as a thematic focus under the High-Level Political Forum.
- The EU and Member States should actively promote discussion on how responsible business and the UNGPs can facilitate the achievement of each of the Global Goals. They should also ensure that partnerships for achieving specific Global Goals are used to address adverse business impacts on these goals;
- In the context of their follow-up and review, EU Member States should consider where businesses domiciled in their territory or jurisdiction have adverse impacts on each of the Global Goals, by and make these impacts a priority in their implementation of the UNGPs. This underlines that responsible business is a precondition for sustainable development;
- The EU and Member States should integrate the implementation of and adherence to the UNGPs in public procurement, development finance programmes - including private sector development programmes, safeguards and blended finance instruments;
- Specifically, the EU and Member States should make businesses' respect for human rights, as defined in the UNGPs, a minimum basic requirement for private sector participation in public-private partnerships to achieve the Global Goals.

Moderator: Allan Lerberg Jørgensen (The Danish Institute for Human Rights)

Panelists:

- Michael Addo (UNWG on business and Human Rights);
- Michael Ellis (European Commission, Directorate General For Development

and Cooperation, EuropeAid, DEVCO A1 Policy and Coherence);
- Margaret Wachenfeld (IHRB);
- Troels Boerrild (ActionAid Denmark);

Organized by: The Danish Institute for Human Rights, Action Aid, the Institute for Human Rights and Business and the MVO Platform.

Discussion

Allan Lerberg Jørgensen from the Danish Institute for Human Rights started the session by noting that human rights have a more prominent place than before in development goals, but that there are still a lot of questions to work on. How are governments going to hold each other responsible? How will peer review take place? How will the SDGs be integrated into existing NAPS? How will implementation of the goals be financed, etc. The 2030 Agenda is very open to business. What are the opportunities? What are the risks?

Michael Addo from the UNWG on Business and Human Rights said he thought the 2030 agenda provides the opportunity the business and human rights community was hoping for.

"The SDGs brought human rights to the center of development." **– Michael Addo.**

And he said it was clear that they were not an exclusively public sector exercise. The value of the SDGs is that the private sector's know-how has been brought in.

Margaret Wachenfeld from the Institute for Human Rights and Business agreed that the SDGs offered opportunities to address some of systemic challenges that some businesses have been grappling with in trying to do business in a responsible way. But she also cautioned that some of the core assumptions needed to be unpacked. Yes, business can be a good partner in the SDGs, but they are not necessarily a good partner and certainly should not be automatically seen as one. Wachenfeld stressed the importance of the "do no harm" approach which should come first. Just as we have a "whole of government" approach, we need a "whole of business" approach to business involvement in the SDGs, she said.

The SDGs are very comprehensive, according to Michael Ellis from the European Commission (EuropeAid). The SDGs and UNGPs should be implemented together, he said. Business is seen as a provider and a partner, without looking at the pros and cons. There are challenges, but it is an incredible agenda. We are heading in the right direction, although maybe we are not going fast enough. He suggested that the EU should have standard EU policy and be coherent. There should be a commitment to the SDGs whatever the context.

Troels Boerrild from ActionAid Denmark said that up until now too little attention in the SDG debate has been given to the potentially transformative positive impact of making it mandatory for businesses to ensure respect for human rights of workers and communities in their own operations and in their business relationships. On the other hand, he noted that the issue of tax had received more attention in the SDGs than in the business and human rights debate. In his view it will be crucial to find a way of tackling tax havens and the global race to the bottom on tax rates and tax breaks to stand a chance of realising the SDGs by 2030.

"There is not much room for a discussion on responsible business in the 2030 Agenda, whereas a lot of attention is given to business opportunities." **– Troels Bourrild.**

The audience raised concerns about the SDG agenda and raised some key issues: how can UN agencies be mobilised; how can we make sure the "do-no-harm" agenda (UNGPs) does not get lost; what about the issues of tax and policy coherence; the tension between the role of the private sector as funder of UN global programmes and the need for the same UN agencies to call for responsible business behaviour by these companies; the crucial need for the integration of human rights in multilateral development banks and other financing vehicles.

Session 25 - Access to Judicial Remedies

This session examined the different pathways to improve access to judicial remedies, the third pillar of the UN Guiding Principles on Business and Human Rights (UNGPs). The findings of a dialogue that took place among legal experts in Europe were introduced and the legal, procedural, and institutional barriers which still prevent victims of corporate abuses from gaining access to effective remedy were explained, including both transnational and domestic cases that involve human rights abuses. The session considered issues of access to evidence, applicable law, financial barriers, collective redress, and the division of competencies between the EU and Member States. Lastly, the session focused on examples of good practice that may help governments to tackle these barriers as part of their duty to protect human rights under the UNGPs.
This session was part of the Human Rights in Business Project training session co-funded by the European Union's Civil Justice Programme.

Findings and recommendations put forward by the participants:

- The barriers in civil procedure law are too high to allow effective access to judicial remedy both in transnational and in domestic cases concerning business and human right issues. They can currently only be overcome in exceptional cases.
- EU and Member States should take steps to remove judicial and procedural barriers and associated financial obstacles, taking into account the guidance and recommendations provided by the Council of Europe and the Office of the High Commissioner for Human Rights.
- EU and Member States should introduce mechanisms allowing effective collective redress in order to alleviate the financial barriers to access to remedy.
- The debate on the implementation of the UN Guiding Principles on Business and Human Rights should involve stakeholders including unions of judges, bar associations and legal experts in discussions on how to tackle procedural barriers;

Moderator: Sandra Cossart (Sherpa)

Panelists:

- Lene Wendland (Senior Advisor and Manager, Business & Human Rights, Office of the United Nations High Commissioner for Human Rights);
- Gabriela Quijano (Business and Human Rights Legal Adviser, Amnesty International International Secretariat);
- Christopher Schuller (Policy Adviser, German Institute for Human Rights)
- Ingrid Gubbay (Lawyer, Hausfeld);
- Channa Samkalden (Lawyer, Prakken d'Oliveira).

Organized by: Frank Bold and Human Rights in Business Project

Discussion

Sandra Crossart from Sherpa introduced the topic, explaining that victims of business-related human rights abuses are often left without remedy because civil law protects parent companies from liabilities for the impacts associated with the operations of their subsidiaries and other entities they can influence. Other obstacles for victims can result from the complex legal structures used in business organisations, the high cost of litigation, a lack of mechanisms to fund litigation, and the burden of proof combined with a lack of access to evidence for victims.

Lene Wendland, a Senior Advisor and Manager Business & Human Rights at the Office of the United Nations High Commissioner for Human Rights ("OHCHR"), explained that OHCHR had started an initiative on enhancing accountability and access to remedy in cases of business involvement in human rights abuses (Accountability and Remedy Project ("ARP") to support the implementation of the UN Guiding Principles for Business and Human Rights ("UNGPs"), and particularly the third pillar on access to remedy. The final recommendations will be presented in June and submitted to the UN Human Rights Council. Through consultation

and extensive research, the ARP has identified six key issues where progress would ensure a significant improvement in access to remedy.

The OHCHR has developed guidance, with concrete recommendations to improve domestic legal systems. This is adaptable, recognising that the challenges and appropriate solutions in each legal system might differ. The OHCHR has also collected examples of good state practice that demonstrates to governments what implementing the recommendations in law might look like. The guidance covers two areas:

1. Public law: effective cooperation between States in cross border cases, enabling and empowering prosecution.
2. Civil law: expanding and diversifying sources of funding and reducing the cost of court fees through technologies and greater efficiency.

Wendland ended with a recommendation for the EU, suggesting that the European Commission and Member States use the guidance, as it provides concrete recommendations and addresses issues concerning cross border disputes.

Gabriela Quijano, **a** Business and Human Rights Legal Adviser at Amnesty International's International Secretariat**,** presented the *'Recommendation of the Committee of Ministers of Council of Europe to Member States on human rights and business'*.[11] The recommendation focuses on remedy, recognising it as the biggest gap in implementing the UNGPs. On civil remedy the document recommends that Member States should apply measures that ensure that human rights abuses caused by companies result in civil liability in law. This liability should also apply in cases where the harm and victims are located abroad. Accordingly, the courts in Member States should have jurisdiction over such claims. The Council of Europe has also recommended that the law in Member States should include mechanisms for collective redress that allow collective determination of similar cases in respect of business-related human rights abuses.

Quijano also highlighted the need for Member States to review their legislation to ensure that it complies with the UNGPs and that it creates conditions that are conducive for respecting human rights by business. Secondly, she highlighted that there is a broad consensus on what the most pressing issues are. The Council of Europe's recommendation as well as other normative and guidance documents may help governments to understand the barriers to access to justice and to identify effective options to improve access to remedy.

Ingrid Gubbay**,** a lawyer with Hausfeld, focused her presentation on the issues of civil legal procedure that are important in this type of litigation. Gubbay explained the funding issues, the costs of litigation and the role of disclosure of evidence. Particular barriers exist in the opt-in system for collective redress for large communities. This requires every single victim to expressly join theaction and provide the necessary evidence about their individual case. While many European countries do not provide any form of collective redress, in the UK, the system of collective redress is changing in some areas towards the opt-out model. Gubbay explained the differences between the UNGPs' concept of human rights due diligence and the tort of negligence which provides a legal basis for litigation in business and human rights cases. To demonstrate the importance of collective redress, Gubbay presented a case concerning Unilever's operation in the Copa Belt region that resulted in a settlement. This settlement, negotiated by Hausfeld, was possible because the UK courts had jurisdiction over the case. The case was settled after 16 months. Such cases cannot be treated as individual cases, because, among other things, that would restrict the amount of compensation, which is key to the financial viability of the litigation.

"Ideally, the cases concerning global issues should be taken up by governments, because

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https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Rec(2016)3&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864&direct=true

the costs of civil litigation are too high." – **Ingrid Gubbay.**

Channa Samkalden is a lawyer with Prakken d'Oliveira who represents Nigerian farmers in a case against Royal Dutch Shell that is currently pending in Dutch courts. The case against Shell started in 2008. It serves as an example of the challenges of funding such litigation as the barriers to access public funding are striking. Legal aid only covers basic lawyer fees. It does not cover other costs including experts' opinions.

"Plaintiffs are put in an unfavourable position where they are required to provide proof but they don't have funding to cover the costs of obtaining such a proof." – **Channa Samkalden.**

This particular case could go ahead only because plaintiffs were able to secure private funding. Principled and difficult HR cases cannot be done on pro bono basis because they take too much time and because many lawyers find they have a conflict of interest.

The key procedural challenges in the litigation included determination of jurisdiction and of the applicable law and disclosure of evidence. In the Shell case, the jurisdiction of the court over the Shell parent company (domiciled in the Netherlands) and its Nigerian subsidiary (domiciled in Nigeria) was determined on the basis of Dutch law. This provides that if there are two cases that are connected and the court has jurisdiction over one of them, it can have jurisdiction over both cases (and defendants). The interpretation of this rule by the court in the case can be confirmed in a statute to ensure consistent application in the future. With regards to applicable law, the damage occurred in Nigeria, so the court applied Nigerian law to determine the case in line with the rules of the EU Rome II Regulation on applicable law. Nigerian law is less developed than Dutch law, and this complicated the case. The case was further complicated by restrictive rules that apply in the Netherlands to the disclosure of evidence held by the defendant. In the Netherlands, the party that asks for disclosure of evidence must identify specific documents that exist, and this is rarely possible for victims. This restriction creates an imbalance between the parties.

Christopher Schuller, a policy advisor at the German Institute for Human Rights, used an example of a case to illustrate the difficulties associated with human rights violations that affect large number of people. In his example, a factory burned down in Pakistan and 300 people were injured. As a result, he said, litigation was being brought against a German company that sourced from the factory. In Germany, individual cases can be merged in a collective proceeding, but only after every individual claim has been filed, which inflates the cost and the time needed for the action. In the five years since the UNGPs were adopted there has been an extreme unwillingness to address the third pillar on access to remedy in governments' National Action Plans ("NAPs"). He said that evvery NAP shares this flaw. One reason is that there is an irrational fear that the only form of collective redress is a US-style class action.

"The key to address this problem [access to remedy] *is to engage national bar organisations, law professors and national associations of judges in this debate and ensure their support for the needed changes in law of civil procedure."* – **Christopher Schuller.**

Session 26 - Policy coherence for BHR: Trade & Sustainability in FTAs

All recently concluded Free Trade Agreements (FTAs) between the EU and third countries include a chapter on Trade and Sustainable Development (TSD). This could be seen as addressing principle 9 of the UN Guiding Principles: "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". However, what works on paper does not always work in practice. Some argue that core trade provisions are often more successfully implemented than commitments made in TSD chapters.

Recommendations put forward by participants:

- The European Commission and Member States should strengthen implementation and monitoring of the TSD provisions in EU trade agreements;
- The European Commission and Member States should invest in capacity-building, awareness raising and support for aligning its different policies to achieve external policy coherence;
- The European Commission and Member States should consider the following recommendations:
  - share best practice to promote institutionalisation and implementation;
  - create mechanisms to promote social dialogue and access to remedy;
  - promote respect for human rights and due diligence in supply chains;
  - use agreements as incentives in the peace process (specifically for the EU-Peru/Colombia FTA);
  - use business and human rights terminology;
  - include all stakeholders in negotiations, including civil society;
  - use detailed and unambiguous wording in TSD provisions. This facilitates implementation.

Moderator: John Morrison (IHRB)

Panelists:

- Gaelle Dusepulchre (vice-chair of the EU DAG for the South Korean FTA & Permanent representative EU with the International Federation for Human Rights);
- Daniele Basso (Member of EU-Peru/Colombia DAG & ETUC representative);
- Ana Catalina Herrera Parra (Juridical advisor and advocacy officer, Confederación General del Trabajo Colombia);
- Silvia Formentini (European Commission, DG Trade);
- Eleonora Catella (Member EU-Korea DAG, EU-Peru/Colombia DAG & representative Business Europe).

Organized by CNV Internationaal and the Netherlands Ministry of Foreign Affairs

Discussion

John Morrison introduced the topic saying that the issue of trade and business & human rights is a policy coherence issue. He explained that the session would look at the implementation of TSD provisions in existing EU FTAs, like the FTA with Korea and the FTA with Colombia and Peru, with the aim of drawing conclusions for future FTAs.

Silvia Formentini from the European Commission explained the EU approach to negotiating TSD provisions. The TSD chapter is designed to address labour and environmental issues and is included in all new generation trade agreements. The rationale behind including these chapters is that trade agreements should not become a race to the bottom, but rather foster synergies between trade, labour and environmental policies. Therefore, she said, we need to make sure there is sufficient protection of labour and the environment at the domestic level. As well as reaffirming commitments to existing international conventions and agreements in the area of labour and environment, the agreements set a positive agenda. The goal is to make trade work to stimulate progress on

both labour and environmental issues. In every concluded FTA, specific institutional structures are foreseen to oversee implementation of the TSD provisions.

The moderator asked why Formentini mentioned labour and environment and not other human rights?

> *"Respect for human rights in general is an overarching principle underlying the agreements. In TSD chapters, the focus is on both labour and environmental standards that have a more direct link to trade."* **– Silvia Formentini.**

Gaelle Dusepulchre, vice-chair of the EU DAG for the South Korean FTA & Permanent Representative EU with the International Federation for Human Rights, explained, based on her experience with the South Korean FTA, that the scope of the TSD chapter was too narrow. For instance, she said, there were no commitments to enforce human rights obligations and no human rights assessment had been conducted. Additionally, the provisions lack any enforcement mechanism. Dusepulchre said that TSD chapters should not just be about labour and environmental issues, but about human rights in general.

Eleonora Catella, a member of the EU-Korea DAG, EU-Peru/Colombia DAG & a representative of Business Europe, was also involved with the South Korean FTA. She said businesses have benefited from the level playing field created by this FTA. EU companies often introduce higher standards than their trading partners. If foreign companies also need to comply with these standards, it stimulates fair competition. She said it was easier for business to comply and implement the standards if the language in the TSD chapter is more detailed. Business can play an important role in monitoring, she added, but you also need other relevant organisations.

Catella added that there is an established EU Domestic Advisory Group (DAG) that meets two or three times a year, and there is also a DAG on the Korean side. The Chairs of the EU and the Korean DAGs have been invited to meet with the TSD committee. In the TSD Committee, the European Commission can take up issues with the South Korean Government.

Formentini added that civil society plays an important role in implementing the TSD chapter. If issues arise, civil society groups can discuss them among themselves in the DAGs and take note of them in their public statement. In the TSD Committee, governments can raise the issues put forward by civil society.

Daniele Basso, a Member of EU-Peru/Colombia DAG & ETUC representative said that there were some fundamental problems with the Colombia FTA in Latin America First of all, he explained, the monitoring mechanism is quite weak, especially on the Colombian side. Second, the TSD chapters are not enforceable, because parties cannot impose any sanctions in case of non-compliance. This is different from the US approach in trade agreements, which has a sanction mechanism to enforce labour provisions. Basso argued that this approach gave the US more leverage vis-à-vis the EU.

Ana Catalina Herrera Parra, from the Confederación General del Trabajo Colombia, agreed that the TSD chapter in Colombia had not yet been effectively implemented, but argued that this was not really surprising giving the overall security situation in Colombia. This situation has consequences for freedom of association, the right to strike, the establishment of trade unions, etc. At the same time, there were opportunities to improve dialogue in Colombia. Recently, the Ministry of Labour and of Trade, with the support of the EU Delegation in Bogotá, invited trade union representatives to discuss establishing the Colombian DAGs. Some of the obstacles for effective implementation include the government's lack of interest in in complying with the human rights framework and the fact that tariff cuts have been implemented regardless of the government's behaviour with regard to respecting human rights.

The audience raised a number of different issues including a call to make human rights more explicit in FTAs; a point regarding the usefulness of harmonising different frameworks/ groups (like OECD) and the problem of “over” protecting investors in FTAs - they have access to arbitration and judges, but affected communities lack this type of protection because TSD chapters do not include the same type of enforcement mechanism.

The moderator ended the session with three issues that require further discussion:

1. Is the EU using its leverage sufficiently ***before*** FTAs are signed and could this leverage be increased by ILO recommendations and/or OECD accession?
2. How can internal and external coherence be improved?
3. Monitoring and oversight: how can vulnerable populations be effectively represented, especially in growing economies?

Closing Session: Towards becoming an International Game Changer

Caroline Rees from Shift moderated the closing session that started with a video message from Professor John Ruggie, Berthold Beitz Professor in Human Rights and International Law at the Harvard Kennedy School & the Former Special Representative of the UN Secretary-General for Business and Human Rights. He applauded the EU and its Member States for the work already done, but said the EU can do more. For example, the development of NAPs is lagging behind. "The EU has come a long way, but still has a long way to go," he said.

In her visionary statement Debbie Stothard, Secretary General FIDH and Coordinator of the Alternative ASEAN Network on Burma, also challenged the EU to do more. The EU has a very good track record in the protection of human rights, but this seems to be changing, especially when it comes to business and human rights where the EU policies are not coherent nor consistent. She asked the EU not to be afraid of a possible treaty, that is so needed in the perspective of the grassroots movements. She ended with a plea:

> *"Europe is still a very powerful player, and please empower yourself to make sure that human rights and business become a reality in our region and in the rest of the world".* **– Debby Stothard.**

Caroline Rees presented the conclusions that came from the discussions in the different parallel sessions[12]:

- The EU should facilitate peer learning, including voluntary national reviews, to support all Member States to develop and implement strong national action plans.
- The EU should develop a coherent strategy to implement the UNGPs at the EU level shared by all Directorates General to be integrated into the forthcoming EU Action Plan on responsible Business Conduct.
- The EU and Member States should encourage companies and investors to mitigate the focus on short-term financial results, in order to attract longer-term investors and so promote greater respect for human rights and sustainability as factors in business decisions.
- The EU and Member States should take steps to remove legal, procedural, and institutional barriers within Europe that prevent victims of business-related human rights abuse from gaining access to judicial remedy in both transnational and domestic cases. The Council of Europe and UN recommendations on Human Rights and Business provides useful guidance in this regard. Involve Bars' and judges' associations in finding solutions.
- The EU and Member States should strengthen access to non-judicial remedy using the full array of possible state-based non judicial grievance mechanisms. This should include aligning practices and strengthening the capacity of OECD National Contact Points within as well as outside the EU, demanding stronger accountability mechanisms through their board positions in international financial institutions, and strengthening the judicial system as the essential backbone of NJGMs.
- EU and Member States should ensure that business enterprises carry out human rights due diligence by using the full range of options available, such as:

[12] Note these are not the official conference conclusions by the host but the conclusions put forward in the different sessions of the conference.

- leading by example by their own due diligence in own procurement and export credit policies;
- supporting multi stakeholder platforms that move beyond dialogue to shared agendas for action to implement due diligence, building on the Dutch covenant experience;
- giving clear guidance to companies on the inclusion of human rights due diligence information in their reporting under the Non-Financial Reporting Directive, for example by using UNGP Reporting Framework;
- adjusting tort law to reflect the scope of corporate responsibility to respect human rights as outlined in the UNGPs;
- providing advice to companies operating in conflict areas on the human rights related risks that exist and on steps to manage them.

- The EU and Member States should not be scared of the process to reach a UN binding instrument, but should also not wait for it before improving access to remedy for victims in the short term.
- The EU and Member States should acknowledge the integral importance of the UNGPs to achieve the Global Goals (GGs) for Sustainable Development. The first and essential step for all companies in contributing to the GGs must be to 'do no harm' to people and planet. The UNGPs should be integrated into financing for the GGs, including through public-private partnerships. The EU should also support integration of the UNGPs into national development plans.
- The EU and Member States should improve implementation and monitoring of the Trade and Sustainable Development provisions in EU trade agreements.

Moderator: Carol Rees (Shift)

Contribution by:
- John Ruggy (Berthold Beitz Professor in Human Rights and International Law, Harvard Kennedy School & Former Special Representative of the UN Secretary-General for Business and Human Rights)
- Debby Stothard (FIDH and Alternative ASEAN Network on Burma)

Panelists:
- Marine de Carne de Trécesson (Ambassador for Corporate Social Responsibility of France)
- Rae Lindsay (Clifford Chance)
- Eduard Nazarski (Amnesty International the Netherlands).

Organized by: MVO Platform and the Netherlands Ministry of Foreign Affairs

Discussion

Marine de Carne stressed the importance of the process. It is important to involve all stakeholders and increase ownership. Within the EU there should be a level playing field, including peer learning and peer review, because not respecting human rights is not an option. The EU has to use its leverage to increase human rights norms worldwide.

Nothing will change if the root causes, the structural issues, are not addressed said Rae Lindsay. "We need to think of a coherent way to deal with this." The legal profession should lead to bring the variety of perspectives and expertise together. Unpacking the UNGPs into public space is not easy. The practical obstacles need to be identified by all stakeholders. Lawyers have a responsibility to bring businesses to the table.

Eduard Nazarski is impatient since the suffering and injustice continues. Mandatory due diligence is needed and an important step forward, since only a very tiny percentage of companies is actually doing proper human rights due diligence.

"When it comes to access to justice it is important that not just lawyers take the lead, but that also governments reach out and have a firm position." **– Eduard Nazarski.**

Richard Howitt (European Parliament Rapporteur on Corporate Social Responsibility) noted in his closing remarks that although the conference brought together

like minded people, it created a new energy. Access to Remedy remains an important issue that needs to be addressed. He stressed the fact that no progress was made on the issue of extra territorial jurisdiction and referred back to the film shown in the morning session:

> *"What can we give the daughter of human rights defender Bertha Caceres, who was murdered in March 2016, justice? "* **– Richard Howitt.**

Deputy Director Political Affairs for the Dutch Ministry of Foreign Affairs, André Haspels**,** officially closed the conference. He challenged the EU to be more consistent in applying the UNGPs, now only 7 states have a NAP. Access to Remedy (including non-judicial remedy) should be an important issue in all NAPs. And on EU level these national efforts should be matched. He concluded by stating that the EU should not accept any company to cause harm to people.

Annex A: Programme of the Day

Time	What	Organizers
08:30-09:00	Conference Registration	
09:00-10:00	Opening Plenary Session: The Need for an EU Business and Human Rights Roadmap	MVO Platform, the Netherlands Ministry of Foreign Affairs and Oxfam Novib
10:00-10:15	Break	
10:15-11:35	Morning parallel sessions: 11. Business and Human Rights within Europe 12. National Action Plans: Evaluating progress and charting next steps in Europe 13. Corporate Governance and Capital Markets Policies 14. Responsible Business Conduct in (post) Conflict Areas; what is the Role of EU Member States? 15. Human Rights Reporting for Companies 16. Access to Remedy: Effectiveness of non-judicial grievance mechanisms	 BHRRC, the Dutch Human Rights Institute, FNV and Frank Bold DIHR and Netherlands Ministry of Foreign Affairs Frank Bold SOMO and the Netherlands Ministry of Foreign Affairs Shift and Fairfood SOMO
11:35-12:00	Coffee/ Tea Break	
12:00-13:30	Plenary session: Human Rights Due Diligence: The Role of States	Frank Bold and Human Rights in Business Project
13:30-14:30	Lunch	
14:30-16:00	Afternoon parallel sessions: 21. Complementarity between the UNGPs and the UN Binding Instrument? 22. Human Rights Due Diligence in the Supply Chain 23. Public Procurement: Eliminating Human Rights abuses from Government Supply Chains 24. A Perfect Storm: Implementing the UNGPs in the Context of the 2030 Agenda for Sustainable Development 25. Access to Judicial Remedies 26. Policy Coherence for Business and Human Rights: Trade & Sustainability in FTAs	 SOMO, CIDSE, Friends of the Earth Europe and TNI ITUC Danish Institute for Human Rights, Swedwatch and the Stop Child Labour Coalition DIHR, Action Aid, the Institute for Human Rights and Business and the MVO Platform Frank Bold and Human Rights in Business Project CNV International and the Netherlands Ministry of Foreign Affairs
16:00-16:30	Coffee/ Tea Break	
16:30-17:30	Closing Plenary Session: Towards becoming an international game changer	MVO Platform
17:30-19:00	Official Reception	

Annex B: List of Organizers, Partners & Sponsors

Organised by:

Partners:

Sponsors:

The conference hosted a final training session of the Human Rights in Business Project. The project, co-funded by the Civil Justice Programme of the European Union, aims at researching and resolving the problems associated with access to remedy in the EU context, training stakeholders to use the mechanisms which provide the necessary access to justice in the EU and disseminating the results of the research done.

HUMAN RIGHTS IN BUSINESS

This project is co-funded by the European Union