

: Conference Report

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Policy Lunch November 2019

Bridging the gap. How to reconcile the EU with a UN treaty on business and human rights

Larissa Neubauer

In January 2019, a dam erected by a mining company burst in Brazil, killing more than 270 people in the flooding and destroying a train line and a hotel nearby. The mine was operated by a Brazilian company, but it was financed by international investors, including European finance corporations, and had been inspected and approved by a German-based company. Questions arose over who was liable for the damages and losses caused and how victims could access their right to remedy.

This is just one of many examples to illustrate why, in 2014, an initiative by Ecuador and South Africa called for an open-ended working group on business and human rights, mandated by the United Nations Human Rights Council and tasked with exploring

the possibility of a legally binding instrument. At present, most instruments in place globally are voluntary, with a growing number of countries working on national legislation. However, the number of human rights violations demonstrates that existing instruments are not enough. The fifth session of the open-ended working group took place in Geneva in October 2019 and negotiated a revised draft of a possible treaty.

The Policy Lunch organised by the Development and Peace Foundation (sef:) and the International Alliance of Catholic Development Agencies (CIDSE) in Brussels on 19 November 2019 provided insights into the debates and especially into the role of the European Union (EU) during the negotiations.

With 90 countries and an active body of civil society organisations present in Geneva, the working group made progress in shaping a potential new international instrument. The number of countries attending the negotiations and their constructive attitude were highlighted by the speakers at the Policy Lunch, who pointed out that this was notable in comparison to previous sessions, where some of the countries had blocked the negotiations. Nevertheless, as Luisa Ragher, Head of Division, Global.1 on Human Rights in the European External Action Service (EEAS), observed, only a handful actively participated in the discussions. "There has been limited engagement so far, and it is unclear whether we will see that in the future. We were there with an open mind, but we still have questions that need to be clarified," she said. Dr Nadia Bernaz, Associate Professor of Law at the



Policy Lunch November 2019: Podium with Kinda Mohamadieh, Denise Auclair (chair), Dr Nadia Bernaz and Luisa Ragher (l.t.r.)

University of Wageningen, welcomed the fact that the EU nevertheless made constructive comments during the meeting in Geneva, despite the lack of an official mandate so far.



Policy Lunch November 2019: Kinda Mohamadieh

Would a legally binding treaty compete with or complement voluntary instruments?

One of the concerns circulating since the working group took up its work is the question of the role of the treaty compared to the existing – but voluntary – United Nations Guiding Principles (UNGPs, adopted in 2011). Dr Bernaz indicated that the most important development in this draft was how it is anchored in the UNGPs. “Those of us who have been following this have seen it as a complementary process to the UNGPs, but this is not how it was framed at the beginning. It was framed as a competition, which is not the right approach. The draft is now presented as something that clearly complements the Guiding Principles rather than competing.”

Scope of the treaty

Another issue that had stalled negotiations in previous sessions was the debate on the scope of the treaty. Ms Ragher argued that from a victim’s point of view, “you deserve protection when your rights are abused”. Here, the European Union has been an early advocate for applying any possible legally

binding instrument to all businesses alike – be they transnational corporations or national companies. The revised draft goes in that direction. The African Group and China, however, made clear that they would like the treaty to focus on transnational corporations only. Kinda Mohamadieh, Legal Advisor and Senior Researcher at Third World Network, pointed out that the issue of the scope had been one of the most contentious in the discussion. However, she called upon the negotiators to also focus on the operational parts of the treaty in order to ensure access to remedy and justice in all cases of corporate human rights violations, including that by transnational corporations. This involves elements of prevention and human rights due diligence, adjudicative jurisdiction and access of victims to a forum, legal liability in the context of corporate groups and value chains, and mutual cooperation in enforcement of judgements.

Due diligence

The question of due diligence was also raised by Nadia Bernaz. “The big added value of the treaty is to translate the due diligence process and the liability attached to that from the UNGPs into domestic legislation. It is not about creating some sort of a world court.” As she saw it, this would level the playing field and offer a framework for states to actually adopt such legislation. If the majority of EU member states adopted this type of legislation, it would also kill the argument of due diligence hurting competitiveness.

Ms Ragher pointed out that the European Commission is already working on due diligence. However, in order to create a level playing field, it would be necessary to have a larger number of developed countries worldwide supporting a treaty and applying due diligence legislation. Unfortunately, she added, no other major developed countries or entities – aside from the EU and Switzerland – participated in the Geneva negotiations.

EU mandate yet to come

The Commission has not yet received a clear mandate from its member states to negotiate on behalf of the EU. All speakers hoped that a clearer mandate will be given after the new European Commission has taken up its work in December 2019. It remains to be seen how the dynamics will change in 2020 and what the policy of the new Commission will look like regarding business and human rights.

Imprint

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