

Keynote

Luxembourg Conference on Business and Human Rights

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## INTRODUCTION

Excellency/Excellencies

1. Thank you for the kind introduction
2. Thank you Your Excellency, Mr Jean Asselborn, for his personal commitment and support of the NAP to implement the UNGPs without which I suspect the outcome may have been different. His contribution is deeply appreciated.
3. Marc and Basak for dedicated work to turn commitment into reality.
4. I feel a rather close affinity to this NAP, thanks to the conversations that I had in a different capacity as a former member of the UN Working Group on Business and Human Rights during with representatives of the Government of Luxembourg on the fringes of the Annual Forum on Business and Human Rights. It was during one of the sessions in Geneva that Marc announced the plan to elaborate this NAP. It is therefore a matter of immense gratification to see that the promise was faithfully delivered on time as promised.
5. That was a couple of years ago and here we are setting out on the preparation of an update of the NAP in order to look back on what has worked best last time round and what can be done in the future.
6. In this context, as in the context of any NAP endeavour, it is important to acknowledge a few important truths:
  - a. that there is no such thing as a perfect NAP; We can have a good NAP, even a very good one but I suspect a perfect one will probably be elusive and, dare I say, unnecessary.

- b. similarly that no two NAPs are the same although we can draw inspiration from the experience of other countries.
7. So then, what does a good NAP or even a very good NAP look like?
8. In the Foreword to the 2018 NAP, HE the Minister of Foreign Affairs observed that:
9. [The NAP] demonstrates the growing awareness, on all sides and at all levels, of the complex problem of human rights violations caused by corporate activities, as well as the willingness to pursue, in accordance with one's competences, expertise and means, solutions worthy of our international commitments, our democracy and our rule of law.
10. My attention and interest are drawn to your reference to
  - a. The growing awareness about the compelling issues raised by BHR
  - b. By all sides and all levels
  - c. The complexity of the challenges before us, alongside
  - d. The willingness to pursue solutions worthy of our commitments, our democracy and our rule of law.
11. The Minister's observation is important not only because it responds well to the challenges posed by the UNGPs but also it provides us with an excellent platform on which to launch the update of the NAP. With the vision set out so clearly, it will be useful to ask ourselves, as part of this exercise
  - a. Whether and if so how has the NAP experience over the last two years contributed to finding solutions that are worthy of the values and commitments identified in the Minister's observation.
  - b. Are our solutions credible and sustainable?

- c. What challenges remain in this search for durable solutions and how may we employ the lessons from the first NAP experience to improve upon the strategies under the next update of the NAP?
12. The conversation for this update will, no doubt, be varied and diverse and even possibly intense and difficult but it is not inappropriate in the circumstances of today's conversations to consider with a scorecard of the strengths of the NAP on the one hand and the challenges on the other.
13. Please forgive the simplicity of the approach because I know that government officials and other stakeholders have invested considerable effort in unravelling and untangling some complex issues and in the process having to be pragmatic in their choices and conclusions whilst taking account of competing values and interests.
14. Nevertheless, we must not lose sight of the Minister's ambition to seek solutions that are worthy of Luxembourg's international commitments, its democracy and rule of law and this compels us to look deeper in our search for solutions beyond the superficial.

**15. SO WHAT DOES IT TAKE FOR A NAP TO INSPIRE SOLUTIONS TO THE COMPLEX BHR**

**CHALLENGES?**

- a. Firstly, we must overcome the resource challenge: Some government officials have been heard to bemoan the cost – in terms of human and financial resources - of developing a NAP. There is ,no doubt, some merit in this lament and it should be taken seriously, especially in the global south. However, the subject deserves further critical reflection.

- i. What price tag will you put on freedom in a democratic society? This question literally challenges the vision statement of HE Mr Jean Asselborn, in his foreword to the Luxembourg NAP to search for solutions that are worthy of (Luxembourgish) democracy and rule of law. For my part, the less said of this claim, the better, lest we demean the values upon which our society is built.
- ii. From a more pragmatic perspective, this resource argument is premised on the presumption that the resources required for a NAP will be new and additional to current commitment and this I will challenge. A NAP should be seen as part of the State's duty to protect everyone from adverse human rights impacts, including from third parties. In this respect, resources to execute this obligation form part of the wider human rights obligation and therefore foreseeable. Indeed a careful assessment of the implementation of international human rights obligations by States as reflected in the observations, opinions and judgments of human rights supervisory bodies such as the European Court of Human Rights, the UN Human Rights Treaty Bodies and to an extent the Court of Justice of the European Union confirms the scope of States obligation.
- iii. Another dimension of this cost enquiry is to consider the trade-off for failure to invest in a preventive strategy such as a NAP. There is widespread evidence of adverse impacts in the conduct of business both to affected groups and to business enterprises themselves. Indeed the reputational and financial damage that enterprises risk by

not taking account of human rights can be stretched to governments for their failure to set adequate standards for the conduct of business. This will be considered a breach of their international obligations that HE the minister [Jean Asselborn] is keen to secure. In essence, the trade-off for not launching a NAP could be a lot higher and possibly irretrievably damaging all round.

Fortunately, we can assume this is not the primary challenge in Luxembourg where the question is rather one of developing a NAP that is truly transformative.

- b. In the context of countries such as Luxembourg, a more pressing benchmark is the importance of ownership of the NAP as a governmental policy instrument which requires the total buy-in from all government departments. This is a leadership requirement that cannot be conceded or adjusted.
- c. Some tension between government departments is probably unavoidable but consensus is not impossible. This will depend on the level of government commitment to achieving the BHR objectives. Throughout the NAP, there is a strong and express commitment on behalf of the government of Luxembourg to implement the UNGPs and this commitment is reinforced by the understanding that the implementation of the UNGPs is driven and guided by Luxembourg's international commitments at various intergovernmental organisations including the EU, the United Nations, the OECD and the Council of Europe. This is not an easy commitment or one to be taken for granted when it is made. It is therefore important that when and where it has been

successfully established, its details should be published (with pride, if I may ass) so that others may learn from the Luxembourg experience.

- d. A similarly commendable element of the NAP is the effort made in the NAP to know and understand the economic, political and legal environment in which the NAP is to be implemented. To do this is to help appreciate the opportunities and challenges that exist as part of implementation. The Joint Work Program of the Inter-Ministerial Committee on Human Rights and its Working Group on Business and Human Rights aim, according to the NAP, to, *inter alia*, map the business landscape.
- e. What has become known as a baseline assessment is an important step in the implementation of the UNGPs and presumably, this exercise was undertaken before the NAP was adopted. The publication of the mapping exercise will be immensely useful so that all may learn from the lessons of Luxembourg. Some of the questions raised by an effective baseline assessment are not always easy to answer and so the sharing of any real time experiences is always useful. Lingering questions include:
  - i. Who should undertake this?
  - ii. Should it be a broad assessment of the entire landscape or will a focus on a particular sector be sufficient?
  - iii. What process should this assessment follow and what outcomes may be expected?
  - iv. Critical to who your stakeholders are to be consulted
- f. It is reassuring to note that the NAP concludes, presumably out of the baseline assessment that:

- i. Luxembourg acknowledges the international nature of its financial centre and the structure of its labour market as well as the composition of the labour force.
- ii. From this knowledge Luxembourg is able to identify the key sectors for attention in the implementation of the UNGPs as including:
  1. The financial sector
  2. The extractive sector
  3. ICT, including Artificial Intelligence
  4. Construction
  5. Hospitality, and
  6. Data Protection.

The value of isolating the key business sectors in Luxembourg for priority attention is to tailor specific, measurable and achievable targets to the needs of those sectors. I hope to be able to revisit this issues later in my address when I reflect on the subject of targets.

- g. At this stage of preparing for the update of the NAP, the question that may be posed is whether a baseline assessment will be useful or necessary for a NAP update as against a fresh launch?
  1. A NAP should be based on informed strategic choices and knowing the landscape at various milestones is one way of gathering the essential evidence to support decisions.
  2. This may not be necessary if the economic and social environment has not changed radically and the State's priorities remain unchanged. Times do however change and



so do the nation's priorities. Events such as war and economic disaster at home or abroad can drive the need to revisit the economic priorities. These and similar events can redefine new actors, including affected communities. The financial crisis of 2008, the conflicts around the world, Syrian, Libya, Iraq etc have generated economic ripples affecting actors such as migrants or investors sufficiently to disrupt priorities for reform. In any case, even in the absence of policy adjustment driven by crisis, an assessment at the launch and update stages of a NAP may provide valuable information and affirmation, where necessary of the impact of government BHR strategy.

3. How have other States responded to the value of a baseline assessment at this stage in the implementation of the NAP?

The UK is the only country to have fully updated its NAP and sadly, there are no lessons from that exercise in this respect as it did not undertake a baseline assessment neither for its initial NAP nor for its update.

- h. Next, we know that the process of preparing the NAP is as important (perhaps even more important) as the substance. In this respect, the Guidance prepared by the UNWG proposes a multi-stakeholder approach, preferably working its way from the bottom up. + DIHR/ICAR.
- i. It is useful to note that a NAP is a matter of economic and cultural evolution rather than a revolution. It is not a one-off solution but an evolving process

for which it is important to know and understand the context as to what is achievable at what time.

- j. It follows that, it may be necessary to move in simple but concrete steps.

This may even suggest that the NAP may need to focus on a particular sector alone as a source of inspiration for other sectors rather than to seek to respond to the challenges in all sectors at once. The choice of such a narrow focus may be guided by the relationship between the chosen sector and the other economic environments. The financial sector is an excellent example in this respect.

## **16. SCORECARD: HOW DOES THE LUXEMBOURG NAP FARE ON SUCH A SCORECARD OF INDICATORS?**

17. We are informed that efforts to ensure that all government departments and ministries have a role in the preparation of the NAP. The inter-ministerial Committee on Human Rights mandated to see the process through is a point of good practice.

- a. Yet we are also alerted to a CSR NAP led by the Ministry of the Economy –

The relationships between these important instruments may need clarification

- b. The NAP further sets out a link between the UNGPs and other initiatives such as the SDGs. This is an area of acknowledged importance and so further reflection and elaboration from the point of view of Luxembourg could be extremely helpful.

18. I note also with delight in observing how closely the NAP followed the Guidance prepared by the UNWG in ensuring the importance of consultation of relevant stakeholders. The NAP records two main consultations in January and April 2017 alongside bilateral contacts. Communication in terms of publication of the outcomes of these consultations can be very helpful because it can contribute to effective benchmarking and defining progress.

19. Despite the central importance of stakeholder consultation in the development of NAPs, it is still unclear about how to stage and manage NAP consultations effectively. Generally consultations raise interesting questions about whether

- a. Opportunistic or special?
- b. Who are the **relevant** stakeholders?
  - i. Affected groups – what does ‘affected’ mean in different economic environments. Who, in the context of Luxembourg are affected groups? Affected by what and will the NAP focus on the subject matter generating the effects under consideration?
  - ii. Where do human rights advocates fit in this conversation?
  - iii. Business community – Is it preferable to speak directly with the enterprises themselves or should attention be directed to their representatives – the business associations?
  - iv. Is there a place for the academic community?
- c. Should stakeholder consultations be undertaken together or separately?
- d. Similar/same questions or tailored questions
- e. One level or more of consultations at different stages of the NAP?
- f. Should the stakeholder self-convene or should they be invited?

- g. Do the requirements differ if it is a second or third update of the NAP, rather than the first?

## **20. REVOLUTION OR EVOLUTION?**

- a. Ladies and gentlemen,
- b. A NAP is a strategic attempt to changing business cultures and reconciling conflicting values. This is complex and therefore can take time.  
  
Nevertheless, you need to work to specific targets, clear and transparent benchmarks and designated milestones.
- c. In setting targets, experience suggests that you ‘think globally and act locally’ is apt while you focus on gradual steps taking account of SMART targets and outcomes: Specific; Measurable; Achievable; Realistic and Time bound.
- d. Grow the NAP incrementally. Consolidate gains and build upon them
- e. Target low hanging fruit – especially the State as an economic actor
- f. Similarly draw together actions already in existence – existing regulatory regimes, legal standards concerning environment, consumer protection, health and safety, labour law.
- g. The current NAP has given serious attention to substantive targets which relate well to the UNGPs even if the UNGPS are not always mentioned expressly. This is great and will go a long way to respond to the gradual evolution of BHR in Luxembourg. As we approach the review and update, this is a good time to seek to consolidate any gains by learning lessons from the last two years. Here we can reflect on the general advice to think globally and act locally as well as aiming for SMART targets.

- i. One of the unique targets of the NAP is to elaborate a National Pact on the Respect of Human Rights in the Activities of business Enterprises. This is proposed as a partnership undertaking between the government and business enterprises to ensure the performance of their respective duties and responsibilities. This is a specific, measurable and achievable target. Although there was no time for this, we may presume this as a target within the life of the current NAP. The update will need to reflect on this and then to look further to its implementation.
- ii. The current NAP commits to ensure equitable access to public tenders, taking into account, innovation, respect for the environment and CSR.
  1. Could this target, for example, be more specific so it can be measured? **[see others]**.
  2. How does this relate to the UNGPs?
- iii. It is commendable that the NAP sets a clear expectation for companies to respect human rights, including by preventing violations and adopting policy instruments including due diligence. In addition they are expected to address adverse impacts.
  1. Would this be monitored and if so how?
  2. There is an emerging trend towards mandatory due diligence (France, Australia, UK, Netherlands). Any plans of joining this development in the updated NAP?

iv. In addition, it commits to improving inter-ministerial cooperation on human rights issues and strengthen coherence between internal and external human rights policies. These are valuable targets.

1. The question is whether and how these are to be measured.
2. Bearing in mind the potential tensions between ministries, it may be useful to outline specific tasks and roles for different departments under the NAP to ensure that they all stay committed.
3. The ambition to strengthen policy coherence between internal and external policies is a really good one that would benefit from some further specificity in the areas of application. For example, coherence between human rights commitments and bilateral investment treaties. How about role of financial institutions internationally?

## **21. REMEDY:**

Ladies and gentlemen, I am conscious that I have taken a great deal of your attention and so I would, if I may, like to make one final point.

The NAP takes a prospective outlook which is not unusual because the UNGPs are similarly situated. However, we also know that this character of the UNGPs has been the subject of considerable criticism especially in relation to access to remedy. The NAP refers to the role of the NCP in the event of corporate human rights violations and highlights the good practice of being tripartite and codifying its rules of procedure. However, that the NCP is hosted within the Ministry of Economy creates

the wrong optics for an institution that is meant to be independent. In any case, there must be remedy opportunities beyond the NCP.

22. The subject of remedy has been discussed widely at the Annual Forum on Business and Human Rights and this has generated a range of issues. Civil society groups have raised concerns about corporate capture, jurisdictional restrictions, financial challenges, inequality of arms among others. This has led to discussions about the value of operational grievance mechanisms and the role of State non-judicial mechanisms. No doubt, some of these issues are relevant in Luxembourg, including how some of these handicaps may be redressed or how the different remedy mechanisms may complement each other. There is a bit of an unfortunate *lacuna* concerning access to remedy in this NAP and so the update provides an excellent opportunity to rectify it.

23. While we prepare for the update of the Luxembourg NAP, it is also valuable to explore lessons that may be drawn upon from the wider field of NAP development.

Some general lessons of emerging good practice in the field. [Learning and sharing]

- a. New line of consultation with other states
- b. Adopting a partner state to support
- c. Peer review meetings: EU presidencies of Netherlands and Belgium and the Latin American Regional Consultations
- d. Active participation in UN Annual Forum/Regional Forum and regular consultation
- e. Seek evidence of what works and what does not
- f. Leadership – convene, share, support.

## 24. CONCLUSION

In conclusion, ladies and gentlemen, there is a great deal of to be commended for the NAP to implement the UNGPs in Luxembourg. There is the unequivocal government commitment, the close application of the UNWG Guidance on NAPs, the identification of key sector areas for priority attention and the definition of targets to be achieved. After two years of implementation, it is even more commendable that the authorities have begun the process of updating the NAP. This critical step provides an opportunity to plug any gaps and shortcomings that have become evident over the life of the NAP. The revised NAP will have another chance to revisit the original baseline study and to update it with lessons from the recent past and for the authorities to consult more widely with relevant stakeholders. The subject of substantive targets for the revised NAP will also be of interest in the expectation that they will be a lot SMARTer this time round. In this respect, it will also be useful for the revised NAP to link its targets to the selected priority sectors. Above all else, it will be extremely valuable for the revised NAP to give dedicated attention to the subject of remedy in which it is able to take account of ways of setting out varieties of remedy opportunities beyond the NCP.

25. Distinguished guests, ladies and gentlemen, I look forward to the outcome of the deliberations for updating the NAP. I thank you for your attention and wish you the very best in your endeavours.