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The EU in the Negotiation of the UN Disability Convention

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The EU in the Negotiation of the UN Disability Convention

*By Gráinne de Búrca**

Abstract

The UN Convention on the Rights of Persons with Disabilities (CRPD) is a novel and ambitious human rights treaty which entered into force in 2008. This article focuses on two features of particular relevance to the European Union. The first is its strikingly ‘experimentalist’ architecture (to use the term coined by Charles Sabel and Jonathan Zeitlin), and the second is the fact that this was the first occasion on which the European Community, as it then was, participated in the drafting and signing of an international human rights treaty. The article examines the role played by the EC in the negotiation process and considers whether the EU significantly influenced the Convention’s experimentalist character. It concludes that, while the EU was overall an active and supportive participant in the drafting process, the Convention’s experimentalist character was driven by other factors, in particular by the central role of NGOs and other non-state actors in the negotiation process. The EU, on the other hand, strove mainly to promote the adoption of its own internal model of disability discrimination at the international level.

* Professor, Fordham Law School, and Straus Fellow at NYU Law School. Email: deburca@law.fordham.edu. I am grateful to all of the participants at the conference on “Extending Experimental Governance from the EU to the World?” organized by Charles Sabel and Jonathan Zeitlin at Wisconsin Law School in October 2009, and to Bruno de Witte, Panos Koutrakos and Vlad Perju for their comments on an earlier draft of this paper. Thanks are also due to Katharina Hermann for excellent research assistance, in particular in the process of interviewing delegates who participated in the drafting of the UN Disability Convention. This research was made possible by a generous grant from the Jean Monnet Program of New York University Law School. 16 interviews were conducted with a range of delegates including officials from the European Commission and the UN Office of the High Commissioner for Human Rights, members from the Austrian, German, Irish, Mexican, New Zealand, Portuguese and UK delegations, and from a range of Non Governmental Organizations including the European Disability Forum, the International Disability Caucus, Landmine Survivors Network and Fundación ONCE. Some of the members of these national delegations were also chairs of the European Union delegation, the Latin American and Caribbean group (GRULAC) and the group of National Human Rights Institutions (NHRI) respectively. I am very grateful to Jorge Ballesteros, Andrew Begg, Carla Besozzi, John Biggar, Flaminia Bussacchini, Mara Bustelo, Theresia Degener, Andreia Marques, Dominic Porter, Gerard Quinn, Marianne Schulze, Stefano Sensi, Stefan Tromel Sturmer, Liz Tillet, Simon Walker, and Kirsten Young for their time and their willingness to provide insight into the process of drafting the Convention.

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Introduction

The UN Convention on the Rights of Persons with Disabilities (CRPD) was negotiated and drafted between 2001 and 2006, and came into force on May 3 2008. It takes its place alongside a set of other UN human rights treaties, beginning with the International Convention on the Elimination of all Forms of Racial Discrimination (1965), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant of Economic Social and Cultural Rights (ICESR), both of 1966, and five other ‘core’ human rights treaties.¹ Already, the CRPD has attracted 143 signatories and 76 ratifications, and ratification by the European Community will be completed shortly, following the adoption of the decision concluding the Convention on behalf of the EC.²

Although it is only one amongst eight major UN human rights treaties, the Convention on the Rights of Persons with Disabilities has attracted considerable attention for a variety of reasons.³ Apart from its formal recognition and legal promulgation at the international level of the rights of disabled persons, who have long constituted a highly marginalized and ‘invisible’ minority, the Convention is notable in several other ways. In particular, it is seen by some as marking a new departure in international treaty-making,⁴ especially in the field of international human

¹ The other five are the Convention on the Elimination of Discrimination against Women (CEDAW) 1979, the Convention against Torture (CAT) 1984, the Convention on the Rights of the Child (CRC) 1989, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) 1990, and the International Convention for the Protection of All Persons from Enforced Disappearance 2006.

² Council Decision No. 15540/09, PESC 1493, COHOM 252, CONUN 120, SOC 667, of 26 November 2009. of 26 November 2009.

³ For analyses of some of the novel features of the CRPD, see T. Melish “The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify”, 14 Hum. Rts. Brief. 37 (2007) and F. Mégret “The Disabilities Convention: Towards a Holistic Conception of Rights” *International Journal of Human Rights*, Vol. 12, No. 261, 2008. They point out, amongst other features, the shift from a state-centric to a more participatory mode of treaty-making, the adoption of a social rather than a medical model of disability, the adoption of a rights rather than a welfare model of legal protection, the emphasis on positive as well as negative rights, and the blurring or transcending of many other traditional dichotomies such as public/private, state/individual, vertical/horizontal, immediate/progressive, adoption/implementation, remedy/prevention, amongst others. Anna Lawson in her analysis of the CRPD describes it as a ‘startling instrument’: “The United Nations Convention on the Rights of Persons with Disabilities; New Era or False Dawn?” 34 *Syracuse J. Int’l L. & Com.* 563. For a collection of essays discussing the origins and implications of the CRPD see G. Quinn and O.M. Arnardóttir, (eds) *The UN Convention on the Rights of Persons with Disabilities* (Brill, 2009).

⁴ The 1997 Ottawa Convention (banning anti-personnel land mines) and the 1998 Rome Statute establishing the International Criminal Court are the other two major examples of this new trend in ‘participatory’ treaty-making. For a critique of the claim that this mode of treaty-making is democratic, see K. Anderson “The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society” (2000) 11 *European Journal of International Law* 91-120, who argues that “international NGOs are cast in

rights treaty-making.⁵ A first notable feature in this regard is that the CRPD was drafted with a high degree of participation on the part of individuals with disabilities and civil society organizations representing them, as well as national human rights institutions, rather than only or mainly by States. Secondly, its provisions are premised on a holistic ‘social model’ (which views the disadvantages arising from disability as contingent and removable social barriers) instead of the narrower and traditional ‘medical model’ of disability (in which the disadvantages are generally viewed as intrinsic to the condition of the person).⁶ And thirdly, it avoids many traditional dichotomies and distinctions such as those between positive and negative rights and between public and private action. In other words, both in the manner of its drafting and in its substantive provisions, the CRPD is an innovative and mould-breaking instrument. Further, the rapidity with which the Convention was drafted and adopted,⁷ and the warm welcome given to it by the human rights community and by disabled persons groups suggest that the regime which has been adopted is considered to be a promising one for addressing the hardships and obstacles encountered by people with disabilities and for changing traditional practices affecting disabled people.

This article focuses on two novel dimensions of the Disability Convention which are particularly relevant to the European Union. The first is the fact that the Disability Convention contains a range of provisions and features which closely resemble the ‘architecture of experimentalism’ outlined by Sabel and Zeitlin as being characteristic of EU governance,⁸ in a way that also distinguishes the Convention from previous international human rights treaties. These features are outlined and described below. The second is the fact that the CRPD is the first international

the role of giving some veneer of democratic legitimacy to an international system that...suffers from a permanently incurable democratic deficit”.

⁵ F. Mégret, n.3 above.

⁶ For an analysis of the Convention with particular emphasis on the move away from the medical to the social model of disability see A. Lawson “The United Nations Convention on the Rights of Persons with Disabilities; New Era or False Dawn?” 34 *Syracuse J. Int’l L. & Com.* 563.

⁷ It was said by the UN Secretary General to be “the most rapidly negotiated human rights treaty in the history of international law”: see www.un.org/News/Press/docs/2006/sgsm10797.doc.htm, 13 December 2006.

⁸ C. Sabel and J. Zeitlin “Learning from Difference: The New Architecture of Experimentalist Governance in the European Union” (2008) 14 *European Law Journal* 271, and *Experimentalist Governance in the European Union: Towards a New Architecture* (OUP, 2010).

human rights treaty to which the European Community is a party, and the first human rights treaty which the EC was involved in negotiating and signing, alongside the EU Member States.⁹

The congruence of these two features – the presence of the EC for the first time as a formal participant in the drafting of a human rights treaty, and the experimentalist character of the regime established by the resulting treaty – raises the presumption of a causal relationship between them. More specifically, since a good deal of EU governance - from the open method of coordination, to the increasing number of framework directives, to a multitude of other regulatory arrangements - resembles the architecture of experimentalism described by Sabel and Zeitlin, and since the EC was actively involved in drafting and negotiating the Disability Convention, it seems reasonable to assume that the EC played a role in influencing the experimentalist features of the CRDP. This hypothesis is examined in the remainder of the article, which assesses the role of the EC in the drafting of the Disability Convention, with particular emphasis on the extent to which the EU influenced the inclusion of experimentalist features in it. There are two main sources for the material on which the article is based. The first is the negotiation archives of the CRPD which are maintained online by the UN,¹⁰ and the second is a series of interviews conducted with sixteen individuals who were delegates or otherwise accredited participants in the negotiation process.¹¹

Experimentalist governance and the international human rights domain

Charles Sabel and Jonathan Zeitlin have recently developed the concept of experimentalist architecture to describe, through a novel lens, the evolving process of governance within the European Union.¹² Their account of EU governance argues that EU rule-making typically proceeds in an iterative process with four basic steps: (1) the establishment by States and transnational institutions of broad framework goals, with standards being set for assessing the achievement of these goals; (2) the allocation to lower-level public actors and institutions of the

⁹ See L. Waddington “A New Era in Human Rights Protection in the European Community: The Implications of the UN Convention on the Rights of Persons with Disabilities for the European Community” papers.ssrn.com/sol3/papers.cfm?abstract_id=1026581

¹⁰ See www.un.org/disabilities/default.asp?id=1423

¹¹ See the asterisked footnote above for a list of interviewees.

¹² See n.8 above for their joint writing on EU experimentalist governance. Charles Sabel has written extensively in earlier work on the idea of experimental governance in other contexts. For a prominent example see M. Dorf and C. Sabel, *The Constitution of Democratic Experimentalism* 98 Colum L. Rev 267 (1998)

role of elaborating and implementing those goals, with a significant degree of substantive discretion in so doing; (3) the requirement that those lower-level actors or units report regularly to the ‘centre’ on their performance, and participate in a system of review, often peer-type review, in which their results are assessed and compared with those of others pursuing the same general ends; and (4) periodic revision by the actors involved of the framework goals, as well as the standards and the decision-making procedures.

The premises of Sabel and Zeitlin’s argument are that, under circumstances of strategic uncertainty and dispersed authority, as is the case for many if not most domains of EU policy, we are likely to see forms of experimentalist governance arising. Experimentalism posits the setting of broad framework goals as a way of reaching initial consensus amongst parties on policies on which there are very different views and considerable uncertainty as to which approach is best, and combines this with an emphasis on learning from practice and from the knowledge and information generated by reporting back on the results of the exercise of local discretion. A fundamental tenet of experimentalist governance is that all aspects of the process are regularly subject to review and open to revision in the light of experience gained. Experimentalist governance systems envisage a significant role for stakeholder participation and implementation and they do not rely significantly on hierarchical or *ex ante* prescription to resolve policy problems. They are data-driven, relying on benchmarking and peer review, and aim at the diffusion of knowledge and learning from difference. They are premised on the need for constant problem-identification and a search for solutions, with ongoing monitoring and regular revision.

Although the domain of human rights protection may at first sight appear an unlikely candidate for experimentalist governance,¹³ an analysis of the provisions of the Disability Convention reveals that many of its provisions, and indeed its overall ‘architecture’, share many of the features of an experimentalist regime. Some of these provisions, however, are broadly similar to provisions which are characteristic of previous and existing international human rights treaties. Examples of such familiar provisions are: (i) the articulation of rights in broad and general terms;

¹³ See G.de Búrca, “EU Race Discrimination Law: A Hybrid Model” in G. de Búrca and J. Scott *Law and New Governance in Europe and the US* (Hart, 2006), and “New Modes of Governance and the Protection of Human Rights” in P. Alston and O. De Schutter (eds) *Monitoring Fundamental Rights in the EU* (Hart Publishing, 2005) 25.

(ii) the existence of discretion on the part of state actors as to how to implement and elaborate on them; and (iii) the institution of periodic reporting and monitoring. However, there are other experimentalist-type features and provisions of the Disability Convention which are novel and have not generally been a part of previous international human rights treaties. Examples of the latter are: (i) the central role accorded to stakeholders – in this case mainly disability NGOs and national human rights institutions – in all aspects of the Convention’s drafting, implementation, monitoring and operation; (ii) a specific provision emphasizing *national* implementation and monitoring, with a role for national institutions and stakeholders, to complement the more traditional provisions on international monitoring; (iii) an obligation on States to collect relevant research, data and statistics; and (iv) a provision for the holding of a substantive annual conference of the parties, to review all aspects of the operation of the Convention in practice. There are also other more general features of the Convention which resonate with the premises of experimentalist governance, in particular the flexible nature of many of its provisions.¹⁴

In terms of its overall structure too, the CRPD sets broad goals (e.g. promoting and ensuring full and equal enjoyment of all human rights and fundamental freedoms of all disabled persons), and follows these with a series of eight overarching general principles: respect for dignity, full participation and inclusion, non-discrimination, respect for difference, equal opportunity, accessibility, gender equality, and respect for the evolving capacities of children. These, in turn, are followed by an extensive series of positive and negative obligations on States to ensure the full realization of the rights of disabled persons.

When taken together, the combination of the familiar and the novel features of the Disability Convention closely resemble the architecture of experimentalism described by Sabel and Zeitlin

¹⁴ On the relevance this flexibility, see T. Melish, “The UN Disability Convention: Historic Process, Strong Prospects, and Why the U.S. Should Ratify” n.3 above at page 45: “the Committee carefully avoided “shopping lists” and over-specification of details and standards as an agreed operational modality in the drafting process. It did so precisely to ensure that the Convention’s text would remain relevant and vital over time and space, capable of responding to new challenges and modes of abuse as they arose, as well as the vastly different challenges faced by States at different levels of development. It also wished to avoid the negative inference that anything not expressly included in a detailed provision was intended to be excluded. Thus, broadly exemplary terms with inclusive references and a higher level of generality were consistently preferred to overly-specific, narrowly-tailored ones or “lists” of abuse and standardized implementing measures. The choice and design of precise implementing measures is properly left to the discretion of States, in consultation with civil society and informed by the processes of constructive dialogue and information sharing envisioned by the supervisory framework established under the Convention”

in the context of much of the EU's internal regulation and governance. This raises the question posed above, namely whether the participation of the EC in the negotiation of the Disability Convention influenced its experimentalist character, and more specifically whether the EC sought to promote this form of governance as a suitable one for the international arena. In the following section, the approach of the EU to the idea of drafting a Disability Convention and to the process of negotiating this 'mixed agreement' is described. This is followed by a more detailed outline of the experimentalist features and provisions of the CRDP, and finally, of the stance of the EU in relation to each of these provisions.

The approach of the EU to the decision to draft a UN Disability Convention

The decision to launch the process of drafting a human rights convention for people with disabilities was taken by the UN General Assembly in December 2001, after a strong push for such an initiative by Mexico, and following a decade of more general lobbying from interested groups and actors.¹⁵ An *Ad Hoc* Committee was established by Resolution of the General Assembly, and it began work almost immediately, allowing any UN member State with an interest to participate.¹⁶

The initial approach of the EU to the drafting of the Convention was somewhat ambivalent. During the very first session of the *Ad Hoc* Committee, the EU argued that, although it supported a rights-based approach to disability, it considered that the suggestion to draft a legal instrument did not exclude the Committee from considering other options as well.¹⁷ This supports the claim made by a number of interviewees that the EU was opposed to the Mexican initiative for a human rights instrument from the outset, and had also opposed an earlier Irish initiative of the same kind. Further, the EU at the second session of the *Ad Hoc* Committee expressed its preference for an instrument "containing general principles, mainly including equality and non-discrimination with respect to human rights in the context of disability" and cautioned against an instrument which would "end up reinforcing a segregationist tendency in law and policy for

¹⁵ See T. Melish, n. 3 above, and G. Quinn and O. Arnardóttir, n. 3 above. For a useful summary account of the background to the decision to draft a Disability Rights Convention, see www.hrc.act.gov.au/assets/docs/UNCROPD%20Paper.doc

¹⁶ At the end of the second session of the *Ad Hoc* Committee, a subcommittee known as the Working Group, consisting of 27 states and 12 representatives of organizations representing people with disabilities, was established to carry out the task of drafting.

¹⁷ www.un.org/esa/socev/enable/rights/adhocmeetaac265w2e.htm

people with disabilities”, or which would “duplicate other international rights, rules or standards”.¹⁸ In other words, the EU did not support a multiplication of the number of separate human rights conventions for each potential group, and would have preferred to focus on strengthening the core protections in the two main Covenants (the ICCPR and ICESR) and ensuring their applicability to all.

More generally, the EU initially was not convinced of the need for an international legal instrument on disability rights, and its preferred route was to strengthen and support the 1993 UN Standard Rules for the Equalization of Opportunities of Persons with Disabilities, which were not legally binding but were intended to serve ‘as an instrument for policy making and as a basis for technical and economic cooperation’.¹⁹ However, once it became clear that a consensus in favor of a binding international treaty was emerging, the EU changed its position and argued at that point for a legal instrument based essentially on equality and anti-discrimination, rather than one based on the articulation of separate substantive rights for disabled persons. Thus, the overall EU position was that it supported a strong disability agenda, but was sceptical of the need for a legally binding Convention at all, and believed that development of the existing UN guidelines would be a better alternative. Secondly, once the premise of a binding Convention had been agreed, the EU did not support a substantive rights-based Convention, suggesting instead that a non-discrimination instrument would be more appropriate as a means of mainstreaming disability issues into the existing framework. More importantly, a non-discrimination instrument would have entailed the extension of the EU’s own internal model internationally, into the UN context. One key European Commission official who was involved in the negotiations described the anti-discrimination legislation of EU as “the most advanced in the world” and asserted that the Commission’s goal was to ensure this was promoted at the international level.

In other words, despite the EC’s initial opposition, once it became clear that there was to be a Disability Convention, the Commission perceived an opportunity for the Community to become party for the first time, as a recognized international organization, to an international human

¹⁸ Ibid.

¹⁹ www.un.org/esa/socdev/enable/dissre00.htm

rights treaty.²⁰ At this point the Commission switched tactics to make a strong argument for a binding instrument, in line with new ‘social approach’ to disability which it had long been advocated.²¹ This change in stance not only provided the Commission with the possibility to participate on behalf of the EC in the drafting of an international human rights instrument but also to push for the adoption of an EC position at the international level, thus advocating for the ‘anti-discrimination’ rather than the ‘substantive rights’ perspective.

The Mexican government had produced an early draft which advocated a ‘social development’ model rather than a human rights model, but it was persuaded ultimately by the NGO community that, if Mexico wanted to continue to lead on the issue, it would have to argue from a human rights perspective. A gap, however, evolved between the Latin American idea of focusing broadly on social development and the EU proposal to pursue a non-discrimination rights-based approach.²² As indicated above, the EU position was that the Convention should not create any new rights, and that the existing EU anti-discrimination model would be appropriate for the international domain. Ultimately however, the negotiating parties did not accept the EU’s proposal, nor did they follow the development approach proposed by the Mexican initiative, but the Convention instead adopted a ‘holistic’ and hybrid model premised on a combination of the equality model and a model of substantive rights tailored to persons with disabilities.

The Disability Convention as a Mixed Agreement of the EC and its Member States

The Disability Convention is a mixed agreement, from the perspective of the EC, which means that it was signed by the European Community and by all 27 EU Member States, and that at least some of the areas covered by the Convention fall into the shared competence of the EC and the

²⁰ The Commission pushed hard for an explicit reference to be made in the text of the Convention for the possibility for international organizations to accede to the instrument, and was ultimately successful in this: Articles 43 and 44 of the CRPD provide that a ‘regional integration organization’ as defined therein may accede to the Convention.

²¹ See Commission Communication on equal opportunities for disabled persons, COM(96) 406 final of 30 July 1996

²² This gap manifested itself sharply at a later stage in the negotiation when discussions on Article 32, concerning international cooperation, took place. The EU was adamantly opposed to any attempt to link the raising of standards and protection of rights on the part of developing countries with an obligation on the part of wealthier countries to provide aid. The EU was willing to compromise on a provision for the mainstreaming of disability discrimination into development, but not to link the achievement of Convention obligations by developing countries to an obligation on the part of the EU and others to provide aid.

Member States.²³ This also meant that both the European Commission (on behalf of the European Community) and the EU member states were represented in the negotiations. The Commission had proposed that its negotiation mandate be legally based on Article 13 of the EC Treaty, which authorizes the Community, within the limits of the powers conferred by the EC Treaty, to “take appropriate action to combat discrimination based on ... disability”²⁴.

During the drafting of the Convention, the EU Member States continuously worked to coordinate their positions, and the Commission played an important part in this coordination process. In the Commission’s view, a significant part of its role was to provide expertise for the Member States in relation to existing EC disability policy, including the provisions of Directive 2000/78,²⁵ since some of the national delegations apparently lacked the necessary knowledge in this respect. The Commission was also concerned to indicate where there was potential conflict with EU internal legislation. One recurrent subject for discussion between the Member States and the EC concerned the precise scope of EC competences, but this discussion remained confined within the EU Member States, none of whom acted or spoke against the Commission within the negotiations on the issues that subsequently took place.²⁶

The complexity of the process of negotiating a mixed agreement where both the EC and the Member States are separately involved, and where the line between the competences of the EU and those of the States is not clear, is evident from the comments of those who were interviewed. Several interviewees were uncertain about what the ‘EU position’ actually was, given that different Member State delegations publicly expressed divergent positions on various important issues. For instance, certain Member States, such as the Netherlands, were overtly sceptical

²³ The declaration on the Community’s competences is contained in Annex II to the Council Decision of 26 November 2009 concerning the conclusion by the EC of the UN Disability Convention: Council Decision No. 15540/09, PESC 1493, COHOM 252, CONUN 120, SOC 667, of 26 November 2009.

²⁴ See Commission recommendation to the Council to the Council to authorize the Commission to participate in the negotiations of an international legally binding instrument to promote and protect the rights and dignity of persons with disabilities, SEC (2003) 0116 final. For further discussion of the circumstances of the Commission’s mandate, see L. Waddington, n.9 above, at footnote 28 of her paper and corresponding text.

²⁵ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16–22.

²⁶ Questions occasionally arose as to who should speak on particular issues, whether the EC Commission or the member state holding the presidency of the EU Council, and on which issues. The Commission’s Directorate General on external relations (RELEX) played a role in making sure that the interaction between the EU and the EC was a pragmatic one. During the negotiations, the Commission sat next to the Presidency, and the Commission and the Presidency conferred constantly.

about the idea of a Convention at all, whereas others, such as Ireland, clearly supported one.²⁷ Differences were also expressed amongst EU Member States on issues such as gender equality. Nevertheless, the EU delegation worked to maintain a united front during the UN negotiations and to protect the appearance of a consensual EU position as far as possible.²⁸ It seems also that the influence of disability NGOs, and particularly of the umbrella European Disability Forum (EDF) on the European Union was very significant, and may have led to the development of a more cohesive and well-coordinated EU approach in the end.

The complexity and multifaceted nature of the question of the effectiveness of the EU as an international actor is evident in the observation of some of the non-EU participants interviewed. More than one interviewee suggested that the EU's need to speak with a single voice sometimes had the effect of weakening its influence in the proceedings when the number of non-EU states opposed to a particular proposal was very high.²⁹ However, the EU spokesperson on these occasions was evidently aware of this risk, and sought on a number of occasions to draw attention to the fact that he or she was speaking on behalf of twenty-seven States rather than just one, highlighting and reminding all delegations of the composite character of the EU as an international actor. Most of the interviewees described the EU as a dominant actor which participated actively at all stages and adopted strong positions, even though it was clearly

²⁷ Specific concerns on the part of certain Member States about the drafting of an international disability Convention were the extent to which it could interfere with their existing domestic educational and employment systems, and the cost of adjusting to a new legal framework. They were also concerned about its financial implications, and in several of them were strongly opposed the provision on development assistance for similar reasons.

²⁸ As is normal for the EU within the UN context, the EU member states discussed their position around an EU table before the actual negotiations, circulating proposals the night before and meeting in the morning in advance of the UN negotiations. Much of the coordination took place within the EU Council's working party on human rights (COHOM). According to several interviewees, some of the EU delegation members were stronger than others (eg the UK was mentioned by several as the strongest of the EU delegations in view of its mixture of foreign affairs officials, social affairs experts and disability activists, while other delegations were weak due in part to a lack of knowledge and expertise). The Commission worked to help produce a consensus position amongst Member States and consulted regularly with Brussels, but the main speaker on behalf of the EU position at the negotiations was the EU Council Presidency rather than the Commission. Many of those interviewed noticed a discrepancy in the quality of leadership of different presidencies, with certain Member States (eg Austria and Ireland, and also the UK which was effective although it took controversial positions in some respects) giving strong and positive leadership, while others (e.g. Greece) were considered weak and not well-informed.

²⁹ One example cited concerned the informal negotiations on the monitoring mechanism, where many of the innovative provisions that had been drawn from an OHCHR report on monitoring submitted to the 6th session of the *Ad Hoc* Committee gradually disappeared as countries such as Cuba, Sudan, Egypt, El Salvador and others took the floor to speak against innovations; while the EU, speaking in favor of various innovations to the system, took the floor only once as a single voice, and interviewees suggested that its influence was markedly reduced in this particular context.

hampered to some extent by the need to come up with a common position. Several interviewees commented that the EU's close alliance with the relevant civil society organizations and especially with the EDF within the negotiations helped to strengthen the position of the EU and to give it greater weight *vis-à-vis* the positions of other strong groups of actors such as the grouping of Latin American and Caribbean countries (GRULAC).³⁰

The experimentalist features of the Disability Convention

Before turning to the influence of the EU on particular provisions of the Disability Convention, some of the experimentalist features of the Convention will be described in more detail. As outlined above, the characteristics of the CRPD which justify describing it as an experimentalist regime include: (a) the extensive participation of NGOs and others in all aspects of the process; (b) the emphasis on national monitoring; (c) the non-definition of disability; (d) an open-ended definition of discrimination, including denial of reasonable accommodation; and (e) a substantive biennial meeting of the parties. Each of these provisions will in turn be described and briefly explained.

“Stakeholder” participation in the regime

One of the most pervasive and notable features of the CRPD is the emphasis on inclusion and full participation of people with disabilities in all aspects of public life, including in all matters which affect them. This insistence on facilitating and ensuring the participation of the most affected stakeholders in the field was evident not just in the negotiation and drafting of the Convention itself, but, more importantly, it animates many of the substantive provisions of the instrument, including Article 3(c) (which makes full participation one of the guiding principles of the Convention), Article 4(3) (obligation of involvement of persons with disabilities in development and implementation of legislation and policies to implement the Convention), Article 24(1)(c) (on the right to education to enable full participation of PWD in society), 24(3) (full and equal participation in education), 26(1)(b) (habilitation and rehabilitation services which ensure participation and inclusion in the community and all aspects of society), Article 29

³⁰ It seems that the main points of difference between the EU and GRULAC concerned the question of development and in particular the discussion about international cooperation, and also the issue of differentiation between civil and political and social, economic and cultural rights, which the EU favored. GRULAC's position was that there are no first or second degree rights in regard to disability, hence no relevant differences between civil and political and economic, social and cultural rights.

(participation in political and public life), Article 30(5) (to encourage and promote participation in recreational, leisure and sporting activities), Article 32(1) (involving civil society and NGO participation in international cooperation), Article 33(3) (full participation of civil society and PWD NGOs in monitoring implementation of Convention), Article 34(4), as well as recitals (m), (o) and (y).

The general impetus to ensure the inclusion of disabled persons in political and social decision-making derived in part from the growing influence of the social model of disability which emerged and was promoted during the civil rights movement in the US, gained traction in the UK in the 1970s and 80s and has become very widely accepted both domestically (notably in the US, which adopted the Americans with Disabilities Act in 1990) and gradually also internationally.³¹ The social model of disability contrasts with the more traditional medical model of disability, in emphasizing that the disadvantages which arise from the variation in the physical, mental and emotional characteristics of human beings are not intrinsic to their human condition, but are the consequence of avoidable social and relational impediments which reduce the quality of life of people with disabilities and different levels of ability. Mexico, which is credited by most observers with having propelled the proposal for an international disability convention onto the UN agenda, strongly supported the social model with a significant emphasis on the inclusion of disabled persons and organizations representing them. Similarly, the prominent place given to NGOs and National Human Rights Institutions (NHRIs) during the lead-up to and in the drafting of the Convention, and their influence on many governments, is a major explanatory factor behind the Convention being built on the progressive social model, rather than the traditional and restrictive medical model which many states still adopted.

According to the account of Tara Melish, the UN representative to Mental Disability Rights International, who was involved in the negotiation of the Convention, the *Ad Hoc* Committee made three critical decisions at its first session: to authorize representatives of accredited NGOs to participate in all public (and later also all informal and closed) meetings of the *Ad Hoc* Committee, with extensive formal representation in the Working Group, permitting them to make substantive statements on the UN floor following discussion of each draft article, actively

³¹ The slogan adopted by Disability NGOs was “Nothing about us without us”.

lobby State delegations during sessions, receive official documents, and make written and other presentations; secondly, Member States were formally encouraged by the *Ad Hoc* Committee to incorporate persons with disabilities or other experts on disability into their official delegations at meetings, as well as to consult with them at home in the preparatory process in establishing positions and priorities; and thirdly, the *Ad Hoc* Committee promoted equal NGO representation from the richest and poorest countries, establishing a UN Voluntary Fund on Disability to support the participation of civil society experts from the least developed countries.³²

The Emphasis on National Monitoring as part of the International Monitoring Mechanism

Articles 34-39 of the Disability Convention establish a fairly standard international human rights monitoring mechanism with a Committee of Experts³³ empowered to monitor compliance with the Convention through receiving, examining and responding to State reports and reporting to the UN General Assembly and Economic and Social Committee, with a slightly more controversial individual right of complaint to the Committee contained in an Optional Protocol. However, what is particularly novel in the Convention is the provision in Article 33 on mechanisms for independent national monitoring and implementation.

There was a significant amount of discussion and debate on the general monitoring mechanism during the negotiations, with NGOs and others - the Asia-Pacific forum of NHRIs being specifically active in this regard - arguing for innovative methods but the UN Office of the High Commissioner for Human Rights (OHCHR) suggesting that it would be better to wait for the outcome of more general proposals for reform of the UN human rights treaty monitoring system. The OHCHR had proposed an integrated monitoring body on the UN level,³⁴ and several States were supportive of the suggestion to wait to see what came of this proposal, while others argued for greater creativity in the Disability Convention's monitoring provisions. Other states indicated

³² T. Melish, n.3 above.

³³ What renders this traditional international mechanism somewhat distinctive in the CRPD context is that Art 34(4) requires consideration to be given to the inclusion of persons with disabilities on the Committee. This has since been done and the Committee of 18 experts is composed of several individuals with disabilities.

³⁴ This was apparently influenced by a series of debates which took place in the 1980s and 1990s, leading to the recommendation for an integrated, consolidated monitoring system see P. Alston "Final report on enhancing the long-term effectiveness of the United Nations human rights treaty system" report presented to the then UN Commission on Human Rights by the UN Economic and Social Council: , E/CN.4/1997/74 , and P. Alston "Effective Implementation of International Instruments on Human Rights, including Reporting Obligations under International Instruments on Human Rights" UN General Assembly, Document A 44/668 of 8 November 1989

that they did not want a typical UN monitoring mechanism, which they considered to be a failure in practice. Consequently, some of the NGOs and National Human Rights Institutions (NHRIs) suggested some innovative ideas, such as a monitoring role for NHRIs, national focal points, and the inclusion of stakeholders in the monitoring mechanism.³⁵ A range of the innovations suggested were proposed in the so-called ‘Bangkok draft’ of the Working Group, which was a subgroup of the *Ad Hoc* Committee, and some though not all were eventually included in the final draft. It appears from interviews conducted that the message sent by state delegations was to avoid being too prescriptive on how the novel monitoring mechanisms should be implemented. Ultimately, both NGO groups and NHRIs played a significant role in the discussions and helped to ensure that the implementation mechanism for the Disability Convention were not held hostage to the broader and more difficult debate about reform of the UN Treaty-body system more generally.³⁶

Article 33 of the Convention introduces the idea of ‘focal points’ by providing that States parties shall “designate one or more focal points within government for matters relating to the implementation of the present Convention” and also provides for the establishment of a coordination mechanism within government.³⁷ Article 33 also assigns a key role to NHRIs in the elaboration of the Convention by providing that states parties shall “maintain, strengthen, designate or establish ... a framework, including one or more independent mechanisms...to promote, protect and monitor implementation of the present Convention”.³⁸ Further, Article 33(3) provides that civil society and, in particular, Disability NGOs are to be fully involved in the monitoring process. It seems that the idea of designating a focal point was to assist Disability NGOs and others in knowing whom to contact and to lobby in the context of monitoring and

³⁵ Other somewhat innovative elements in the monitoring mechanism were the provision in Article 36(4) (inspired by a similar provision in the UN Convention on the Rights of the Child) on the transparency and broad availability and accessibility of the comments and suggestions of the international monitoring committee in response to state reporting.

³⁶ See Marianne Schulze “Effective Exercise of the Rights of Persons with Disabilities: National Monitoring Mechanisms” in *Global Standards- Local Action – 15 Years Vienna World Conference on Human Rights* (Vienna/Graz 2009)

³⁷ One interviewee indicated that since the Convention was adopted, it has been noted by Disability NGOs that this provision is not well understood, and in particular that parties implementing the Convention do not understand the difference between a focal point and a coordinating mechanism, and that different parties are interpreting the provision on a suitable focal point quite differently from one another.

³⁸ Art 33 makes indirect although not explicit reference to the so-called Paris Principles on the status of independent national human rights institutions, which was adopted by a resolution of the UN General Assembly in 1993. See www2.ohchr.org/English/law/parisprinciples.htm

implementing the Convention, and to make the national implementation process more active and effective. This idea was particularly promoted during the negotiations by the NGOs and NHRIs themselves.

Thus, the CRPD makes national implementation and monitoring a central dimension of its overall provisions on monitoring, and this is emphasized not just in Article 33 but also in Article 16(3),³⁹ and complemented by the provision requiring appropriate data-collection and research in Article 31.⁴⁰ Together, these emphasize the crucial relationship between the international framework and the national level, and the extent to which the practical realization of the commitments contained in the Convention depend on the constant engagement of independent actors and stakeholders. Following the logic of experimentalist governance, the commitments themselves take shape and are fleshed out through the interaction of the domestic and the international levels, bolstered by constant information-gathering and scrutiny.

The (non) definition of disability

One of the provisions of the Convention which generated the most extensive discussion and controversy and which was amongst the last to be agreed, was that dealing with the meaning of disability. The crux of the controversy was whether or not to include a definition of disability in the Convention. An experimentalist approach to law-making would prioritize flexibility and revisability in the interests of adaptation to change and inclusiveness, and this militates against the inclusion of a precise definition of disability. On the other hand, a traditional human rights approach tends to be much more sceptical of this kind of flexibility, seeing it as an opportunity for states to evade real commitments.⁴¹ This scepticism and caution was evident during the drafting of the Disability Convention amongst the NGOs in particular, many of whom argued for a precise and clear definition of disability, mainly in order to avoid the exclusion of certain disabilities by states parties in their internal policies and laws. And indeed, it seems that there

³⁹ Article 16(3) of the Convention requires states to ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.

⁴⁰ Article 31(1) provides “States Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention”.

⁴¹ For an interesting analysis of the pros and cons of a flexible approach to lawmaking in the context of human rights instruments, but with particular focus on the ‘access to knowledge’ movement, see Molly Buetz Land, “Protecting Rights Online” 34 *Yale J. Int’l L.* 1 (2009). See also T. Melish, n3 above.

was concern on the part of government delegations to avoid being too detailed and prescriptive in this way, for these kinds of reasons.⁴²

The compromise ultimately agreed was to include a provision on the meaning of disability in the first article of the Convention on ‘purposes’ rather than in the second article on ‘definitions’. Article 1 includes the following sentence: “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.⁴³ The approach adopted here clearly follows the social rather than the medical model of disability, and is fully compatible with the premises of an experimentalist governance approach.

An expansive and inclusive definition of Discrimination, including Denial of Reasonable Accommodation

Article 2 of the CRPD adopts a broad and inclusive definition of discrimination which provides as follows: “Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation; “Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms’.

Two aspects of this definition are of particular note, from an experimentalist perspective. The first is the breadth of the definition of discrimination, including both intentional and unintentional (impact-based) discrimination, even while not using the language of ‘direct’ or ‘indirect’. The second notable feature is the inclusion of denial of reasonable accommodation as part of the definition of discrimination. This is a very interesting concept which is of growing

⁴² A. Byrnes “The Proposed UN Draft Convention on the Human Rights of Persons with Disabilities: What’s in it and What isn’t?” http://www.hreoc.gov.au/disability_rights/convention/byrnes_2503.htm

⁴³ Article 1 CRPD.

significance in the field of anti-discrimination law, and it is one which fits well with premises of experimentalism in its flexibility and adaptability to need and circumstance, describing both the wrong (denial of reasonable accommodation) and the remedy (provision of reasonable accommodation) in the same terms.

A substantive biennial meeting of the state parties

The idea of revisability, of a built-in opportunity for regular review and reconsideration of all aspects of the substance and functioning of a regulatory system, is central to the model of experimentalist governance. Such an emphasis does not at first sight seem well-suited to the context of a UN Treaty, which is painstakingly negotiated over years - and even the CRPD, which to date has been the most rapidly adopted human rights treaty ever - took five years. Further, a typical feature of international treaty-making is that such treaties not easily open to revision without a similarly lengthy procedure. However, the Disability Convention, in a departure from the practice of previous human rights treaties, provides for something which seems intended to operate as a mechanism for regular review, even if not a formal mode of amendment.

One of the innovations of the CRPD— borrowing perhaps from a similar provision of the Ottawa Convention on Landmines – is to be found in Article 40, which provides that “the States Parties shall meet regularly in a Conference of States Parties in order to consider any matter with regard to the implementation of the present Convention”. While most other international human rights treaties in practice hold a reasonably regular conference of the parties (without any explicit provision for such being found in the treaty itself), this is generally done for purely formal reasons, mainly to elect the members of the monitoring committee and other minor housekeeping matters, and substantive matters relating to the treaty are not discussed.

Article 40 was strongly advocated by the Latin American and Caribbean Grouping of States, as well as by NGOs. The model which the NGOs had in mind for a strong biennial conference was apparently inspired by a similar provision in the Ottawa Landmines Convention, in which the annual conference plays a particularly substantive role because there is no independent monitoring provision provided for in that Treaty. The CRPD, on the other hand, has, as we have

seen, an international monitoring mechanism with an optional individual complaints procedure, as well as significant provisions on national monitoring. The provision in Article 40 providing for a biennial meeting of the parties is therefore additional to these, and therefore serves a slightly different function from that under the Ottawa Convention. According to a well-informed participant in the drafting process, Article 40 was “designed to allow States Parties to meet regularly to discuss best practices, difficulties, needs, and other matters regarding implementation of the Convention.”⁴⁴

The contribution of the EU to the experimentalist features of the Disability Convention

What, then, was the role of the EU in relation to these particular features of the CRPD? Is it the case, as suggested earlier, that the similarity between the architecture of experimentalism of EU governance and the experimentalism of the Disability Convention is to be explained by the role of the EU in advocating a similar kind of governance for the international domain in general, and for the protection of the rights of people with disabilities in particular? The answer is not unequivocal, but presents a mixed picture of the EU’s stance in relation to these features of the Convention.

The EU’s stance on “stakeholder” participation in the regime

We have seen, above, that, even though the EU initially argued for a narrower discrimination-based approach over a substantive-rights approach for the Convention, it had nevertheless always premised its anti-discrimination approach on the social rather than the medical model of disability. This can be seen clearly from the prominence of the social model in one of the early EC policy documents on its approach to disability in 1996.⁴⁵ Significantly, one key dimension of the social model of disability is the goal of inclusion and full participation for people with disabilities. Further, the EU’s main internal disability-discrimination legislation, Directive 2000/78,⁴⁶ includes stakeholder participation in monitoring and implementation. Promotion of stakeholder participation in the international disability regime would therefore also be consistent with the EU’s goal of promoting and ‘exporting’ the internal EU disability model into the UN negotiations. Further, it seems that several EU States included persons with disabilities within

⁴⁴ See T.Melish at n.3 above,

⁴⁵ Commission Communication on Equality of Opportunity for People with Disabilities

⁴⁶ See n.25 above.

their delegations, which changed the dynamics of the meetings and put pressure on the EU itself to give them a stronger voice. Nonetheless, it seems that the strongest State (rather than NGO) advocacy for the involvement of people with disabilities and their representative organizations in the regime came not from the EU, but from delegations such as Mexico and New Zealand. The EU supported such proposals, but was apparently not itself an active proponent and campaigner on behalf of stakeholder participation during the negotiations.

Predictably, the most active advocates of stakeholder involvement were the relevant NGOs, but they in turn built upon their recognition by and support from key actors in the process, including the Latin American and Caribbean states (GRULAC) and the EU, while many other developing countries were not in favour of including stakeholders in the negotiations.

Most of those interviewed suggested that the reasons underlying EU support for NGO and stakeholder involvement were pragmatic and instrumental, as well as being responsive to the demands of the NGOs themselves, and that the Disability Convention process benefited from the precedent of the Ottawa Convention on landmines, in which there had been a remarkable degree of civil society involvement. The instrumental and pragmatic reasons were similar to those which underpin the EU's emphasis on stakeholder involvement in EU internal governance and regulation, namely the importance of expertise and experience, and the EU's interest in having a well-informed position. It seems that the importance of expertise made itself felt early on in the UN negotiations when many national delegations, consisting primarily of foreign ministry officials and diplomats, evidently lacked expertise, understanding and knowledge of the issues. A number of interviewees speculated that, had social affairs ministries been involved (as indeed was the case for some Member State delegations such as the UK), there might have been more resistance to the involvement of NGOs. However, given the predominance of foreign ministry officials and the lack of expertise on issues of disability, the practical assistance of NGOs was therefore very useful for many of the national delegations, and there was less resistance to civil society participation than might normally be the case in relation to the drafting of human right instruments where there is a stronger official line or state policy.

To sum up, it seems that the EU was a reliable supporter and facilitator of stakeholder involvement and participation of PWD in the Disability Convention, but was not as active or determined a proponent as New Zealand or Mexico for such inclusion.

The EU's stance on National Monitoring as part of the International Monitoring Mechanism

Although the discussions on the monitoring mechanism for the Disability Convention were not led by the EU, the EU nevertheless gave its support to the inclusion of a strong monitoring mechanism from the outset, and participated actively in the discussions, responding positively to most of the innovative proposals which were made. For obvious reasons, however, including the absence of a functional equivalent to the EC Commission at the international level, the EU in this instance did not seek to replicate or promote its own internal anti-discrimination monitoring system as suitable for the UN level.

Ultimately, the innovative proposals on independent national monitoring and stakeholder participation came from the NGOs, and in particular from the NHRIs. It seems that the OHCHR did not take a strong position on the inclusion of a monitoring mechanism other than to suggest waiting for the outcome of the more general treaty-body reform process, and many State delegations apparently did not initially want any monitoring mechanism. The EU, on the other hand, supporting States such as Mexico which had proposed an international monitoring mechanism, adopted a clear stand in favor of one, arguing that the absence of such a committee would render the Convention useless. As far as the innovative and experimentalist proposals were concerned, the EU, while it did not propose these, was willing, together with the GRULAC and others, to support them.

The EU stance on the (non) definition of disability

We have seen above that the question of whether or not to include a definition of disability in the CRPD was contentious. It seems that certain States in particular were unhappy with the idea of an expansive definition which would include mental disability, which led them to argue against any definition, in order to retain national autonomy to determine the scope of those covered. On the other hand, certain NGOs, including the influential umbrella European Disability Forum, opposed any definition for the opposite reason, namely to avoid the possible adoption of an

excessively narrow definition or one which might ossify future adaptation and expansion of the norm.

The EU also opposed the inclusion of a definition, but for a slightly different, if partly related, reason. The EC Commission in particular argued – as it had with many other provisions of the Convention – that the approach used by the EU in its internal disability discrimination legislation should be followed. The relevant EU Directive⁴⁷ prohibiting discrimination on grounds of disability in employment does not contain any definition of disability, and the Commission took the view that a similar approach would be suitable for the international level where it would be even more difficult to gain agreement on a single definition amongst so many different states. The concerns of the NGOs to ensure the most robust and extensive degree of protection for disabled persons, however, were exacerbated by some confusion over the implications of the judgment of the European Court of Justice on the meaning of the term ‘disability’ in the EU Directive in *Chacón Navas*.⁴⁸ According to several interviewees, some of the NGOs understood the judgment as limiting and narrowing the definition of disability by excluding sickness even where suffered for a long time, whereas others understood it more broadly and did not see it posing any obstacle to an inclusive understanding of the term.⁴⁹ However, it seems that the judgment of the ECJ in *Chacón Navas* caused the Commission to soften its position of opposition to any kind of definition or guidance, and to agree eventually to the inclusion of guidance on the meaning of disability in the Convention.⁵⁰

A compromise was, therefore, ultimately reached which reflected neither the EU preference to have no definition at all in accordance with Directive 2000/78, nor the initial NGO preference for a precise definition which would firmly commit states, but instead a soft threshold definition in

⁴⁷ Directive 2000/78, known as the Framework Employment Equality Directive prohibits discrimination on grounds of disability in employment, but does not define the term disability: see Council Dir 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16–22.

⁴⁸ C-13/05, *Chacón Navas v Euresst Colectividades*, [2006] ECR I-6467. For discussion of the implications of this judgment in relation to the CRPD, see L. Waddington (2007) 44 C.M.L.Rev. 487-499.

⁴⁹ A more positive interpretation of *Chacón Navas* arguably gains some support from the ECJ’s later judgment in C-303/06, *Coleman v Attridge Law*, judgment of 17 July 2008, while not specifically touching on the definition of disability nonetheless adopted an expansive reading of the protection against disability discrimination afforded by the Directive by including ‘discrimination by association’ within its remit.

⁵⁰ L. Waddington, n above at p. 18.

the form of guidance which is open-ended and inclusive.⁵¹ The aim was to satisfy those who wanted to retain flexibility and the possibility of dynamic evolution, as well as those who sought above all to prevent governments or courts resiling from commitments by adopting an excessively narrow or exclusionary interpretation.

Thus, the position of the EU was to oppose any definition of disability, inclusive or otherwise, for the reason that this was the approach adopted in its own internal anti-discrimination Directive, but ultimately (after the *Chacón Navas* ruling) the Commission modified its strict opposition and accepted the compromise solution in Article 1.

The EU stance on an expansive definition of Discrimination, including Denial of Reasonable Accommodation

The EC Commission took the view, during the negotiations, that there should be a definition of discrimination which would include both direct and indirect discrimination, as is the case under the various EU anti-discrimination directives.⁵² However, a number of delegations were opposed to the inclusion of a specific reference to ‘indirect discrimination’⁵³ and it did not eventually appear in the text. Nonetheless, the idea that the CRPD should be understood as prohibiting indirect discrimination was not contested and seemed to be accepted by most State delegations. While previous anti-discrimination Conventions such as CEDAW and CERD also do not explicitly prohibit indirect discrimination, the relevant Treaty bodies charged with monitoring these instruments have treated discrimination as encompassing both intentional and unintentional, *de jure* as well as *de facto*, direct as well as indirect discrimination.⁵⁴ Thus, even though the words ‘indirect discrimination’ which had appeared in the working text presented by the Working Group of Convention’s *Ad Hoc* Committee⁵⁵ did not eventually appear in the text of

⁵¹ See n.43 above and text.

⁵² Article 2(2)(b) of the Framework Equality Directive 2000/78 provides the following definition: “indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, a particular sexual orientation at a particular disadvantage compared with other persons unless... that provision, criterion or practice is objectively justified...”

⁵³ See the Report of the Third Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, www.un.org/esa/socde/enable/rights/ahc3reporte.htm, footnote 24 and text.

⁵⁴ See Wouter Vandenhoe, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia, 2005)

⁵⁵ N.53 above.

the Convention itself, it seems clear that it is implicitly covered by the broad definition eventually agreed.

Where the EU succeeded in expanding further the definition of discrimination, and extending it to cover omissions and inaction as well as action, however, was in the inclusion of ‘denial of reasonable accommodation’ as an instance of discrimination in Article 2. This concept was a novelty in the context of an international human rights treaty. The EC Commission was the main advocate of this provision, once again as part of the attempt to transpose the EU model to the international domain, since the concept of reasonable accommodation is contained in Directive 2000/78 on employment equality.⁵⁶ In the words of one interviewee, the Commission – which positioned itself as guardian of the EC treaties and existing EC legislation - insisted that the failure to achieve reasonable accommodation constituted discrimination.

On this occasion however, unlike in its initial attempt to argue against a binding legal instrument on disability and its subsequent attempt to limit the scope of the Convention to an anti-discrimination instrument, the EU was successful. The reason for the difference in the success of its negotiating stance on this issue, which had also initially encountered significant opposition from other delegations, seems to be twofold. The first is the support for civil society, and the second concerns the actual origins of the idea of reasonable accommodation. As for the first, the EU found strong allies amongst the Disability NGOs, who viewed it as an important tool for people with disabilities, rather than simply another EU attempt to have its internal anti-discrimination model transposed to the global stage. Other States, however, were unfamiliar with or opposed to the provision, and some apparently perceived it as the unnecessary imposition of an unfamiliar EU concept into the international debate. Certain delegations from the Grouping of Latin American and Caribbean states took the view that the notion of reasonable accommodation would provide a way to justify disability discrimination, and would weaken the force of the legal protection against discrimination. Even within the EU itself, there was some initial disagreement

⁵⁶ Article 5 of Directive 2000/78 provides “In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.”

on this provision, and some debate about how far the Commission – as the main proponent of the inclusion of concept – had competence, and a negotiating mandate, beyond the field of employment. The Commission eventually managed to dissuade the EU Presidency from following the narrower line on this issue, and despite the initial scepticism on the part of other states and delegations, the Commission’s position ultimately prevailed, and a coalition of support for the provision which became Article 2 of the Convention on denial of reasonable accommodation was built.

The second reason for the success of the EU in securing the inclusion of the notion of reasonable accommodation in the Disability Convention seems to be that it was not, in fact, a purely or even mainly European notion which was being foisted onto the rest of the international community. Far from being an invention of EU law, the idea of reasonable accommodation was a central notion in the US Americans with Disabilities Act of 1990. However, the fact that the US was not a strong participant in the negotiation of the Disability Convention meant that the EU was the main vocal proponent of this provision.⁵⁷ Further, it is clear that provision on reasonable accommodation in the EU Framework Equality Directive was inspired by and originally based on international sources. The EC Commission’s proposal for this provision of the Directive⁵⁸ explicitly cited the UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities,⁵⁹ and a General Comment of the UN Committee on Economic Cultural and Social Rights⁶⁰ which emphasized the importance of the idea of reasonable accommodation.

⁵⁷ While the US (under the administration of the second Bush presidency) did participate in the negotiation and drafting of the Convention, it announced early on that it would participate in order to provide technical advice and assistance but declared that it considered disability discrimination to be mainly a domestic matter, and that it would not be ratifying the Convention. Since the coming to power of the Obama administration in the US, that position has changed and the US ratified the Disability Convention in July 2009.

⁵⁸ COM(1999)565, published by the Commission on 25 November 1999.

⁵⁹ UN Standard Rules on the Equalization of Opportunities for Persons with Disabilities, adopted by the UN General Assembly in Resolution 48/96 (annex) on December 20, 1993, in particular Rule 5.

⁶⁰ UN Committee on Economic Social and Cultural Rights, General Comment no. 5 (Persons with Disabilities) 9 December 1994, para 15. For a more general analysis see G. Quinn & T. Degener “Expanding the System: The Debate about a Disability-Specific Convention in Human Rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability 181” in G. Quinn & T. Degener eds. (2002). CHECK title again

The EU stance on a substantive biennial meeting of the state parties

According to a number of interviewees, the proposal for Article 44 originated from GRULAC⁶¹ but with the strong support and advocacy of NGOs, and it reflected the will of many of the parties not to lose the momentum of the Conference working atmosphere. The traditional UN treaty-body system is widely thought to be expensive and bureaucratic, and not to allow for genuine ongoing interaction between the parties to a Treaty or Convention. Article 44 was thus understood by some of the participants to be the second prong of a two-prong approach in the CRPD to address the traditional shortcomings of international human rights treaties when it comes to review and monitoring. According to a number of those interviewed, it seems that the two meetings of the states parties which have taken place since the conclusion of the Convention have been quite substantive in the issues they addressed, and the Disability NGOs in particular have considered them worthwhile.⁶²

The EU does not appear to have played any particular role in the adoption of this provision on a regular meeting of the parties, neither advocating nor opposing it, but agreeing to its inclusion in the Convention.

Conclusion

The initial hypothesis driving the research for this article, namely that the participation of the EC in the negotiation of the UN Disability Convention had influenced the markedly experimentalist nature of the Convention, has not been confirmed. It seems clear that, although the EU did play a significant role in the drafting process and unquestionably influenced the Convention's content in certain ways, and provided support for some of its experimentalist features,⁶³ various other

⁶¹ It seems that some of the developing countries and countries from the global South were keen to get back to Mexico's original idea of having a significant emphasis on developmental issues and socio-economic development, and were disappointed that this had not been more prominent in the Convention. The annual conference of states parties would provide an opportunity to keep these issues on the agenda and to raise others.

⁶² For the proceedings and results of the two Conferences held so far, see <http://www.un.org/disabilities/default.asp?navid=19&pid=1443>

⁶³ The best examples are the open-ended definition of disability, the inclusion of denial of reasonable accommodation as discrimination, and the strong inclusion of stakeholders.

provisions of the CRPD which contribute to its experimentalist character emerged and were adopted quite independently of the role of the EU.⁶⁴

However, two other interesting observations can be made. The first is an observation on the conditions for the emergence of an experimentalist regime – i.e. a regime which prioritizes stakeholder-driven, data-based, flexible, learning-oriented and revisable regulation - in this field of human rights. It is arguable that the single most consistent factor explaining the inclusion of experimentalist features in the Disability Convention is the strong presence from the outset of those most affected (ie disabled people and their representatives) in all aspects of the negotiation of the Convention. While this would not of itself have been sufficient, since a relevant coalition of sufficiently powerful states was obviously also necessary to achieve agreement on the provisions of the CRPD, the presence of those most affected seems to have been crucial in advocating for, supporting and introducing many of these novel features into the Disability Convention. The process is likely also to have been aided by the fact that the disability rights agenda was not a politically high-profile or a particularly divisive issue, which strengthened the hand of the key stakeholders who were in a position to supply their expertise and experience.

A second observation concerns the role of the EU in external relations. The assumption on which the initial hypothesis of this article was based – ie the hypothesis that the EU would have been a strong advocate of the experimentalist features of the CRPD - was that the EU would promote the adoption at the international level of a mode of governance which it has found to be effective in its own internal domain. The EU has used experimentalist governance arrangements in a wide variety of fields where it has sought to secure a broad consensus on sensitive and complex policy problems, across States which approach the problems in a wide variety of ways, and where there is no agreement on how best to address or resolve the policy dilemma at hand.⁶⁵ And despite the

⁶⁴ Examples are the provisions on national monitoring and implementation, and the provision for holding a substantive annual conference of the parties

⁶⁵ The standard example of experimentalist governance in the EU is the ‘open method of coordination’, which has been most prominently used by the EU in the field of economic and social policy, but also in a range of other policy domains. Other examples of experimentalist governance include the kind of framework directives used by the EU in the field of environmental policy (see e.g. the discussion of the Water Framework Directive by Joanne Scott and Jane Holder in their chapter “Law and New Environmental Governance in the EU” in G. de Búrca and J. Scott *Law and New Governance in Europe and the US* (Hart, 2006), pp 211-242. The EU’s ‘networked’ regulation of telecommunications, energy, occupational health and safety, drug authorization, food safety, data privacy, financial

apparent incongruity of applying experimentalist governance methods in the domain of human rights,⁶⁶ the field of disability rights at the international level arguably lends itself well to this approach. Yet there is no strong evidence of the EU playing this role in the negotiation of the Disability Convention. On the contrary, the European Commission, which played an important role negotiating on behalf of the Community, as well as helping to coordinate the position of the EU Member States, had as its primary objective and as a core part of its negotiating mandate the promotion of the EU's internal disability regime on the international stage. Further, although the EU's internal anti-discrimination regime in fact has many experimentalist features,⁶⁷ these were not particularly the features that the Commission sought to promote at the international level.

Rather the Commission seemed concerned to promote the EU's own substantive anti-discrimination regime externally, in part because it believed this model to be the best available, and in part in order to avoid the need for internal adaptation should the UN Convention adopt a different approach. This led the Commission to advocate for provisions or approaches which were part of the EU's internal regime, but which did not enjoy support from any of the other parties as being suitable for this international disability instrument.⁶⁸ Further, the Commission clearly put a great deal of energy into the promotion of the international identity of the EU, which may have deflected some of its attention from the more general, substantive goal of designing the most effective international disability rights instrument. One interesting example concerns the time and effort put by the Commission into the process of gaining agreement on the inclusion of Article 44, concerning the capacity of 'regional integration organizations' to become parties to the Convention.⁶⁹ In short, the primary strategy pursued by the EC in the negotiation of

services amongst others, are given as key examples of experimentalist governance in C. Sabel and J. Zeitlin, "Learning from Difference: The New Architecture of Experimentalist Governance in the European Union", n.8 above.

⁶⁶ See n.13 above and text.

⁶⁷ See de Búrca "Stumbling into Experimentalism: The EU Anti-discrimination Regime" in C. Sabel and J. Zeitlin eds, *Learning from Difference: The New Architecture of Experimentalist Governance in the European Union* (2010), forthcoming, pp 221-226 and "EU Race Discrimination Law: A Hybrid Model" in G. de Búrca and J. Scott *Law and New Governance in Europe and the US* (Hart, 2006) pp 100-118 and

⁶⁸ The most obvious example of this was the EU preference for a pure anti-discrimination instrument over a substantive-rights approach, or over a hybrid approach combining substantive rights tailored specifically for people with disabilities and an anti-discrimination model.

⁶⁹ This provision was not well understood by many other delegates and was apparently perceived by many NGO representatives as strange. Further, there were specific objections to the provision especially from the US and Japan, amongst others. Some were concerned that organizations like the African Union would be able to become parties on the basis of this provision, although the definition in fact refers only to regional integrational organizations which

the Disability Convention seems to have been the promotion of its own internal anti-discrimination model on the international stage, and secondarily the promotion of its own international identity and role (as the EU Treaty exhorts it to do). And while this strategy was not inconsistent with supporting a broadly experimentalist international disability rights regime, the latter enjoyed much less prominence than the former.

In short, while the UN Disability Convention has quite a strikingly experimentalist character in many respects, the emergence of this regime does not seem to have been significantly determined by the participation of the EU, but rather by the strong role of disabled persons, disability NGOs and national human rights institutions within the negotiation process. Furthermore, the EU in its capacity as an international actor on this occasion seems to have modelled itself more as a powerful State, articulating and promoting its self-interest and using international negotiations and lawmaking as a channel for ‘uploading’ its preferred position as the international standard or policy, rather than facilitating the kind of international collaborative problem-solving approach which it often does within its internal governance processes.⁷⁰

have been attributed competencies by member states, and the EU is at present the only International Organization in the world which has competences transferred to it from its Member States..

⁷⁰ For some examples, see n.65 above.