



Submission to the Department of Foreign
Affairs and Trade - Human Rights Unit on
the Irish National Action Plan for
Implementing the UN Guiding Principles on
Business and Human Rights

Comhlámh
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1 Introduction

Comhlámh is the Irish Association of Development Workers and Volunteers, and as a membership organisation, our members have been acting and campaigning on global justice issues from Ireland for the past 40 years. Trade justice has been a consistent issue throughout the history of the association, our members recognising the importance of tackling trade justice for greater equality and global justice and there has been an active member-led Trade Justice group within Comhlámh for many years. Some of the most recent trade justice activities include: work on the [Raw Materials Initiative](#); publication on [Southern Alternatives to EU Trade Policies](#); the Clean Clothes Campaign Ireland action on justice for Rana Plaza and the Alternative [Trade Mandate campaign](#) in the run up to the recent EU elections.

Comhlámh's Trade Justice Group welcomes the opportunity to make a submission regarding the development of an Irish National Action Plan for Implementing the UN Guiding Principles on Business and Human Rights. The submission draws on the work Comhlámh has undertaken over many years on Trade Justice issues and in particular the work of the Trade Justice Group. The submission will focus both on the need for Ireland to promote a concern for the impact of EU trade policies on the human rights of people living both within and outside of the EU as a central principle in developing such policies and on the importance of ensuring that Ireland supports only those trade policies which are consistent with the protection and promotion of human rights. The National Action Plan presents a real opportunity for Ireland to emphasise its commitment to supporting only those trade policies that are consistent with these concerns and to develop a comprehensive programme for acting on this commitment.

In particular, this submission will highlight concerns in relation to a number of issues, including the State's duty to protect human rights, the potential negative impact of the Transatlantic Trade and Investment Partnership currently under negotiation, the need to protect core labour standards and the risks of Investor-State Dispute Settlement (ISDS) mechanisms.

1.1 The State's duty to protect human rights

The first and second principles of the UN Guiding Principles on Business and Human Rights make clear that it is the duty of the State to ensure as far as possible that human rights are not breached within the territory of the State and that, where such breaches do occur, they should

be comprehensively investigated and punished, with appropriate redress offered to victims; the need to apply this approach to business enterprises is specifically emphasised.

While these principles apply to a State's own "territory and/or jurisdiction", the nature of the EU is such that policies developed and adopted by it in general apply of necessity to all member States. Furthermore, while in the past individual States have obtained exemptions from specific policies (for example, provisions on Irish neutrality, tax and the right to life following the initial defeat of the referendum on the Lisbon Treaty in this country[1]), these exemptions have very much been exceptions to the rule.

Moreover, even if Ireland could obtain such exemptions in relation to specific trade policies (should it be decided that they breach the provisions of the first and second principles of the UN Guiding Principles on Business and Human Rights), in any such theoretical situation, it would be morally objectionable and politically inconsistent for Ireland to continue to support such policies for the EU as a whole.

Furthermore this same spirit of consistency should also be applied to trade policies that could lead – directly or indirectly – to human rights abuses outside of the EU; that is, should the EU advocate policies that could endanger human rights in other regions, Ireland should oppose such policies.

2 The Transatlantic Trade and Investment Partnership, regulation and labour rights

Following on from the points raised in the previous section, we would like to put forward a number of concerns relating to the Transatlantic Trade and Investment Partnership (TTIP). We believe that TTIP would breach a number of the UN Guiding Principles on Business and Human Rights, in particular Foundational Principles 1 and 2 and a number of the Operational Principles associated with them.

2.1 Regulation

Of particular concern are the provisions of TTIP in relation to the harmonisation of regulation between the EU and the United States. For obvious reasons, regulation of business enterprises is key to the protection of human rights both within Ireland and elsewhere. In this context, the potential of TTIP to weaken international regulation is very worrying.

While we do not oppose the simplification of regulations relating to trade *per se* – provided that such simplification does not weaken the protection of human rights – there are strong grounds for concern that the emphasis placed by TTIP on simplifying and harmonising regulations on trade between the United States and the EU could lead to a “race to the bottom” in terms of human rights protection.

This “race to the bottom” could be facilitated by two factors in particular:

- The relative weakness of trade regulation in the US as compared to the EU[2].
- The fact that regulation development in the US allows for very significant business input[3].

It is therefore to be feared that the Regulatory Cooperation Committee proposed by TTIP will inevitably lead to the development of trade regulations that are weaker than those currently in place in the EU. Given that such regulations govern all fields of business activity, the potential for a negative impact on human rights across a range of areas, from health to labour rights, we would argue that this provision of TTIP is inconsistent with Ireland’s obligation to uphold the UN Guiding Principles on Business and Human Rights, and in particular the First and Second Foundational Principles and Operational Principles 3, 4, 5 and 6.

2.2 Protection of core labour standards

The issue of labour standards and the rights of employees are highly relevant to Foundational Principles 1 and 2 of the UN Guiding Principles on Business and Human Rights and to Operational Principles 3, 4, 5 and 6. However, as in the case of regulation, protection of core labour standards in the US is significantly weaker than in the EU[4]. In essence, the EU still holds the view that regulation is necessary to ensure that the imbalance of power between employers and employees is mitigated, while the US takes the approach that it is the free market that finds the optimal solution to labour market issues, and that governmental regulation – and, to an extent, the collective bargaining rights of employees – should therefore be limited.[5]

Consistent with TTIP’s emphasis on harmonising regulation on trade matters between the US and the EU, TTIP would therefore pose a risk to the rights currently enjoyed by employees in the EU. As such, if Ireland wishes to comply with the UN Guiding Principles on Business and

Human Rights, it is obliged to oppose TTIP in its current form, and this opposition should be clearly stated in the Irish National Action Plan.

2.3 Summary

It is important to note that, while this submission has thus far focused on the issues of regulation and the protection of core standards of labour within the context of the proposed TTIP, these issues are serious concerns in their own right, and should be addressed as such within the Irish National Action Plan for Implementing the UN Guiding Principles on Business and Human Rights. In short, the Action Plan should contain concrete commitments to support appropriate regulation of business and trade and to protect labour rights, and to oppose measures that would breach these commitments, in all applicable scenarios, whether they involve initiatives at the sub-national, national or international level, and regardless of whether they are proposed by Ireland, the EU or by any other body or organisation.

3 Investor- State Dispute Settlement (ISDS)

ISDS provisions have become relatively common features of international trade deals.[6] Indeed, it is proposed that TTIP should include such a mechanism, although talks on this proposal have now been delayed until the end of negotiations in the face of strong opposition from both civil society and political groups.[7]

Regardless of this postponement, we urge that opposition to such a mechanism in any trade deal negotiated either by Ireland on a bilateral basis or by the EU as a whole be explicitly stated in the National Action Plan. This call is made in view of Operational Principles 9 and 10 of the UN Guiding Principles on Business and Human Rights, which state, respectively, that “States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises” and that “States, when acting as members of multilateral institutions that deal with business-related issues, should:

- Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;
- Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights”.

ISDS mechanisms are fundamentally incompatible with these principles in that they allow investors to take legal action against any host State that takes any action that reduces the value of an investment.[8] This has serious ramifications for human rights, in that it means that any state that acts to prevent human rights abuses within its territory and in doing so reduces the profits of any business or enterprise operating within its territory could face potentially devastating repercussions.

Indeed, such scenarios have already come to pass; Lori M. Wallach, director of the Public Citizen's Global Trade Watch, writes that "using existing ISDS rights under current Bilateral Investment Treaties (BITs) and FTAs, corporations have launched a stunning array of investor-state attacks on health, tobacco, natural resources, financial, environmental, oil and gas extraction, land-use, transportation, toxics and other policies.[9]

Even more disturbing, however, than the prospect of Ireland or other States facing tremendous financial and economic penalties should they attempt to protect their citizens' human rights by adopting policies that impact a corporation's profits (for example, by enacting legislation to protect consumer health or employees' rights) is the likely "freezing effect" that any ISDS mechanism would have on such policies in the first place; faced with the prospect large financial payments being imposed, legislators may simply shy away from any attempt to protect human rights and provide redress for those whose rights have been breached. This reluctance to legislate for fear of punishment – and the consequent negative impacts on areas such as human health and the environment – has in fact already been observed in those jurisdictions in which ISDS mechanisms are in force.[10]

Furthermore, ISDS mechanisms fundamentally violate a number of rights and principles central to the fair administration of justice. In particular, such measures are incompatible with the principle of equality, in that they confer rights on international investors that are not granted either to individuals or to domestic investors; in addition, there are typically no provisions for judicial review, while the ability to seek redress through such a scheme is given only to the investor and not to the host State or any citizen thereof.[11]

3.1 Privatisation

ISDS mechanisms are particularly relevant to the issue of privatisation in that, at least in theory, any government that decides that the involvement of international companies in the provision of

particular services could face legal action from the companies affected.[12] This could have serious repercussions for the protection of human rights should international investors wish to become involved in the provision of services that directly affect individuals' human rights – for example, the health service, the prison service, or the accommodation of asylum seekers, to list but a few examples. Given the nature of international investment, it is inevitable that such investors would focus on their own financial interests rather than on the human rights of the people affected.

ISDS Case study 1: Germany vs. Vattenfall (environmental standards)

In 2009, Swedish energy company, Vattenfall, initiated an international arbitration case against Germany. The case centered around the construction of a coal-fired power plant on the Elbe river. A provisional contract for the construction of the plant was granted by the City of Hamburg in 2007, which set out a number of environmental limitations in an effort to protect the waters of the Elbe river. Striving to meet the EU's water framework directive, additional environmental restrictions in relation to the treatment of waste waters from the plant were added before the final approval was given in 2008 – which Vattenfall argued would make its project 'unviable'. Vattenfall claimed damages of €1.4 billion plus costs and interest under the Energy Charter Treaty. The case was ultimately settled in 2011, with the city of Hamburg agreeing to a modified water permit for the plant. The result was the lowering of environmental standards in comparison to the license permit originally challenged through the dispute. In 2012, Vattenfall filed a second case following Germany's decision to phase-out nuclear energy. The decision responded to public concerns raised following the nuclear accident in Fukushima, Japan. Under the Energy Charter Treaty, Vattenfall is claiming compensation of €4.7 billion over the closure of power plants in Krummel and Brunsbuttel. The case is still pending.

ISDS Case Study 2: Veolia v. Egypt

Since 2012, the French utility company Veolia has been suing Egypt based on the bilateral investment agreement between France and Egypt for an alleged breach of a contract for waste disposal in the city of Alexandria. The city had refused to make changes to the contract which Veolia wanted in order to meet higher costs – in part due to the introduction of a minimum wage. In addition, according to Veolia, the local police had failed to prevent the massive theft of dustbins by the local population. According to media reports, Veolia wants €82 million in compensation (Karadelis 2012).

ISDS Case Study 3: Corporations against health protection

Philip Morris v. Uruguay and Australia: Since 2010, Philip Morris has been suing Uruguay, and since 2011 Australia. Both of these suits are directed against plain packaging for cigarettes and health warnings designed to reduce tobacco consumption. The case against Australia is being conducted via a Hong Kong subsidiary – based on the investment protection agreement between Hong Kong and Australia. Uruguay is being sued by Philip Morris International with headquarters in Switzerland – based on the Switzerland-Uruguay Agreement. The tobacco company wants 2 billion US dollars in compensation from Uruguay, around 4 per cent of the gross domestic product of the country. The amount of the damages being sought from Australia is not known. In both cases, Philip Morris is also calling for a suspension of tobacco control laws (Martin 2013).

3.2 Summary

For these reasons – the need to protect human rights through direct legislation, the proven negative impact of ISDS agreements on a range of issues crucial to human rights, the fundamental incompatibility of ISDS mechanisms with the principles of justice and the need to ensure that privatisation of services does not lead to breaches of the human rights of service users – we urge that opposition to any ISDS mechanisms – whether as part of TTIP or any other agreement – be made an explicit part of the Irish National Action Plan for Implementing the UN Guiding Principles on Business and Human Rights.

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- [1] <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0124&format=XML&language=EN>
- [2] <http://www.euractiv.com/sections/science-policymaking/ttip-means-trading-away-better-regulation-301454>
- [3] <http://stopttip.net/the-eus-giant-and-secretive-deregulation-blitz/>
- [4] <http://transatlantic.sais-jhu.edu/transatlantic-topics/Articles/TTIP%20Forum/TTIP%20labor%20richards%20final.pdf>
- [5] Richard N. **Block**, Peter **Berg**, Karen **Roberts**, 'Comparing and Quantifying Labour Standards in the United States and the European Union' (2003) 19 International Journal of Comparative Labour Law and Industrial Relations, Issue 4, pp. 441–467
- [6] <http://www.industrialall-europe.eu/news/list2.asp?stid=224>
- [7] <http://www.euractiv.com/sections/trade-society/isds-decision-delayed-end-ttip-talks-311234>
- [8] <http://stopttip.net/investor-state-dispute-settlement-isds/>
- [9] <http://transatlantic.sais-jhu.edu/transatlantic-topics/Articles/TTIP%20Forum/ISDS%20in%20TTIP%20Wallach.pdf>
- [10] http://www.academia.edu/8817188/ISDS_Undermines_National_Legislation_and_Policy
- [11] <http://corporateeurope.org/international-trade/2014/04/still-not-loving-isds-10-reasons-oppose-investors-super-rights-eu-trade>
- [12] <http://www.politics.co.uk/comment-analysis/2014/02/24/comment-the-eu-us-treaty-which-enforces-privatisation>