

Submission to Ireland's consultation on implementing the UN Guiding Principles for Business and Human Rights

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This submission is made in a personal capacity. I have worked at the Office of the Compliance Advisor Ombudsman (CAO) at the World Bank Group since 2011. The CAO is a non-judicial redress mechanism for people affected by investments made by the International Finance Corporation (IFC) or the Multilateral Investment Guarantee Agency (MIGA), the private sector arms of the World Bank Group. Specifically within the CAO, I work for the Compliance unit - tasked with reviewing IFC and MIGA investments in terms of their Environmental and Social performance. I moved back to Dublin in September 2014, where I continue to work for the CAO on a consultancy basis.

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Introduction

Coming from the perspective of International law, UN Guiding Principles clarify and detail duties and responsibilities of both government and business enterprises in assessing, mitigating and addressing adverse impacts of business activities upon human rights. With the UN Guiding Principles for Business and Human Rights (the "Guiding Principles") recognised as a foundational reference point, governments have been encouraged to develop a National Action Plan (NAP) as a means to identify a range of public policy initiatives to meet their human rights obligations.¹ While this must be viewed in the context of government meeting its human rights obligations in the domestic and international fora, this submission will focus primarily on policy actions the Irish government can take to assure itself that Irish businesses are operating in accordance with the Guiding Principles in the international arena. Recommendations will be made in respect to Pillar I, II and III.

Since their approval by the United Nations Human Rights Council (June 2011), there has been much debate on the next steps in implementing the Guiding Principles with the discussion focusing on the preparation of a new treaty or individual implementation by national governments. While a treaty would set out universal requirements, such a process can take many years to reach a conclusion and could lead to divided implementation with some States not signing on.² The National Action Plan approach, while potentially leading to quicker adoption, risks divergent levels of application across states. In the absence of a treaty, the main point of this submission is that through encouraging/requiring businesses to adopt already present international standards on Environmental and Social (E&S) sustainability, the Irish government can meet its human rights obligations in an efficient and effective manner while positively positioning Irish businesses for investment by multilateral and international investors. While there are a number of internationally recognised standards that promote sustainability, this submission advocates that Ireland require its semi-state bodies and any multinational business in receipt of Irish public financing to operate in accordance with the IFC Performance Standards/Equator Principles. Further, as a matter of policy the Irish government should strongly encourage, and where possible incentivise, Irish businesses to commit to operate in accordance with the IFC Performance Standards/Equator Principles.

¹ Guidance on National Action Plans on Business and Human Rights - UN Working Group on Business and Human Rights Version 1.0 December 2014

² For further discussion listen to Professor John Ruggie discussion of the topic at University of Ottawa – September 15, 2011, podcast available here <http://goo.gl/NyZ9Vj> or see <http://www.richardkarmel.co.uk/whats-the-point-of-a-business-and-human-rights-treaty/>

IFC Performance Standards and Equator Principles

Background

IFC Performance Standards (PS) are a set of principles with outcome-oriented objectives and requirements to improve the environmental and social performance of a business activity. They provide a comprehensive framework to analyse and manage E&S risks and impacts over the life of the business activity. They have become globally recognized as a leading benchmark for environmental and social risk management in the private sector.³ Since their approval by the World Bank Group Board in 2006, where Ireland has representation, the IFC has required all private sector businesses/projects it has financed to be implemented in accordance with the Performance Standards - commensurate to the risk of the business activity.⁴ These standards were recently updated in 2012 based on IFC and its client experience of implementation, and following a worldwide consultation process with IFC clients, civil society organisations, national governments and representatives of the business community. As noted in Prof. John Ruggie's subsequent work, the 2012 revision of the PS reflect a corporation's responsibility to respect human rights.⁵

Overview of the IFC Performance Standards

While the UN Guiding Principles emphasize business' responsibilities in terms of their impact on human rights, this is partially a semantic shift from how businesses would view their impacts as being environmental, social and/or economic in nature.^{6,7} While the IFC PS have an explicit requirement for businesses to respect human rights, they are broader in considering the potential impacts upon people. As operationalized, an IFC PS compliant E&S assessment process ought to identify and address human rights impacts. In high-risk instances,⁸ the IFC PS guide companies to undertake specific human rights due diligence. Further, this assessment is considered to be an ongoing activity of the business in its management of risks and impacts throughout the project/investment cycle.

The Performance Standard 1 (PS1) outlines overarching requirements on businesses to delineate a policy and maintain a management system for the assessment of, and thereafter avoid, mitigate or compensate for, E&S project risks and impacts. Further, PS1 requires disclosure of project information, stakeholder consultation and establishing a project level grievance mechanism. PS 2-8 give special consideration to the impacts of business activities upon Employees (PS2), Emissions Pollution (PS3), Community Health, Safety and Security (PS4), Land Acquisition (PS5), Biodiversity Conservation (PS6), Indigenous Peoples (PS7) and Cultural Heritage (PS8). Further guidance on PS implementation is provided through detailed guidance notes and World Bank/IFC sector specific guidelines (e.g. for Oil, Gas and Mining, agribusiness etc), and training provided by IFC, the UNEP and private sector consultancy firms. IFC has also published analysis on how the PS address/incorporate the Guiding Principles,⁹ and in particular the International Bill of Human Rights.¹⁰

³ IFC's Business Case for Sustainability - <http://goo.gl/fTUukK>

⁴ The IFC is the largest financier of private sector businesses in developing countries. In Fiscal Year 2014 (July 2013 to June 2014), IFC's new investment commitments were US\$17.261 billion.

⁵ See Shift Project for further details. <http://www.shiftproject.org/page/un-guiding-principles-business-and-human-rights>

⁶ International Council on Mining and Metals, *Integrating human rights due diligence into corporate risk management processes*, March 2012

⁷ Panelists at the UN Forum on Business and Human Rights in Geneva (Dec 2013) frequently coached human rights impacts in terms of Environmental, Social and Economic impacts of private sector activities

⁸ The World Bank Fragile and Conflict Countries list or UN EPFI list (<http://goo.gl/5biK1T>) are potential guidance to business in considering high risk circumstances

⁹ For further details see <http://goo.gl/yiUI65>

¹⁰ For further details see <http://goo.gl/gGD25F>

Equator Principles

Through the Equator Principles EP, large international banks have committed to require clients they finance to implement PS in their business activities. A recent update redefined the scope of implementation to private sector projects conducted outside of high income OECD countries and with a project cost of at least US\$10million.^{11,12} To date, 80 international banks have signed on to the Equator Principles, including some of the world's largest financiers - Citigroup, Bank of America, Barclays, Credit Suisse, HSBC and Rabobank.¹³ No Irish financial institution has signed up to the Equator Principles. Private sector businesses have also committed to operate in accordance with the Equator Principles absent financing from an EP bank.¹⁴

Further Adoption

It is important to note that other multilateral organisations also require businesses they support to implement the PS. For example 15 European Development Finance Institutions (DFI)¹⁵ require client implementation of the PS including CDC Group (UK), FMO (Netherlands), KFW-DEG (Germany), and PROPARGO (France).

Furthermore, OECD countries providing export credit are recommended to review proposed financing against the relevant requirements of the IFC PS.¹⁶

Recommendations - Pillar I and II

- Ireland should require all state-owned companies to operate in accordance with the IFC Performance Standards with consideration to limiting their scope in line with the Equator Principles.
 - Operationally, this would translate to ESB International agreeing to operate in accordance with the PS when making investments/implementing projects outside of OECD high-income countries with a project cost exceeding the euro equivalent of US\$10million. It would require Enterprise Ireland to screen potential clients it assists outside of OECD high-income countries for potential violations of the IFC Performance Standards.¹⁷ *This responds to UN Guiding Principle 4.*
 - In financial institutions where the Irish government has an equity stake, these banks should be required and/or encouraged, depending on the equity percentage, to sign up to the Equator Principles. *This responds to UN Guiding Principle 4.*
 - Irish public sector investments in defined assets, either from the NTMA or Irish Aid¹⁸, should be made with the requirement that the client implement the Equator Principles or another internationally recognised standard (e.g. the Sustainability standards of the European Investment Bank or the European Bank for Reconstruction and Development). *This responds to UN Guiding Principle 4.*
- Where Ireland's public sector is procuring goods and/or services from businesses operating outside of OECD high-income countries, transactions should be screened to the Performance

¹¹ For further details see <http://www.equator-principles.com/index.php/ep3/ep3>

¹² Operationally this means that where one of these banks are financing a project outside of an OECD high income country, the bank will require the business to operation in accordance with the IFC Performance Standards commensurate to the risk of the business activity.

¹³ For further details see <http://www.equator-principles.com/index.php/members-reporting>

¹⁴ Kosovo's Power Distribution Company (Kosovo KEK) has committed to operate in accordance with the Performance Standards.

¹⁵ See IFC Business Case for Sustainability <http://goo.gl/FTUukK>

¹⁶ For further details see <http://goo.gl/9nI90B>

¹⁷ A Performance Standard screen is a desk based review of publicly available information in relation to higher level standards of the PS. Where a review detects potential serious concern, further discussions with the business may be necessary prior to commitment.

¹⁸ For example, Irish Aid's investment in the Private Infrastructure Development Group

Standards utilising a risk-based approach based on size and overall volume. *This responds to UN Guiding Principle 5.*

- Ireland should encourage, and where possible incentivise, Irish businesses to commit to operate in accordance with the Equator Principles. Potential incentives could be formal (i.e. tax incentives on profits repatriated from these investments) or informal (i.e. greater promotion of these businesses internationally by Irish government agencies). *This responds to the overarching commitments in the Guiding Principles and specifically to GP 3(C) and (d) and supports Irish businesses in meeting GP 11-24 & 29.*¹⁹

Access to Remedy - Pillar III

Ensuring those people potentially affected by the business activities of Irish state agencies or Irish businesses have access to an effective, efficient and independent remedy is essential for the systematic implementation of the Guiding Principles. In many developing countries judicial remedies are ineffective or non-existent and the possibility of project-affected people utilising the Irish judicial system presents issues of access to justice, jurisdiction and applicable law. Therefore, as in common with many bilateral and multilateral development agencies, there can be a reliance on a non-judicial grievance mechanism (GM).²⁰

Non-judicial GMs provides a structure by which a complaint from project-affected people can be addressed through a dispute resolution or compliance process. While neither process can guarantee outcomes, the initiation of the process itself can lead to positive impacts at the project level (i.e. greater awareness by a business). These types of mechanisms usually have a greater degree of accessibility and independence compared to other redress systems.

Ireland already has a non-judicial GM: the OECD National Contact Point (NCP). Through this structure, project-affected people can bring a complaint in relation to an Irish business to Ireland's NCP for mediation and/or potential resolution. It is imperative that Ireland assures itself that this non-judicial GM is meeting the requirements of UN Guiding Principle 31.

Recommendation – Pillar III

- Broaden the scope of its OECD National Contact Point (NCP) to receive complaints in relation to Irish state-owned agencies in relation to PS issues.²¹ *This responds to UN Guiding Principle 27.*²²
- NCP to consider complaints raising PS issues in relation to Irish businesses that publicly commit to implement their business in accordance with the PS. DFAT or NCP to publish a list of Irish business that have committed to implement their business in accordance with the PS. *This responds to UN Guiding Principle 27 and supports implementation of GP 11-24, 29 and 31.*
- In order to ensure the independence of the NCP, the NCP should be positioned in a government department unrelated to any state agency it could receive a complaint upon or,

¹⁹ See Footnote 20

²⁰ While the PS require a business to establish a grievance mechanism (GM) scaled to the risks and adverse impacts of a project, for various reasons such operational-level GM can fail to address issues at the project level due to their perception of non-independence and failure of adequate implementation. For further details see SOMO article - <http://goo.gl/Y70XP5>

²¹ Of note, the Netherlands' National Action Plan commits to broaden the scope of its NCP "to carry out a sector wide investigation into CSR issues". See <http://accountabilityroundtable.org/analysis/napsassessments/>, page 42.

²² In making this recommendation, it is noteworthy to recall the Commentary on this GP, specifically "Gaps in the provision of remedy for business-related human rights abuses could be filled, where appropriate, by expanding the mandates of existing non-judicial mechanisms and/or by adding new mechanisms."

set up as an independent state body to handle complaints (latter option strongly recommended in order to effectively meet GP 31).²³ *This responds to UN Guiding Principle 31.*

- Establishment of a public website providing details on how to contact Ireland's NCP and providing details on past and current cases.²⁴ *This responds to UN Guiding Principle 31 (b) and (e).*²⁵

Conclusion

Failure of state agencies and private sector businesses to adhere to best international practice in their activities abroad can lead to significant reputational risk to the home nation and, in some instances, question the viability of business activities abroad. The activities of European and US oil, gas and mining companies in developing countries as well as the failure to monitor impacts of business activities along the supply chain frequently leads to risks to the home nation.^{26, 27}

Implementation of the IFC's Performance Standards (or other global standards) responds effectively to UN Guiding Principles on Business and Human Rights. The PS are broader in their consideration of project risks upon people and provide greater specificity through set requirements and detailed guidance notes. The PS have been noted as an implementing mechanism by Prof John Ruggie's Shift Project and, in the NAP Toolkit by the Danish Institute for Human Rights and International Corporation Accountability Roundtable.²⁸

The Performance Standards have a proven track record of implementation. They were developed in consultation with NGOs, local community representatives and businesses and have been approved by National Governments through their representation at the World Bank Group Board. Further, regarding cost implications for businesses (otherwise known as "business case for sustainability"), a 2011 study notes that over the long-term stronger E&S performance correlates to better financial performance.²⁹

Implementing the Performance Standards provides Irish businesses with greater access to multilateral and private sector finance. As IFC, 15 European DFIs and 80 major international banks require implementation of the Performance Standards/Equator Principles, Irish businesses will expectedly be required to do the same when seeking finance.

In many instances, failure of operational level grievance mechanisms and non-existence or ineffective state systems within a foreign country leaves the home country's non-judicial grievance mechanism as the only avenue for potential redress. Therefore, it is imperative that Ireland enhances its non-judicial grievance mechanism in line with the requirements of the UN Guiding Principles Pillar III.

²³ Of note, in 2012 Denmark established a Mediation and Complaints-Handling Institution for Responsible Business Conduct as its NCP. It is an independent body within public administration.

²⁴ For an example please see www.cao-ombudsman.org

²⁵ In making this recommendation, it is noteworthy to recall the Commentary on this GP, specifically "Gaps in the provision of remedy for business-related human rights abuses could be filled, where appropriate, by expanding the mandates of existing non-judicial mechanisms and/or by adding new mechanisms."

²⁶ For example see CAO's cases in relation to Dinant and Wilmar

²⁷ Of note - Tullow Oil, an Anglo-Irish exploration company was subject of a CAO compliance appraisal. For further details see <http://goo.gl/j8PkrD>

²⁸ See p.58 of DIHR/ICAR Toolkit at <http://accountabilityroundtable.org/wp-content/uploads/2014/06/DIHR-ICAR-National-Action-Plans-NAPs-Report3.pdf>

²⁹ Eccles G.R., Ioannou I. Serafeim G. "The Impact of a Corporate Culture of Sustainability on Corporate Behavior and Performance," Harvard Business School, November 2011. Cited in IFC's Business Case for Sustainability - <http://goo.gl/ftUukK>

An Irish Government NAP that requires and/or encourages the implementation of the IFC Performance Standards is in line with international best practice, improves Irish business' financial, environmental and social sustainability, supports Irish businesses in seeking finance, protects Ireland's reputation, provides reassurance to Irish people in the goods they consume and, potentially, will positively influence the coordination and development of other European NAPs.