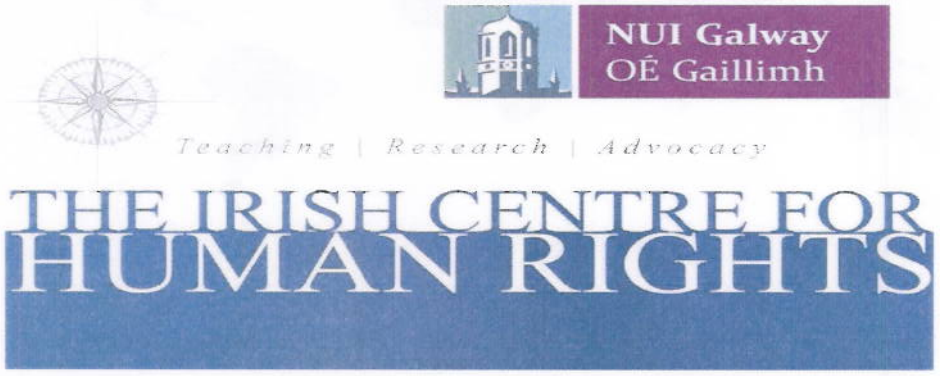

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Submission to the Irish Department of Foreign Affairs in Response to the Review of the White Paper on Irish Aid

CONTENTS:

INTRODUCTION

This submission is made, following participation by the Irish Centre for Human Rights (ICHR) in the 12th NGO Form on Human Rights, on the review of the White Paper on Irish Aid, in Dublin Castle on 17th February 2012.

This submission is not intended as an exhaustive response by the ICHR to the White Paper. Instead it seeks to address some specific concerns related to the fact that the broader context in which development assistance as currently practiced is receiving very little if any substantive recognition in the current consultation process.

It is well recognised the global system of economic management, constructed through international trade and investment agreements, broadly operates counter to the interests of developing countries. As such this system of trade and investment agreements is also prejudicial to the rationale and aims of development assistance generally and Irish Aid specifically. Public awareness of the gross imbalance in benefits and costs, relative to donor and developing countries, resulting from the structure of the current system, is increasing, as is awareness of the overall ineffectiveness of 'traditional' development assistance as currently conceived and practiced in redressing this imbalance. A development assistance programme that does not account for the worst effects of this broader system will soon be widely viewed as relatively pointless, and perhaps as a misuse or waste of taxpayer contributions.

Also missing from the consultation process is a consideration of recent developments in international human rights law (IHRL) concerning the obligations of donor states according to the United Nations Charter and the International Covenant on Economic, Social and Cultural Rights under the rubric of international cooperation. The obligation to cooperate can be viewed as mandating the re-design of development assistance programmes to foreground specific actions that wealthier states should take, consistent with their individual capacities, to realise a more just and equitable system of international economic governance.

This submission suggests specific actions that the Irish Government should take as a member of the European Union (EU) that could realistically influence the future development of a more just system.[1] They relate to the EU Economic Partnership Agreements (EPAs) and the evolving EU Investment Policy. These actions are oriented within the aims of the White Paper, and are characterised as examples of the broadened understanding of development assistance and cooperation as advocated here.

Actions such as those suggested here, must be viewed as practically necessary, in a social and political sense, if the rationale and motivation of the Irish Aid programme is to be rescued and rehabilitated and if the self-professed developmental aims of the programme are to be realised. However, the development of an obligation to cooperate under IHRL also takes the discussion into a realm where the Irish Government and donor states in general, will have to increasingly contend with arguments from developing countries, civil society actors and their own public, to the effect that such action and re-orientation is also necessary as a matter of international law.

[1] See section on Ways of Working.

PROGRESS MADE

The Government should be commended on the relative quality of its development assistance programme, as well as the relatively substantial and consistent contributions made as a percentage of GDP. The Irish Aid programme is regarded by the OECD as one of the exemplary models among its member states. The Irish Government's commitment to untied assistance is of particular merit and importance.

However, a deeper understanding of the systemic exigencies and wider context of development mandates certain changes. The White Paper recognises this context, albeit with brief and vague wording. Substantive commitments are indiscernible and the Government's progress or otherwise as such would be next to impossible to ascertain.

This is the case in the three specific areas of major concern to the present submission; human rights and development; trade and development; and investment and development. Notably, **the Government's awareness of the extensive impact of investment and international investment rules on human rights and development would not seem to have reached a sufficient threshold for the White Paper to contain a devoted section.**

The White Paper on Human Rights and Development

Human rights remain a peripheral concern in the White Paper, and seem to be summed up by the statement that "Irish Aid programmes and projects *should* further the realisation of human rights".[2] The assumption is an overly simplistic and erroneous one of identity between human rights and development, whereby "spending on development is spending on human rights".[3] The Government commits vaguely to "continue to be a strong supporter … of the UN's human rights machinery".[4] The most detailed discussion of human rights in the Paper is under the heading of "Encountering Difficulties",[5] and relates not to the realisation of human rights, but to the use of non-realisation by partner countries as a reason for the denial of aid or the threat of denial.

Of greatest concern here is the lack of recognition by the Irish Government of its extraterritorial obligations under human rights law. While the Government mentions the right to development[6] it is very unclear as to the relevance, if any, of the right to the Irish Aid programme.[7] The White Paper acknowledges that "international human rights standards, as set out in the Universal Declaration of Human Rights and other instruments, apply to both donor and recipient countries", yet it pays no further attention to donor obligations, instead exaggerating the primary responsibility of the recipient state. While this primary responsibility cannot be denied, such a dismissal of donor state obligations is not justifiable.[8]

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[2] White Paper on Irish Aid, p 59 [emphasis added].
[3] Ibid.
[4] Ibid.
[5] Ibid, p 61.
[6] Declaration on the Right to Development, General Assembly Resolution 41/128 of 4 December 1986.
[7] The right to development and obligations of international cooperation are closely related legal concepts. As valid as they are, the authors here leave aside arguments specifically from the right to development, emanating as they do from a source of soft law, and instead focus on developments in the positive treaty (or hard law) obligation on donor states to cooperate.
[8] As is discussed in detail in the next section on Changing Context.

The White Paper on Trade and Development

While in favour of the broad agenda of increased liberalisation of trade through the World Trade Organisation (WTO) the Government nevertheless seems somewhat sensitive to the widely disparate requirements of the developing countries. However again, the commitments of the Government to aid in the realisation of those needs are vague and insubstantial:

> "The Government states that it is committed to fulfilling the development dimension of the Doha Round [of the WTO] … to help ensure that the poorest and weakest countries are not overwhelmed and marginalised."[9]

This commitment is laudable, though how exactly it will be implemented and monitored is not made clear. The same lack of detail is evident later in relation to the Government's policy concerning Economic Partnership Agreements, where it is simply stated:

> "We believe that the EPA negotiations must result in agreements that are supportive of ACP countries' development needs and their poverty reduction efforts."[10]

Additionally, the White Paper refers to the fact that "Ireland is well-placed to bring some influence to bear on European Union development policy", and that it will "Seek to strengthen coherence at EU level, in order that policies in all relevant areas reinforce the Union's development objectives".[11]

CHANGING CONTEXT

Ten years ago, in a seminal report, Oxfam explained clearly and at length how the rules of the international trade and investment system are "rigged in favour of the rich".[12]

> "In their rhetoric, governments of rich countries constantly stress their commitment to poverty reduction. Yet the same governments use their trade policy to conduct what amounts to robbery against the world's poor. When developing countries export to rich country markets, they face tariff barriers that are four times higher than those encountered by rich countries. Those barriers cost them $100 billion a year – twice as much as they receive in aid."[13]

In the same vein the United Nations Development Program noted the following in 2005:

> "Rich country trade policies continue to deny poor countries and poor people a fair share of global prosperity—and they fly in the face of the Millennium Declaration. More than aid, trade has the potential to increase the share of the world's poorest countries and people in global prosperity. Limiting that potential through unfair trade policies is inconsistent with a commitment to the MDGs. More than that, it is unjust and hypocritical."[14]

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[9] White Paper, p 65.
[10] White Paper, p 67.
[11] White Paper, p 81. The section below on Key Issues will elaborate as to how this could be concretely achieved.
[12] Oxfam, *Rigged Rules and Double Standards: Trade, Globalisation and the Fight against Poverty*, 2002, p 5.
[13] Ibid.
[14] UNDP, *Human Development Report 2005: International Cooperation at a Crossroads – Aid, Trade and Security in an Unequal World*, United Nations, New York, 2005, p 3.

Little has changed in the intervening years and the costs of unfair trade and investment rules continue to dwarf the relatively meagre aid contributions of the donor countries.
The United Nations Conference on Trade and Development track the net financial transactions between donor and developing countries every year. This measure takes into account all transactions including official development assistance (ODA) and effectively maps the international flow of wealth year by year. Net financial transfers between developed and developing countries have been negative since 1997, meaning that there has been an *overall* transfer of wealth every year *from* developing countries *to* 'donor' states over the last 15 years. The scale of this transfer is frightening. At its recent peak it amounted to US$ 900 billion in the year 2008.[15]

In the same year the Irish Government gave a relatively substantial US$1.3 billion in ODA,[16] and the OECD estimates that donor states as a whole gave US$ 118 billion.[17] The net transfer of US$ 900 billion puts this charitable contribution in proper perspective. Unequal international economic arrangements codified in trade and investment agreements form the major source of this injustice. As such the context in which Irish development assistance is placed, if changing at all, would seem to be going from bad to worse.

Within this context there has been a resultant turn towards human rights in recent times, which can be largely explained as a reaction to the failure of the traditional charitable paradigm of development assistance. The continuing unjust structure of the international economic order is viewed as the source of that failure, and efforts to argue for the reform of this structure are replacing the old principle of charity with a paradigm of obligation based in public international and human rights law. The obligation of international cooperation, derived from the UN Charter and the Covenant on Economic Social and Cultural Rights, among other instruments, is of central importance here, placing particular duties on donor states. [18]

The Obligation of International Cooperation

The Charter of the United Nations sets the principle of cooperation at the heart of the organisation, which has the stated purpose of seeking:

> "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all."[19]

Chapter IX of the Charter obliges states to take "joint and separate action in cooperation with the Organization for the achievement of … human rights and fundamental freedoms for all".[20]

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[15] Statistics on net transfers from UNCTAD, *World Investment Report 2011.*
[16] See http://www.oecd.org/document/38/0,3343,en_2649_34603_42592230_1_1_1_1,00.html (18-4-2012)
[17] See http://webnet.oecd.org/dcdgraphs/ODAhistory/ (18-4-2012)
[18] See M Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law,* Oxford University Press, Oxford, 2007; S Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation,* Intersentia, Antwerpen, 2006; International Council on Human Rights Policy, *Duties sans Frontières: Human Rights and Global Social Justice,* ICHRP, Geneva, 2003; M Sepulveda Carmona, 'The Obligations of 'International Assistance and Cooperation' under the International Covenant on Economic, Social and Cultural Rights: A Possible Entry Point to a Human Rights Based Approach to Millennium Development Goal 8', *The International Journal of Human Rights*, Volume 13, Number 1, February 2009 , pp. 86-109(24); F Coomans and M Kamminga (eds) *Extraterritorial Applcation of Human Rights Treaties,* Intersentia, Antwerp, 2004.
[19] United Nations Charter, Art 1(3).
[20] United Nations Charter, Arts 55 and 56.

The obligation to cooperate has received its most extensive elaboration as a necessary requirement of Article 2(1) of the Covenant on Economic, Social and Cultural Rights, which obliges:

> "Each State Party …., to take steps, individually and *through international assistance and co-operation*, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means."[21]

Having ratified the Covenant, and as a member of the United Nations, the Government is bound by this obligation to cooperate under international law.[22] Accordingly, it has duties not only regarding the people of the Irish state, but also toward the people of other states, particularly in regard to the people of developing countries. These are known as extraterritorial or transnational duties, and the obligation to cooperate under Article 2(1) of the Covenant is a primary manifestation of such duties.[23] This obligation has distinct effects on the parameters of the Government's foreign economic policy, as formulated and pursued individually and through inter-governmental organisations such as the EU.[24] The parameters of policy and action regarding international trade and investment agreements affecting developing countries are of particular importance.[25]

It is clear from the drafting of Article 2(1) that the obligation to assist and the obligation to cooperate are intended as two overlapping but nevertheless distinct obligations, having separate and different rationales.[26] While assistance is necessary, cooperation is a far broader concept "*of cardinal importance* to the under-developed countries".[27] As such a traditional development assistance programme, absent a broader programme aimed at creating a just international economic order in cooperation with developing countries, will not satisfy the Irish Government's extraterritorial obligations under Article 2(1).

At a minimum, the obligation to *respect* the rights of peoples in developing countries must be adhered to. This minimum obligation is neither controversial, nor complicated or overly dependent on other actors, and is well within the Government's capacity. Specifically, this aspect has been noted as the

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[21] General Assembly Resolution 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976 [emphasis added].

[22] In 1990 the Committee on Economic, Social and Cultural Rights, which interprets and adjudicates the Covenant, stated that,

"The Committee wishes to emphasize that in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, *international cooperation* for development and thus for the realization of economic, social and cultural rights *is an obligation of all States*. It is particularly incumbent upon those States which are in a position to assist others in this regard. … It emphasizes that, in the absence of an active programme of international assistance *and cooperation* on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries." CESCR, General Comment No. 3, The Nature of State Parties' Obligations, para 14 [emphasis added].

[23] "The analysis of the sources of international human rights law obligations shows clearly that there are already existing extraterritorial human rights obligations. This is not only evident through an interpretation of treaty obligations, customary international law and general principles of international law, but has also been confirmed by international courts and committees." S Skogly, *Beyond National Borders*, supra note 16, p 202.

[24] Ibid, pp 88-89, and pp 190-197.

[25] Ibid, p 190. See also M Salomon, *Global Economic Policy and Human Rights: Three Sites of Disconnection*, Carnegie Council, 25 March 2010. For specific application of these obligations see, W Vandenhole, 'Third State Obligations under the ICESCR: A Case Study of EU Sugar Policy', *Nordic Journal of International Law* 76, 2007; FIAN, *Globalising Economic and Social Human Rights by Strengthening Extraterritorial State Obligations: Seven Case Studies on the Effects of German Policies on Human Rights in the South*, March 2005.

[26] M Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, Clarendon Press, Oxford, 1995, p 147.

[27] Statement by India in the drafting process. S Skogly, *Beyond National Borders*, supra note 16, p 85.

baseline by the Committee on Economic, Social and Cultural Rights, which interprets and adjudicates the Covenant. The Committee has stated in its General Comment 15 devoted to the right to water, that,

> To comply with their international obligations … States parties have to respect the enjoyment of the right to water in other countries. *International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries.*[28]

By logical extension the parameters of the obligations described apply equally to all the substantive rights of the Covenant. The language here is of compliance, requirement and obligation, leaving no doubt that the Committee sees the respect of Covenant rights in developing countries by the wealthier nations as the very least that must be done to satisfy the obligation to cooperate. This highlights the necessity of due diligence in the negotiation and structuring of international agreements. The Committee has stated:

> "With regard to the conclusion and implementation of other international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to water. Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water."[29]

The emphasis is on the principle of first doing no harm and *the necessity of having procedures of awareness and prior assessment* to ensure that the Covenant rights are not violated in the formation of the international economic order. Therefore, "States parties should ensure that their actions, as members of international organizations, take due account" of the Covenant rights.[30]

Finally, the Committee has elaborated on these obligations within its Concluding Observations on states parties' periodic reports. The Committee has directly addressed the Irish Government on this issue:

> "The Committee encourages the State party, as a member of international organisations … to do all it can to *ensure that the policies and decisions of those organisations are in conformity with the obligations of states parties under the Covenant*, in particular [those] concerning international assistance and cooperation."[31]

Such pressure from the Committee will only become greater over time, and it will be increasingly joined by voices from academia, civil society organisations and growing numbers of voters within the borders of the wealthy nations themselves.

The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights were recently adopted by a group of experts based on a decade of legal research.[32] These Principles form a source of international law, as they are a product of "the most highly qualified publicists of the various nations [and therefore a] subsidiary means for the determination of rules of

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[28] General Comment 15, para 31 [emphasis added].
[29] *Ibid*, para 35.
[30] *Ibid*, para 36.
[31] UN Doc E/C.12/1/Add.77, para 37 [emphasis added].
[32] The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, produced by the Extraterritorial Obligations (ETO) Consortium, the International Commission of Jurists and the Maastricht Centre for Human Rights, at http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=23901 (18-4-2012)

law".[33] The Principles are authoritative and influential, as the Committee, and other judicial and quasi-judicial human rights bodies, will no doubt refer to them closely in their further elaboration of the obligation to cooperate.

The Principles hold that states have obligations to respect socio-economic rights in situations where their "acts or omissions bring about *foreseeable effects* on [those rights] whether within or outside its territory"[34], and where, acting separately or jointly, they are "*in a position to ... take measures* to realize economic, social and cultural rights extraterritorially".[35] States must not engage in "acts and omissions that *create a real risk* of nullifying or impairing" the socio-economic rights of peoples in other countries, where this negative effect "is a *foreseeable result* of their conduct".[36] It is clearly stated that "*uncertainty about potential impacts does not constitute justification* for such conduct".[37] As a member of an international organisation a state "must take *all reasonable steps* to ensure that the relevant organisation acts consistently with [their] international human rights obligations".[38]

KEY ISSUES

The key issues addressed here relate firstly to the Economic Partnership Agreements (EPAs) being negotiated between the European Union (EU) and a number of developing countries, and secondly to the current formulation of a regional EU Investment Policy.

Economic Partnership Agreements

The long-standing negotiations over the EPAs have for some time been mired in criticism from many angles.[39] Advances in liberalisation of trade through the WTO has been the catalyst for the renegotiation of the older Lome Agreement, offering certain developing countries preferential access to EU markets, which, the EU argues, no longer adhere to the WTO rules on regional agreements. Instead of seeing this as necessitating the correction of the WTO rules in order to properly allow for the needs of developing countries, the EU has taken it as requiring the reduction of concessions to these countries within its regional sphere, putting them at a further disadvantage in an already unjust world trading system.

The negotiations on the EPAs generally fall foul of the truism that equal rules on a field of vastly unequal players, without sufficient preferential checks and balances, will always end in vastly unequal results. Under current arrangements advantages of size, technology and subsidies will ensure that European companies will almost always out-perform companies and producers in the developing countries, meaning that the EPAs run the real and forseeable risk of retarding development. Indeed, an independent assessment funded by the European Commission itself found that trade between the EU

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[33] Statute of the International Court of Justice, Article 38(d).
[34] Maastricht Principles, supra note 32, Principle 9(b) [emphasis added].
[35] Principle 9(c) [emphasis added] .
[36] Principle 13 [emphasis added].
[37] Ibid [emphasis added].
[38] Principle 15 [emphasis added].
[39] See for example; South Centre, *EPAs: The Wrong Development Model for Africa and Options for the Future* Analytical Note SC/TDP/AN/EPA/23, Geneva, March 2010; B Gavin, *The EU-ACP Economic Partnership Agreements: What Impact on Development?* Dublin, Trinity College, International Institute of Integration Studies (IIIS), 2007; *Slamming the Door on Development: Analysis of the EU's Response to the Pacific's EPA Negotiating Proposals*, Oxfam International, December 2006; *Unequal Partners: How EU-ACP Economic Partnership Agreements Could Harm the Development Prospects of Many of the World's Poorest,* Oxfam International, September 2006; *Partnership Under Pressure: an Assessment of the EC's Conduct in the EPA Negotiations*, ActionAid, Cafod, Christian Aid, Tearfund and Traidcraft, 2007; South Centre, *Understanding the Economic Partnership Agreements*, Analytical Note, SC/AN/TDP/EPA/1, Geneva, March 2007.

and West Africa under the EPAs would stall the development of a modern industrial base in the developing countries, reduce their exports of traditional crops, and lead to internal conflict and struggles over more limited resources.[40]

Even generously allowing that the benefits may be at least uncertain, the costs are nevertheless readily measureable and large. EPAs will eliminate developing country tariffs, disallow protective measures and shrink policy space to support local producers. These countries will also be forced to institute wide-ranging administrative, legal and economic reforms that will incur significant costs. Some estimates place these costs at €9 billion for all the relevant countries collectively.[41] Over and above this amount, those countries are expected to lose US$359 million per year due to tariff elimination during the first stage of liberalisation alone.[42] Another study has found that in a simple comparison of their tariff losses compared to gains in lowered duties at EU borders developing countries will come out worse off.[43]

While their smaller and weaker companies and economies will succumb to the increased competition with the combined strength of the EU, government budgets will also be substantially reduced along with the capacity of those governments to compensate and provide the goods and services that are the socio-economic rights of their people. Calls for the EU to increase development assistance to sufficiently cover the budget shortfalls have been rejected by EU negotiators on the basis that this would not provide sufficient certainty for foreign direct investment.[44]

The structuring of the negotiations themselves does not take into account the huge advantages of institutional capacity and resources enjoyed by the EU in relation to the paucity of the same suffered by the developing countries.[45]

Due to the effective failure of the negotiations, developing countries are being pressured into signing interim EPA agreements, which some countries have initialled under duress, appending long lists of reservations. The interim agreements pre-empt the conclusion of final agreements that could adequately reflect their interests, and in themselves can have seriously negative developmental impacts.[46]

From a human rights standpoint,[47] the foreseeable negative effects of the EPAs on agricultural and industrial development, increases in internal conflict, and substantial and uncompensated financial

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[40] Price-Waterhouse-Coopers, *Sustainability Impact Assessment (SIA) of the EU-ACP Economic Partnership Agreements: Regional SIA - West African ACP Countries*, Final Report (revised), 30 January 2004, available at http://trade.ec.europa.eu/doclib/docs/2005/january/tradoc_121200.pdf (17-4-2012)

[41] C Milner 'An Assessment of the Overall Implementation and Adjustment Costs for the ACP Countries of EPAs with the EU' in R Grynberg and A Clarke, *The European Development Fund and Economic Partnership Agreements*, Commonwealth Secretariat, 2006.

[42] S Bilal and C Stevens (eds) *The Interim Economic Partnership Agreements between the EU and African States: Contents, Challenges andPprospects* (Policy Management Report 17) Maastricht, ECDPM-ODI, 2009.

[43] South Centre, *Economic Partnership Agreements in Africa: A Cost-Benefit Analysis*, Analytical Note SC/TDP/AN/EPA, 29 January 2012.

[44] See South Centre, *EPAs and Development Assistance: Rebalancing Rights and Obligations*, Analytical Note, SC/AN/TDP/EPA/19, Geneva, September 2008; West Africa-European Community, *EPA Negotiations, Technical Meeting , Joint report.* Brussels, 20-23 April 2009.

[45] See South Centre, *Understanding the Economic Partnership Agreements*, supra note 39.

[46] See Open Letter to Mr.Karel De Gucht, European Commissioner for Trade, *On Undue Pressure on Namibia to sign an Interim EPA*, Brussels, 18 June 2010, signed by 30 European NGOs, at http://epawatch.files.wordpress.com/2010/06/namibia-ngo-letter-100618.pdf (18-4-2012)

[47] On human rights and trade generally see Office of the High Commissioner for Human Rights, *Human Rights and Trade,* Communication to the 5th WTO Ministerial Conference, Cancun, Mexico, 10-14 September, 2003.

costs to government budgets, all amount to very obvious potential human rights deficits. A broad range of human rights would be affected, from the rights to work and food, to the rights to life and personal security, to the rights linked to the provision of public services such as health, education and social security.[48] Furthermore, there exists no hard evidence or guarantee that the supposed offset to this deficit, macro-economic growth due to increased competitiveness as a result of greater integration into the global marketplace, will in fact materialise.[49]

Since the last time developing countries were pressured into accepting a broad-ranging liberalisation of trade and investment, through the 1994 Uruguay Round that established the WTO, research has shown that such liberalisation had a distinctly harmful effect on their development. The costs of implementing the new trade rules far outweighed any benefits. The rules have been found to work at cross-purposes with the World Bank's poverty reduction programmes and the aims of donor states' development assistance programmes, and make it harder for developing countries to realise the socio-economic rights of their people.[50]

From a procedural point of view, the intransigence of the EU and the structure of the negotiating process is also undermining the participatory rights of the developing countries and preventing the formulation of a trade regime that reflects their interests and their objectives. The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities has noted and emphasised, in accordance with the UN Charter and other requirements of international law, "the centrality and *primacy of human rights obligations* in all areas of governance and development, including international and regional trade, investment and financial policies, agreements and practices".[51] The Sub-Commission further states that "the realization of human rights and fundamental freedoms … is *the first and most fundamental responsibility* and objective of States in all areas of governance and development".[52] The absence of any substantive human rights dimension or analysis in the negotiations on the EPAs is as such of deep concern.

Also of great concern is that the EU is using the latest negotiations on the EPAs to re-table certain issues that the developing countries as a whole have rejected at the WTO. Known as the Singapore issues at the WTO, these were commitments demanded by the wealthy states from developing countries that run counter to their developmental interests, and which were not accompanied by any real concessions from the wealthy states. The EU is pushing these concessions under the concept of "Full EPAs" over and above liberalisation of trade in goods, demanding substantial commitments on issues like services, intellectual property rights, investment, competition, government procurement and trade facilitation.[53] These demands go well beyond what is required under existing WTO agreements.[54]

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[48] International Federation for Human Rights, *Position Paper – Economic Partnership Agreements and Human Rights*, June 2007; J Gathii, *The Right to Development, Human Rights and Economic Partnership Agreements*, Albany Law School, Legal Studies Research Paper Series, No. 12, 2011-2012.

[49] See for example United Nations Conference on Trade and Development, *Economic Development in Africa: Rethinking the Role of Foreign Direct Investment*, United Nations, Geneva, 2005; and Ha-Joon Chang (ed) *Rethinking Development Economics*, Anthem Press, 2003.

[50] J Finger and P Schuler, *Implementation of Uruguay Round Commitments: The Development Challenge*, World Bank Working Paper No. 2215, 1 October 1999.

[51] *Human rights as the Primary Objective of Trade, Investment and Financial Policy,* Sub-Commission on Prevention of Discrimination and Protection of Minorities, Resolution 1998/12.

[52] Ibid.

[53] *Critical Issues in the EPA Negotiations: An EU CSO Discussion Paper,* August 2009, p 2. This discussion paper is supported by the following organisations: Afrikagrupperna/Africa groups of Sweden; AITEC, France; ATTAC France; 11.11.11, Belgium; Both Ends, Netherland; Coordinadora de ONGD de Euskadi, Spain; CNCD 11.11.11, Belgium; Comhlamh, Ireland; Fair, Italy; Forum Syd, Sweden; German Stop EPA Coalition www.stopepa.de; Germany; IBIS, Denmark; Micah Challenge, Portugal; MS ActionAid, Denmark; Oxfam International; Setem-Catalunya, Spain; Terra

Chief among these issues is that of investment. The EU is currently attempting to force developing countries into investment concessions as part of the EPAs, using market access as a bargaining chip, despite the real concerns that these agreements will severely restrict the policy space available to those countries to ensure an actual developmental benefit from increased trade and investment.

EU Investment Policy

Under the Lisbon Treaty competence for the conclusion of international investment agreements has been transferred from member states to the EU itself, and the major responsibility for the formulation of a common EU Investment Policy now falls to the Commission. The formulation of this Policy will have major ramifications for the development prospects of a large number of developing countries.

The major concern is that this Policy will continue to reflect a distinct imbalance in the current international investment regime, consisting of thousands of bilateral investment treaties (BITs). The imbalance is between the extensive rights conferred on foreign investors, on the one hand, and the restrictions on the abilities of developing countries to develop policy, protect sectors and industries, and regulate these investors in the interests of their own people and their own development, on the other. If this imbalance continues and the singular model of FDI driven economic development continues to be forced on developing countries, then these countries will never break out of a cycle of impoverishment.[55]

Bilateral investment treaties are single purpose agreements designed simply to protect foreign investors. They have no regard for the development objectives or the human rights responsibilities of host states, and they critically reduce the policy and regulatory space necessary for developing countries to control foreign investment such that they can reap developmental benefits from it.[56] Taken together, BITs institute a legal framework with almost global coverage, the provisions of which are commensurate with the liberal, developed country stance on FDI protection.[57] As noted by the United Nations Conference on Trade and Development:

> "Developing countries have tried for many years unsuccessfully to impose greater obligations on foreign investors in [BITs]. How to ensure adequate corporate

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Nuova, Italy; Traidcraft, UK; Trocaire, Ireland; World Development Movement, UK; World Rural Forum, Spain. At http://epawatch.files.wordpress.com/2009/09/critical-issues-paper-090828-final2.pdf (17-42012)

[54] European Research Office, *The ACP and the EU Negotiating Mandates. A Comparison and Commentary*, 9 July 2002.

[55] United Nations Conference on Trade and Development, *Economic Development in Africa: Rethinking the Role of Foreign Direct Investment*, United Nations, Geneva, 2005; L Bernal (et al eds), *The World Development Report 2005: An Unbalanced Message on Investment Liberalisation*, South Centre, Geneva, August 2004; M Mortimore & S Vergara (2004) *Targeting Winners: Can Foreign Direct Investment Policy Help Developing Countries Industrialise?*, The European Journal of Development Research, 16:3, 499-530; P Nunnenkamp, *To What Extent Can Foreign Direct Investment Help Achieve International Development Goals?* Blackwell, 2004; R Shapiro, *Foreign Direct Investments In Developing Nations*, Council for European Investment Security, 2011; S Lall and R Narula (2004) *Foreign Direct Investment and its Role in Economic Development: Do We Need a New Agenda?*, The European Journal of Development Research, 16:3, 447-464.

[56] "The challenge faced by developing countries on FDI matters is considerable. In addition to the legitimate dilemmas faced by each country in determining its stance on FDI, there are strong external pressures on most developing countries to conform with what in essence would be an investor-oriented agreement and which *de facto* significantly circumscribes the exercise of sovereign power by developing country nation states in their own territory. Moreover, in a world of uneven development and great disparities in economic and political power among states, the asymmetries are such that to accept the kind of national policies or an investment arrangement of the sort pressed for by the North would likely accentuate the differences." South Centre, *Foreign Direct Investment, Development and the New Global Economic Order: A Policy Brief for the South*, Atar, Geneva, 1997, p. vi.

[57] S Schill, *The Multilateralisation of International Investment Law: The Emergence of a Multilateral System of Investment Protection on the Basis of Bilateral Treaties*, Society of International Economic Law, Working Paper No. 18/08, 2008.

> contributions to development remains a key challenge for many developing countries.... Existing [BITs] do not specifically address development concerns."[58]

As such these investment agreements result in many actual and potential human rights deficits.[59] Socio-economic rights, forming the core of development concerns, are those most negatively affected as the primary effect of BITs is to limit the scope of governments in the provision of public services. Furthermore, the expansive interpretation given to investor's rights by international arbitrators is resulting in even further limitation of that scope. One investor-state dispute is a particularly illustrative example, involving Argentina and the right to water. Despite Argentina explicitly basing its defence on its IHRL obligation to provide the right to water for its people, the arbitration panel dismissed this defence and prioritised Argentina's obligations under the relevant BIT, through an extremely expansive interpretation of the treaty's fair and equitable treatment provision.[60] This amounts to arbitrators directing states to ignore their IHRL obligations in favour of the protection of foreign investors.

These investment agreements fail to increase developmentally effective financial inflows[61], and therefore, as currently structured, they are detrimental to developing countries.[62] It is increasingly understood that the rationale for these agreements is simply backward. BITs do not attract investment, and increased investment does not necessarily bring national development. It is *national development* that brings investment. Therefore, sacrifices of developing country control over their own economy and the nature and pace of their integration into the global economy that are directed to attract FDI are often completely counter productive.[63]

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[58] United Nations Conference on Trade and Development, *International Investment Rule-Making: Stocktaking, Challenges and the Way Forward – Series on International Investment Policies for Development*, United Nations, Geneva, 2008, pp. 45-6.

[59] See, *Human Rights, Trade and Investment, Report of the High Commissioner for Human Rights*, U.N. Economic and Social Council, U.N. Doc. E/CN.4/Sub.2/2003/9, 2 July 2003; L Peterson, *Human Rights and Bilateral Investment Treaties: Mapping the Role of Human Rights Law Within Investor-State Arbitration*, Rights and Democracy, International Centre for Human Rights and Democratic Development, Montreal, 2009; R Bachand and S Rousseau, *International Investment and Human Rights: Political and Legal Issues*, Rights and Democracy, International Centre for Human Rights and Democratic Development, Montreal, 2003; T Weiler 'Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order', *British Columbia International and Comparative Law Review* 27, 2004; L Peterson and K Gray, *International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration*, International Institute for Sustainable Development, Winnipeg, 2003; R Suda, *The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization*, Global Law Working Paper 01/05, Symposium - 'Transnational Corporations and Human Rights', New York University School of Law, 2005; S Zia-Zarifi, *Protection Without Protectionism: Linking a Multilateral Investment Agreement and Human Rights* (International Council on Human Rights Policy, Geneva, 2000); U Kriebaum, 'Privatising Human Rights: The Interface between International Investment Protection and Human Rights' in A Reinisch and U Kriebaum (eds) *The Law of International Relations – Liber Amicorum Hanspeter Neuhold*, Eleven International Publishing, 2007.

[60] *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case no. ARB/03/19.

[61] Both the World Bank and the UNDP note that there is no evidence that BITs increase flows of FDI to developing countries which sign them, this is especially true of the least developed countries: World Bank, *Global Prospects and Developing Countries*, Washington, 2003; UNDP, *Making Global Trade Work for People*, United Nations, New York, 2003; M Jacob, *International Investment Agreements and Human Rights*, INEF Research Paper Series, Human Rights, Corporate Responsibility and Sustainable Development, March 2010;

[62] A Cho and N Dubash, *Will Investment Rules Shrink Policy Space For Sustainable Development? Evidence from the Electricity Sector*, Trade Related Agenda – Development and Equity, Working Paper No. 16, World Resources Institute and South Centre, December 2003; A Guzman 'Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) *Vanderbilt Journal of International Law* 38;

[63] See especially the work of Ha Joon Chang; 'Globalisation, Transnational Corporations, and Economic Development' in D. Baker, G. Epstein, and R. Pollin (eds.), *Globalisation and Progressive Economic Policy*, Cambridge University Press, Cambridge, 1998; *Kicking Away the Ladder – Development Strategy in Historical Perspective*, Anthem Press, London,

The realisation of this fact has led a number of countries in Latin America to renounce the BITs they have signed and to remove themselves, as far as is possible, from the current international investment regime.[64] There is also a recent continental effort to set up an alternative international arbitration centre.[65]

An EU Investment Policy that forces a significant loss of developing country control over their own economy is completely inconsistent with its development assistance policy and that of its member states. On a national level, realisation of this fact was the reason why Norway suspended its BIT program in the mid-1990s.[66] Following extensive consultations a new model BIT made significant advances compared to its European counterparts. The most fundamental change in the model is undoubtedly an express broadening of the initial purpose of the agreement to include the realisation of human rights and a variety of wider developmental objectives. A government commentary states the need:

> "to lead the development from one-sided agreements that safeguard the interests of the investor to comprehensive agreements that safeguard the regulative needs of both developed and developing countries, making investors accountable while ensuring them predictability and protection."[67]

The commentary further added that the future evolution of international investment law should "not intervene in the state's legitimate exercise of authority where major public interests are affected."[68]

Sensitive to some of the widespread criticisms of BITs the European Parliament itself has called on the Commission to ensure that the EU Investment Policy includes obligations not only on host states but also on investors, noting that:

> "for investment agreements to further benefit [developing] countries, they should also be based on investor obligations in terms of compliance with human rights and anti-corruption standards as part of a broader partnership between the EU and developing countries for the purpose of reducing poverty."[69]

Similarly, the EU Parliament expressed dissatisfaction with an earlier communication from the Commission stressing that "while [it focussed] extensively on investor protection, it should better

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2002; (ed) *Rethinking Development Economics*, Anthem Press, 2003. See also, D Rodrik, *The New Global Economy and Developing Countries: Making Openness Work*, Washington, D.C., Overseas Development Council, 1999.

[64] Ecuador has denounced 9 of its 25 BITs and initiated re-negotiations on the remaining 16, maintaining the need for a wholesale review of the investment treaty regime. Venezuela, as well, has begun the process of addressing the effectiveness of its BITs from a developmental perspective, having denounced its BIT with the Netherlands in April 2008. See UNCTAD, *Recent Developments in International investment Agreements,* IIA MONITOR No. 2 (2008) International Investment Agreements, UNCTAD/WEB/DIAE/IA/2008/1.

[65] Under the Treaty for the Union of South American Nations, there is a proposal led by Ecuador, to set up an alternative international arbitration centre to the International Centre for the Settlement of Investment Disputes (under the auspices of the Word Bank), which is widely regarded to be institutionally biased towards foreign investors over the public good. See S Fiezzoni, *UNASUR Arbitration Centre: The Present Situation and the Principal Characteristics of Ecuador's Proposal*, Investment Treaty News, 12 January 2012; C Leathley, *What will the recent entry into force of the UNASUR Treaty mean for investment arbitration in South America?* Kluwer Arbitration Blog, 13 April 2011.

[66] L Peterson, *Norway Proposes Significant Reforms to its Investment Treaty Practices*, Investment Treaty News, 27 March 2008; South Centre *Comments on Norway's Draft Model Bilateral Investment Treaty (BIT): Potentially Diminishing the Development Policy Space of Developing Country Partners*, Geneva, Switzerland, 15 April 2008.

[67] L Peterson, *Norway Proposes Significant Reforms,* ibid.

[68] Ibid.

[69] European Parliament Resolution of 6 April 2011 on the Future European International Investment Policy (2010/2203(INI)), para 37.

address the right to protect the public capacity to regulate and meet the EU's obligation to exercise policy coherence for development".[70] The Parliament also stated:

> "that the EU should also be aware of the concerns of its developing partners and should not call for more liberalisation if the latter deem it necessary for their development to protect certain sectors, particularly public services."[71]

However, it would seem that the Commission is not in any way adequately addressing the Parliament's concern for the lack of a development dimension in EU Investment Policy[72], but is instead focused only on "legal certainty and maximum protection for EU investors".[73]

WAYS OF WORKING

Broadening the Understanding of Development beyond Assistance and beyond Charity

In light of the foregoing, the Irish Centre for Human Rights (ICHR) requests the Irish Government to acknowledge its international legal obligation to cooperate at an international level, individually and through international organisations, with all developing countries, to realise the socio-economic rights of their peoples and their development aspirations.

Among other things, the obligation to cooperate requires the Government to respect the socio-economic rights of peoples in developing countries, putting in place procedures of prior assessment and awareness such that its acts and omissions do not contribute to a rights deficit in these countries, or negatively affect their development. The Government is therefore required to observe due diligence in the negotiation and structuring of international agreements, such that these agreements do not adversely impact upon development or socio-economic rights realisation.

The Government should thereby take heed of the Committee on Economic, Social and Cultural Rights, which has called upon it "to do all it can to ensure that the policies and decisions of those organisations [of which it is a member] are in conformity with the obligations of states parties under the Covenant".[74]

The legal standard for the engagement of the Government's obligations is that it must take all reasonable steps, when it is in a position to take a measure or influence events individually and as a member of an international organisation, and where a given act or omission has a foreseeable negative effect, or involves a real risk of nullifying or impairing the socio-economic rights of those in developing countries. The Government must err on the side of the cautionary principle in cases of complete uncertainty.

The ICHR urges the Government to foreground these obligations as a part of its stated efforts at policy coherence, both domestically, through the Inter-Departmental Committee on Development, and internationally through action within the EU. It must do so particularly in light of Lisbon Treaty,

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[70] Ibid, para 6.
[71] Ibid, para 26.
[72] Seattle to Brussels Network, *European Member States refuse necessary reform, ignore the will of the European Parliament and insist that future EU investment agreements copy their bad practice*, September 2011.
[73] *Outcome of proceedings of the Trade Policy Committee (Full Members) meeting on 22 January 2010*, EU document [5667/10 WTO 25].
[74] UN Doc E/C.12/1/Add.77, para 37, supra note 31.

Article 208 TFEU, which defines the achievement of the Millennium Development Goals and poverty reduction as over-arching foreign policy goals for the whole Union.

Ireland is called on to foreground these issues during its upcoming Presidency of the Union in early 2013. To facilitate the Government's obligations we recommend that the Human Rights Unit at the Department of Foreign Affairs be tasked with conducting regular and ongoing human rights impact assessments, in connection with civil society organisations, on all major agreements entered into and currently being negotiated both between Ireland and developing countries, and between the EU and developing countries. The results of these assessments should feed in to the processes of the Inter-Departmental Committee on Development, as well is into the policies and positions taken by Ireland in the EU Commission and Council.

Specific Actions and Policy Orientations within the EU

In particular, and in fulfilment of its international legal obligations, the Irish Centre for Human Rights recommends that the Government adopt the following actions and policy orientations:

On Economic Partnership Agreements

- To conduct its own human rights and sustainable development impact assessment on the EPAs and to verify them against the independent assessments referred to, in order to ensure that the agreements do not have any foreseeable negative effects on the socio-economic rights of peoples in developing countries, in line with Article 9 of the Cotonou Agreement requiring "respect for and promotion of all human rights";

- To adopt a flexible approach, and to call on the EU Commission to do the same, with regard to ongoing negotiations and contentious issues, and to take full account of the developmental priorities of developing countries, especially with regard to the concept of "full EPAs" and demands for more concessions on more issues than are called for under WTO rules;

- To call on the Commission to discontinue the practice of forcing developing countries into interim agreements in the face of failed negotiations due to EU intransigence and the concerns of developing countries not being taken into proper account;

- To encourage the Commission to open the negotiations to include Parliamentary debates and extensive consultation with other stakeholders, such as NGOs, trade unions and academics;

- To call for the exclusion of essential public services such as health, water and education from the EPAs;

On EU Investment Policy

- To conduct its own study on the complex effects of international investment law as it is currently structured, taking into account the studies referred to above, particularly that of Norway, paying particular attention to the human rights consequences on all states of severely reduced policy and regulatory space in favour of foreign investment protection;

- To call within the EU Commission for the inclusion in the Policy of a strong developmental purpose along the lines of the Norwegian government's approach, and investor obligations in the

areas of human rights and corporate accountability, again in accord with Lisbon Treaty, Article 208;

- To call on the Commission to, at a minimum, carefully qualify the extent of key provisions (on fair and equitable treatment, national treatment, expropriation, and umbrella and carve out clauses) to protect as far as possible, the space of states to regulate in the public interest and provide public services;

- To call on the Commission to ensure that the Policy reflects the need for a balanced, transparent and stable dispute resolution mechanism, importantly including the necessary exhaustion of domestic remedies;

- To do all it can domestically and internationally to open up a consultation process on an EU investment policy to increase public awareness and debate before any final policy is determined.

In these ways of working the Irish Government can give reality and substance to the assertion given in its own words, that, "the provision of assistance and our cooperation with developing countries is a reflection of our *responsibility* to others and of our vision of *a fair global society*".[75]

(Word count 4, 915 excluding footnotes and quotations).

[75] White Paper, cover note.