



HUMAN RIGHTS IN TRADE AND INVESTMENT POLICIES:

THE POTENTIAL OF A UN TREATY ON TRANSNATIONAL CORPORATIONS AND OTHER BUSINESSES

INTRODUCTION

The international trade and investment regime is under the spotlight. The impacts of several high-profile agreements have been hotly debated in the public realm, in some cases their future placed into question. And while the number of bilateral investment treaties and free trade agreements has grown over the past decades, their impacts on human rights have not been adequately addressed.

For example,¹ in recent years agricultural exports from the European Union (EU) have put considerable downward pressure on food prices in developing countries, such as milk powder in Burkina Faso and Bangladesh, and poultry meat in Ghana. Many smallholder farmers have been plunged into poverty or even crowded out of markets, with women producers among the first impacted. Such exports have led to infringements of the human right to food and other social rights, and have undermined efforts to enhance sustainability and reduce climate impacts of production and consumption.

The demand to abolish export taxes can spawn additional mining, a sector in which environmental damage and climate impacts as well as human rights infringements, including land expropriation to the detriment of women's livelihoods, are all too common. Investor protection provisions enable foreign investors to challenge

national regulations and claim billions of euros as compensation for perceived unfairness or indirect expropriation. They can take legal action even against reforms that affect land ownership, water supply or health care or serve the protection of human rights and the environment.²

CIDSE and its members cooperate closely with local organisations, many of which are women's organisations, working with communities whose rights and livelihoods have been affected by such trade arrangements. We have advocated for attention to this reality in the context of different agreements, such as those between the EU and Peru, Colombia, Central America, African countries and regions or India. We have made proposals for reforms of certain instruments, including human rights clauses and sustainability impact assessments.³ In analyses of recent negotiations, such as those between the EU and Canada or the United States, we have sought to assess whether they are in line with international standards on business and human rights.

The UN Guiding Principles on Business & Human Rights, adopted by the UN Human Rights Council in 2011, deal explicitly with international trade and investment agreements and make clear that States are expected to consistently fulfil their obligation to protect human rights in this context, cautioning States to reserve and maintain adequate policy and regulatory ability to do so.

¹ Armin Paasch (MISEREOR), "The fig-leaf approach to human rights," D+C Development and Cooperation, 11 October 2016. <https://www.dandc.eu/en/article/eu-trade-policies-do-not-take-human-rights-account-appropriately>.

² For example, in Guatemala internal government documents obtained through the country's Freedom of Information Act show how the risk of one of these cases weighed heavily on one State's decision not to challenge a controversial gold mine, despite protests from its citizens and a recommendation from the Inter-American Commission on Human Rights that it be closed down. Lorna Gold (Trócaire) a.o., "The impact on and opportunities in relation to TTIP", 2016, <https://www.trocaire.org/sites/default/files/resources/policy/trocaire-attac-submission-to-jobs-committee-jan-2016.pdf>.

³ CIDSE submission to the European Commission public consultation on the handbook for sustainability impact assessments of EU trade negotiations, 2015.

Further, in 2014 the Human Rights Council adopted resolution 26/9 establishing an open-ended intergovernmental working group with a mandate to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises. How this Treaty might contribute to addressing potential conflicts between trade and investment policies and human rights and ensure the primacy of the latter, was among the key issues discussed during the first and second sessions of the group in 2015 and 2016.

CIDSE commissioned a study by Prof. Markus Krajewski of the University of Erlangen-Nürnberg in Germany, entitled “Ensuring the Primacy of Human Rights in Trade and Investment Policies: Model clauses for a UN Treaty on transnational corporations, other businesses and human rights”,⁴ in order to deepen the analysis and contribute to this debate. The study reviews potential areas of conflict between State obligations under current trade and investment agreements on the one hand, and obligations under international human rights law on the other, illustrated by actual examples. The study then looks at the different options under consideration for reform of instruments and mechanisms within the trade and investment regime. Finally, it explores the potential of a future Treaty on businesses and human rights to help overcome the limitations and gaps of these reforms and contribute to ensuring the primacy of human rights law over trade and investment law.

THE RATIONALE FOR FUNDAMENTAL REFORM



“Business is a noble vocation, directed to improving wealth and improving our world.”

Pope Francis, *Laudato Si’: On Care for our Common Home*, 129.

For CIDSE, ensuring that businesses contribute to people’s well being and respect human rights goes hand in hand with the reform of trade and investment policies. As mentioned above, there is ample evidence of negative impacts on human rights, and women’s livelihoods in particular, in the practice of these agreements and with the involvement of corporate actors.

There are fundamental questions of justice at stake. Should the ability to change unjust national laws, such as the mining law in Guatemala which allows the use of cyanide and asks only 1% royalties, be inhibited by conditions in trade and investment

agreements? Should foreign investors have privileged access to private arbitration tribunals in cases of claims of infringements upon their rights, while individual and communities whose rights have been abused struggle to have access to justice? In fact, trade and investment agreements are reinforcing a power imbalance, providing international corporate actors with further instruments to drive decisions on national regulation on labor rights, health and environmental standards. This undermines democracy and the international and constitutional obligations of States to fulfil human dignity, human rights and the common good.

These issues are at the heart of the increasing concerns of citizens and large mobilisations against trade and investment agreements as currently formulated. Recent political developments have underlined the need to rethink our international trading system, and the reality of global corporate supply chains and national regulations that are either inadequate or not implemented. These issues cannot be addressed only at a national level. Alongside the significant efforts of local actors, including social movements, civil society and Church actors, further action is needed at the international level to ensure consistent respect for human rights, as well as policy coherence with international commitments on sustainable development and climate change.

TRADE POLICY REFORMS AND THEIR LIMITS

CIDSE and its members have been advocating for various reforms of trade and investment agreements, with the aim to make sure that national policy space to protect human rights is not limited but rather widened. We successfully pressed the EU to include strong human rights chapters in sustainability impact assessments on trade agreements. However, impact assessments are usually only concluded once trade talks have advanced considerably and it has become difficult to change course.

CIDSE members have also proposed to include human rights in exception clauses of trade and investment agreements, to ensure that provisions of these agreements cannot prevent the adoption of measures for the purpose of respecting, protecting or fulfilling human rights and respecting democratic principles and the rule of law in their internal and international policies.⁵ Such a model clause, developed by Prof. Lorand Bartels for MISEREOR and the German Institute for Human Rights, would also establish a complaint mechanism for civil society and give scope for rewriting the problematic clauses of trade agreements. However, this has not been taken up.

⁴ <http://www.cidse.org/publications/business-and-human-rights/business-and-human-rights-frameworks/ensuring-the-primacy-of-human-rights-in-trade-and-investment-policies.html>.

⁵ Lorand Bartels, “A Model Human Rights Clause for the EU’s International Trade Agreements”, MISEREOR / German Institute for Human Rights, 2014. http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/Studie_A_Model_Human_Rights_Clause.pdf.

Experience shows that the non-binding UN Guiding Principles have so far not moved States to fundamentally change their practices concerning trade and investment agreements, and are therefore not sufficient. The Comprehensive Economic Trade Agreement (CETA) concluded between the EU and Canada does not contain any provisions which could be seen as an implementation of the Guiding Principles, including the “right to regulate” clause which does not include human rights obligations. As a study commissioned by CAFOD shows, the same is true for the Transatlantic Trade and Investment Partnership (TTIP) negotiated between the EU and the United States.

The TTIP negotiation texts did not make clear that measures taken by governments to protect against adverse human rights impacts and to raise the human rights performance of companies would come within the scope of “legitimate public policy objectives”.⁶ Moreover, as Prof. Krajewski points out, “right to regulate” provisions are based on a flawed perception of the nature of trade and investment agreements: they generally do not question the right to regulate of States. But they limit policy options to those that least affect profits of corporations and require States to pay compensation for measures in conflict with provisions of the trade agreement. “Right to regulate” clauses would therefore be largely ineffective.

An international investment court system has been proposed to replace the private panels that have been dealing with disputes between foreign investors and States to date. This maintains that foreign investors deserve a special right to sue state agencies. And yet investors already have multiple fora for bringing legal cases to defend their commercial rights. This contrasts with the lack of progress in providing meaningful access to courts for victims of human rights abuses.

THE POTENTIAL OF A UN TREATY



“Business activities should foster better conditions of life and well being for poor people and indigenous communities.”

Mgr. Álvaro Ramazzini, Bishop of Huehuetenango, Guatemala, during a panel debate in the European Parliament, March 2017.

From the above, it is clear that the scope of current reforms in trade policy has been very limited. There is therefore a need to establish clear rules in international law to guarantee the primacy of human rights over trade and investment law. Prof. Krajewski’s study develops and explains model clauses addressing investment and trade policies which could be included in a treaty on businesses and human rights, in three specific areas. As CIDSE, we highlight the following key aspects:

» 1. REGULATING THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND TRADE AND INVESTMENT AGREEMENTS

Treaty provisions could regulate the relationship between trade and investment agreements and human rights through a specific supremacy clause or through requirements ensuring the observance of human rights in trade and investment disputes and through the incorporation of human rights obligations and clauses in future trade and investment agreements.

In light of the equality of all international treaties, the Treaty could establish a formal supremacy of human rights obligations over trade and investment agreements through an explicit supremacy clause, such that in case of conflict between the Treaty and another agreement concluded between two or more parties of the Treaty, the former would prevail over the latter. While this would provide the strongest protection, an alternative would be a provision such that parties to the Treaty would incorporate an exception clause in trade and investment agreements, referring to human rights obligations and instruments and covering internal and international policies.

Regarding trade and investment disputes, CIDSE believes that new agreements containing special rights for investors to sue States should not be concluded, and that existing agreements which include special dispute settlement mechanisms should be terminated. In the case of existing agreements which continue, a Treaty provision aiming at the recognition of treaty obligations in investment and trade dispute settlement could establish a minimum standard.

Prof. Krajewski’s study notes that it is unlikely that rebalancing and restructuring the relationship between investment and trade rules and human rights in a treaty will have negative effects on the trade and investment performance of the parties of the treaty.

» 2. HUMAN RIGHTS IMPACT ASSESSMENTS

The Treaty could require the States to conduct human rights impact assessments before, during and at the end of the negotiation of a new trade and investment treaty and periodically review the impact of such a treaty on human rights.

Following on from discussion above, human rights impact assessments are necessary to make sure that the rights of women, indigenous peoples, smallholders, informal workers, children and disabled people, and the related human rights obligations of States are given due attention. To make trade policies coherent with sustainability and human rights, impact assessments have to inform decisions on the negotiation mandate – exploring a wider range of scenarios – throughout the entire negotiation cycle, and in the implementation of the trade agreement. The Treaty could also specify the terms and conditions of the assessment.

⁶ CAFOD, “Leader or laggard? Is the UK meeting its commitments on business and human rights?”, November 2016.

» 3. HUMAN RIGHTS OBLIGATIONS FOR EXPORT CREDIT AND INVESTMENT GUARANTEE SCHEMES

The Treaty on businesses and human rights could specify obligations of export credit and investment guarantee agencies.

A study commissioned by MISEREOR and others concludes that Germany's export credit agency and the state-owned KfW IPEX Bank failed to properly identify the environmental and human rights risks of the construction of two coal-fired power plants in South Africa and the associated operations before partially financing and supporting the projects. Coal mining and coal-fired power plants have negative effects on environment-related human rights to water, food and health to local communities.⁷

Export credit and investment insurances or guarantees play a significant role in the context of business and human rights, as mentioned in the UN Guiding Principles. Economic incentives for foreign investors or exporters are usually not addressed in trade and investment agreements (except the Multilateral Investment Guarantee Agency). However, they may have a considerable impact on the human rights situation in the importing or host country. Most national export credit and investment guarantee schemes are based on domestic laws or policies. Beyond the voluntary OECD Common Approaches, there are no internationally binding rules on export or investment guarantee agencies.

The Treaty could therefore add value in this area through standard setting to level the playing field. This could aim to ensure that enterprises which receive financial and other support do not cause or contribute to human rights violations, and that such support does not give an incentive to do so. Obligations could be fulfilled through concrete steps, including requirements for human rights impact assessments and/or for human rights due diligence, and withholding of incentives in case of abuse.



“Environmental impact assessment should not come after the drawing up of a business proposition or the proposal of a particular policy, plan or programme. It should be part of the process from the beginning, and be carried out in a way which is interdisciplinary, transparent and free of all economic or political pressure.”

Pope Francis, *Laudato Si'*: On Care for our Common Home, 183.

CONCLUSION

With this study, CIDSE presents proposals for provisions the Treaty could contain, which can serve as a basis for wider discussion. As the third session of the intergovernmental working group in October 2017 will begin negotiations on the draft text for the Treaty, the time is ripe to put forward possible concrete wording for its provisions. For CIDSE and its members, it is essential that the Treaty not be developed in isolation, but rather in full context including its relation with trade and investment agreements, so that the protection of human rights is strengthened rather than limited therein.

As Markus Krajewski concludes, the international regime of trade and investment agreements is currently suffering from a significant legitimacy crisis, which should be considered as a window of opportunity for the introduction of new legal approaches to address the relationship between human rights and investment and trade policies.

The trade and investment regime is at a crossroads. With the conclusion of CETA, it is now being advanced as a model for a new generation of trade agreements, including for future potential UK bilateral agreements. And yet CETA presents clear limitations, as highlighted above. The EU is also looking to establish a new model of investment agreements, beginning with agreements under negotiations with countries such as Myanmar. It is therefore a key moment for encouraging debate, reflections on questions of justice and new thinking and measures so that trade and investment can serve to protect human rights rather than infringe upon them, and restore citizens' confidence in the ability of governments to work in the common interest.

⁷ MISEREOR / Action Aid / MACUA, “When only the coal counts – German co-responsibility for human rights in the South African coal sector”, 2017.

This paper is available in English, Italian, French, German and Spanish at www.cidse.org/resources

CIDSE is an international family of Catholic social justice organisations, working together to promote justice, harness the power of global solidarity and create transformational change to end poverty and inequalities. We do this by challenging systemic injustice and inequity as well as destruction of nature. We believe in a world where every human being has the right to live in dignity.

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