**Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights**

***Second session, 24 – 28 October 2016***

**FORM for NGOs and other relevant stakeholders submitting a written contribution**

Please note that the written contribution is formatted and issued, unedited, in the language(s) received from the submitting organization (it should be submitted in one of the official UN languages).

In order for your contribution to be published on the OEIWG web page prior to the session, the deadline for submission is 30 September 2016. All submissions are final.

Please fill out **this** FORM and CHECKLIST to submit your written contribution and send it to the address indicated below. Your information goes after each arrow.

**1.** Please indicate the contact information for the representative submitting the written contribution (i.e. name, mobile, email) here:  **Melik ÖZDEN (0797288058,** **contact@cetim.ch****), Gonzalo Berron (+55 11 964262381, gonzalo.berron@tni.org)**

**2. (a)** If this is an individual contribution, please indicate here your organization's name (kindly state in brackets whether your organization has ECOSOC consultative status (i.e. General, Special, or Roster). 

or,

**2. (b)** If this is a joint contribution including ECOSOC NGO(s), list here the co-sponsoring ECOSOC NGO(s) as they appear in the ECOSOC database and their status (in brackets): Group all General NGOs first, group the Special second, group the Roster third**. Europe-Third World Centre (CETIM), non-governmental organization in general consultative status, Institute for Policy Studies/Transnational Institute, non-governmental organizations in Special consultative status**

**3.** Indicate here any non-ECOSOC NGO(s) supporting the joint contribution (they will appear as a footnote to the title – unless it is a joint contribution from non-ECOSOC stakeholders only): 

**4.** Indicate the TITLE for the written contribution (in original language) here:  **Theme 5.b): State Obligations regarding the Trade and Investment regime**

**Please make sure that:**

* The written contribution is in MS WORD document format (Font Times New Roman 10; no bold; no underline; no italics).
* Please use the Spell/grammar check on your text. (Go to Tools, Spelling & Grammar)
* Different language versions of one statement should be sent in the same email, but using **a separate form** for each.
* Email the document to: igwg-tncs@ohchr.org

**PLEASE PASTE THE FINAL TEXT BELOW**:

The Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity(Global Campaign) facilitated the written submission of six points for consideration of the 2nd Session of the “Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights” taking place in Geneva during October 24-28, 2016. It is part of the Campaign’s contribution to the work of the Working Group mandated to develop a “legally Binding International instrument on TNCs and other business enterprises with respect to Human Rights”. It expresses in its diversity the conviction that such a legally Binding Instrument is essential for two dimensions of the Campaign’s work: to end corporate impunity and address the systemic power of TNCs which has reached unprecedented impacts on the daily lives of affected communities.

The Trade and Investment regime

The legally binding international instrument must develop specific state obligations in relation to the international trade and investment regime, affirming the hierarchical superiority of human rights norms (*jus cogens)*.

Decades of accumulated evidence from affected communities, Hearings of the Permanent Peoples Tribunal (PPT), extensive reports from civil society organisations[[1]](#footnote-2), academics[[2]](#footnote-3), experts and official sources[[3]](#footnote-4) have consistently contested the global corporate law underpinning the conduct of international trade and investment. Increasingly international and national legislation has been skewed exclusively in favour of capital, transnational corporations and the privileges of investors[[4]](#footnote-5).

Global south and global north

Multiple Free Trade Agreements (FTAs), Investment Agreements (IIAs & BITS) and other neoliberal instruments and institutions such as the WTO have rolled back the economic, social, cultural and environmental rights of people across the Global South[[5]](#footnote-6). Increasingly these Agreements also aim for a similar roll-back of peoples rights in the global North[[6]](#footnote-7)

Sovereignty of the State vs corporate Architecture of Impunity

These Trade and Investment frameworks have functioned as a sustained assault on the sovereignty of the State and its international obligation and capacity to regulate TNCs and to make economic and development policies in the national interest serving the economic and political well-being of its people.

This global corporate rule has led to an unprecedented regulatory asymmetry that functions as an architecture of legitimation and impunity for the operations of TNCs[[7]](#footnote-8). It functions solely to protect and privilege the interests and profits of TNCs [[8]](#footnote-9) and perpetuates in this way the imbalance between soft law for the protection of human rights versus hard law in the form of powerful enforcement mechanisms regarding corporate rights.

*UN Rapporteur Alfred de Zayas, in his* 2015 report to the UN General Assembly analyses the incompatibility of ISDS with human rights norms[[9]](#footnote-10).

Architecture of Legitimation and Impunity for corporations vs People’s Access to Justice

Under the FTAs, IIAs and Bi-lateral Investment Treaties which carry Investment protection clauses, TNCs are legitimated to make demands that challenge national and constitutional provisions protecting the interests of citizens. One of the most contested features of the current Trade and Investment regime is the Investor-state dispute settlement mechanism (ISDS)[[10]](#footnote-11). With ISDS, TNCs have been given the power to sue states while states are denied (or have renounced) their power to act in protection of their citizens’ interests and rights.

There are currently 739 known investment treaty cases against States. The majority of those come as a result of regulatory measures taken by the States[[11]](#footnote-12). The number of investment arbitration cases and the mega sums of money siphoned from public coffers paid to TNCs has surged in the last two decades. The amount of money awarded to TNCs in these cases has also expanded dramatically.[[12]](#footnote-13)

There are hundreds of examples of multimillion dollar lawsuits by TNCs and investors when governments try to protect public health, access to water, access to public services, indigenous populations right to self-determination, and degradation of the environment, just to give some examples[[13]](#footnote-14). Growing evidence confirms that the ISDS system has helped corporations to roll back vital protections for people and the environment, and has allowed them to override democratic decisions. Some examples are[[14]](#footnote-15):

* An ISDS tribunal sided with the Canadian mining corporation Copper Mesa in a case against Ecuador where peasants had prevented a mining project to defend their farms, biodiversity, water supplies, and community forest reserves. Copper Mesa employed paramilitaries to try to force its way in[[15]](#footnote-16). While the Tribunal acknowledged that Copper Mesa responded to the local opposition with unabashed violence, it still ordered Ecuador to pay $24 million in compensation[[16]](#footnote-17).
* Since 2009, the Canadian Mining corporation Pacific Rim (owned by Oceanic Gold) is suing El Salvador (the most water-stressed country in Latin America) for its sovereign decision and refusal to grant a license on the grounds that Pacific Rim failed to meet environmental requirements. The claim is for USD250 million.

Corporate Arbitration industry abuse

The corporate arbitration industry and the privatisation of justice which it represents is not confined only to ICSID but is also pursued through several other arbitration tribunals.

In contrast, so many cases pursued in national and International Courts of law by citizens, including the cases of Chevron or Bophal, illustrate the insurmountable obstacles faced in the search for justice. These national and international juridical systems have been skewed to unilaterally privilege TNCs destructive practices and profits; in prohibitive legal fees even for most states and an arsenal of repressive and propaganda attacks on affected communities even during the process of seeking justice.

Proposals

While members of the global TNC Campaign seek the abrogation of the current Trade and Investment Institutions and Agreements in the long run as unjust treaties, the following proposals are advocated in the framework of the work currently going forward at the UN OEIGWG on TNCs and other business enterprises with respect to human rights.

We propose three principles towards the construction of the general framework on trade and investment:

1. affirming the supremacy of human rights and the protection of the environment over the rights of investors and TNCs
2. ending the investor-to-state dispute settlement (ISDS) regime
3. reclaiming state sovereignty over public policy and state priorities.

The following six proposals are put forward:

1. The Treaty’s starting point needs to re-assert/reclaim State sovereignty and the State’s right to regulate and its obligations to protect the human rights of its citizens and its commitment to develop an alternative model of the economy placing peoples basic needs before corporate profits.

2. The Treaty needs to guarantee the primacy and superiority of the overall framework of human rights in relation to Trade and Investment policy and Agreements and Contracts that guarantee the rights of all women and men - farmers, fishers and indigenous people - to the means of livelihood; of workers, including migrant workers, to decent and safe working conditions and a living wage; to the rights of nature and to the protection of public services and the public interest.

3. The Treaty must overturn the current ISDS mechanism and the privatisation of justice in the current abusive system of investment arbitration as it is currently the practice at the ICSID and several other arbitration institutions. Put in place an Investment regulation system including the resolution of investment disputes that guarantees the States sovereignty and the resolution of disputes that does not compromise the interests of citizens.

4. Prohibit the current mega billion dollar secretive arbitration industry currently benefiting a small clique of mainly American and European legal corporations.

5. The Treaty must provide regulation on financial transactions and speculation, prohibit practices of tax and wage evasion and transfer pricing.

6. Provide reasonable and affordable mechanisms facilitating access to justice for affected communities destroyed by exploitative and extractive trade and investment policies.

1. A Call for the Building of an Alternative Legal Framework to the International Investment Treaties: favoring the Public Interest while doing away with Transnational Corporate Impunity http://www.ips-dc.org/call-building-alternative-legal-framework-international-investment-treaties-favoring-public-interest-away-transnational-corporate-impunity; Over 200 civil society groups ask EU and US negotiators to exclude ISDS from TTIP talks. http://corporateeurope.org/sites/default/files/attachments/ttip\_investment\_letter\_final.pdf [↑](#footnote-ref-2)
2. Public Statement on the International Investment Regime by academics http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/ [↑](#footnote-ref-3)
3. Stiglitz op-ed against ISDS “On the wrong side of globalization”, 15 Mar 2014 http://opinionator.blogs.nytimes.com/2014/03/15/on-the-wrong-side-of-globalization/?\_r=0 ; A “health warning” on international investment agreements by the UN Special Rapporteur on the Right to Health, 11 Aug 2014 http://www.rightingfinance.org/wp-content/uploads/2015/02/report.pdf ; Alfred de Zayas, UN Independent Expert on the promotion of a democratic and equitable international order by the Human Rights Council 2015 report to the UN General Assembly on the incompatibility of ISDS with human rights norms (A/70/285) on the impacts of ISDS. http://www.un.org/en/ga/search/view\_doc.asp?symbol=A/70/285 [↑](#footnote-ref-4)
4. Juan Hernández Zubizarreta (2015) The new Global Corporate Law, State of Power 2015, Transnational Institute, https://www.tni.org/en/briefing/new-global-corporate-law [↑](#footnote-ref-5)
5. http://www.isdscorporateattacks.org/ and http://isds.bilaterals.org/ [↑](#footnote-ref-6)
6. https://www.theguardian.com/business/2015/may/13/the-secret-corporate-takeover-of-trade-agreements https://www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy [↑](#footnote-ref-7)
7. M. Sornarajah (2011) Mutations of Neo-Liberalism in International Investment Law 3(1) TRADE L.& DEV.203 [↑](#footnote-ref-8)
8. http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031&LangID=E [↑](#footnote-ref-9)
9. http://www.un.org/en/ga/search/view\_doc.asp?symbol=A/70/285 [↑](#footnote-ref-10)
10. In 2015, Cecilia Malmström, EU trade Commissioner called ISDS: “the most toxic acronym in Europe” http://www.politico.eu/article/isds-the-most-toxic-acronym-in-europe/ [↑](#footnote-ref-11)
11. http://investmentpolicyhub.unctad.org/ISDS [↑](#footnote-ref-12)
12. Goldhaber, Michael D. (2015) “Deciding the world’s biggest disputes”, 2015 Arbitration Scorecard, American Lawyer, Focus Europe, July.   [↑](#footnote-ref-13)
13. UNCTAD database on known investment treaty ISDS cases worldwide http://investmentpolicyhub.unctad.org/ISDS [↑](#footnote-ref-14)
14. Other examples : Pacific Rim vs. El Salvador; Crystallex vs. Venezuela; Renco Group vs Perú y Bear Creek vs Perú; Infinito Gold vs. Costa Rica; Dominion Minerals vs. Panamá; TransCanada vs. Estados Unidos; Lone Pine vs. Canadá; Bilcon vs. Canada ; y Glencore vs. Colombia. [↑](#footnote-ref-15)
15. https://business-humanrights.org/en/copper-mesa-mining-lawsuit-re-ecuador [↑](#footnote-ref-16)
16. http://www.italaw.com/sites/default/files/case-documents/italaw7443.pdf [↑](#footnote-ref-17)