PARLIAMENTARY ASSEMBLY, COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS

HUMAN RIGHTS COMPATIBILITY OF INVESTOR-STATE ARBITRATIION IN INTERNATIONAL INVESTOR-PROTECTION AGREEMENTS, STRASBOURG 19 APRIL 2016

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**Dear Pieter Omtzigt, distinguished Parliamentarians, colleagues, ladies and gentlemen**

In 2012 the United Nations Human Rights Council entrusted me with the newly created mandate of the Independent Expert on the Promotion of a Democratic and Equitable Order. Since then I have presented four reports to the HR Council and four to the General Assembly. Relevant to this hearing are my 2015 report to the Council (A/HRC/30/44) on bilateral investment treaties and multilateral trade agreements and my 2015 report to the General Assembly (A/70/285) on the incompatibility of the investor-state dispute settlement mechanism with numerous provisions of the **UN Charter**, human rights treaty obligations, notably the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, International Labour Organization and World Health Organization Conventions, including the Framework Convention on Tobacco Control, the Framework Convention on Climate Change, numerous General Assembly Resolutions, notably the 2030 Agenda for Sustainable Development (A/70/1), and certain general principles of law such as good faith, the prohibition of abuse of rights[[1]](#footnote-1), and the prohibition of unconscionable or *contra bonos mores* agreements[[2]](#footnote-2).

In his memorandum of 18 February 2016, Rapporteur Pieter Omtzigt focuses on the core values of the Council of Europe -- democracy, the rule of law and human rights, which must be central to any discussion on ISDS and the proposed Investment Court System. For members of the European Union, article 21(1) of the Treaty of Lisbon stipulates “The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for the principles of the United Nations Charter and international law.”[[3]](#footnote-3) I consider ISDS to be **unconstitutional under European law**[[4]](#footnote-4), and believe that the European Court of Justice in Luxembourg should so rule if an appropriate case is brought before it.

As my 2015 reports to the Human Rights Council and General Assembly substantiate, ISDS constitutes an assault on democracy, subverts the rule of law and violates numerous civil, political, economic, social and cultural rights. The rule of law is **not** the rule of blind positivism nor of clever legalisms to undermine justice. The letter of a treaty must never be instrumentalized against its spirit.

Over the centuries, Europe and what some referred to as “civilized nations” evolved from despotism and authoritarianism to establish a system of **independent public courts** that function according to principles of transparency, accountability and predictability, an *acquis* we would like to take for granted. Yet, countries that are ostensibly committed to democracy and the rule of law have accepted the creation of a ***privatized* system of dispute settlement that is neither transparent nor accountable** and in most cases not even appealable. The credibility of the administration of justice and the necessity of stability and *Rechtssicherheit* are undermined when three arbitrators whose lack of independence and accountability have been repeatedly signaled by experts and civil society organizations[[5]](#footnote-5) are given the power to ignore the legislation and judicial decisions of sovereign States and ultimately frustrate the democratic will of many electorates who have voted for just taxation of transnational enterprises, for environmental protection, access to generic medicines, improved labour standards, food security[[6]](#footnote-6), employment and social programs.

Experience with ISDS over the past thirty years demonstrates that some countries have been forced to roll back social legislation and that in some cases governments have not even dared to enact environmental protection measures out of fear of being sued for billions of dollars before ISDS tribunals. This **regulatory chil**l – we may call it regulatory freeze – has impacted not only developing countries. Even countries like Canada have preferred to capitulate to threats and demands emanating from the oil and pharmaceutical industries[[7]](#footnote-7). Germany is currently being sued by energy-giant Vattenfall because of its post-Fukushima decision to phase out nuclear energy, and the US is being sued by Trans-Canada for 15 billion dollars on account of Obama’s decisions not to allow the environmentally dangerous “Keystone pipeline” to be built. The latest assault on the right of sovereign States to protect the population and the environment is the outrageous ISDS case filed by Tobie Mining and Energy Inc. against Columbia, claiming 16.5 billion dollars in compensation on account of Colombia’s refusal to let the mining company expand into the Amazonian National Park and pollute the Amazonian rainforest.[[8]](#footnote-8)

My reports have the added value of formulating pragmatic and implementable recommendations for the consideration of States, Parliaments, Inter-governmental Organizations, National Human Rights Institutions and civil society. **Bottom line: ISDS cannot be reformed, it must be abolished**.

We should not be concerned only about the toxicity of future agreements such as the CETA[[9]](#footnote-9), TPP, TTIP and TISA – we must address the continued harm caused by the existing 3200 bilateral investment agreements, which must be revisited, revised or terminated, because the world has changed since the 1980’s and 1990’s and we now have the **empirical evidence** that the promises of job creation, growth and development have not been fulfilled; we have evidence of environmental degradation, for which transnational corporations have not been held accountable. Moreover, the gulf between rich and poor has grown nationally and internationally. Studies about the impact of NAFTA show that the United States lost millions of manufacturing and other jobs that were relocated to Mexico’s *maquiladoras*, where not only labour costs, but labour standards and human rights protection are depressed.

UNCTAD bears some responsibility for having persuaded dozens of developing nations to come to Geneva for a photo opportunity and signing of bilateral agreements that have frequently proven to be toxic to them. In this sense, UNCTAD owes an apology to those countries who relied to their detriment on UNCTAD’s over-optimistic projections. Again, I call upon UNCTAD to **convene a world conference** to revise existing trade and investment treaties according to the pertinent articles of the Vienna Convention on the Law of Treaties, including provisions on error, fraud, *rebus* *sic stantibus* and incompatibility with peremptory norms[[10]](#footnote-10). In my reports to the HR Council and General Assembly, I propose to revise existing treaties by invoking the doctrine of severability and thus removing only those treaty provisions that are *contra bonos mores*, such as ISDS and “survival clauses”.

With regard to the establishment of an International Investment Court with an appeal chamber, the first question is whether the US and the EU need it at all? Why should a special court give rights to investors to sue governments, whereas governments cannot sue investors before the same tribunals? And, do US and EU investors really need privileged protection? All potential parties to the TTIP are democratic States with competent and independent courts and decades of rule of law experience. In its February 2016 opinion the *Deutsche Richterbund* concluded that the ICS is not needed[[11]](#footnote-11). I would go beyond that and insist that the very existence of the ICS would act as a brake on social change and social justice, because States would still fear frivolous and vexatious litigation. The Dean of the *Colegio de la Abogacía* in Barcelona and numerous Spanish judges have similarly rejected the idea of special tribunals[[12]](#footnote-12). The only way to begin to consider ICS would be if the ICS Statute stipulates a **complete carve-out of jurisdiction** in matters of public health – e.g. tobacco control – environmental protection, labour standards, budgetary and fiscal policies. Moreover, the statute should clarify that in case of conflict, human rights treaty obligations prevail.

At this juncture I would like to recall **two ontologies** that seem to have been lost in the ideologically-driven corporate narrative. First: the ontology of the State, its *raison d’être*, which is to legislate and regulate in the public interest. This includes taking preventive measures to avert potential harm to the population, e.g. as a result of fracking and other business activities. Second: the ontology of business, which is to take calculated risks for profit. It is not for the State to guarantee the profits of an investor, who can obtain risk insurance and factor it in as part of the cost of doing business.

Some advocates of ISDS like to refer to the right to property in order to validate their claim to special protection. They refer to the BITs and FTAs and invoke the principle *pacta sunt servanda* in connection with their expansive interpretations of “property”, “investment” and “legitimate expectations”. No one disputes that the right to property deserves protection, as reflected in Protocol I to the **European Convention on Human Rights** and in article 17 of the Universal Declaration of Human Rights. And while the International Covenant on Civil and Political Rights does not protect the right to property as such, any arbitrary expropriation would constitute a violation of article 26 ICCPR, which prohibits discrimination. But let us also remember that the right to property does not prohibit expropriations in the public interest (eminent domain), and must be seen in the context of other rights, including the right of peoples to self-determination, to sovereignty over their natural resources, to free, prior and informed consent, to access to information, to public participation in the conduct of public affairs, to food, water, education, health care and culture. And while the right to property protects investors from arbitrary expropriation, it also protects the right of indigenous peoples to their natural resources (Art 1 ICCPR, ICESCR), a fact that transnational corporations and some governments blithely ignore when spoliating the indigenous of trillions of Euros worth of minerals, gold, uranium, oil, gas, timber and other “property” found on indigenous territories.

*Pacta sunt servanda* very much applies to the international human rights treaty regime, and all States parties to the ICCPR and ICESCR must fulfill these hard law treaty obligations. States also have a legitimate interest in seeing that the provisions of these treaties are not undermined by other commitments, including trade and investment treaties. As elsewhere, there is an issue of priorities which should be settled once and for all. While corporations would like to give primacy to business-friendly human rights, it is obvious that the freedom to engage in economic activity and the right to property must be in tandem with the rights to life, food, water, health, housing and privacy.

In the European context we acknowledge that States must also fulfill the provisions of the **European Social Charter**. We also recognize the precedent set by the ECHR judgment in *Soering v. U.K*., where the Court decided that **the European Convention on Human Rights prevails over an extradition treaty**. *Mutatis mutandis*, every judge and every arbitrator must know that an investment treaty is not a “stand alone” code and that in case of conflict with human rights treaty provisions, the latter must not only be taken into account, but should be preeminent. This would not do injustice to the investor, because investors can foresee the risk and prepare for the probability that States, pursuant to their human rights treaty obligations, sooner or later will have to adjust their legislation to achieve budgetary and fiscal justice, protect the population from genetically modified organisms and food products, pesticides, toxic elements in fuels and toys, and from environmental degradation. In the case of a dispute about the application of an investment treaty, the investor is **not** without remedy, but can always turn to the courts of the countries where they are operating, or have recourse to diplomatic protection and the well-tried State to State dispute settlement mechanisms.

**Parliamentarians** should come to grips with the paradox that while they ratify human rights treaties that impose hard law obligations, they also enter into trade and investment agreements that render the fulfillment of human rights treaties more difficult or even impossible. Under no conditions should parliamentarians accept to fast-track the adoption of trade and investment agreements, which in a democratic society, require full disclosure and public participation in conformity with articles 19 and 25 of the ICCPR. Parliamentarians should pro-actively inform their constituents about the facts and foreseeable consequences of adopting trade and investment agreements. Bearing in mind that the consequences can be very negative in the field of social rights, the adoption of free trade and investment agreements should be conditioned on public participation and **referenda**. Otherwise they lack democratic legitimacy, as indeed prior bilateral and multilateral agreements manifest grave democratic deficits which put into question their validity under international law. Civil society should also take advantage of the provisions of human rights treaties and submit appropriate cases to the European Court of Human Rights, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights etc. in order to challenge the application of free trade and investment treaties when they result in violations of human rights.

In order to obtain greater clarity on these issues, the UN General Assembly should invoke article 96 of the Charter and request an **advisory opinion** from the International Court of Justice, which should specifically state that the human rights treaty regime must prevail over competing treaties. Moreover, to the extent that free trade and investment agreements conflict with provisions of the UN Charter, undermine sovereignty, democracy, the rule of law, human rights and the right to development, the **supremacy clause (charter article 103**) stipulates: ” In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”[[13]](#footnote-13) An advisory opinion by the ICJ would surely confirm this.

Allow me a few final thoughts before the inter-active dialogue.

Modification or termination of international investment agreements may be a complex task, but much less problematic than, for example, resolving armed conflict. Time and again the world economy has had to adjust in order to advance the cause of civilization. So it was with the prohibition of the lucrative slave trade, the abolition of slavery and decolonization, which were replaced by other economic models. For centuries slavery was the de facto economic model with implicit legality; colonialism was de facto the international order. Today these practices are seen as crimes against humanity. For decades, investor–State dispute settlement arbitrations have de facto upset the international order, but they cannot trump the Charter of the United Nations. Just as other economic paradigms were abandoned, eventually investor–State dispute settlement will be recognized as an experiment gone wrong, an attempted hijacking of constitutionality resulting in the retrogression of human rights.   
  
By way of conclusion, it would be appropriate to reaffirm that while free trade, foreign direct investment and investment agreements can be beneficial, they are not ends in themselves, and sometimes their consequences severely restrict the regulatory space of democratic governments and adversely impact the enjoyment of human rights. A strategy should be developed to ensure that trade works for human rights and does not interfere with the primary role of the State to act in the public interest. There are ample opportunities for corporations and investors to make legitimate profits and enter into genuine “partnerships” with States and not into asymmetrical relationships with rigged ISDS schemes. The rule of thumb should be to: (a) give to corporations what belongs to them – an environment in which to compete fairly; (b) give back to States what is fundamentally and inalienably theirs – sovereignty and policy space; (c) give Parliaments what demonstrates their role as true representatives and watchdogs – the faculty to consider all aspects of treaties without secrecy and fast-tracking; and (d) return to the people their right to participation, due process and democracy.

ISDS and ICS are undoubtedly *contra bonos mores* and must be rejected, because investors and transnational corporations are not democratic institutions and must not be allowed to interfere in the fundamental functions of States by delaying, undermining or making it impossible for States to fulfill their human rights treaty obligations. It is futile to attempt reforming this fundamentally flawed system that has already caused considerable harm to the commonweal and brought benefits only to corporations and shareholders. ISDS and ICS simply fail the test of human rights. Alas, notwithstanding serious studies by economists, lawyers and judges, human rights impact assessments and expert reports with correct diagnoses, TNCs and their powerful lobbies continue pushing forward for a corporate take-over of democratic governance, which is incompatible with the three pillars of the Council of Europe – democracy, rule of law and human rights.

I thank you for your attention.

1. “The doctrine of abuse of rights (or *abus de droit*) is one of the many outgrowths of the legal principle of good faith” Sir Robert Jennings (ed.), *Oppenheim International Law*, 9th edition, p. 407. “The doctrine prevents a Party to an agreement from exercising its rights in a way that is unreasonable in the light of the spirit of the agreement. Used frequently in international courts, the idea behind the abuse of rights doctrine is being increasingly recognized as a norm of international law.” According to Hersch Lauterpacht the concept of abuse of rights is present in most developed legal systems and “it is only at a rudimentary stage of legal development that society permits the unchecked use of rights without regard to its social consequences”, *The Development of International Law by the International Court*, p. 162, London, Stevens & Sons 1958. Lauterpacht, *The Function of Law in the International Community*, Chapter 14, (1933). Isabel Feichtner, EJIL 22, pp. 1177-1179. G.D.S. Taylor, “the Content of the Rule against Abuse of Rights in International Law”, also citing Lauterpacht. https://www.ilsa.org/jessup/jessup16/Batch%202/46BritYBIntlL323.pdf. Alexandre Kiss, “Abuse of Rights” in R. Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*, Vol. I, pp. 20-26, Oxford 2012. [↑](#footnote-ref-1)
2. Alfred Verdross, “Forbidden Treaties in International Law”, *American Journal of International Law,* Vol. 31, No. 4 (1937), pp. 571 *et seq*. Verdross, “Les principes du droit et la jurisprudence internationale”, *Recueil des Cours de l'Académie de Droit International,* La Haye, (1935), pp. 195–249. Olivier Corten, Pierre Klein, *The Vienna Convention on the Law of Treaties : A Commentary*, Vol I, p. 1461. Oxford 2011. Robert Kolb, *The International Court of Justice*, Oxford, 2013, p. 81*.* There is an ethical minimum standard for treaties, and a treaty which subverts *ordre public* or is otherwise *contra bonos mores* is void, e.g. if it prevents the universally recognized tasks of a civilized State such as maintenance of public order, care of the bodily and spiritual welfare of citizens and protection of nationals abroad. Thomas Cottier, *The Challenge of* *WTO Law: Collected Essays.* Ch. 4. Good faith and the protection of legitimate expectations, London 2007. <http://www.ejil.org/pdfs/1/1/1145.pdf>. See also https://law.wustl.edu/SBA/upperlevel/.../IntLaw-Mutharika2.doc. [↑](#footnote-ref-2)
3. Nicolas Hachez, “’Essential elements’ clauses in EU trade agreements making trade work in a way that helps Human Rights?” Working Paper No. 158, April 2015. Leuven Centre for Global Government Studies. Cf. Bruno Simma and Theodore Kill, “Harmonizing investment protection and human rights: first steps towards a methodology”, in Christina Binder *et al.* (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009). [↑](#footnote-ref-3)
4. http://www.clientearth.org/health-environment/health-environment-publications/legality-of-investor-state-dispute-settlement-under-eu-law-3020 [↑](#footnote-ref-4)
5. <http://people.ffii.org/~ante/ISDS/draft-isds.html>. Pia Eberhard, Cecilia Olivet, *Profiting from Injustice, how law firms, arbitrators and financiers are fueling an investment arbitration boom,* Corporate Europe Observatory, Brussels, 2012. [↑](#footnote-ref-5)
6. Jean Feyder, *La Faim Tue*, preface Jean-Claude Juncker, l’Harmattan, 2010. Olivier de Schutter, *Agroecology*, 2011. http://www.srfood.org/en/report-agroecology-and-the-right-to-food [↑](#footnote-ref-6)
7. Maude Barlow et Raoul Marc Jennar, “Le Fléau de l’arbitrage internationale”, *Le Monde Diplomatique*, Fevrier 2016, p. 6; Benoit Bréville et Martine Bulard “Des tribunaux pour détrousser les Etats” *Le Monde Diplomatique*, juin 2014. [↑](#footnote-ref-7)
8. http://www.italaw.com/cases/3961 [↑](#footnote-ref-8)
9. http://ec.europa.eu/trade/policy/in-focus/ceta/ [↑](#footnote-ref-9)
10. Benedetto Conforti and Angelo Labella, “Invalidity and Termination of Treaties: The role of National Courts” in 1 EJIL (1990) pp. 44- 66 at 52. [↑](#footnote-ref-10)
11. http://www.zeit.de/politik/ausland/2016-02/ttip-deutscher-richterbund-schiedsgerichte [↑](#footnote-ref-11)
12. <http://juecesparalademocracia.blogspot.be/2015/06/resolucion-de-jpd-contra-la.html>  
    http://www.eldiario.es/economia/colegios-Espana-TTIP-arbitraje-inversores\_0\_495901200.html [↑](#footnote-ref-12)
13. The hierarchy in norms was suggested in a famous dictum in the ICJ’s *Barcelona Traction* judgment that "basic rights of the human person" (*droits fondamentaux de la personne humaine*) create obligations *erga omnes*. **Theodor Meron, “On a Hierarchy of International Human Rights Law”, *American Journal of International Law*, Vol. 80, 1986, pp. 1-23 at page 1.** *Sawhoyamaxa Indigenous Community v Paraguay* (Inter-American Court of Human Rights, judgment of 29 March 2006, paras; 137-141). In his textbook *International Human Rights Law* (Cambridge University Press, 2nd ed. 2014), Professor Olivier de Schutter lists this and other cases in favor of the argument of a hierarchy, pp. 71 - 110.  [↑](#footnote-ref-13)