**RESPONSIBILITY TO ACT (R2A)**

**UN Independent Expert urges Governments, Parliaments and Courts to fulfill their Responsibility to Act (R2A) in the public interest**

The Independent Expert on the promotion of a democratic and equitable international order, Alfred de Zayas, reminds Governments, Parliaments and Courts of their sacred Responsibility to Act (R2A) in the interest of the population, economic stability, social development, environmental sustainability, food security, improvement of health and labour standards, *inter alia* through taxation, the adoption of precautionary and preventive measures to protect the population against the dangers of genetically modified organisms, fracking, open-pit mining, toxins in pesticides, and water pollution.

In the context of discussions about investor-state-dispute settlement mechanisms and the investment court system, the independent expert emphasizes that international *ordre public* does not allow governments to divest themselves of R2A by virtue of signing and ratifying Bilateral Investment Treaties or multilateral free trade agreements when these usurp fundamental governmental functions. Similarly, Parliaments cannot divest themselves of R2A by fast-tracking ratification of treaties that have been negotiated without multi-stakeholder participation, and that have been met by massive public opposition when provisions of these treaties have become public, e.g. in the case of the TTIP, when more than 3.3 million Europeans signed a petition against ratification and when a public consultation of the European Commission resulted in a rejection by 97% of the participants. Any Government or Parliament that calls itself democratic and representative must listen to the voice of the people. In such cases, the best approach would be to organize public referenda in each of the countries concerned, bearing in mind that experts have signaled that the proposed treaty as currently drafted poses grave dangers to democracy, the rule of law and human rights.

In view of thirty-years’ experience with investor protection treaties and the many egregious arbitral awards issued by corporate-friendly arbitration tribunals, Governments, Parliaments and Courts have a duty to revisit the treaties and revise them so as to make them work for human rights and sustainable development and not against them. This requires abolishing privatized tribunals that by-pass public courts and rejecting the relabeling scam of ISDS as a so-called Investment Court System, which suffers from the same fundamental problems of ISDS and by virtue of new mega treaties including TPP, TTIP, CETA and TISA would actually aggravate the dangers to necessary government regulation.

This so-called Investment Court System does not resolve the fundamental concerns about creating a one-sided jurisdiction, which would advance investor interests without imposing any binding legal obligations on them, and which would not provide for the competence of the ICS to entertain claims against investors and transnational corporations when they violate national laws or cause health and environmental harm. The new ICS system makes procedural changes, but does not resolve the fundamental injustice of granting far-reaching privileges to foreign investors, allowing them to by-pass domestic courts and the customary international law requirement of exhaustion of domestic remedies, undermining national laws and significantly increasing the danger of frivolous and vexatious litigation based on expansive interpretation of vague treaty terminology such as “indirect expropriation”, “fair and equitable treatment” or “legitimate expectation.” The ISDS bonanza for specialized corporate lawyers and arbitrators would be many times multiplied by the new ICS, at the expense of the public treasury which would have to bear the unconscionably high costs of long and protracted litigation.

**The international Human Rights Treaty regime**

All potential States parties to TPP, TTIP, CETA and TISA are bound by the international human rights treaty regime and most of them are parties to universal and regional human rights treaties, including the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the European Convention on Human Rights and Fundamental Freedoms and the European Social Charter. *Pacta sunt servanda* requires that States respect, protect and fulfill their human rights treaty obligations. The principle of good faith (article 26 Vienna Convention on the Law of Treaties) prohibits them from entering into other agreements that would delay, circumvent, undermine or even make impossible the fulfillment of human rights treaty obligations.

Certain provisions of bilateral investment treaties and multilateral free trade agreements, notably the investor-protection chapter, are in conflict with the effective implementation of human rights treaties. Many arbitral awards discussed in my 2015 report to the Human Rights Council (A/HRC/30/44) and to the General Assembly (A/70/285) are incompatible with human rights treaties. By way of example:

*International Covenant on Civil and Political Rights*

Article 1: Self-determination. All peoples have the right of self-determination, to freely determine their political status and freely pursue their economic, social and cultural development. They have the right to freely dispose of their natural wealth and resources and under no conditions may a people be deprived of their means of subsistence. States have an obligation to promote the realization of the right of self-determination and cannot frustrate it by entering into free trade and investment agreements that effectively despoil peoples of their natural wealth and resources, entail land-grab and even displacement of population. Pursuant to the Declaration on the Rights of Indigenous Peoples, any use of their lands is subject to their free, prior and informed consent, which is practically never obtained. This is of particular relevance to indigenous peoples, but also to former colonies who still suffer from the post-traumatic-stress-disorder of colonialism and neo-colonialism in the form of abusive oil, gas and mining concessions.

Article 2: Right to a remedy. All individuals have a right to an enforceable remedy, e.g. to compensation for environmental damage caused by transnational corporations. But even a decision of the highest State court against a transnational corporation can be left without implementation when the corporation invokes ISDS against the State and refuses to pay compensation to the victims. (see Chevron v. Ecuador discussed in my reports). Another problem is that individual victims have no standing before ISDS of ICS tribunals, although their human rights are affected, and cannot demand compensation from the polluters.

Article 6: Right to life. Many activities of transnational corporations threaten the right to health and ultimately the right to life, e.g. when entire areas are polluted through open-pit mining, oil sludge, toxic waste, radioactivity, etc. The State has an obligation to adopt precautionary measures to avert such dangers from the population – and this must not allow a transnational corporation to demand compensation for “lost profits”. There is risk insurance that corporations can buy and factor them in as part of the cost of doing business. Transnational corporations have been guilty of turning over the names of unionists and other syndicalist to the police or to para-military groups, leading to the disappearance and death of human rights activists (see book *Cuentas Pendientes* by Horacio Verbitsky/Juan Pablo Bohoslavsky). In order to accommodate the interests of transnational corporations, national police and sometimes the army have also been used against demonstrators protesting against open-pit mining, with frequent deaths. Private military and security companies have also been employed by transnational corporations and have largely enjoyed impunity from prosecution in spite of egregious abuses and killings. The Pharmaceutical industry and the evergreening of patents also leads to deaths because of lack of access to generic medicines at an affordable price.

Article 12: Freedom of movement. Sometimes mega-projects have led to the involuntary transfer of populations and the loss of homelands, churches, cemeteries. The oil, gas and mining industries have left an ugly trail of devastated landscapes and destruction of ecosystems causing populations to move. In cases where the environment has been seriously polluted, populations cannot return to their homes.

Article 14: Due process. All suits at law must be adjudicated by independent tribunals under the principles of transparency and accountability. ISDS tribunals have been repeatedly shown to lack transparency, predictability, accountability and appealability. This is contrary to the steady development of the rule of law toward public courts and *Rechtssicherheit*. Some arbitral awards even violate the principle of separation of powers, e.g. when arbitrators in the Chevron case ordered the Government of Ecuador to interfere with the independent Ecuadorian judiciary by overruling the judgment of Ecuadorian courts against the transnational enterprise.

Article 17: rights of the family and privacy.

Article 19: the right to access to information, including on free trade and investment agreements, which are not matters of national security, and about which there are multiple stakeholders, including consumer groups, environmental protection groups, labour unions, health professionals – all of whom need precise information to evaluate the impact of trade and investment agreements. Treaties which are elaborated and negotiated in secret are incompatible with the pro-active duty of democratic States to provide information on matters that concern the population at large.

Article 21: Right of Peaceful Assembly. Demonstrators against mega-projects have been made to disappear, have been detained, and sometimes killed.

Article 24: rights of the child. Compensation paid to transnational corporations pursuant to ISDS awards entail a significant reduction of public funds to advance the rights of the child, reduce infant mortality, provide for better education, etc.

Article 25: Public participation in the conduct of public affairs. This right has been systematically violated when elaborating and negotiating BITs and FTAs in secret, without consultation of stakeholders, and then through undemocratic fast-tracking by Parliaments who refuse to represent the will of their constituents, in violation of R2A. In view of the dangers posed by ISDS and ICS to the rule of law and human rights, such agreements must be subject to public discussion and referenda.

Article 26: Right to equality, prohibition of discrimination. ISDS grants special rights only to foreign investors, not to domestic investors and corporations.

Article 27: Rights of minorities. While indigenous peoples are protected by Article 1 ICCPR, minorities also must have protection of their rights to their culture and livelihood, which are frequently violated by transnationals through destruction of their environment, hunting, fishing, access to clean water, etc.

*International Covenant on Economic, Social and Cultural Rights*

ISDS and ICS and the consequences or their application are incompatible with ICESCR.

Article 1: self-determination
Article 2: Right to a remedy
Article 4: Limitation of rights “solely for the purpose of promoting the general welfare in a democratic society.”

Article 6: Right to work. Many mega-agreements have led to the loss of millions of jobs (e.g. Nafta) and a race to the bottom in terms of labour rights, e.g. when manufacturing jobs in the US were relocated in the Mexican *maquiladoras*, known for the infra-human conditions of work and unconscionably low wages.

Article 7: Right to just and favorable conditions of work.

Article 8: Right to from trade unions and to strike.

Article 9: Right to social security

Article 10: Protection of the family

Article 11: Standard of living, including adequate food, clothing and housing. In developing countries food security is of crucial importance. Threats of ISDS litigation from the subsidized agro-industry of developed countries have prevented countries from adopting necessary agricultural policies to ensure food security (see reports of Olivier de Schutter, <http://www.srfood.org/en/official-reports>, http://www.srfood.org/en/guiding-principles-on-human-rights-impact-assessments-of-trade-and-investment-agreements).

Article 12: Right to the highest attainable standard of physical and mental health. The evergreening of patents by the pharmaceutical industry significantly reduces access to generic medicines.

Article 13: Right to education

Article 15: Right to one’s own culture, including one’s own film industry, television programming and music. A population will lose its identity if it is forced to view foreign movies and television programmes, just because they are cheaper. The government of each country has an obligation to promote and preserve its own culture as a world heritage of mankind in the sense of UNESCO’s promotion of diversity. Homologation of culture is contrary to the right to one’s identity and personality.

In the regional human rights protection systems, the European Convention on Human Rights and Fundamental Freedoms (notably articles 5, 6, 8, 9, 10, 11, 13 and 14) and the European Social Charter establish similar human rights treaty obligations that require pro-active measures of implementation (*Pacta sunt servanda*).

**State Sovereignty and Jurisdiction of Courts and Tribunals**

There is a peremptory norm of customary international law that jurisdiction is based on consent. This norm is based on the practice of sovereign states. Thus, for instance, the jurisdiction of the International Court of Justice is not universal or automatic, but conditioned the States giving a declaration under article 36 of the ICJ statute, consent that can also be withdrawn. Two or more States can also express consent *ad hoc* in a *compromis* agreeing to refer a given matter to the ICJ for adjudication. Yet another possibility of establishing jurisdiction is through clauses known as compromissory clauses by virtue of which a State party undertakes in advance to accept the jurisdiction of the Court, should a dispute arise on the interpretation or application of the treaty with another State party (over 300 treaties contain such clauses, e.g. the Genocide Convention, article IX). Other treaties have Optional Protocols that provide for automatic referral, e.g. the Optional Protocols to the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. As with article 36 of the ICJ Statute, such consent can be withdrawn by denouncing the optional protocol in question. This confirms the ontology of the sovereign State, which defines and determines the international order and international law.

Absent consent, a tribunal has no jurisdiction. By analogy, the question must be addressed whether ISDS and ICS, their “umbrella clauses” and “survival clauses”, do not violate this norm of jurisdiction by consent. If States can refuse the jurisdiction of the ICJ, *a fortiori* they are able to refuse the jurisdiction of an arbitral tribunal composed of 3 private arbitrators, especially when the tribunal encroaches on the fundamental functions of the State in the fields of taxation, health, agricultural policy, environmental protection, etc.

ISDS advocates invoke the principle *pacta sunt servanda* and refer to BITs and FTAs containing ISDS chapters. These, however, must be seen in the context of the Vienna Convention on the Law of Treaties, in particular the requirement of good faith, not only in the elaboration and implementation of a given treaty, but also in its interpretation. The experience of 30 years of arbitral awards that have violated this good faith requirement gives reason to terminate the agreements. Article 62 VCLT states that when the situation has significantly changed from the time when the agreement was entered into (*rebus sic stantibus*), the agreement can be revised. The only limitation to the application of article 62 is in the field of treaties concerning boundaries, but certainly not in the context of commercial agreements. Other VCLT provisions allow revision or termination in cases of error (Art. 48), fraud (art. 49), corruption (art. 50) or coercion (art. 51-52).

As we know from diplomats and academic researchers, when most States entered into BITs and FTAs, no one would have contemplated or even imagined that ISDS arbitrators would blithely disregard national law and the judgments of the highest domestic tribunals and that they would challenge the ontological functions of the State in the fields of taxation, regulation of health, labour and environmental standards. Such an enormous surrender of sovereignty would have required absolute clarity in the texts of the BITs and FTAs, not vague terminology subject to the arbitrary interpretation by private corporate arbitrators. The customary international law presumption is that a State cannot surrender sovereignty by chance or inadvertence. Moreover, international *ordre public* does not accept that a State waive its R2A functions. If a State does, the agreement must be considered *contra bonos mores,* because it defeats the *raison d’être* of every State as the defender of the rights of the population. In other words, the State ceases to be a State and becomes a subject of corporate neo-colonialism.

One of the many adverse results of the existence of ISDS has been that states have become hostage of transnational corporations that are dictating the limits of the protective function of the State and impeding the exercise of precautionary and preventive measures, e.g. to avert harm from toxins in food, gmo’s and environmental degradation. Advocates of ISDS and ICS contend that corporations are not dictating policy. This is disingenuous. When a State knows that adopting environmental protection legislation will lead to litigation that may cost millions in attorney’s fees and billions in compensation awards, its regulating function has been effectively hijacked.

An investment protection mechanism cannot result in the transfer of important components of sovereignty from the State to transnational corporations. Contracts that are unconscionable in their declared aims or unconscionable in their actual consequences[[1]](#footnote-1) are invalid as *contra bonos mores* and must be declared null and void under article 53 VCLT. Thus, a contract that stipulates or that indirectly restricts the State’s R2A to regulate taxation, raise the minimum wage, impose emission controls, reduce tobacco use – under threat of litigation and huge compensation claims is clearly in violation of international *ordre public* and constitutes an assault on the international order established under the UN Charter. The supremacy clause of the UN Charter (article 103) comes here into play and requires that any treaty provision that conflicts with the UN Charter must be abolished or at least revised in a manner as to make it compatible with the Purposes and Principles of the United Nations.

Considering that jurisdiction is based on consent, it would be instructive to go back to the *travaux préparatoires* of the BITs and FTAs and see whether States ever realized what was at stake or ever consented to extensive interpretations of concepts such as “investment” and “legitimate expectations”. Indeed, treaties are made with rational expectations on both sides. No State will consent to a treaty if the negative consequences are likely to outweigh the potential benefits. If those dangers and negative consequences are not spelled out, consent cannot be presumed and revision becomes necessary. Consent must be tested also in the context of Parliamentary advice and consent. In the absence of thorough discussion, such consent is imperfect. Fast-tracking is not acceptable when consequences are as grave as with ISDS and ICS.

**Conclusions**

R2A engages Governments, Parliaments and the Courts. Governments must refuse to follow the siren call of foreign direct investment and refrain from adhering to any BITs and FTAs if they contain ISDS or ICS provisions. Parliaments must not succumb to the hard-sell of lobbyists and instead listen to their constituents and ensure that ratification of BITs and FTAs is conditioned on *ex ante* human rights, health and environmental impact assessments. Courts should refuse implementation of ISDS awards when they are in conflict with public policy, human rights, environmental sustainability and development. The public policy exception contained in article 5 of the 1958 New York Convention should be used systematically by the Courts of all UN members to deny effect to unconscionable awards. Indeed, it is illogical that public courts should be implementing the decisions of privatized tribunals that do not respect the basics of judicial restraint, democratic governance and human rights.

It is time for the International Court of Justice to issue an **advisory opinion** clearly stating that human rights treaty obligations take priority over investment and trade agreements, and that any treaty that envisages direct or indirect interference with a State’s fiscal, budgetary or protective functions, and which prevents a State from fulfilling its human rights treaty obligations is null and void. Awards by ISDS and ICS tribunals that restrict the regulatory space of States, particularly in the environmental and health sectors, are invalid as contrary to the Purposes and Principles of the United Nations (Charter, article 103).

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1. The contract between Shylock and the Merchant of Venice Antonio was invalid as *contra bonos mores*, because failure to reimburse a debt cannot have death as its consequence. By analogy, when a State cannot pay a debt to an investor the consequence cannot be interventionism as practiced in the early 20th century when imperialism was the order of the day, or more recently by the IMF and central banks in the context of the imposition of “austerity measures” and “privatizations” (see reports of the UN Rapporteurs on Foreign Debt, Cephas Lumina <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/478/85/PDF/N1047885.pdf?OpenElement>, and Juan Pablo Bohoslavsky, http://www.un.org/ga/search/view\_doc.asp?symbol=A/69/273). [↑](#footnote-ref-1)