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Independent Expert calls for an end to secret negotiations of free trade and investment agreements until public consultation and participation is ensured and independent human rights impact assessments are conducted

GENEVA – The Independent Expert on the promotion of a democratic and equitable international order, Alfred de Zayas, is alarmed by the general lack of awareness concerning the adverse effects that existing bilateral and multilateral free trade and investment agreements have already had on the enjoyment of human rights in many countries, particularly in the developing world. He is concerned about the secrecy surrounding current negotiations for trade treaties like the Transatlantic Trade and Investment Partnership (TTIP), the Trans-Pacific Partnership (TPP) and the Trade in Services Agreement (TISA), currently under discussion, which have excluded key stakeholder groups from the process, including labour unions, environmental protection groups, food-safety movements and health professionals. The expert maintains that proactive disclosure by governments, genuine consultation and public participation in decision-making are indispensable to render such agreements democratically legitimate.

“Fast-tracking” adoption of such treaties is tantamount to disenfranchising the public. Therefore, Parliaments should call for a moratorium on all pending free trade and investment agreements until independent human rights impact assessments are conducted and the public is properly consulted. Scarce reports indicate that these agreements are not about trade facilitation but essentially about deregulation, which is a “lose-lose” proposition for everybody except transnational corporations.

The expert is especially worried about the impact that investor-state-arbitrations (ISDS) may have on human rights, in particular the provision which allows investors to challenge domestic legislation and administrative decisions if these can potentially reduce their profits. Such investor-state tribunals are made up of arbitrators, mostly corporate lawyers, whose independence has been put into question on grounds of conflict of interest, and whose decisions are not subject to appeal or to other forms of accountability. The apparent lack of independence, transparency and accountability of ISDS tribunals also entails a *prima-facie* violation of article 14 of the International Covenant on Civil and Political Rights (ICCPR), which requires that suits at law be adjudicated by independent tribunals. It has been argued that ISDS tilts the playing field away from democratic accountability, favouring “big business” over the rights and interests of labourers and consumers.

Prior experience has shown that transnational corporations have sued States on account of their social legislation, labour laws, minimum wage provisions, environmental and health protection measures. Such lawsuits entail a frontal attack on democratic governance, in particular on the exercise of the State responsibility to legislate in the public interest, thus undermining both the commitment to the rule of law and to domestic and international democracy.

The Independent Expert recalls that because all States are bound by the United Nations Charter, which is akin to a World Constitution, all bi-lateral and international treaties must conform with the Charter, in particular with articles 1, 2, 55 and 56, which stipulate the principles of equal rights and self-determination of peoples, respect for human rights and fundamental freedoms, sovereign equality of States, the prohibition of the threat of and the use of force and of intervention in matters which are essentially within the domestic jurisdiction of States. Article

103 of the Charter stipulates that “in the event of 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.” In other words, provisions of free trade and investment agreements and decisions of ISDS arbitrators must conform with the UN Charter and must not lead to a violation, erosion of or retrogression in human rights protection or compromise State sovereignty and the State’s fundamental obligation to ensure the human rights and well-being of all persons living under its jurisdiction. Such agreements or arbitral decisions are null and void as incompatible with Article 103 of the UN Charter and contrary to international *ordre public*.

Similarly, universal and regional human rights treaties, including the ICCPR, the International Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights, the American Convention on Human Rights and the African Charter on Human and Peoples Rights, as well as ILO Conventions on labour standards and WHO Conventions, including the Framework Convention on Tobacco Control (in force 27 February 2005, 168 signatories), the Framework Convention on Climate Change and the Biodiversity Convention must take precedence over trade and investment agreements.

Already in 1989 the European Court of Human Rights held in *Soering v. United Kingdom* that the obligations under ECHR are superior to those under extradition treaties. This judicial precedent is *mutatis mutandis* applicable to free trade and investment agreements. Moreover, to the extent that free trade and investment agreements lead to gross violations of human rights, mass dislocation and migration, the suicide of ruined and desperate farmers and peasants, usurpation of State sovereignty and subversion of democratic governance, they are *contra bonos mores* and therefore null and void (Art. 53 Vienna Convention on the Law of Treaties (VCLT), *jus cogens*; Art. 38 ICJ Statute, general principles of law). Under no condition can ISDS tribunals hinder States in the fulfilment of their fundamental duties to regulate domestic policies in economic, social and labour matters. Arbitration awards and punitive damages assessed against States because of changes in their labour laws (including raising the minimum wage), measures to protect the environment, regulation of toxic waste disposal, public health standards, medical hygiene etc. shock the conscience of mankind, violate the good faith requirement of treaty implementation (art. 26 VCLT), constitute a gross abuse of rights and unjust enrichment. Ontologically capitalism and investment entail risk-taking. The progressive improvement of health and social legislation is an important goal of a democratic and equitable international order – and as such a thoroughly foreseeable risk that investors must accept.

Regional Human Rights Courts including the Inter-American Court on Human Rights, the European Court on Human Rights and the African Court on Human and Peoples Rights are called upon to reaffirm the principle that human rights obligations necessarily take precedence over trade and investment agreements. The UN Treaty bodies, including the Human Rights Committee and the Committee on Economic Social and Cultural Rights, should reaffirm this principle in their jurisprudence on individual cases, in general comments and in concluding observations.

The new Forum on human rights, democracy and the rule of law, created at the 28th session of the Human Rights Council, could consider devoting its first session to the usurpation of governmental functions by transnational enterprises that have no democratic legitimacy. The Independent expert calls on the Human Rights Council to systematically review the compatibility of certain provisions of free trade and investment agreements with human rights norms, as part of the UPR procedure. The Council should also consider tasking its Advisory Committee with a study on the impact of free trade and investment agreements and how to modify them so as to promote rather than hinder human rights. This would be a logical and necessary continuation of the work on globalization conducted by the Sub-Commission on the Promotion and Protection of Human Rights. Special Procedures mandate holders, including the Working Group on Business and Human Rights, the Special Rapporteur on the Right to Food¹, the Special Rapporteur on the Right to Health, and the Special Rapporteur on the independence of judges and lawyers should consider continuing to pay attention to this issue e.g. by preparing studies on the impacts of such agreements in the context of their mandates.

¹ See the Special Rapporteur’s Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements A/19/59 Add.5

Finally, the General Assembly should refer pertinent legal questions to the International Court of Justice for advisory opinions and recommendations, including the primacy of human rights treaties over other treaties, the necessity to carry out human rights impact assessments, the responsibility of States to regulate the activities of transnational corporations operating in their territories and the level of compensation owed to victims of violations of human rights.

A moratorium on on-going negotiations is necessary to prevent the establishment of economic and financial structures that foreseeably will lead to gross violations of human rights worldwide and ultimately may lead to situations where international peace and security are threatened. Special procedures mandate holders have a preventive vocation which is more important than their task to propose curative measures after the fact.

Alfred de Zayas (United States of America) was appointed as the first Independent Expert on the promotion of a democratic and equitable international order by the Human Rights Council, effective May 2012.

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