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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Written statement* submitted by Europe Centre – Third World, non-governmental organization with general consultative status and the American Association of Jurists, non-governmental organization with special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[1st July 2004]

*This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

Bilateral treaties on free trade and promotion and protection of investments: "arms of massive destruction" to national and international public law and human rights law

I. Our planet is wrapped in a thick weft of international, regional and bilateral economic and financial agreements and treaties that have subordinated or taken the place of the basic tools of international and national human rights law (including the right to a safe environment), national Constitutions, economic legislation directed to national development and labour and social laws that tend to alleviate inequalities and exclusion.

This weft, as a consequence of the application of "the most favourable treatment" "national treatment" and "most favoured nation" clauses, that appear in almost every treaty, works as a communicating glasses system, that allows neo-liberal policies circulate freely on a planetary scale and get into States, where they disintegrate national economies and provoke grave social harms.

All this involves the primacy of capital rights over democratic and human rights of peoples. Liberalisation and privatisation policies are consolidating –as a legally binding legal system-. It is a matter of making these policies **non reverted** through international agreements.

It is the regression to a sort of feudal or corporative law, opposed to national and international public law, that works in the exclusive interest of the big transnational capital and those of rich states and to the detriment of fundamental rights of the so-called peripheral states and their peoples.
With the aggravating circumstance that such corporative law is accompanied by a strong coercive system in order to grant its application: fines, economic sanctions, economic and military pressures, etc. To settle differences between parties, "discretional tribunals" have been created outside the judiciary systems of national and international public law, amongst which it is noticeable those created within the ISCID.[1]

[1] International Centre for Settlement of Investment Disputes (ICSI), member of the World Bank Group whose President is *ex officio*, the President of the World Bank itself. Within the ICSI arbitral tribunals are created to solve controversies between transnational corporations and states (136 of which are parties to the ICSI), that accept to be submitted to its discretion. States, when accepting this jurisdiction to resolve conflicts on an equal footing with private corporations, renounce to a fundamental prerogative of sovereignty: the territorial jurisdiction of their tribunals. The Convention of 18th March 1965 (Convention of Washington) that established the ISCI, was prepared by the World Bank. During the discussion, States faithful at that moment to the Calvo doctrine (infra III,3) opposed ***unanimously*** to the creation of international arbitral tribunals to resolve conflicts between states and foreign investors. But today fifteen Latin-American states are party to the ISCI. Most of them adhered during the 1990s. Within the WTO there is an Organ to settle controversies (Organe de règlement des différends – ORD).

International and regional Agreements are part of this system of corporative law. [2]

Bilateral treaties (approximately 2000 in force in the whole planet), are not very visible to public opinion, many of them have been reached on the sly ***and are even more harmful to rights of peoples than international or regional treaties in force or in process***.
Bilateral treaties include treaties of promotion and protection of foreign investments (TPPI), free trade, intellectual property rights, cooperation and science and technology. These treaties are the result of a tactics by the centres of planetary economical and political power, particularly of the United States, which consists of negotiating one by one with weak and/or corrupted governments ready to give up.

At the regional level something similar occurs. The United States got the CAFTA approved against the clock in Central America in order to be in a better position to negotiate the FTAA.
And in the FTAA negotiation, the proposal of a "light" FTAA is an application of the same tactics to leave to bilateral negotiation the most controversial questions.
We refer, in particular, to bilateral treaties of promotion and protection of foreign investments (TPPI), that somehow set up the axis of this corporative law.

II. Bilateral treaties of promotion and protection of foreign investments (TPPI).

These are treaties between States but the rights they agree upon are conferred to individuals and include provisions regarding the mechanism of settlement of controversies that can arise because of the investment, between the foreign investor and the state that receives the investment. The breach of any of the obligations assumed upon a TPPI arises international liability of the receiving State for harms caused. The novelty lies on the fact that the procedure to make such a conduct cease and obtain a compensation is separated from the classical International Law.

Under that system, the individual has no direct access to court and it is the state to which he/she is a national makes the claim its own, though diplomatic protection, but according to the Calvo doctrine (see. III, 3) this can only happen once the individual affected has exhausted administrative and judicial appeals established under the national legislation of the state that he/she pretends to sue.
Within the system of TPPIs this is different, since it admits direct access of individuals to the international discretional instance under the conditions agreed upon in the Treaty.

Let's see which are the main contents of the existing TPPIs:

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[2] International treaties are basically the ones agreed upon within the frame of the World Trade Organization (WTO), among which the one related to intellectual property matters linked to trade (TRIPS), the Agreement on measures on investments related to trade (of goods) (TRIM) and the General Agreement on Trade and Services (GATS).
Among regional Agreements it is noticeable the North American Free Trade Agreement (NAFTA), the CAFTA (Central American Free Trade Agreement) which is the free trade agreement among countries of Central America and United States already signed by four central American countries in December 2003 and the projected Free Trade Area of the Americas (FTAA).
There are besides the European Treaty of Maastrich and other regional structures such as ASEAN (Association of Nations of Eastern Asia), the AFTA (ASEAN Free Trade Area) and the APEC (Asia Pacific Economic Cooperation). If the European Constitutional Treaty is passed, agreed by the governments without popular participation on its contents, it will be a master piece in Europe of this anti-democratic and neo-liberal law at the service of transnational economic power.

1. Foreign investments enjoy always the most favourable treatment, irrespective of it being or not in the TPPI itself, but if it is in other treaties or norms. The breach of the most favourable treatment generates liability of the receiving state, claimable by procedures (usually a discretional tribunal) foreseen by the treaty itself.
This means that in all cases the investment will receive the most favourable treatment, irrespective of which is the norm (national or international) that grants better conditions to investments. Thus, even when those most favourable conditions do not appear in the TPPI, they are part of it and its breach involves international liability claimable by ways foreseen by the TPPI itself.

2. National treatment. Any advantage granted to national investors must be extended to foreign investors. National investors cannot receive any aid by the state, since it would involve violation of equality of treatment between national and foreign investors.

3. The "most favoured nation" clause. Advantages mutually agreed between two states under a bilateral treaty are automatically extended to treaties celebrated by them with other states where the "most favoured nation" clause (which exists in all, or almost all, bilateral treaties) is included.

4. Absence and even prohibition of performance requisites. Performance requisites consist of requesting the investor, in order to authorize the investment, some conducts aimed at protecting national economy: using, as much as possible, national raw material, exporting part of the production to increase the currency income, etc. **Such requisites are not in the TPPI and in some cases they are expressly prohibited,** as in the Argentinean-American treaty and the one between Canada and Uruguay. In some cases, the situation of the receiving state is worse than the TRIM, agreed upon within the WTO, that forbids the performance requisites only in trade of goods. For example, the Uruguay-Canada agreement extends the prohibition of performance requisites to services and the transfer of technology. Therefore, within this frame, the receiving state cannot demand the investor to transmit the *know how* to local partners and local workers. That is to say that, in this case, there is no incorporation of technology in the receiving state.

5. TPPIs include clauses that foresee compensation in case of expropriation or "other measures of equivalent effect". This last sentence, ambiguous, makes it possible to demand compensation in the case of measures adopted by the receiving state that "prevent the investor from profits that it could reasonably expect", as stated by the discretional court in the "Metalclad c/Mexico" case, within the NAFTA.[3]

6. TPPIs include compensation for losses derived from a variety of reasons, such as the loss of future or expected profits, as pointed out in 5.

7. TPPIs include foreign transfer of capital, profits, remunerations, privileges, emeritus for consultancy services, etc., with no restrictions, in freely convertible currency.

[3] In 1996 the American company *Metalclad* sued the Mexican government for violating chapter 11 of the FTAA, when the government of San Luis Potosi impeded the opening of a toxic waste deposit to this company. According to the FTAA norms, denying the permission to open a dump was considered an act of "expropriation" and the Mexican government had to compensate *Metalclad* with 16.7 million dollars.

III. If there is a political will to do so, there is a way out from the trap of free trade and promotion and protection of investments bilateral treaties to restore national and international public law and promote human rights.

There are several ways to achieve it:

1) Denouncing the Treaties when their legal force ends in order to avoid an automatic new footing.

2) Invoking the pre-eminence of a hierarchically higher norm.

Article 53 of the Vienna Convention on the law of Treaties, states the following: *« A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character».*

3) Restore the territorial competence of national tribunals.

In many bilateral treaties of trade and investments, in the NAFTA and the projected FTAA there is a waiver clause to national jurisdiction in favour of discretional tribunals to settle conflicts between an individual investor and the State that receives the investment.

This waiver involves the abandonment of the so-called "Calvo doctrine" based upon the principles of national sovereignty, equality among national and foreign citizens and territorial jurisdiction. According to the Calvo doctrine, sovereign States enjoy the right to be free from any kind of interference by other States and foreigners hold the same rights as nationals and in the case of litigation or plaints, they will have the obligation to exhaust all legal appeals in local courts without asking their country of origin's protection and diplomatic intervention.

The Calvo doctrine is in the Charter of the Organisation of American States (article 15), the Bogotá Covenant (article 7), Resolution 3171 of 17th December 1973 of the UN General Assembly (*Permanent sovereignty on natural resources*), point 3, and several national Constitutions.[4]

4) Monitoring the constitutionality of treaties.

International treaties must be submitted to a constitutionality control, in order for national tribunals to determine whether they are in accordance with the part of the Constitution as regards rights and warranties and particularly with international human rights norms with *jus cogens* hierarchy (peremptory international law norms).

5) Verifying if there are essential defects in the conclusion and adoption of a treaty that involve its invalidity.

[4] Constitutions of Argentina (Art. 116); Bolivia (Art. 24); El Salvador (Art. 98 and 99); Ecuador (Art. 14); Guatemala (Art. 29); Perú (Art. 63, 2° c); Venezuela (Art. 151), etc.

In the adoption of a treaty there can be procedural defects that involve its invalidity. For instance, when the national law or Constitution sets the previous constitutional control and this is not done.

Another ground for invalidity in a treaty is a background defect.

Section 2, entitled *Invalidity of Treaties* (articles 46 to 53) of the Vienna Convention on Law of the Treaties refers to them.
We have already referred to article 53 of the Vienna Convention in 2).
According to article 46 of the Convention, there can be grounds for invalidity when a treaty has been concluded in manifest violation of a provision of internal law of one of the parties that concluded the treaty.

Combining articles 46 and 53 the conclusion of a treaty in violation of fundamental rights and warranties granted in the State's Constitution and basic international human rights law norms, such as the right to health, to food, to an adequate housing, to education, etc. would be a ground for invalidity.

6) Invoking invalidity of a treaty concluded by state authorities that, in so doing, have violated their mandate.

State authorities that have signed and ratified a treaty with clauses that violate the State's sovereignty and fundamental rights of the people, apart from committing grave offences that could include treason, have violated their mandate consisting of developing their official duties according to the Constitution, laws and fundamental international norms, compulsory to all States. The Treaty will be void, since one of the parties has breached its mandate and the other party will not be allowed to allege ignorance of this fact in order to maintain the treaty's validity, when the mandate's breach is manifest.
