

On concept of competence of NGOs in respect to the impacts of CETA on economic and social human rights

1. The realisation of economic and social rights depends crucially on such economic and social conditions which affect people's life.

Still the impacts of diverse economic and social conditions to the economic and social human rights are often neither assessed nor addressed in political decision made on those conditions.

The civil society organisations can not often do much to get economic and social human rights respected and implemented but as they are part of society's economic and social life they can monitor the economic and social conditions and how states' decisions on these conditions affect economic and social rights.

They can bring the human rights impacts of such decisions into public consideration, taking into account also that:

It belongs to the realisation of universal human rights that "Everyone is entitled to a social and international order in which the rights [...] can be fully realized" as confirmed by Universal Declaration of Human Rights (1) and "non-governmental organizations also have an important role and a responsibility in contributing" to the realisation of this right by monitoring it as confirmed by UN declaration on rights of human rights defenders. (2)

Regarding this right to a social and international order in which human rights "can be fully realized", everyone has the right in respect to the governmental organs "to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights" and to have "access to information as to how those rights [...] are given effect in domestic legislative, judicial or administrative systems". (3)

2. Thus also in case of CETA people have a right to know **how their right to such "a social and international order" which realises their human rights is also "given effect in domestic legislative, judicial or administrative systems"**. (4) Particularly so when CETA investment court can judge the state to pay huge compensations to a transnational investor from state's public measures by which the state secures social and international order which fulfills human rights. (5)

Citizens have in respect to human rights a right of "**access to information as to how those rights [...] are given effect in domestic legislative, judicial or administrative systems"** also in relation to the right to social and international order where those rights can be realised. (6) Particularly so when state ratifies binding rules on international economy. The authorities are responsible also in this respect to know how they give effect to human rights in legislative, judicial or administrative systems and the UN Human Rights Council:

- "calls upon all States to ensure that information held by public authorities, including with respect to economic, social and cultural rights, and as related to environmental, land, natural resources and development issues, is proactively disclosed and not unnecessarily [...] withheld from the public". (7)

- "recognizes the importance of the independent voice of human rights defenders and other civil society actors [...], in promoting, protecting and realizing all human rights, including economic, social and cultural rights" and "**in identifying and raising awareness of human rights impacts**" of "business operations, including in relation to workplace health, safety and rights, and natural resource exploitation, environmental, land and development issues". (8)

3. Our organisations have this kind of experience of bringing up these kind of impacts which the states create by approving binding provisions whose human rights impacts they have not identified, explicated or assessed.

Citizens' right of "access to information as to how those rights [...] are given effect in domestic legislative, judicial or administrative systems" (9) also in respect to globalised business activity "shall be subject only to such limitations as are in accordance with applicable international obligations and are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society". (10)

It is thus our right and competence as NGOs to bring up towards transparency the impacts which the states create by approving binding provisions whose human rights impacts they have not identified, explicated or assessed.

Where the government is not able to make it public in transparent, demonstrated manner how economic and social human rights would be respected, protected and fulfilled also in respect to the binding orders of CETA-type 'investment court' judgements, citizens and civil society organisations have thus competence, including right and responsibility to monitor:

- does the state bring within its legal systems such new binding elements whose impacts on economic and social human rights and on its ability to fulfil its obligations on those rights it has not assessed - or, if not, then:
- how has state assessed the impacts on economic and social rights provided by the Charter and respected and fulfilled its obligations to implement these human rights also in respect to what kind of investment rules or tribunals are made

So the question is how did the state respect these rights in negotiating and approving such new 'investment court' whose judgements would be binding even where they impair or affect negatively the effective realisation of such rights

On human rights impacts of binding awards and judgements of the CETA 'investment court' on which the official administration and strongly institutionalised actors have not yet even established legal competences or official tasks or capacities, more autonomous NGOs and citizen groups' self-organised activity are often quicker to bring up to public consideration such impacts and address consequent new challenges and threats to human rights.

4. UN Human Rights Council "reaffirms the urgent need to respect, protect, promote and facilitate the work of those defending economic, social and cultural rights as a vital factor contributing towards the realization of those rights" (11) compliant to the states' commitments on "Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights" according to which:

"Each State shall adopt such legislative, administrative and other steps as may be necessary to ensure that the rights [...] are effectively guaranteed" including this right of "access to information as to how" human rights like the right "to a social and international order in which" human rights "can be fully realized" are "given effect in domestic legislative, judicial or administrative systems" (12) also regarding the impacts of business operations. (13)

Thus as in respect to human rights "everyone is entitled to a social and international order in which the rights [...] can be fully realized" all citizens and NGOs have a competent right to get transparent information from the state how this right is fully realised also in respect to the human rights impacts of agreements on international investment so that:

"Each State has a prime responsibility and duty to protect, promote and implement all human rights and [...] to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all [...] are able to enjoy all those rights [...] in practice" like the UN General Assembly has approved in respect to the "Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms". (14)

Thus in respect to the human rights impacts of treaties like CETA "The conclusion of such treaties should therefore be preceded by human rights impact assessments" as "States parties cannot derogate from the obligations under the Covenant in trade and investment treaties that they may conclude" like the UN Committee on Economic, Social and Cultural Rights has noted. (15)

"The obligation to respect economic, social and cultural rights is violated when States parties prioritize the interests of business entities over Covenant rights without adequate justification, or when they pursue policies that negatively affect such rights". Thus states' "plans on business and human rights should incorporate human rights principles, including effective and meaningful participation, non-discrimination and gender equality, and accountability and transparency" taking into account " the fundamental role that [...] civil society organizations can and should play in achieving the full realization of Covenant rights in the context of business activities." (16)

5. The Finnish government has not built needed administrative capacity and has not carried its responsibility for assessing how economic and social human rights are affected by such new CETA-type 'investment court system'-based investment protection that is privileged for transnational investors.

The less transparent is the legal human rights competence of the way how the state negotiates and approves binding trade and investment treaties which have human rights impacts, the more important is the role and responsibility of the concerned citizens and organised civil society to monitor states' commitments.

It is thus crucial to determine the competence of civil society in the process in relation to the competences of the new 'investment court system' itself and how it could be allowed or not allowed to affect the realisation of the economic and social human rights taking into account that:

a) While CETA 'investment court system' is a new creation by the EU, so far according to the European Court of Justice however not even the EU has had legal competence to initiate, negotiate and agree by itself such CETA investment court type investor state arbitration mechanism - which it has now initiated, negotiated and agreed.

b) "Competences not conferred upon the Union in the Treaties remain with the Member States." (17)

c) But before memberstates can either confer or not confer their competence, each memberstate must first have established legality of having such competence itself in harmony with the constitutional whole of its legislation.

If the competence to negotiate and agree CETA investment court type investor state arbitration system 'remain with the Member States', in which sense they have had or used this kind of competence earlier ?

d) The legitimacy for such new 'investment court system' (initiated to CETA by the EU) can not thus be created for the member states by the EU, but must be derived from the constitutions of the EU member-states and verified to be consistent also with the human rights obligations of the states. Are there such competences explicitly defined for the states in their constitutions ?

6. As our complaint concerns human rights impacts of such 'investment court system', which has not existed ever before and on which there is thus no duly defined competence explicitly specified even for the states or for the EU to negotiate or to maintain such investment court system, so far the states do not have even the legal institutionalised competence on such court systems' functioning in relation to human rights.

As organs of the EU or its memberstates had not been enacted due legal competence even to create or negotiate such 'investment court system' they have also not set official tasks to secure and verify it to be in coherence and consistent with the human rights obligations which the states have.

Thus 'investment court' was negotiated and approved by the government without duly assessing its impacts to economic and social human rights and without verifying and securing that binding 'investment court system' could not lead to impairing the realisation of the concerned economic and social rights recognised by the Charter.

In respect to such new issues like the creation of investment court systems for which even the state organs have not been established or verified explicit competences, there often does not yet even exist official institutionalised competence or expertise.

While even on that how such 'investment courts' work, which have never existed in practice, there can not yet exist due institutionalised expertise or competence, without due human rights impact assessments of such investment enforcement system the states have even less competence to know how countless individual's economic and social human rights may be endangered as a result of such binding judgements of such new type of 'investment courts'.

In such situations the states are responsible to first assess how the rules in general relate and impact to human rights but even this has not been done. Civil society has in this respect particular task and competence in monitoring the non-compliance of a State's law or practice.

Notes and references

1. Universal Declaration of Human Rights, UDHR, article 28
2. UN General Assembly A/RES/53/144, 8 March 1999, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, paragraph 18.3
3. UN General Assembly A/RES/53/144, 8 March 1999, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, paragraphs 6 and 8.2
4. UDHR article 28 and A/RES/53/144, paragraphs 6 and 18.3
5. UN General Assembly A/RES/53/144, 8 March 1999, Declaration on the Right and Responsibility of Individuals,

Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms

6. UN General Assembly A/RES/53/144, 8 March 1999, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, paragraph 6

7. A/HRC/RES/31/32 Resolution adopted by the Human Rights Council on 24 March 2016 31/32. Protecting human rights defenders, whether individuals, groups or organs of society, addressing economic, social and cultural rights

8. A/HRC/RES/31/32 Resolution adopted by the Human Rights Council on 24 March 2016 31/32. Protecting human rights defenders, whether individuals, groups or organs of society, addressing economic, social and cultural rights, paragraphs 7 and 15

9. UN General Assembly A/RES/53/144, 8 March 1999, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, paragraph 6

10. A/HRC/RES/31/32 Resolution adopted by the Human Rights Council on 24 March 2016 31/32. Protecting human rights defenders, whether individuals, groups or organs of society, addressing economic, social and cultural rights, paragraph 12

11. A/HRC/RES/31/32 Resolution adopted by the Human Rights Council on 24 March 2016 31/32. Protecting human rights defenders, whether individuals, groups or organs of society, addressing economic, social and cultural rights, paragraph 1

12. UN General Assembly A/RES/53/144, 8 March 1999, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, paragraphs 2.2 and 6

13. A/HRC/RES/31/32 Resolution adopted by the Human Rights Council on 24 March 2016 31/32. Protecting human rights defenders, whether individuals, groups or organs of society, addressing economic, social and cultural rights. paragraph 15

14. UN General Assembly A/RES/53/144, 8 March 1999, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, paragraph 2.1

15. UN Committee on Economic, Social and Cultural Rights, E/C.12/GC/24, State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, paragraph 13

16. UN Committee on Economic, Social and Cultural Rights, E/C.12/GC/24, State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, paragraphs 12 and 59

17. TEU, article 5.2