PUBLIC STATEMENT
ON THE INTERNATIONAL INVESTMENT REGIME
31 August 2010

We have a shared concern for the harm done to the public welfare by the international investment regime, as currently structured, especially its hampering of the ability of governments to act for their people in response to the concerns of human development and environmental sustainability.

WE AGREE THAT:

General principles

1. The protection of investors, and by extension the use of investment law and arbitration, is a means to the end of advancing the public welfare and must not be treated as an end in itself.

2. All investors, regardless of nationality, should have access to an open and independent judicial system for the resolution of disputes, including disputes with government.

3. Foreign investment may have harmful as well as beneficial impacts on society and it is the responsibility of any government to encourage the beneficial while limiting the harmful.

4. States have a fundamental right to regulate on behalf of the public welfare and this right must not be subordinated to the interests of investors where the right to regulate is exercised in good faith and for a legitimate purpose.

Pro-investor interpretations of investment treaties

5. Awards issued by international arbitrators against states have in numerous cases incorporated overly expansive interpretations of language in investment treaties. These interpretations have prioritized the protection of the property and economic interests of transnational corporations over the right to regulate of states and the right to self-determination of peoples. This is especially evident in the approach adopted by many arbitration tribunals to investment treaty concepts of corporate nationality, expropriation, most-favoured-nation treatment, non-discrimination, and fair and equitable treatment, all of which have been given unduly pro-investor interpretations at the expense of states, their governments, and those on whose behalf they act. This has constituted a major reorientation of the balance between investor protection and public regulation in international law.

6. The award of damages as a remedy of first resort in investment arbitration poses a serious threat to democratic choice and the capacity of governments to act in the

public interest by way of innovative policy-making in response to changing social, economic, and environmental conditions.

Legal framework and dispute resolution

7. The primary legal framework for the regulation of investor-state relations is domestic law.

8. Investment treaty arbitration as currently constituted is not a fair, independent, and balanced method for the resolution of investment disputes and therefore should not be relied on for this purpose. There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration, including by refusal to pay arbitration awards against them where an award for compensation has followed from a good faith measure that was introduced for a legitimate purpose.

9. Private citizens, local communities and civil society organizations should be afforded a right to participate in decision-making that affects their rights and interests, including in the context of investor-state dispute settlement or contract renegotiation. The international investment regime, by not allowing for full and equal participation of such parties alongside the investor where their interests are affected, fails to satisfy this basic requirement of procedural fairness.

10. Although not without flaws, investment contracts are preferable to investment treaties as a legal mechanism to supplement domestic law in the regulation of investor-state relations because they allow for greater care to be taken and greater certainty to be achieved in the framing of the parties' legal rights and obligations. This is only so, however, if the investment contract precludes resort by either the investor or the state to an investment treaty claim so as to permit it to avoid its contractual commitments, including commitments on dispute settlement and choice of law.

11. Investment contracts should be concluded and implemented in accordance with the principles of public accountability and openness and should preserve the state's right to regulate in good faith and for a legitimate purpose.

12. Investment contracts should provide a mechanism for managed renegotiation by the investor and state, based on a fair and balanced process in which adequate support and resourcing is available to both parties, so as to accommodate significant changes in the circumstances of the underlying agreement.

13. Proposals to conclude a multilateral investment agreement or to restate international investment law based on recent arbitration awards are misguided because they risk entrenching and legitimizing an international investment regime that lacks fairness and balance, including basic requirements of openness and judicial independence.

WE THEREFORE RECOMMEND THAT:

14. States should review their investment treaties with a view to withdrawing from or renegotiating them in light of the concerns expressed above; should take steps to replace or curtail the use of investment treaty arbitration; and should strengthen their domestic justice system for the benefit of all citizens and communities, including investors.

15. International organizations should refrain from promoting investment treaties and should conduct research and make recommendations on the serious risks posed to governments by investment treaty arbitration; on preferred alternatives to investment treaty arbitration including private risk insurance and contract-based arbitration; and on strategies for states to pursue withdrawal from or renegotiation of their investment treaties.

16. The international business community should refrain from promoting the international investment regime and from resorting to investment treaty arbitration. Instead, it should promote fair and balanced adjudicative processes that satisfy the requirements of openness and judicial independence in accordance with the principles of procedural fairness and the rule of law. The international business community should also seek to resolve disputes in a co-operative spirit with recourse to adjudication only as a last resort.

17. Civil society should continue to take steps to inform its constituents and society at large of the failures of and threats posed by the international investment regime and to oppose the application of that regime to governments that undertake legislative or general policy measures for legitimate purposes.

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BACKGROUND NOTE

This statement emerges from discussions during a visit by Professor M. Sornarajah to Osgoode Hall Law School of York University in Toronto, Canada, and at a workshop on the adjudication of international economic disputes held at the Oñati International Institute for the Sociology of Law.

The statement was motivated by a concern that we are at an important juncture for the international investment regime in light of upcoming meetings and ongoing processes on investment law and arbitration. These include:

- European Union processes to develop a common investment policy that could consolidate or supercede hundreds of bilateral investment treaties.

- Negotiations toward a Trans-Pacific Partnership Agreement on investment;

- Possible renewed negotiations on investment at the World Trade Organization, especially in relation to trade disciplines under the *General Agreement on Trade in Services*;

- Regional initiatives to reform investment law and arbitration, especially in Latin America;

- Reviews by states of their domestic policy on investment law and arbitration;

- Revisions of their arbitration rules, as they involve states, by the UN Commission on International Trade Law and by the International Chamber of Commerce;

- Upcoming meetings of the UN Conference on Trade and Development and other organizations that will address investment treaties.

The aim of this statement is to bring the concerns expressed above to the attention of decision-makers and the public in general.