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***“Democratizing international dispute settlement:
The case of trade and investment disputes”***

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Introduction

International law and the international settlement of disputes play an increasingly important role in our globalized and interconnected world. Given their growing relevance, it is essential that international laws and institutions and their respective processes be as democratic as possible, rather than being far-removed from the people they ultimately affect. Unfortunately, however, the current structure of international law and institutions has much room for improvement.

International dispute settlement in particular lacks transparency, opportunities for public participation, and accountability. International dispute settlement mechanisms vary in their provenance, mandate, operation, resources, independence and effectiveness, but they are an essential component of the international legal system -- just as domestic dispute settlement mechanisms are essential to implementing and enforcing national law. They thus are of fundamental importance to solving the critical issues addressed by the international legal system, including human rights, the environment, human health, labor, trade, and investment.

Despite the manifest importance of international dispute settlement mechanisms, they lack fundamental elements of transparency and public participation that characterize democratic legal systems governed by the rule of law. For example, in some instances, it is difficult or impossible to know that dispute settlement proceedings have been initiated, what the issues and arguments are in a dispute, or what the rulings are, and it is often impossible to file *amicus curiae* briefs or otherwise to provide information to dispute settlement bodies. This dearth of transparency and public participation not only undermines democratic values generally, but also has severe practical implications for the accuracy, efficacy and legitimacy of the dispute settlement processes. If public input is made possible, the quality of decisions is likely to improve through additional relevant information, legal analysis and perspectives. Decision-makers and parties will likely be more conscientious if their decisions and submissions exposed to public scrutiny. Transparency will most likely also reduce the

likelihood of corruption, cronyism and nepotism, as well as increase the credibility of the dispute settlement process.

Reform seems particularly urgent in two areas of dispute settlement that have evolved and proliferated at unprecedented speed in the past ten to fifteen years: trade and investment-related disputes between states, and between foreign investors and host states. Trade and investment decisions and awards can directly affect the daily lives of people around the world. Investment cases, for instance, have involved: the provision of potable water in countries such as Bolivia, Argentina and Tanzania; California's law banning certain substances in gasoline contaminating ground water; regulations aimed at protecting sacred Native American sites from destruction and environmental harm caused by open-pit mining operations; and the ban on the export of PCB wastes from Canada to the United States. In all of these cases, investors sued host states and requested compensation for taking certain regulatory measures to protect the environment, human health and implementing other public policy objectives, such as providing potable drinking water to citizens.

In the trade context, the World Trade Organization (WTO) remains the primary rule-making regime with judicial powers incorporated in the dispute settlement body. The WTO's rules supersede national, provincial, state and community laws and standards to protect labor rights, the environment and human health, local culture, human rights, consumer rights, and democratic structures. For example, WTO tribunals have been asked to decide upon a wide range of public policy issues, including for instance, the question of whether hormone-treated beef should find its way into European supermarkets or whether Brazil could prohibit the importation of used short-life tires for environmental (disposal) reasons.

Given the important implications on domestic sovereignty, it seems only commonsensical that dispute settlement processes under the trade and investment regimes be transparent and provide for meaningful public participation. Only if processes are transparent and participatory can tribunals and governments be held accountable for their actions and decisions. Unfortunately, however, international trade and investment dispute settlement processes suffer from a tremendous lack of transparency, public participation and accountability.

Dispute Settlement at the World Trade Organization (WTO)

The WTO's main function, according to its web site "is to ensure that trade flows as smoothly, predictably and freely as possible." WTO Agreements thus aim at "disciplining" an extremely wide range of measures, including export and import restrictions, but also domestic measures that in some way affect trade, such as environmental and health measures. To enforce its rules, the WTO has a binding dispute settlement mechanism. The mechanism is based on clearly-defined procedural rules. Rulings in disputes are first made by a panel and can be appealed on points of law. Rulings are automatically adopted unless there is a consensus amongst all WTO Members to reject a ruling. This is one of the main differences with the previous GATT dispute settlement under which rulings could only be adopted by consensus, meaning that one single opposition, including that of the losing party, could block the ruling. Between the WTO's creation in January 1995 and 26 October 2005, 350 cases have been initiated.

The WTO system is perceived as effective because it is binding and provides for sanctions. If a party is found to violate one of the many WTO rules, the challenging WTO Member can request the permission of the dispute settlement body to impose trade sanctions, meaning, for instance, that the winning Member can increase tariffs on products emanating from the “losing” Member.

Compared to its predecessor the GATT, the WTO has improved transparency and, to some extent, has even become more participatory. Nevertheless, given its considerable economic and public policy implications, WTO dispute settlement remains too undemocratic and non-transparent. Typically available from the WTO web site are the request for consultation and the subsequent request for establishment of a panel. Also available are the notification of appeal and status reports. And most importantly, the WTO posts the panel and the Appellate Body reports. Thus, citizens around the world can be informed when a dispute procedure is initiated and they can read WTO jurisprudence first hand.

However, it remains the case that WTO reports are not released to the public until well after the date they are issued to the government parties. This can create problems because news coverage is entirely based on hearsay, and special interest groups, including certain government officials, can (and often do) easily misrepresent the WTO panels’ findings. If reports are only disclosed to the disputing parties, no one can challenge the distorted representations. The Panel report in a recent case involving the regulation of genetically modified products (*EC-Biotech*), for instance, was issued in early May 2006, but was only made public in late September, leaving non-disputing WTO Members and citizens only with the second-hand information during an almost five-month period.

Another problem is that documents and materials provided during the dispute settlement process, such as party submissions, are kept confidential unless a government voluntarily releases its own submissions to the public. Panel hearings with the parties or experts are also conducted *in camera*, that is behind closed doors, and thus remain secret. In only case in WTO history – in follow-up proceedings to the famous *EC - Beef Hormones* case in September 2005 and September/October 2006 -- was the public invited to observe the panel hearing via closed circuit television in a separate room at the WTO. In that follow-up case, referred to hereafter as the *US-Hormones* case, all parties agreed to open the hearings to the public. This does not mean that the parties agreeing to open the hearings in the *US-Hormones* case will do the same in other cases. Quite to the contrary, Members retain the ability to pick and choose what hearings to make public. Indeed, at least one of the parties that requested open hearings in the *US-Hormones* case (the EC, US, and Canada) has specifically chosen not to hold open hearings in other, subsequent cases. Without access to parties’ submissions and to hearings it is difficult, if not impossible, for citizens and other WTO Member governments to get a good understanding of what exactly is at issue in the dispute.

A step towards public participation was taken in 1998 when the WTO Appellate Body in the landmark *Shrimp/Turtle* case recognized the panels’ authority to accept and consider *amicus curiae* briefs from civil society. Since that case, WTO dispute settlement panels and the Appellate Body have accepted unsolicited *amicus curiae* briefs from third

parties in a number of instances. The Appellate Body has made clear, though, that panels did not have any legal duty or obligation to do so. Moreover, while several amicus briefs have been accepted, it is not clear to what extent unsolicited *amicus curiae* briefs by non-disputing parties were actually considered, when they were subsequently not incorporated or attached to a disputing party's submission.

Investment-related arbitration involving a state as a party

While there remains plenty of room in WTO dispute settlement to improve transparency and public participation despite some of the progress made over the past years, the situation in the context of investment dispute settlement has an even longer way to go. Investment dispute settlement processes are based on an entirely secretive model which finds its origin in private commercial arbitration. That is, although investment disputes involving states implicate public interest issues, they are decided in processes designed to address private and commercial issues, without regard to the transparency and participation values of democratic governance.

Investment disputes can occur between states or between a foreign investor and a state, and can be based on a treaty, foreign investment laws or contracts. Until fairly recently, arbitration typically emanated from investment contracts or similar instruments, with the first decision finding jurisdiction in a treaty only in 1990. Since then, an increasing number of cases originate from investment laws and treaties. Bilateral investment agreements (BITs) or Free Trade Agreements (FTAs) incorporating investment chapters typically include rules, procedures and institutions for the protection of foreign investors. More recent BITs and investment chapters provide for mandatory international arbitration, authorised to render binding awards, often providing both state-to-state as well as investor-state arbitration. Investor-state arbitration allows foreign investors to challenge host governments for alleged violations of host state obligations under the BIT or investment chapter.

Recourse to formal state-to-state dispute settlement under a BIT or an investment chapter is rare. The use of investor-state dispute settlement procedures against host governments by the foreign investors themselves is much more common. In fact, recourse by investors to investor-state arbitration has skyrocketed in the past decade. Like the state-to-state procedures, these investor-state arbitrations are compulsory and the disputing parties are bound by the results. Increasingly, investors are using this tool to challenge the host governments' domestic regulatory actions relating to human rights, health, safety and the environment. Investors can more easily than states take the risk of challenging a host government's domestic measures irrespective of whether the public interest is involved. Unlike home state governments, investors have no reason to consider how their arguments might be held against them in other subsequent arbitrations, or how they might affect the political relationship between two countries. As a consequence, the number of investor-initiated disputes is expected to continue to rise, especially as more lawyers are becoming aware of, and specialized in, this type of arbitration.

As in WTO dispute settlement, investor-state arbitrations frequently raise profoundly important issues of public policy that penetrate deeply into domestic decision-making processes. Moreover, these arbitrations often involve large potential monetary liability for

public treasuries. For example, the 37 arbitrations against Argentina after its financial crisis allege billions of dollars in damages. In addition, the transaction costs involved in the arbitrations can place the bill of the tribunal and attorneys fees in the millions of dollars. Further, the potential for contradictory decisions raises issues not only for the respondent, but for the legitimacy of international law as a whole. For example, the first award of the Argentina saga found it liable, rejecting Argentina's plea of necessity grounded on the extreme economic, political, and social crisis that it suffered. Another decision, in contrast, accepted the defense and found that necessity precluded liability.

Despite the important economic, social and environmental implications of investor-state arbitrations, procedures typically lack fundamental elements of transparency and public participation -- although the degree of deficiency may vary depending on the set of arbitration rules applied. Treaties and contracts between host governments and investors can refer to different sets of arbitration rules and institutions, giving the investor a choice among them. Many of the rules referred to were drafted with commercial arbitration in mind, not investment arbitrations against host states that raise issues relating to the public interest. The rules most frequently referred to are those under the United Nations Commission on International Trade Law (UNCITRAL) and those under the International Centre for Settlement of Investment Disputes (ICSID). ICSID rules are exceptional in that they were specifically developed for disputes between host states and investors, as opposed to disputes between private parties. However, they, too, lack adequate transparency.

In contrast to WTO disputes, it is usually impossible for the public or non-disputing states to know even that an arbitration proceeding has been initiated, let alone what is at issue in an arbitration. With the exception of ICSID arbitrations, where cases are at least included in a public registry and recent developments are posted on ICSID's web site, there is no system in place that compiles and reports notices of intent to arbitrate. Moreover, even ICSID does not make public the actual notice of arbitration that formally commences the investor-state arbitration process, making it difficult for citizens and other governments to know what is at stake.

Furthermore, there is typically no explicit legal obligation to make the arbitral awards in investor-state arbitrations public. Worse, certain arbitration rules have been understood to prevent the disclosure of awards without the consent of both disputing parties. Such an approach contradicts constitutional and international human rights of access to information held by a state, and any information held by private bodies and that is required for the exercise and protection of any rights.

Materials submitted to the arbitration panels in investor-state arbitrations are typically also kept secret, either based on explicit confidentiality provisions or on procedural orders of the tribunal. In a pending investor-state arbitration initiated by a British water company against the government of Tanzania, for instance, the arbitration tribunal ruled in favor of confidentiality during the proceedings. In that case, which involves issues relating to access to potable water, Tanzania had requested open hearings and disclosure of documents, but the British investor opposed.

Finally, while there are instances where arbitral tribunals have allowed the public to observe hearings via closed-circuit TV and have accepted amicus curiae submissions by non-parties, there is no requirement to replicate this in any other cases.

Final Remarks

The positive effects of more democratic dispute settlement processes will be manifold: the quality of decisions will improve through useful information, legal analysis and perspectives; low-quality work will be less likely because decision makers will know their decisions will be exposed to public scrutiny; and the likelihood of corruption, cronyism and nepotism will be reduced. Only a revised model of dispute settlement rules can serve as an example for domestic judicial systems that are still non-transparent, corrupt and inaccessible.

WTO Members and countries negotiating and renegotiating BITs and FTAs need to make trade and investment dispute settlement processes more transparent, participatory and accountable. Individuals, communities and NGOs must be able to be adequately informed and have credible standing and a meaningful voice in decisions taken by far-away international arbitrators -- decisions that can directly and profoundly affect their lives.

Reform is possible, and some initial steps have already been taken. Recognizing the democratic deficit of investor-state arbitrations, the United States, Canada, and Mexico, for example, have committed to disclosing all documents concerning NAFTA investment arbitrations, including their submissions, transcripts of hearings, and awards. Other countries could do the same with respect to their BITs and FTAs. At the same time, there are opportunities to reform those arbitration regimes to which BITs and FTAs commonly refer. UNCITRAL arbitration rules, for example, are currently being revised after 30 years of existence, offering an opportunity to create more transparent and participatory rules for arbitrations involving state parties. In the WTO context, reform may be difficult in the near future if the consensus of nearly 150 WTO Members is needed. However, individual Members can be pro-active and make it their policy to post all their submissions at the date of their filings and to request open hearings in all disputes to which they are party, including through web casting. Each of these initiatives will lead to a more democratic international dispute settlement regime, step by step.

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