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Dear Special Rapporteur,

**Re: Call for information: Special Rapporteur on the right to development**

One of the biggest impediments to the right to development, when it comes to business, is state reliance on international investment agreements (IIAs). These agreements were designed to be a quid pro quo between states; that is, host state protection of foreign investment in exchange for businesses (from home states) promoting the economic development of the host state. However, that quid pro quo has been in peril for many years now. Indeed, several studies have documented that while foreign investment helps a state's economic development, IIAs do not necessarily achieve that goals. At the same time, studies have shown that IIAs pose a threat to a state's ability to protect human rights and the environment.<sup>1</sup>

**What laws, policies and incentives are in place (or should be introduced) to encourage businesses to contribute to the effective realization of the right to development?**

Given that foreign investment is often crucial to fostering development and that IIAs may, indirectly, encourage foreign investment yet simultaneously pose a threat to the right to development, IIAs need to be better structured to achieve development aims. This could be achieved through a number of different measures. For instance, IIAs could be required to specify that only foreign investment that makes a contribution to economic development will be protected under an IIA. This was accepted in *Salini v. Morocco* and some tribunals and a few treaties have subsequently adopted this requirement.<sup>2</sup> In addition, IIAs should specify that a state's right to regulate any issue relating to the promotion of development aims, including the protection of human rights and the environment, is protected and should not be the subject of an investment arbitration.

Standards of treatment in IIAs should further carve out any issues relating to the protection of issues relating to the right to development. The standards of fair and equitable treatment and

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<sup>1</sup> See e.g. Barnali Choudhury, International Investment Law and Non-Economic Issues, 53 *Vanderbilt Law Review* 1 (2021)

<sup>2</sup> *Salini Costruttori SpA & Italstrade SpA v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (July 23, 2001).

prohibitions on expropriation, for instance, should specifically carve out any state regulations relating to development aims from their ambit.<sup>3</sup> This will prevent foreign investors from being able to challenge regulations with development aims in investment arbitration. In addition, all investment arbitrations should be staffed either by an arbitrator with expertise in the right to development or the tribunal should be required to consult with a development expert.

In addition, domestic investment laws should similarly prevent the entry of foreign investment which does not contribute to development. This should be assessed by a state agency which should be required to assess the contribution that a foreign business will make to a state's development against a priority list of development aims in the country.

### **How do businesses ensure that development projects do not result in environmental pollution and/or forced displacement of communities, including indigenous peoples?**

All businesses involved in development projects should be required to undergo an environmental impact assessment before the project is established. Businesses should be able to demonstrate that they will put in effective tools to mitigate environmental pollution by engaging in environmental due diligence.

Businesses should similarly be mandated to obtain free, prior, and informed consent by a community before establishing a project. The FPIC process should involve stakeholders from all aspects of the community.

Both of these processes could be specified in domestic law and be conditional upon the granting of licences or permits. Such licences or permits and the requirement to complete either an EIA or the FPIC process should be controlled by the local government rather than the federal government since the latter often has different development priorities than the former. These processes could also be specified in IIAs as well.

### **How can States and other actors (e.g., national human rights institutions, development finance institutions and businesses) provide effective remedies to individuals and communities alleging breach of the right to development?**

Apart from the growing trend of human rights or environmental due diligence initiatives which could enable domestic courts to provide remedies to affected individuals, it might be possible to have international tribunals provide remedies as well. This could be from an international tribunal specializing in the right to development to which an affected individual could bring a complaint against a business or a state. Or, it could be achieved by reconfiguring the international investment arbitration process. By reconfiguring such a process, states could bring development claims against foreign investors in international arbitration and then distribute any monetary award obtained through such a process to affected individuals.

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<sup>3</sup> For ways to do this, please see Choudhury, note 1.

I look forward to speaking more about these ideas in our meeting later this month.

Yours truly,

A handwritten signature in cursive script that reads "Barnali Choudhury".

Barnali Choudhury