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Report of the Special Rapporteur on the rights of indigenous peoples[*, **]

Note by the Secretariat

The report transmitted herewith provides an analysis of the impacts of international investment agreements, including bilateral investment treaties and investment chapters of free trade agreements, on the rights of indigenous peoples.

[*] The present document was submitted late so as to include the most up-to-date information possible.
[**] The annexes to the present report are reproduced in the language of submission only.

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I. Introduction

1. The present report is submitted to the Human Rights Council by the Special Rapporteur on the rights of indigenous peoples pursuant to Council resolutions 15/14 and 24/9. In the report, she provides a brief summary of her activities since her previous report (A/HRC/30/41) and offers a thematic analysis of the impact of international investment agreements on the rights of indigenous peoples.

II. Activities of the Special Rapporteur

A. Country visits

2. Since the thirtieth session of the Council, the Special Rapporteur carried out three official country visits — to Lapland in August 2015, Honduras in November 2015 and Brazil in March 2016 — the reports of which will be issued as addenda to the present report.

B. Report on environmental conservation measures

3. The Special Rapporteur will present a thematic report on environmental conservation measures and their impact on indigenous peoples' rights to the General Assembly at its seventy-first session.

III. International investment agreements

A. Background

4. In her 2015 report to the General Assembly (A/70/301), the Special Rapporteur concluded that the protections that international investment agreements provide to foreign investors can have significant impacts on indigenous peoples' rights. In order to gain further insights into the issue she sent questionnaires to States Members of the United Nations, indigenous peoples and civil society organizations and, in cooperation with the International Work Group for Indigenous Affairs, the Asia Indigenous Peoples Pact, the Columbia Center on Sustainable Investment and the Indigenous Peoples' International Centre for Policy Research and Education (Tebtebba), organized a series of regional and global consultations with indigenous peoples and experts in the area of international investment law and human rights.

5. This research indicates that there are significant impacts on indigenous peoples' rights as a result of the international investment regime, in addition to the impacts of the investments themselves. These impacts are manifested in the subordination of those rights to investor protections, generally as a result of a phenomenon referred to as regulatory chill and serious deficiencies in the dispute resolution process instituted by the investment regime.

6. The present report is the second of three that the Rapporteur dedicates to this issue. She has previously introduced the topic and touched on some of the impacts of international investment agreements on indigenous peoples' rights and the more systemic issues associated with the international investment law regime. In the present report, she seeks to further contextualize and examine those impacts by focusing on cases involving such

agreements and rights. In her final report, she will reflect on the standards of protections that those agreements afford and contextualize them in the light of developments in international human rights law and the sustainable development agenda as they pertain to indigenous peoples.

7. In doing so, the Special Rapporteur seeks to promote coherence in international investment law and international human rights law and ensure that State fulfilment of duties pertaining to indigenous peoples' rights is not obstructed by protections afforded to investors.

B. Overview of international investment agreements

8. The international investment regime consists of 3,268 international investment agreements, comprising almost 3,000 bilateral investment treaties and more than 300 investment chapters of bilateral or regional free trade agreements.[1] These agreements, between States, provide legal protections to investors of "home States" for their investments in "host States".

9. International investment agreements tend to follow a standard format, with provisions on: prohibiting expropriation or "regulatory taking" without compensation; national treatment or non-discrimination, meaning that foreign investors are treated no less favourably than domestic investors; "most favoured nation treatment", requiring the same standard of treatment available to other foreign investors; "fair and equitable treatment", or "minimum international standards of treatment", which can be very broad in scope, generally including protection of investors' "legitimate expectations";[2] and full protection and security for investments.

10. International investment agreements also typically provide investors with access to an investor-State dispute settlement process, whereby investors can bring arbitration cases against a host State for alleged failures to protect their investments in accordance with the provisions in the agreements. There is generally no obligation to exhaust domestic remedies or appeals system, and minimal transparency or opportunities for third-party intervention. Awards are enforceable through the acquisition of a State's overseas assets, are not subject to any financial limitations and can run into billions of dollars.

11. According to the United Nations Conference on Trade and Development (UNCTAD), cancellations or alleged violations of contracts and revocation or denial of licences are among the most commonly challenged State actions, with approximately 30 per cent of all settlements relating to the extractive and energy industries, which account for most new investments.[3] The majority of such cases are taken against States with significant populations of indigenous peoples in whose territories the exploited mineral, energy or forest resources are located.

12. Recent years have seen a growing number of megaregional free trade agreements, with scopes that extend far beyond trade to include investment and regulatory dimensions,

[1] See United Nations Conference on Trade and Development (UNCTAD), "Recent trends in international investment agreements and investor-State disputes", International Investment Agreement – Issues Note (February 2015), available from http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf.

[2] See UNCTAD, *Fair and Equitable Treatment*, Series on Issues in International Investment Agreements II (New York, 2012), available from http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf.

[3] See UNCTAD, "Recent trends".

essentially forming global economic structural agreements. The most recent is the Trans-Pacific Partnership. Its investment chapter, containing many of the standard provisions in the model bilateral investment treaty of the United States of America, is one of its most controversial features. It has been widely criticized, including by Special Rapporteurs, for limiting democratic space by effectively transferring public decision-making powers over economic, social and cultural governance to corporate actors.

IV. Indigenous peoples' rights

A. Overview

13. Under international human rights law, indigenous peoples are recognized as peoples vested with the right to self-determination, as affirmed in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, by virtue of which they are entitled to determine their own social, cultural and economic development. The rights affirmed under those treaties, which have been widely adopted, take on particular characteristics when interpreted in the light of indigenous peoples' distinct realities, needs, world views and historical contexts and the *jus cogens* prohibition of racial discrimination. The United Nations Declaration on the Rights of Indigenous Peoples offers the clearest articulation and interpretation of those rights as they pertain to indigenous peoples.

14. This is reflected in the jurisprudence of the United Nations human rights treaty bodies, which instruct States to use the United Nations Declaration on the Rights of Indigenous Peoples when implementing their treaty obligations. The treaties have also been interpreted by national and regional courts and commissions in Latin America and Africa in the light of the provisions of the Declaration and the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169), indicating the universal applicability of those instruments and signalling the emergence of customary international law in the area of indigenous peoples' rights.

15. The concept of "indigenous peoples" is not defined under international law. However, its generally accepted characteristics include: self-identification as an indigenous people; the existence of and desire to maintain a special relationship with ancestral territories; distinct social, economic or political systems from mainstream society, which may be reflected in language, culture, beliefs and customary law; and a historically non-dominant position within society. This applies irrespective of State nomenclature.

16. Indigenous peoples' territorial and property rights are *sui generis* in nature, encompassing the territories and resources that they have traditionally owned, occupied or otherwise used or acquired, including the right to own, use, develop and control resources. Those collective rights exist irrespective of State titles and are premised on: their status as self-determining peoples entitled to the lands and resources necessary for their physical and cultural survival; their customary land tenure regimes; and long-term possession of ancestral territories.

17. Consequently, States are obliged to establish culturally appropriate mechanisms to enable the effective participation of indigenous peoples in all decision-making processes that directly affect their rights. To ensure this, international human rights law standards require good-faith consultations to obtain their free, prior and informed consent.This requirement applies prior to the enactment of legislative or administrative measures, the development of investment plans or the issuance of concessions, licences or permits for projects in or near their territories.

18. Human rights bodies have consequently clarified that economic growth or national development cannot be used as a basis for non-consensual infringements on the territorial and cultural rights of indigenous peoples.[4] This is reinforced by the *erga omnes* nature of the right of all peoples to self-determination, the prohibition of racial discrimination and the fact that their protection is a matter of public interest.

B. Recognition and enforcement

19. Indigenous peoples are among the most marginalized and discriminated against groups in the world. The international framework protecting their rights emerged largely in response to that reality. Significant advances have been made in some jurisdictions in relation to the recognition of their rights, in particular in Latin America, and varying degrees of recognition are afforded in the domestic regulatory frameworks of other countries. However, throughout much of Asia and Africa, the rights recognized as pertaining to groups that meet the characteristics of indigenous peoples under international law tend to fall short of those recognized under international human rights law standards and, in many cases, the international law category "indigenous peoples" is not officially recognized.

20. Even in countries where international human rights law standards have been incorporated into domestic law, further steps are necessary to adjust the law to fully meet these international standards and ensure their enforcement. The associated "implementation gap" between law and practice is often symptomatic of power imbalances between vulnerable indigenous peoples and powerful political elites who seek to benefit from exploitation of resources found in their territories.

21. This power imbalance is generally mirrored in the relationship between institutions established to protect indigenous peoples' rights and those responsible for promoting and facilitating natural resource exploitation. Therefore, even in jurisdictions with advanced legal frameworks, deep-rooted structural discrimination and vested interests can render ineffective the legal protections afforded to indigenous peoples.

C. Business and indigenous peoples' rights

22. The Guiding Principles on Business and Human Rights affirm the independent corporate responsibility to respect indigenous peoples' rights as recognized in international human rights law. This responsibility is bolstered by the incorporation of the Principles into standards, such as the Organization for Economic Cooperation and Development (OECD) Guidelines on Multinational Corporations. A growing body of standards exists in relation to investment that affects indigenous peoples' lands, including performance standards of most international financial institutions, such as the International Finance Corporation, and apply to private banks that adhere to the Equator Principles, which require clients to respect indigenous peoples' rights, including free, prior and informed consent. The World Bank has included the requirement for such consent in its draft revised policy. However, other banks, such as the African Development Bank and the Brazilian Development Bank, have yet to develop safeguard policies for indigenous peoples.

23. The standards of a growing number of multi-stakeholder initiatives include respect for indigenous peoples' rights, as affirmed under the United Nations Declaration on the Rights of Indigenous Peoples, and consequently require free, prior and informed consent

[4] See CCPR/C/52/D/511/1992.

prior to approving or undertaking an investment. Some extractive industry bodies and companies sourcing palm oil, sugar, soy and other resources have also made policy progress towards the recognition of rights recognized in the Declaration, including the requirement for such consent, as has the United Nations Global Compact. Those developments reflect the general acknowledgement by transnational corporations of their responsibility to respect indigenous peoples' rights.

24. However, implementation of those commitments remains poor, and issues remain surrounding the interpretation of indigenous peoples' rights, in particular the right to give or withhold free, prior and informed consent.

25. Tackling the underlying issue of corporate participation in violations of indigenous peoples' rights would contribute significantly to addressing the current imbalance and incoherence in international law. Mechanisms have been proposed to address business and human rights, such as arbitration tribunals dedicated to providing a remedy for affected peoples and individuals. Discussions at the intergovernmental level on a treaty on business and human rights have also raised many of the issues witnessed in the context of promoting investor obligations under international investment agreements.

V. Impacts on indigenous peoples' rights of investments, international investment agreements and investor-State dispute settlements

A. Impact of investments on indigenous peoples

26. The Special Rapporteur's research reveals an alarming number of cases in the mining, oil and gas, hydroelectric and agribusiness sectors whereby foreign investment projects have resulted in serious violations of indigenous peoples' land, self-governance and cultural rights. Those violations, which can extend to crimes against humanity, have been addressed extensively in the recommendations and jurisprudence of international and regional human rights bodies.

27. Typically, the host States involved employ economic development policies aimed at the exploitation of energy, mineral, land or other resources that are predominantly located in the territories of indigenous peoples. The government agencies responsible for implementing those policies regard such lands and resources as available for unhindered exploitation and actively promote them as such abroad to generate capital inflows. Recognition of indigenous peoples' rights in the domestic legal framework is either non-existent, inadequate or not enforced. Where they exist, institutions mandated to uphold indigenous peoples' rights are politically weak, unaccountable or underfunded. Indigenous peoples lack access to remedies in home and host States and are forced to mobilize, leading to criminalization, violence and deaths. They experience profound human rights violations as a result of impacts on their lands, livelihoods, cultures, development options and governance structures, which, in some cases, threaten their very cultural and physical survival. Projects are stalled and there is a trend towards investor-State dispute settlements related to fair and equitable treatment, full protection and security and expropriation.

28. Despite significant developments in the recognition of indigenous peoples' rights and safeguards under international human rights law, investment in those sectors is generating "increasing and ever more widespread effects on indigenous peoples' lives"[5] as

[5] See A/HRC/24/41, para. 1.

the legal vacuum arising from the lack of recognition or enforcement of their land rights facilitates arbitrary land expropriation, enabling national and local officials to make those lands available for investment projects. At the same time, the vast majority of those lands are protected under international investment agreements, and related investor-State dispute settlement disputes in agribusiness and extractive sectors are expected in Africa and Asia, while in Latin America there is a growing number of claims concerning settlements in relation to such activities in or near indigenous territories.

29. Special Rapporteurs, United Nations treaty bodies and the Inter-American Commission on Human Rights have made numerous recommendations urging home States to adopt regulatory measures for companies domiciled in their jurisdictions aimed at preventing, sanctioning and remedying violations of indigenous peoples' rights abroad for which those companies are responsible or in which they are complicit.[6]

30. The Inter-American Commission on Human Rights has noted that addressing related jurisdictional issues may require negotiations between States during bilateral or other agreements and before foreign companies are accepted for business.

B. Impacts of international investment agreements and investor-State dispute settlements

31. International investment agreements can have serious impacts on indigenous peoples' rights as a result of three main interrelated issues: (a) the failure to adequately address human rights in the preambles and substantive provisions of such agreements; (b) the actual or perceived threat of enforcement of investor protections under investor-State dispute settlement arbitration, leading to regulatory chill; and (c) the exclusion of indigenous peoples from the drafting, negotiation and approval processes of agreements and from the settlement of disputes.

32. These potential impacts of international investment agreements must be considered in the light of the current inadequate recognition and lack of enforcement of indigenous peoples' rights in domestic legal frameworks. Such agreements, and investor-State dispute settlements, tend to block necessary advances and developments in domestic legal frameworks as they relate to investment activity. They limit the State's will and freedom to impose and enforce human rights obligations on transnational corporations and to progressively realize human rights. By entrenching investor protections, they also entrench rights-denying aspects of extant legislative frameworks and contribute to preventing the needed reform from a human rights perspective.

33. International human rights law and international investment agreements play significant roles in governing the behaviour of host States in relation to resource extraction in or near indigenous peoples' territories. Agreements serve to protect and regulate property rights of investors related to the exploitation or use of land and resources. Those rights can come into direct conflict with the pre-existing — but not necessarily formally recognized and titled — inherent customary law and possession-based property rights of indigenous peoples protected under international human rights law.

34. International human rights law recognizes that in certain contexts restrictions can be placed on indigenous peoples' property rights. However, to be legitimate, such restrictions must be: (a) established by law; (b) necessary; (c) proportional to their purpose; and (d) non-restrictive to the peoples' survival.[7] It affirms that, in the context of indigenous

[6] See A/HRC/24/41, para. 48, and CERD/CAN/CO/19-20, para. 14.

[7] See *Saramaka People v. Suriname*, Inter-American Court of Human Rights (2007).

peoples' property rights, these conditions imply that good-faith consultations must be held to obtain free, prior and informed consent before any measures affecting those property rights can be considered legitimate.

35. Inadequate respect and protections for indigenous peoples' land and free, prior and informed consent rights when granting rights to investors over their territories are the root causes for subsequent and broader violations of indigenous peoples' rights. In such contexts, international investment agreements that fail to recognize international human rights law obligations contribute to the subordination of indigenous peoples' rights to investor protections, as those protections become an obstacle to future recognition of indigenous peoples' pre-existing rights.

36. In order to address the perverse situation that arises when indigenous peoples are prevented from realizing their land and resource rights owing to protections afforded to investors, a former Special Rapporteur has stressed:

> That resolving [indigenous peoples'] land rights issues should at all times take priority over commercial development. There needs to be recognition not only in law but also in practice of the prior right of traditional communities. The idea of prior right being granted to a mining or other business company rather than to a community that has held and cared for the land over generations must be stopped, as it brings the whole system of protection of human rights of indigenous peoples into disrepute.[8]

37. International investment agreements that have facilitated and protected investments in indigenous territories are often accompanied by the deployment of military and private security services. The effects of this are a major concern in many jurisdictions, in particular those with histories of low-intensity conflict. As a result, under international human rights law, and as reflected in article 30 of the United Nations Declaration on the Rights of Indigenous Peoples, military activities should not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed to or requested by the indigenous peoples concerned.[9] However, such security presences are effectively mandated under certain existing interpretations of the provisions of such agreements on full protection and security, leading to a direct conflict between international investment law and international human rights law.

38. In some cases, international investment agreements, and measures deemed necessary to facilitate their implementation, have triggered large-scale conflict and significant loss of life. On 1 January 1994, when the North American Free Trade Agreement came into effect and triggered privatization of indigenous peoples' communal lands, the Zapatista National Liberation Army, composed of indigenous peoples from Chiapas, initiated an armed rebellion, calling the Agreement a "death sentence" for indigenous peoples.

39. Some 14 years later, the free trade agreement between the United States and Peru was used as a pretext for a series of neo-liberal legislative decrees, 10 of which had seriously negative implications for Amazonian indigenous peoples' territorial rights. The refusal of the Government of Peru to accept proposals made by indigenous peoples triggered mobilization, resulting in the tragic deaths of 30 people when the military was deployed in response.

40. Consideration of investor-State dispute settlement claims where indigenous peoples' rights are involved affords the opportunity to assess the practices of tribunals, the

[8] See E/CN.4/2003/90/Add.3, para. 67 (e).
[9] See A/HRC/24/41/Add.3, para. 50.

arguments made by States and investors and the space available for indigenous peoples' participation and the ways in which international investment agreements can come into conflict with international human rights law.

C. Examples of investor-State dispute settlements involving indigenous peoples' rights

41. In the International Centre for Settlement of Investment Disputes case *Burlington Resources Inc. v. Ecuador* (2010)[10] the oil and gas company claimed that Ecuador had failed to meet its obligations to give its operations full protection and security against indigenous peoples' opposition and at times violent protests. The State argued that the indigenous peoples' actions had been a case of force majeure and did not address the issue of indigenous peoples' rights in its defence. The security aspect of the claim was rejected on procedural grounds without addressing the indigenous rights issues. The case was also subject to parallel consideration by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights . In 2012, the Court ruled that the failure to consult the indigenous peoples and obtain their free, prior and informed consent, and the use of force by the State, had put the indigenous peoples' survival at risk.[11]

42. In *Chevron v. Ecuador* (2014), the company took a series of arbitration cases to avoid paying damages awarded by Ecuadorian courts in 2011. The $8.6 billion award followed a class action suit addressing harms suffered by indigenous peoples as a result of environmental contamination. The case demonstrates the extremely broad and potentially indigenous rights-denying interpretation of "investment" as including a lawsuit in domestic courts and payments to affected people arising from the lack of remediation. Precautionary measures were subsequently sought from the Inter-American Commission on Human Rights seeking to prevent any action arising from the investor-State dispute settlement award that would contravene, undermine, or threaten the human rights of the concerned indigenous communities.

43. In *Von Pezold and Border Timbers v. Zimbabwe* (2015), the company claimed expropriation under the bilateral investment treaties between Germany and Zimbabwe and between Switzerland and Zimbabwe in the context of the State's taking of land. Four indigenous communities, whose traditional lands were the subject of proceedings, submitted an amicus submission claiming that the State and the company had human rights obligations towards them. In its preliminary order of June 2012, the International Centre for Settlement of Investment Disputes tribunal acknowledged their claims to the lands and that its determinations may well have an impact on the interests of the indigenous communities. However, the tribunal rejected their amicus submission on the grounds that: (a) the communities and their chiefs lacked "independence", as they were associated with people affiliated to the Government, and therefore the claimants may be unfairly prejudiced by their participation; (b) it was not in a position to decide if they were indigenous or not and lacked the competence to interpret indigenous peoples' rights; (c) it was not persuaded that consideration of international human rights law obligations, including, article 26 of the United Nations Declaration on the Rights of Indigenous Peoples was part of its mandate, and rules of general international law did not necessarily extend to international human rights law; and (d) neither the State nor the company had raised indigenous rights issues. It concluded that the putative rights of the indigenous communities as "indigenous peoples" under international human rights law was a matter outside of the scope of the dispute.

[10] *Burlington Resources Inc. v. Ecuador* Decision on Jurisdiction (2010).

[11] *Sarayaku v. Ecuador*, Inter-American Court of Human Rights (2012).

44. In *Glamis Gold v. United States* (2009), an arbitration panel found against the company, which had been refused access to a sacred area of the Quechan tribal nation. The decision hinged on the tribunal's position that its role was to assess if the customary international law standard of fair and equitable treatment had been breached and not to assess if the State had fairly balanced the competing rights of the Quechan nation and the company. It held that the State had been justified in relying upon the opinion of the professionals it had engaged and that, as the investor's expectations had not been induced by the State in a quasi-contractual manner, they did not trigger a treaty breach. The decision also pointed to the significance of the highly regulated environment in California with respect to environmental measures in general and mineral exploration in particular, which should have tempered the investor's expectations. The tribunal accepted the Quechan amicus submission but did not engage with its argument that international human rights law as it pertained to indigenous peoples was applicable in the case.

45. In *Grand River Enterprise Six Nations, Ltd. v. the United States* (2011), a tobacco company owned by members of the Canadian Haudenosaunee nations challenged measure taken by the United States. One of the issues raised by the company was the absence of prior consultation in relation to some of the measures. While finding that no expropriation had occurred, the tribunal stated that it may well be that there does exist a principle of customary international law requiring governmental authorities to consult indigenous peoples as collectivities on governmental policies or actions significantly affecting them. As the enterprise was owned by individuals, the tribunal held that it did not have to address the issue of prior consultation. It did, however, add that a good case could be made that consultations should have occurred with governments of the native American tribes or nations in the United States, whose members and sovereign interests could, and apparently are, being affected by the measures to regulate commerce in tobacco.[12]

46. In the Permanent Court of Arbitration case *South American Silver Mining v. the Plurinational State of Bolivia*, the company is seeking $387 million for the alleged expropriation of 10 mining concessions and violations of fair and equitable treatment, pursuant to the bilateral investment treaty between the United Kingdom of Great Britain and Northern Ireland and the Plurinational State of Bolivia. The company holds that it made legitimate efforts with the communities to achieve an overall consent and that opposition to the project is from a small group of illegal miners and certain indigenous organizations, with the Government fomenting conflict. It argues that the communities have repeatedly requested it to move forward with the project, and alleges that the Plurinational State of Bolivia failed to provide full protection and security, noting its "patently unreasonable" decision not to prosecute indigenous leaders, given the implications for its investment.[13]

47. The Plurinational State of Bolivia responded that: (a) it had acted in the public interest and had been justified in reverting ownership to the State in accordance with the principles of proportionality and necessity, to avoid security concerns arising out of indigenous peoples' opposition to the project and to restore public order; (b) it was enforcing domestic legislation that should have tempered the company's legitimate expectations, as the State made no commitment to stability; (c) the project violates rights recognized in the United Nations Declaration on the Rights of Indigenous Peoples; (d) the company had attempted to fabricate consent in total disregard for the right to self-government of the concerned indigenous peoples; (e) the bilateral investment treaty had no applicable law clause, so there should be "systemic interpretation" in accordance with article 31 (3) (c) of the Vienna Convention on the law of treaties, including human rights

[12] See *Grand River Enterprises Six Nations, Ltd. v. United States*, paras. 210 and 212, available from www.state.gov/documents/organization/156820.pdf.

[13] See notice of arbitration and claimant's reply, available from https://pcacases.com/web/view/54.

obligations towards indigenous peoples under national and international law, as this would be consistent with the evolving nature of standards around fair and equitable treatment, full protection and security, arbitrariness and expropriation; and (f) customary international law recognizes the primacy of human rights over investor protections, citing the ruling of the Inter-American Court of Human Rights in *Sawhoyamaxa v. Paraguay* and Article 103 of the Charter of the United Nations.[14]

48. In response, the company contends that: (a) the State failed to show how the systemic interpretation would result in having to degrade the protections granted to the company under the treaty to uphold the putative rights of indigenous communities under international law; (b) the United Nations Declaration on the Rights of Indigenous Peoples, OECD Guidelines and the Guiding Principles on Business and Human Rights are non-binding instruments, while the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), the Inter-American Commission on Human Rights and the jurisprudence of the Inter-American Court of Human Rights are not binding on the United Kingdom, and consequently they are not rules of international law applicable to relations between the parties; (d) the State failed to demonstrate that protection of indigenous peoples' rights had advanced to the level of "*erga omnes* obligations" or why human rights trump investor protections.

49. The company invoked the view of Canada in *Grand River Enterprise Six Nations, Ltd. v. the United States* (see para. 48) that the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169) and the United Nations Declaration on the Rights of Indigenous Peoples do not form part of customary international law, and the decisions of previous tribunals in *Glamis Gold v. United States* (see para. 47) not to rule on the applicability of indigenous rights and in *Von Pezold and Border Timbers v. Zimbabwe* (see para. 46) that indigenous rights do not fall under the scope of bilateral investment treaties. The company holds that an exception maintaining preference for indigenous peoples' rights over investor protections would be necessary to "degrade" investor protections and points to the standard Maori exception employed in the bilateral investment treaties of New Zealand as evidence of this.[15]

50. In the International Centre for Settlement of Investment Disputes case *Bear Creek Mining Corp. v. Peru*, the company is claiming over $500 million for alleged indirect expropriation, lack of fair and equitable treatment, discrimination and lack of full protection and security for its presumptive mining rights at the Santa Ana concession, under the free trade agreement between Peru and Canada. The claim was made following indigenous peoples' protests, which gave rise to the withdrawal of its mining concession.

51. According to the company, the protests, some of which turned violent, were politically motivated involving an anti-foreign and anti-mining movement that gained support from the Aymara indigenous people. It claims that, rather than assess the social and environmental conditions, the Government of Peru acted out of political expediency and capitulated to extreme violence. The company states that it intended to comply with environmental permitting and corporate social responsibility and had consulted the indigenous communities that supported the project and that would benefit significantly as a result of employment and revenues.[16]

[14] See claimant's reply to respondent's counter-memorial, available from https://pcacases.com/web/view/54.

[15] Ibid.

[16] See claimant's memorial on the merits, available from https://icsid.worldbank.org/apps/icsidweb/cases/pages/casedetail.aspx?CaseNo=ARB/14/21&tab=DOC.

52. The State's response addressed the nature of the investment, the necessity of its actions and the absence of adequate consultation and free, prior and informed consent. It argued that the project had not constituted an investment as permissions to proceed were still pending, including the approval of the environmental social impact assessment. Consequently, the company had never held rights to mine. The indigenous peoples' protests had paralyzed major cities in Puno, Peru, for more than a month and the violent social unrest had been due to deep-rooted indigenous community opposition to mining activities and not, as the company alleged, "puppet shows staged by politicians" or "political theatre". It states that the revocation of the concession had therefore been a non-discriminatory and necessary exercise of its police powers aimed at guaranteeing public safety.[17]

53. Addressing the consultation and consent requirements, the State argues that the company had been responsible for engaging with and learning the concerns of the indigenous peoples affected by the project but had failed to consult with and obtain the consent of all the affected indigenous peoples and communities, as it had been required to do under relevant international human rights law standards, Peruvian law, practices recommended by the Government of Canada and the International Council on Mining and Metals guidelines. In that regard, it argues that Peruvian law serves to implement the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), which requires prior consultation and in practice is a "consent" requirement. It states that it was incumbent on the company not only to go through the motions of consulting with affected indigenous communities, and that it must in fact obtain prior approval as, without that approval or consent, the project cannot succeed. It also states that the company would not have obtained consent had the months of violent protests in opposition to it been predicted. Instead, the company's support had come from a handful of communities in the area of influence of the project and not from the neighbouring communities that would also be affected by the project and who opposed it. This selective and divisive approach to consultation served to fuel discontent and conflict with cross border implications.[18]

54. The Colombia Centre on Sustainable Investment submitted an application to file a written submission in the case, but was denied by the tribunal.[19] The amicus submission had pointed to the inconsistency between the investor's understanding of what is meant by "an investment" and the definition in the free trade agreement. Furthermore, it had raised the consequent non-applicability of the fair and equitable treatment standard and the failure to demonstrate legitimate expectations, even if that standard had been applied. Similarly, it had pointed to the central role that the requirement to seek and obtain free, prior and informed consent should play in the assessment of the facts and the determination of the award, and the urgency of ensuring compliance with this requirement, in the light of the extensive mining-related social conflict throughout Peru. According to the submission, providing compensation to the company would be equivalent to granting it a right to exploitation and would disregard indigenous peoples' rights.

D. Observations on investor-State dispute settlements

55. A number of observations can be made with regard to the above cases. Firstly, in all of the cases where an award was issued, international human rights law as it pertains to indigenous peoples' rights was not considered a source of applicable law. With the

[17] See respondent's counter-memorial on the merits and memorial on jurisdiction, available from https://icsid.worldbank.org/apps/icsidweb/cases/pages/casedetail.aspx?CaseNo=ARB/14/21&tab=DOC.

[18] Ibid.

[19] See http://ccsi.columbia.edu/work/projects/participation-in-investor-state-disputes/.

exception of *Glamis Gold v. United States*, indigenous peoples' rights and interests were effectively ignored by tribunals and considered immaterial to proceedings, despite the fact that violations of their rights and efforts to assert them had been core issues underpinning the disputes in question, and the decisions could have had potentially profound impacts on their rights and well-being.

56. The decision in that case is regarded as forward-looking in terms of ensuring respect for the protection of indigenous peoples' sacred spaces and demonstrating that awards can be sensitive to and inclusive of indigenous peoples' issues. The tribunal's decision that a 50 per cent reduction in the projected earnings, arising from a measure aimed at protecting indigenous peoples' sacred places, did not constitute indirect expropriation and that the measures did not constitute a "manifestly arbitrary" denial of justice, supports this view.

57. However, the tribunal essentially ignored the position articulated in the Quechan nation amicus submission that international human rights law as it pertained to the rights arising in the case should be considered applicable law. A related critique is that the tribunal relied heavily on the robust legislative history in California relating to the environment in the determination of what constituted an investor's legitimate expectation, thereby setting a dangerous precedent in jurisdictions that do not have such a history.

58. How a tribunal would respond to such an argument is unknown. An alternative argument could be that, in States where the rule of law is weak, legislative reform to respect human rights is inevitable once the political environment matures sufficiently. As State obligations in relation to indigenous peoples exist under international human rights law, a reasonable investor should expect that they will eventually be implemented, as any expectation that they will not is blatantly unjust and lacks legitimacy. A clearer position on behalf of the tribunal, that a State maintains the right to regulate in order to protect its indigenous peoples' rights, as recognized under international human rights law, would have avoided this ambiguity.

59. One reason provided for the failure of tribunals to address indigenous rights was the State's failure to raise human rights issues in its arguments, a view also expressed by tribunals in other cases. This contrasts with the pending cases of *Bear Creek Mining Corp. v. Peru* and *South American Silver Mining v. the Plurinational State of Bolivia*, in which the States place significant emphasis on indigenous peoples' rights, in particular consultation and free, prior and informed consent rights, as meriting consideration by the tribunals. This development points to a potential synergy between affording protection to indigenous peoples' rights in domestic regulation and international investment agreements and reducing the risk of potentially costly lawsuits in the context of measures affecting investor protections.

60. These cases also raise important issues regarding corporate and State responsibilities in relation to consultations seeking to establish the free, prior and informed consent of indigenous peoples, and the relationship that such consent has in establishing an investment over which an investor can claim protection. In doing so, the cases give tribunals an opportunity to address an issue of fundamental importance to indigenous peoples' rights and to ensuring greater coherence between the international investment law and international human rights law. An overarching issue that arises relates to the role of corporate human rights due diligence in determining legitimate expectations in contexts where social conflict and rights violations appear inevitable in the absence of free, prior and informed consent.

61. The cases also illustrate the frequent tensions that arise between the international human rights law and international investment law regimes. In *Burlington Resources Inc. v. Ecuador*, the contrast is striking between the findings of the Inter-American Court of Human Rights that the State used unnecessary and excessive force against the indigenous

peoples, thereby threatening their existence, and the claim by the company involved in the investor-State dispute settlement that the State had not used sufficient force to protect its investment from those indigenous peoples, with neither the company nor the State seeing fit to address indigenous peoples' rights in their arguments.

62. The number of investor-State dispute settlement cases involving indigenous peoples' rights is growing, a fact that could be related to the speculative nature of such settlements, which encourages investors, in particular risk-taking extractive companies, to seek ever broader interpretations of the protections surrounding international investment agreements. Similarly, the expectation among risk-adverse States that the trend will continue reduces the probability that States will take urgently needed measures to recognize, protect, respect and fulfil indigenous peoples' rights, including by addressing historical injustices in relation to land claims.

63. The Inter-American Court of Human Rights decision in *Sawhoyamaxa indigenous community v. Paraguay* is illustrative of this.[20] The State argued that it could not implement land restitution programmes aimed at guaranteeing indigenous peoples' rights because of protections afforded to investors under its bilateral investment treaty with Germany. The Court ruled that the treaty had to be interpreted in the light of the State's human rights obligations and that the taking of land for restitution to indigenous people could be justified as a "public purpose or interest". While it is one of the few cases that has attempted to reconcile obligations under international investment law and international human rights law, it offers no guidance on the extent to which the investor should be compensated or what considerations should determine when compensation is or is not required. This points to the need for further guidance from human rights bodies on these matters.

64. The limited and inconsistent role that tribunals attribute in their deliberations to amicus submissions of indigenous peoples also emerges from the cases. The basis in *Von Pezold and Border Timbers v. Zimbabwe* for rejecting the amicus submission raises a number of profound concerns should it guide future tribunals, as South American Silver suggests it should.

65. The notion that indigenous peoples must demonstrate "independence" from the State in relation to matters pertaining to their rights is inconsistent with the State's role as the duty-bearer in relation to those rights. Equally alarming, and contrary to international human rights law, is the tribunal's dismissal of the fundamental role of self-identification in the determination of what constitutes an indigenous people.

66. The tribunal essentially distanced itself from any damage that its decision could have on indigenous rights, acknowledging that its ruling could affect those rights but holding that they were outside the scope of the dispute and not part of the applicable law. This amounts to the subordination of indigenous peoples' rights to investor protections, with no option provided for participation or appeal. Such arguments go to the core of the legitimacy crisis that the international investment law system is facing. Justifications based on a lack of competence in relation to indigenous rights are further evidence of the system's deficiencies.

67. All of the above reflects the fact that, at its core, the investor-State dispute settlement system is adversarial and based on private law, in which affected third-party actors, such as indigenous peoples, have no standing and extremely limited opportunities to participate. Amicus submissions and participations at the request of States are grossly inadequate in a context where States and investors are involved in causing and benefiting from harm to indigenous peoples' rights.

[20] See www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf.

68. In their responses to questionnaires, a number of States pointed to the approach adopted by the European Union, which is to a degree reflected in chapter 8 of the Comprehensive Economic and Trade Agreement between Canada and the European Union, as a step towards reforming dispute resolution systems. Among its improved features is a revised model for appointing State party-nominated arbitrations, eliminating conflicts of interest arising from arbitrators who also act as council and expert, and gaining access to a full appellate review after awards have been rendered. The approach of Brazil in its recent bilateral investment treaties, which do not provide access to investor-State dispute settlements and instead rely on a combination of mediation and diplomatic approaches and State to State arbitration, is also noteworthy.

69. In addition to acknowledging the need to reform dispute resolution systems, States emphasized the need to guarantee the regulatory space necessary for the realization of indigenous peoples' rights, including the requirement for prior consultation with the objective of free, prior and informed consent. The responses suggest that the intent and expectation of home and host States when entering into international investment agreements was not to place limitations on their ability to fulfil indigenous peoples' rights, the presumption being that the State maintains the right to regulate without facing compensation demands and that, where necessary, protections afforded to investors must be balanced in a proportionate manner against the duty to protect indigenous peoples' rights. The Special Rapporteur encourages more States to respond to her questionnaires, which are available in English, French and Spanish and will inform her final report on the issue.

VI. Trans-Pacific Partnership

70. In 2015, the Trans-Pacific Partnership agreement was signed by 12 countries from three continents that, together, account for a large part of global trade. Of those countries, 11 have significant populations of indigenous peoples, a growing number of which are negatively affected by large-scale foreign investment projects in their territories. Those peoples have expressed their concerns in relation to the lack of protections for their rights vis-à-vis those of foreign investors, and the imbalance in remedies. They have also criticized the absence of consultation in the negotiation of the Partnership and the lack of any human rights impact assessments. As pointed out by the Waitangi Tribunal, the failure to adequately consult on the Partnership "harms the relationship [with indigenous peoples] and increases the probability of a low-trust and adversarial relationship going forward".[21] In that regard, indigenous peoples are demanding good-faith consultations prior to ratification as they fear that, unless adequate protections are included, the Partnership will facilitate projects and activities that lead to further conflict and serious violation of rights to lands, territories and natural resources, including their rights to traditional knowledge.

71. The Trans-Pacific Partnership includes no reference to human rights. While it does refer to the right to regulate in relation to "environmental, health or other regulatory objectives", it qualifies this by holding that measures have to be "consistent with" its investment chapter, effectively reducing the scope of this right to that determined by expansive interpretations of broad investment protections.[22]

[21] See Waitangi Tribunal report on the Trans-Pacific Partnership (pre-publication version), available from https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_104833137/Report%20on%20the%20TPPA%20W.pdf.

[22] See Trans-Pacific Partnership, article 9.15, available from https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

72. The Maori of New Zealand are the only indigenous people addressed in the exception chapter.[23] The provision permits "favourable treatment to Maori" and excludes interpretation of the Treaty of Waitangi from investor-State dispute settlements. However, the Maori regard the exception to be inadequate.[24] Having expressed its concerns in relation to the potential impacts of investor-State dispute settlements, the Waitangi Tribunal recommended that the Maori participate in the appointment of arbitrators where their rights are affected.

73. Implicit in the Maori Trans-Pacific Partnership exception is the recognition that their rights, and by extension those of other indigenous peoples, can be negatively affected by investor protections under the Partnership and its investor-State dispute settlement mechanism. So too is the fact that those protections afforded to the Maori under the exception are essentially denied to all other affected indigenous peoples owing to the absence of exceptions for them.

74. One of the issues that indigenous peoples have highlighted in relation to the Partnership is its impact on their control over their traditional knowledge, as the rights of corporations that hold intellectual property rights are strengthened in the relevant chapter of the Partnership, while traditional knowledge rights that fall outside of the intellectual property regime are afforded no protection. Experience to date demonstrates that, in the absence of adequate safeguards, traditional knowledge can be commercialized. Similar concerns exist in relation to genetic resources and biodiversity.

75. An exception, allowing parties to take measures in relation to traditional knowledge in accordance with their international obligations, is included in the exception chapter, but in practice it can be ignored or interpreted to have little relevance by arbitrators. Requirements under international human rights law and international environmental law in relation to equitable benefit sharing and a general requirement for free, prior and informed consent of indigenous peoples were not included in the Trans-Pacific Partnership, with consent only referenced where national law already requires it.

76. The effects of the Trans-Pacific Partnership, whereby investor rights are entrenched and indigenous rights are constrained, could have a particularly profound impact on indigenous peoples in the many resource-rich Partnership countries, given the huge number of extractive industry, forestry, palm oil and energy companies based in Australia, Canada, Malaysia, New Zealand and the United States. These resources are often in areas of ongoing dispute and conflict between indigenous peoples and foreign investors.

VII. Conclusions and recommendations

A. Conclusions

77. **Foreign investment can contribute to economic growth and development. However, there is a long-standing debate as to the conditions necessary for developing countries to benefit from such investment, and the extent to which international investment agreements facilitate those conditions.**[25]

[23] Ibid., article 29.6.

[24] See Waitangi Tribunal (note 21 above).

[25] See K. Mohamadieh and M. Montes, "Throwing Away Industrial Development Tools: Investment Protection Treaties and Performance Requirements", in *Investment Treaties: Views and Experiences from Developing Countries* (South Centre, Geneva, 2015).

78. **Modern international public order requires development to be sustainable and consistent with human rights and democratic principles. While some initial steps have been taken to attempt to incorporate those policy objectives into international investment agreements, through reference to the unencumbered right of the State to regulate in the public interest in the preambles and substantive provisions of model bilateral investment treaties, references to human rights in those agreements are rare and the broader response of the international investment law regime to date has been inadequate. Its legitimacy continues to be questioned as a result.**

79. **The research that the Special Rapporteur conducted in preparing the present report, including workshops and questionnaires, indicates that foreign and domestic investment has a serious impact on indigenous peoples' rights, even in the absence of international investment agreements. Guaranteeing indigenous peoples' rights will therefore require not only reforms within the international investment law regime, but also far more proactive engagement on the part of States in terms of realizing their human rights obligations. However, her research also indicates that such agreements can, and in a growing number of contexts do, compound, contribute to and exacerbate those serious impacts.**

80. **As concluded by the Waitangi Tribunal in the context of the Trans-Pacific Partnership, even when an exception is included with the intention of protecting indigenous peoples' rights:**

> **We are not in a position to reach firm conclusions on the extent to which investor-State dispute settlements under the Trans-Pacific Partnership may prejudice Maori Treaty rights and interests, but we do consider it a serious question worthy of further scrutiny and debate and dialogue between the Treaty partners. We do not accept the Crown's argument that claimant fears in this regard are overstated.**[26]

81. **Harmonizing international investment law with international human rights law is a fundamental precondition to addressing this legitimacy crisis, to respecting indigenous peoples' rights and to ensuring a coherent body of international law. By ensuring that international investment agreements do not restrict regulatory space, and by taking measures to protect indigenous peoples' rights in the context of investor activities, States can prevent costly investor-State dispute settlement cases and eliminate uncertainty around the limits that international investment law places on both State and indigenous peoples' sovereignty. In addition, by invoking international human rights law arguments in settlement disputes, States will increase the pressure on investors to conduct adequate human rights due diligence prior to initiating settlement disputes.**

82. **A synergy therefore exists between protecting the State's right to regulate in the public interest and ensuring the protection of indigenous peoples' rights, as recognizing indigenous peoples' rights provides a means through which States can limit the abrogation of control over decisions pertaining to natural resources to foreign investors and to tribunals charged with protecting their interests.**

83. **The Special Rapporteur believes that it is possible to develop a system of international investment law that reduces risk to indigenous peoples' rights and serves to benefit them and the State, while providing greater investment security to foreign investors. Both short- and longer-term reforms, at the level of international investment law and in domestic regulatory frameworks of home and host States, and**

[26] See Waitangi Tribunal (note 21 above).

in the policies, practices and obligations of investors, will be necessary in order to realize this.

84. **Strong arguments exist for radically reforming the system of investor-State dispute settlements and to reform the investment dispute system. Mechanisms aimed at resolving disputes between investors and States that extend to affected communities and individuals through the use of fact-finding and mediation, and possibly through judicial powers, modelled on a body such as the Inter-American Court of Human Rights, have been proposed.**

85. **The outdated belief of States that they are in a position to guarantee security for investors while ignoring the human rights of indigenous peoples must be debunked. Investors must take responsibility for assessing the social and political risk associated with their investments. Otherwise, their expectations cannot be legitimate. Dispute resolution systems can no longer exclude those who are most affected by the disputes they purportedly resolve, otherwise their awards lack legitimacy. Full and effective participation of indigenous peoples in accordance with their right to give or withhold consent, together with ensuring equity of remedies, are key principles in moving beyond the current unbalanced and incoherent system. The Special Rapporteur encourages cooperation and creative thinking in that regard and looks forward to developing her final report, in which she will examine the interplay of investor protections and indigenous peoples' rights and consider how human rights and sustainable development approaches can help inform the future of international investment law.**

B. Recommendations

Contents of international investment agreements

86. **International investment agreements must include properly constructed clauses in relation to the right to regulate. These clauses should:**

(a) **Avoid the use of qualifying language with respect to the right to regulate in the public interest;**

(b) **Preserve that right in a manner explicitly consistent with the State duties to protect, respect and fulfil indigenous peoples' rights in accordance with international law obligations, including international human rights law;**

(c) **Apply to all investor protection standards, such as fair and equitable treatment, full protection and security and indirect expropriation;**

(d) **Be explicit that bona fide measures in the pursuit of human rights do not constitute a breach of international investment agreements and are non-compensable.**

87. **Mechanisms should be developed to amend existing international investment agreements to include the right to regulate and to mandate respect for human rights.**

88. **International investment agreements should include respect for human rights as a policy objective in their preambles.**[27]

[27] See, for example, the model bilateral investment treaty agreements of Norway, the International Institute for Sustainable Development and South African Development Community.

89. **Where the right to regulate is not sufficiently protected in international investment agreements, general exceptions for measures aimed at the promotion of equality and addressing long-term historic discrimination, or specific exceptions and investor-State dispute settlement carve-outs in relation to measures addressing indigenous peoples' rights, should be included.**[28] **Specific exceptions should be developed in cooperation with indigenous peoples.**

90. **Jurisdiction clauses should prohibit claims taken:**

(a) **In relation to investments that do not comply with the law, including international human rights law;**

(b) **By shell or mailbox companies established in jurisdictions purely or primarily to take advantage of such protections in international investment agreements.**

91. **Investment protection, such as fair and equitable treatment, full protection and security and expropriation prohibitions, should only apply to established investments. They should not apply before consultations have been conducted to obtain indigenous peoples' free, prior and informed consent or before contractual agreements are entered into with the concerned indigenous peoples.**

92. **International investment agreements and interpretative text should entitle States to file counterclaims for affirmative relief arising from investor interference with their obligations under international human rights law.**

Negotiation process

93. **In accordance with the recommendations of the Special Rapporteur in her 2015 report to the General Assembly (A/70/301):**

(a) **Appropriate consultation procedures and mechanisms should be developed in cooperation with indigenous peoples in relation to the drafting, negotiation and approval of international investment agreements, and their right to consultation should be guaranteed prior to the ratification of the Trans-Pacific Partnership;**

(b) H**uman rights impact assessments should be conducted of all trade and investment agreements, following the impact assessments carried out as part of the Guiding Principles on Business and Human Rights developed by the Special Rapporteur on the right to food.**

94. **States should negotiate international investment agreements in accordance with their international cooperation obligations under the International Covenant on Economic, Social and Cultural Rights and in keeping with the "clean hands" doctrine in relation to indigenous peoples' rights.**

95. **States should negotiate international investment agreements in accordance with their international cooperative on obligations under international human rights law, and in keeping with the "clean hands" doctrine, through the conduct of human rights impact assessments, appropriate due diligence and knowledge generation in relation to all potential impacts on indigenous peoples' rights, both at home and abroad.**

[28] See the model bilateral investment treaty of the International Institute for Sustainable Development.

Investment dispute settlement

96. **Investment dispute settlement bodies addressing cases having an impact on indigenous peoples' rights should promote the convergence of human rights and international investment agreements by:**

(a) **Adopting approaches based on international human rights law when weighing up all rights related to a given dispute, addressing issues of necessity based on human rights imperatives such as the elimination of racial discrimination, applying the principle of proportionality and acknowledging the profound impacts of large-scale projects on indigenous peoples' self-determination rights and well-being;**

(b) **According due consideration to international human rights law when interpreting investment protections and the definition of an investment and ensuring that their decisions respect the State's duty to regulate under that law, irrespective of whether the right to regulate is explicitly affirmed in the relevant international investment agreements;**

(c) **Taking into account the human rights responsibilities of investors as outlined in the Guiding Principles on Business and Human Rights;**

(d) **Ensuring that applicable law includes all international human rights law treaties ratified by either State party, and the United Nations Declaration on the Rights of Indigenous Peoples as an interpretative guide for their application to indigenous peoples;**

(e) **Attaching weight to the legitimate expectations of States in relation to their ability to protect indigenous peoples' rights;**

(f) **Recognizing the right of intervention of the indigenous peoples concerned through amicus submissions and by according full consideration to their arguments;**

(g) **Interpreting investor State contract clauses, including stabilization clauses, covered by such agreements through umbrella clauses, in a manner that does not place limitations on the State's ability to protect indigenous peoples' rights;**

(h) **Being cognizant of foreign corporations' contribution to violations of indigenous peoples' rights and the jurisdictional, financial, cultural, technical, logistical and political obstacles facing indigenous peoples when attempting to hold them to account;**

(i) **Avoiding awards that contribute to regulatory chill in relation to indigenous peoples' rights or effectively endorse corporate involvement in indigenous rights' harms;**

(j) **Refusing to accept commercial confidentiality in all but the most extreme situations as a barrier to transparency in the context of regulatory actions related to fundamental human rights.**

97. **States should:**

(a) **Promote the above practices through interpretative text;**

(b) **Ratify the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration;**

(c) **Appoint arbitrators with knowledge of indigenous peoples' rights and cooperate jointly to interpret relevant international investment agreements in relation to indigenous peoples' rights;**

(d) **Avoid including umbrella clauses in bilateral investment treaties;**

(e) **Strengthen their human rights arguments when responding to investor-State dispute settlement claims, emphasizing their duty to regulate in order to protect indigenous peoples' rights and the corporate responsibility to respect those rights.**

Corporate obligations

98. **International investment agreements should:**

(a) **Address the corporate responsibility to respect human rights, including the requirement to conduct human rights due diligence, and to prevent, mitigate and remedy human rights' harms in which they may be involved, in particular in relation to vulnerable groups such as indigenous peoples;**

(b) **Protect only bona fide investments. If evidence exists of inadequate human rights due diligence or corporate contribution to indigenous rights harms, there should be express provisions for the denial of the benefits of investor protection in terms of access to investor-State dispute settlements through a duty on tribunals to decline jurisdiction, with mechanisms to vitiate corporate rights in such contexts;**

(c) **Require public reporting by corporations in relation to the potential impact of their operations on indigenous peoples' rights and measures taken to prevent and mitigate such impacts.**

99. **States should consider:**

(a) **Incorporating the provisions of international investment agreements in relation to corporate responsibility into domestic law to enable their enforcement;**

(b) **Developing a mechanism for reviewing corporate compliance with their responsibility to respect human rights, drawing from existing processes, including United Nations treaty and charter bodies, OECD national contact points and international financial institutions' inspection panels, with a view to ensuring due weight is given to findings in any related investment dispute claims.**

100. **Investors should**:

(a) **Operate under the assumption that regulatory frameworks continuously evolve to progressively realize the human rights of indigenous peoples, as explicitly required by international human rights law;**

(b) **Support the transition toward a model of investment that promotes the realization of human rights.**

Complementary measures necessary to mitigate the impacts of international investment agreements

101. **International and regional human rights bodies should continue to issue recommendations addressing the responsibilities of home and host States to regulate corporate behaviour and consider developing general recommendations or advisory opinions on the responsibility of home States in relation to indigenous peoples' rights and the intersection of investment protection and human rights.**

102. **Home States should adopt and enforce extraterritorial regulation in relation to the impacts of their corporations on indigenous peoples overseas and ensure they are held to account for any rights violations, including the denial of protections under international investment agreements.**

103. **Host States must comply with their duty to regulate in relation to indigenous peoples' rights to:**

(a) **Lands, territories and resources, necessitating demarcation based on customary land tenure, possession and use;**

(b) **Restitution of land, territories and resources taken without free, prior and informed consent;**

(c) **Self-determination, by virtue of which they can determine their own social, cultural and economic development and maintain and develop their institutions, customs and decision-making processes;**

(d) **Good-faith prior consultation to give or withhold free, prior and informed consent in relation to measures affecting their rights;**

(e) **Their beliefs and traditional knowledge;**

(f) **A permanent and enduring way of life of their own choosing.**

104. **Governmental bodies responsible for protecting indigenous peoples' rights should ensure that information is made available to foreign investors addressing the need to respect indigenous peoples' rights and the State's obligation to progressively realize those rights.**

105. **Indigenous peoples could consider publicly declaring their expectations with regard to any potential investment projects in their territories, for example, through consultation and free, prior and informed consent protocols, thereby influencing potential investor's legitimate expectations.**

106. **International financial institutions, including the World Bank, must implement their performance standards in a manner consistent with developments in international human rights law standards, including in relation to the requirement for free, prior and informed consent.**

107. **In order to suspend or terminate an international investment agreement that affects indigenous peoples' rights, States could invoke article 62 (2) of the** Vienna Convention on the law of treaties **in relation to a fundamental change in circumstances, such as the recognition of indigenous peoples within their borders. To do so, they would need to show that: (a) such recognition was not foreseen when the agreement was entered into, which could be explained by the evolving understanding of States in Asia and Africa as to what constitutes an indigenous people in those regions; (b) the change radically transforms the extent of obligations still to be performed under the treaty, as could be the case given the requirement to obtain indigenous peoples' free, prior and informed consent to investment plans; and (c) the change is not the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty, a threshold that is not met by the recognition of indigenous peoples' rights within the host State.**

Long-term reform

108. **Longer-term reform of international investment law necessitates a shift in thinking about the purpose and nature of international investment agreements and dispute resolution mechanisms. Rather than viewing their role as purely, or even perhaps primarily, to protect investor rights, they need to be understood within a broader public policy and the international law framework, commensurate with our stage of economic globalization and interdependence, such that legitimate investor protections work in harmony with indigenous and human rights rather than acting as a constraint upon long-term public policy objectives and serving to further fragment**

the international order. This will involve redesigning aspects of the international investment law system that are not fit for purpose. The objective should be to protect the legitimate rights of investors and the need for reasonable predictability, while also guaranteeing the State's right to regulate and protect fundamental human rights, and ensuring that the rights of the most vulnerable are not subordinated to the economic interests of the most powerful.

Annex I

Participation in international and national conferences and dialogues

The Special Rapporteur participated in a number of international dialogues and conferences, including:

(a) The twenty-first session of the Conference of Parties to the United Nations Framework Convention on Climate Change;

(b) A symposium in Canada addressing the national inquiry of the Government on missing and murdered indigenous women;

(c) A high-level dialogue on the World Bank's draft environmental and social standard on indigenous peoples, held in Addis Ababa;

(d) A seminar on litigation experiences in cases of violence against women and women's access to justice, held in Guatemala;

(e) An international seminar on indigenous jurisdiction and access to justice, held in Colombia;

(f) A panel discussion on conflict and peace negotiations and indigenous peoples, held in New York;

(g) A meeting with the World Bank and the Nordic Trust Fund on safeguarding indigenous peoples' rights.

Further details on those activities will be included in the forthcoming report of the Special Rapporteur to the General Assembly.

The Special Rapporteur also participated in the regular sessions of the Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples, and discussed how to better coordinate their mandates. She also held meetings with several State delegations and indigenous organizations.

Annex II

Regional and global workshops on the impact of investment agreements and the rights of indigenous peoples

In order to inform her thematic report, together with IWGIA, AIPP and Tebtebba, the Special Rapporteur organized a series of regional workshops on the impacts of investment treaties on the rights of indigenous peoples. The first was held in Lima, Peru, for Latin America and the second in Bangkok, Thailand for Asia. A third is planned for Africa. The Special Rapporteur also co-organized a global expert's seminar, together with CCSI, which was held in New York in May 2016.

The Special Rapporteur wishes to express her gratitude to all of the indigenous peoples' representatives, civil society organizations and individuals who participated in these meeting and contributed to deepening her knowledge of the impacts of investment treaties on the rights of indigenous peoples and potential avenues for addressing the challenges this poses. She looks forward to continued collaboration with them over the coming year in the development of her final report on the subject of investments and indigenous peoples' rights.

In particular, the Special Rapporteur would like to thank Jose Alywin, Lorenzo Cotula, Joshua Curtis, Howard Mann, Kinda Mohamadieh, Lone Wandahl Mouyal and Luis Vittor and for their expert input and Cathal Doyle for his assistance in the development of the report. She also expresses her gratitude to Asia Indigenous Peoples Pact (AIPP), Columbia Center on Sustainable Investment (CCSI) the International Working Group Indigenous Affairs (IWGIA) and Tebtebba for their assistance in organizing these workshops. She also thanks the staff and students of the University of Colorado Law School Clinic for research they conducted.

She also acknowledges with gratitude the assistance provided by the Office of the United Nations High Commissioner for Human Rights and her external team. She also expresses thanks to the many indigenous peoples, States, United Nations bodies and agencies and non-governmental organizations that cooperated with her over the past year in the implementation of her mandate.

The indigenous representatives and expert participants in the two regional workshops and the global workshop are listed below.

Workshop on Indigenous Peoples and International Investment

May 12, 2016, Ford Foundation headquarters

320 East 43rd St., New York

Participants

Jose Aylwin	Co-director, Observatorio Cuidadano, Chile
Rana Bahri	DLA Piper
Manja Bayang	Supporting the Special Rapporteur on the rights of indigenous peoples
Chhoun Borith	Indigenous representative, Cambodia
Patricia Borraz	Supporting the Special Rapporteur on the rights of indigenous peoples
Amy Brown	Ford Foundation
Stephanie Burgos	Oxfam America
Jesse Coleman	Columbia Center on Sustainable Investment
Kaitlin Cordes	Columbia Center on Sustainable Investment
Lorenzo Cotula	International Institute for Environment and Development
Penny Davies	Ford Foundation
Cathal Doyle	External advisor to the Special Rapporteur on the rights of indigenous peoples
Celeste Drake	Trade & Globalization Policy Specialist at AFL-CIO
Ben Hoffman	Columbia Law School Human Rights Clinic; Human Rights Institute
Atama Katama	CSO Partnership for Development Effectiveness
Birgit Kuba	World Bank Inspection Panel
Danika Littlechild	Canadian Commission for UNESCO
Howie Mann	International Institute for Sustainable Development
Soledad Mills	Equitable Origins
Terry Mitchell	Wilfrid Laurier University, Canada
Marcos Orellana	Center for International Environmental Law
Aaron Marr Page	Forum Nobis
Sochea Pheap	Cambodia Indigenous Youth Association
Nikki Reisch	New York University Center for Human Rights and Global Justice
Stanley Riamit	Indigenous Livelihoods Enhancement Partners, Kenya
Lisa Sachs	Columbia Center on Sustainable Investment
William Shipley	Centre for International Sustainable Development Law
Tui Shortland	Managing Director, Repo Consultancy
Indira Simbolon	Asian Development Bank
Joseph Ole Simmel	Mainyoito Pastoralist Integrated Development Organization
Rukka Sombolinggi	Aliansi Masyarakat Adat Nusantara
Casper Sonesson	United Nations Development Programme

Elsa Stamatopoulou	Columbia University
Sam Szoke-Burke	Columbia Center on Sustainable Investment
Victoria Tauli-Corpuz	Special Rapporteur on the rights of indigenous peoples
Mong Vichet	Highland Association, Cambodia
Samoeun Vothy	Indigenous representative, Cambodia
Christina Warner	University of Colorado American Indian Law Clinic
Shawn Watts	Columbia Law School
Hee-Kyong Yoo	Supporting the Special Rapporteur on the rights of indigenous peoples
Michael Zaccaro	University of Colorado American Indian Law Clinic

Remote participants

Filip Balcerzak	SSW, Poland
Ilias Bantekas	Brunel University London
Graeme Everton	Indigenous Traders
Carla Fredericks	University of Colorado
Lise Johnson	Columbia Center on Sustainable Investment
Kinda Mohamadieh	South Centre
Brendan Plant	Cambridge University
Andrea Saldarriaga	London School of Economics
Shana Tabak	Georgia State University

Indigenous Peoples' International Seminar

Free Trade Agreements, Bilateral Investment Treaties and Large Scale Investment Projects (Megaprojects) and their Impacts on the Rights of Indigenous Peoples

Lima 25-26 April 2016

Participants

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Annex III

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Annex IV

Other ISDS cases impacting on indigenous peoples rights

In *Bechtel v. Bolivia* (2006), Bechtel, a US company, filed an arbitration case for $50 million in 2002 under the Bolivia-Netherlands BIT, in a context where the US had no BIT with Bolivia. The case arose when indigenous peoples' protests at privatization of the water supply lead to nationalization. The case was eventually settled when confrontation with the police turned violent led to an international campaign put significant pressure on the parent company.

In *Cosigo Resources Ltd and Tobie Mining & Energy Inc v. Colombia* Canadian and United States mining companies issued a notice of intent to take a $16.5 billion arbitration case against Colombia under the US-Colombia FTA. They hold that Colombia delayed signing its mining concession until a national park covering the area was established, and that there was inadequate consultation with indigenous peoples in relation to the park's creation. In September 2015, the Colombian Constitutional Court upheld the creation of the park. The companies acknowledge that the proposed mining activities face strong opposition from among the impacted indigenous peoples, but point to an agreement with one indigenous association as evidence of sufficient support to proceed.