



Mandate of the Special Rapporteur on the rights of indigenous peoples

A communication from the UN Special Rapporteur on the rights of indigenous peoples, Ms Victoria Tauli Corpuz, to UNCTAD's Expert Meeting on Investment, Innovation and Entrepreneurship for Productive Capacity-building and Sustainable Development, Fourth Session, Geneva, 16-17 March 2016

Successive UN Special Rapporteurs on the rights of indigenous peoples have expressed serious concerns in relation to the negative impacts of foreign investment on the rights of indigenous peoples. These investments generally involve extraction of natural resources and large scale infrastructure and energy projects in or near the territories of indigenous peoples, and are increasingly associated with violations of their rights up to and including threatening the very cultural and physical survival of these peoples.

As a result of this alarming trend the current UN Special Rapporteur, Ms Victoria Tauli-Corpuz, deemed it necessary to examine how the international legal regime, which serves to facilitate and regulate these investments, protects rights granted to foreign investors at the expense of indigenous peoples' inherent and internationally recognized human rights rights. Her 2015 annual report to the UN General Assembly examined how the international investment legal regime interacts with and serves to constrain the State duty to protect, respect and fulfil the rights of indigenous peoples (UN Doc A/70/301).

The report identified a growing number of mining, oil and gas, agribusiness, hydroelectric, infrastructure and tourism projects facilitated and protected by the extant investment regime that are associated with serious violations of indigenous peoples' territorial, self-governance and cultural rights. It also concluded that, unless reformed, this regime will continue to place constraints on the State's duty to protect human rights into the foreseeable future, and that consequently "a more thorough review of the implications of [this regime] and deeper policy and systemic reforms are needed to ensure the respect, protection and fulfilment of indigenous peoples' rights".

The growing number of arbitration cases against States, in particular by investors involved in natural resource exploitation and extractive industries, also points to the potential synergy between protecting the State's right to regulate and the rights of indigenous peoples. Greater reconciliation of investment policy making with the State duty to regulate in order to protect indigenous peoples' rights is therefore not only necessary for policy coherence, but constitutes a pragmatic solution to some of the challenges currently faced by States in relation to the negative impacts arising from foreign investment. In this regard it is consistent with the notion of principled pragmatism which underpins the strategy for implementing the UN Guiding Principles on Business and Human Rights (UNGPs).

With this objective in mind the Special Rapporteur has decided to develop a follow-up report on the topic to the Human Rights Council. In order to probe the perspectives of all concerned parties, she has developed questionnaires for States, CSOs and indigenous peoples and is scheduling a series of



Mandate of the Special Rapporteur on the rights of indigenous peoples

regional consultations with indigenous peoples on the topic.¹ The Special Rapporteur is particularly interested in engaging in one-on-one dialogues with those States that are reviewing, or considering reviewing, how the international investment regime can be rendered more consistent with the State right to regulate in the public interest, the commitment to sustainable development and the State duty to respect, protect and fulfil international human rights obligations in relation to indigenous peoples consistent with the UNGPs and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

In light of this, the Special Rapporteur commends the work being done by the LSE Investment & Human Rights Project, producing a 'Guide to Implementing the UN Guiding Principles in Investment Policymaking', and wishes to highlight particular considerations related to indigenous peoples which arise in the context of the report's two overarching themes, namely: the material risk to investments that fail to address human rights risks, and the increased barriers to access to remedy for indigenous victims of investment related human rights violations which exist in the context of FDI projects.

Much of the world's remaining natural resources are located in or near indigenous peoples' territories. Research conducted by the Special Rapporteur, academic institutions and indigenous peoples' organizations demonstrates the growing opposition of indigenous peoples to the imposition of an investment regime that serves to restrict their ability to exercise territorial, self-governance and cultural rights, including their right to prior consultation in order to obtain their free prior and informed consent (FPIC), and to fair and equitable benefits in the context of investments in or near their territories. The geographical correlation of natural resources with indigenous peoples' territories, combined with the increased assertion of their own rights, means that States and investors are facing ever increasing material risks whenever they fail to guarantee protection of indigenous peoples' rights in the context of investment regulation, policy making and project implementation.

This risk is evident in the significant and costly delays, and at times suspension or outright cancellation of IIA facilitated foreign investment projects arising from indigenous peoples' protests and blockades, as well as legal challenges they have taken in national and regional courts. Such opposition is a manifestation of indigenous peoples' demand for respect of their distinctive collective rights. Respect for these collective rights mandates culturally appropriate good faith consultation and consent seeking processes prior to entering into any agreements or contracts, adopting legislation and administrative measures, or authorizing projects which impact on those rights.

As a result, it is becoming increasingly evident that IIAs are failing to fulfil their purported objective of providing legal certainty to investors, in terms of ensuring the stability and sustainability of their investments, and of ensuring sustainable development for States and most importantly their peoples. These agreements are instead being transformed into a perverse form of insurance policy against the exercise of indigenous peoples' rights, as States are effectively consenting to compensate foreign

¹ The questionnaire which is addressed to States will be available from 21 March 2016 at <http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/SRIPeoplesIndex.aspx>



Mandate of the Special Rapporteur on the rights of indigenous peoples

investors whenever the legitimate assertion of indigenous peoples' internationally recognized rights puts their expected earnings at risk.

The associated narrowing of legislative and policy space available for the protection of the rights of indigenous peoples contributes to a context in which they face repression in the form of criminalization, threats, intimidation and violence when they demand respect for their rights. This is compounded by the fact that their rights are rendered completely invisible within the international investment architecture, which affords remedies to the rights of foreign investors vis-à-vis States but, as noted by the OHCHR, and highlighted in the LSE Guide, serves to further constrain the potential for victims of corporate related human rights violations to access remedies.

For indigenous peoples this limitation on access to remedy is compounded by two important facts. Firstly, as recognized in the UNGPs and the UNDRIP, due to demographic and cultural factors as well as historical and on-going discriminatory treatment, indigenous peoples face even greater barriers to access to remedies and justice than other segments of society. These barriers can become insurmountable in the context of FDI in their territories.

One such case which is illustrative of the challenges faced by indigenous peoples, and on which the Special Rapporteur has engaged with the Government of Peru, is that of Pluspetrol Norte, a subsidiary of Pluspetrol Resources Inc, which operated an oil concession in Block 1AB in the Peruvian Amazon. Under Peruvian law, the company has legal responsibility for 45 years of serious oil contamination in indigenous peoples' territories. However, its contract expired in August 2015 and it has left the Block without compensating the affected peoples or cleaning-up the damaged areas. The company headquarters is located in the Netherlands, but the Dutch entity is merely a mailbox company, established to capitalize on Dutch investment treaty protections and favourable taxation arrangements. This corporate structure poses significant legal barriers and uncertainty for indigenous peoples should they attempt to hold the company to account for the profound environmental and human rights harms they have suffered. At the same time, Camisea, another Peruvian subsidiary of Pluspetrol Resources Inc, which also operates a highly controversial project in indigenous peoples' territories, took an ISDS case against the Peruvian State in relation to the company's allegations that its rights were being infringed upon. This example serves to illustrate the asymmetry in relation to access to remedy between investors and indigenous peoples, something which only serves to exacerbate the enormous power asymmetries that already exist between these actors.

A second important issue related to indigenous peoples' access to remedy and justice is that many of them throughout the world have yet to have their territorial rights fully recognized, demarcated and protected in practice with restitution provided where their ancestral lands and resources were taken without their free prior and informed consent. This has led to situations, such as that addressed by the Inter American Court of Human Rights (IACtHR) in the *Sawhoyamaxa v Paraguay* case, whereby the rights of indigenous peoples to their lands and to restitution comes into direct conflict with the rights granted by States to investors under IIAs. In the *Sawhoyamaxa* case the State argued that the rights granted to the investor under an IIA with Germany over certain lands implied that those lands could not be returned to the concerned indigenous peoples. This was rejected by the IACtHR, which



Mandate of the Special Rapporteur on the rights of indigenous peoples

held that the State had to implement the IIA in accordance with its human right obligations towards indigenous peoples and therefore return the land and compensate the investors, potentially exposing it to significant claims under the ISDS system.

One of the significant developments within the international investment regime has been the negotiation of the Transpacific Partnership (TPP) Agreement. The TPP currently involves 12 countries, and spans three continents, America, Asia and the Pacific, which account for 40% of global trade. In the Americas, the TPP countries are Canada, Chile, Mexico, Peru and the United States. All of these countries have significant populations of indigenous peoples, a growing number of whom are negatively impacted by large scale foreign investment extractive and infrastructure projects in their territories. Together with affected indigenous peoples in other TPP countries, such as New Zealand, Australia and Malaysia, they have expressed their concerns in relation to the absence of consultation in the negotiation of the TPP, the failure to include adequate protections for their rights vis-à-vis those of foreign investors and the non-existence of remedies related to violations of their rights. They fear that unless such protections are included the TPP will facilitate projects and activities which lead to further conflict and serious violation of rights to lands, territories and natural resources, including their rights to traditional knowledge. Indigenous peoples are consequently calling for good faith consultations with them during the TPP ratification process, in accordance with the UNDRIP and ILO Convention 169 on Indigenous and Tribal Peoples and in keeping with the objectives of the Sustainable Development Goals (SDGs) adopted by States in 2015.

The Special Rapporteur believes that it is possible to develop human rights consistent solutions to the inconsistencies and lack of coherence within the international legal framework which can benefit both indigenous peoples and the State, while simultaneously providing greater investment security to foreign investors. She would therefore be interested in exploring these issues and possible solutions with interested State parties. Drawing on her engagement with and responses from States, indigenous peoples and CSOs, her 2016 report to the HRC will consist of a series of recommendations aimed at addressing how States can realize their duty to protect indigenous peoples' rights and effectively promote the corporate responsibility to respect those rights, while at the same time reducing State exposure to legal challenges from investors that may otherwise arise in the context of projects which impact on indigenous peoples' enjoyment of their rights. Ultimately, for the investment regime to serve its purpose as an enabler of sustainable development for all, it must be rendered consistent with human rights, including in particular the rights of indigenous peoples who are most impacted by the projects that regime facilitates.