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# Outcome Report of Workshop on International Investment and the Rights of Indigenous Peoples

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### Recommended Citation

Kaitlin Y. Cordes & Jesse Coleman, *Outcome Report of Workshop on International Investment and the Rights of Indigenous Peoples*, (2016).

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**Mandate of the Special Rapporteur on the rights of indigenous peoples**

# INTERNATIONAL INVESTMENT AND THE RIGHTS OF INDIGENOUS PEOPLES

**Workshop Outcome Document**

**November 16, 2016**



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The **Columbia Center on Sustainable Investment (CCSI)**, a joint center of Columbia Law School and the Earth Institute at Columbia University, is the only university-based applied research center and forum dedicated to the study, practice, and discussion of sustainable international investment worldwide. Its mission is to develop practical approaches for governments, investors, communities, and other stakeholders to maximize the benefits of international investment for sustainable development, while minimizing the potential harms that can accompany large-scale investment projects. CCSI works at the nexus of international investment law and human rights law, and at the project-level and contract-level on the human rights impacts of investment projects. We conduct robust research; develop accessible resources and tools; convene nuanced dialogue; and provide trainings, advisory support, and technical input.

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### **Mandate of the Special Rapporteur on the rights of indigenous peoples**

Indigenous peoples across the world experience the consequences of historical colonization and invasion of their territories, and face discrimination because of their distinct cultures, identities and ways of life. In recent decades, the international community has given special attention to the human rights situations of indigenous peoples, as shown by the adoption of international standards and guidelines, as well as by the establishment of institutions and bodies that specifically target these peoples' concerns. The rights of indigenous peoples are further promoted by international and regional human rights mechanisms. In this context, the Commission on Human Rights decided to appoint in 2001 a **Special Rapporteur on the rights of indigenous peoples**, as part of the system of thematic Special Procedures. The Special Rapporteur's mandate was renewed by the Commission on Human Rights in 2004, and by the Human Rights Council in 2007. In the fulfillment of her mandate, the Special Rapporteur: promotes good practices to implement international standards concerning the rights of indigenous peoples; reports on the human rights situations of indigenous peoples in selected countries; addresses specific cases of alleged violations; conducts or contributes to thematic studies; undertakes efforts to follow up on the recommendations included in her predecessor's reports; and reports annually on her activities to the Human Rights Council.

## Background

On May 12, 2016, the United Nations (UN) Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, and the Columbia Center on Sustainable Investment hosted a one-day workshop on international investment and the rights of indigenous peoples.

The workshop was part of a series of consultations undertaken to support the Special Rapporteur's second thematic analysis on the impact of international investment agreements on the rights of indigenous peoples.<sup>1</sup> Held at the Ford Foundation in New York, the workshop brought together 53 academics, practitioners, indigenous representatives, and civil society representatives to explore strategies for strengthening the rights and interests of indigenous peoples in the context of international investment. The workshop provided an opportunity for participants to share their diverse perspectives, experiences, and insights regarding the intersection of international investment and human rights, and to discuss creative and pragmatic approaches to short and long-term reform of both the investment and human rights regimes, with the ultimate goal of ensuring that indigenous rights are respected, protected, and fulfilled.

The workshop also built on an earlier report by the Special Rapporteur setting out her concerns regarding the impact of investment and free trade agreements on the human rights of indigenous peoples.<sup>2</sup> That report, which was presented to the 70<sup>th</sup> session of the UN General Assembly, outlined direct and systemic impacts of investment and free trade agreements on the rights of indigenous peoples, and called for a more thorough review of the implications of these agreements to develop and implement effective options for reform.

## Acknowledgments

This document was written by Jesse Coleman and Kaitlin Y. Cordes. The authors would like to thank Alejandra Cicero and Antonio Ortiz for their support in reviewing parts of this document; Sam Szoke-Burke for his help in organizing the May 12 workshop; and Maxence Guinand, Lauren Waugh, and Madeline Wolberg for their note-taking support during the workshop. We are grateful to the UN Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, and her team, in particular Cathal Doyle, for collaborating with the Columbia Center on Sustainable Investment on the workshop. The co-organizers express their gratitude to the Ford Foundation for hosting the discussion at their Headquarters in New York.

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<sup>1</sup> United Nations (UN) Human Rights Council, Report of the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, UN Doc. A/HRC/33/42 (August 11, 2016).

<sup>2</sup> UN General Assembly, Report of the Special Rapporteur on the rights of indigenous peoples, Victoria-Tauli Corpuz, UN Doc. A/70/301 (August 7, 2015).

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## International Investment and the Rights of Indigenous Peoples

This outcome document synthesizes the discussions of a workshop that brought together diverse stakeholders to explore strategies for strengthening the rights and interests of indigenous peoples in the context of international investment.

Indigenous peoples can be disproportionately affected by international investment, due in part to the rich presence of natural resources in indigenous territories as well as the nature of the relationship that indigenous peoples often have with their lands. At the same time, the instruments that regulate international investment can profoundly affect the human rights of third parties. Among such instruments are international investment agreements<sup>3</sup> and investor-state contracts, both of which are usually negotiated behind closed doors, without the participation of indigenous peoples or other stakeholders. These instruments, as well as their corresponding enforcement mechanisms, raise concerns regarding systemic imbalances in the protection of investor interests and human rights. They may also be at odds with the growing emphasis placed on the responsibilities of investors to respect human rights, as outlined in the UN Guiding Principles on Business and Human Rights<sup>4</sup> and other frameworks aimed at promoting responsible, rights-compliant investment.<sup>5</sup>

This document first describes the interaction between international investment law and international human rights law, and how this interaction can affect the rights of indigenous peoples. The second section outlines key challenges facing stakeholders seeking to improve the content of investor-state contracts, including through improvements to contracting processes. The third section outlines options for improving the human rights regime to address the challenges posed by international investment. Workshop discussions on all three topics highlighted the challenges that remain, and the need for further solutions for strengthening the rights of indigenous peoples in the context of international investment.

### 1. The Interaction between Investment and Human Rights Law

International investment law consists primarily of investment agreements and free trade agreements with investment provisions. A complex network of investment agreements has developed rapidly since the 1990s: by the end of 2015, 3,304 such agreements had been signed,<sup>6</sup> with negotiations of new agreements continuing in 2016.<sup>7</sup> Foreign investors have increasingly relied on these agreements to challenge a wide range of host state actions and inactions that they argue have negatively affected their investments. To date, there have been 739 publicly known treaty-based investor-state disputes.<sup>8</sup>

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<sup>3</sup> The term “international investment agreements” is used herein to refer to bilateral and multilateral investment agreements and free trade agreements that contain investment provisions.

<sup>4</sup> UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, UN Doc. A/HRC/17/31 (March 21, 2011) [hereinafter UN Guiding Principles on Business and Human Rights].

<sup>5</sup> See e.g., Organisation for Economic Co-operation and Development (OECD), Guidelines for Multinational Enterprises, available at: <http://www.oecd.org/corporate/mne/>.

<sup>6</sup> UN Conference on Trade and Development (UNCTAD), World Investment Report 2016, at xii, available at: [http://unctad.org/en/PublicationsLibrary/wir2016\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf).

<sup>7</sup> See UNCTAD’s International Investment Agreements Navigator, available at: <http://investmentpolicyhub.unctad.org/IIA>.

<sup>8</sup> Accurate as of November 16, 2016. See UNCTAD’s Investment Dispute Settlement Navigator, available at: <http://investmentpolicyhub.unctad.org/ISDS>.

This international investment regime can disproportionately affect indigenous peoples. And as international investment and demand for resources continue to rise, the implications of investment for the rights of indigenous peoples are likely to increase and intensify. States with significant indigenous populations continue to negotiate IIAs: all 12 signatories to the Trans-Pacific Partnership,<sup>9</sup> for example, have sizeable indigenous populations.

Against this background, workshop participants discussed the implications of investment law for the human rights of indigenous peoples. Participants also put forward several options for reforming investment law in order to align the investment regime with states' obligations to respect, protect, and fulfill human rights. These suggested reforms are also relevant for host states seeking to protect their regulatory space and avoid costly investor-state arbitrations: a particularly pertinent concern for developing country host states.<sup>10</sup>

## a) Implications of International Investment Law

### i. *Restriction of host state regulatory space*

In creating extensive protections for investors and their investments, international investment agreements place corresponding obligations on host states. These obligations can restrict the host state's regulatory space. At times, they also can be in tension with other domestic and international laws, including those protecting the rights of indigenous peoples.

Non-discrimination obligations, for example, may preclude host states from recognizing and protecting the special relationship that indigenous peoples often have with the lands and natural resources upon which they depend. Such obligations, which are commonly found in international investment agreements, require that the host state treat foreign investors no less favorably than domestic investors (the "national treatment" obligation) and other foreign investors (also referred to as the "most-favored nation" treatment obligation). Thus, if the host state decides to provide certain specific protections or privileges for indigenous peoples, and if these measures adversely affect an investor or its investment, this might give rise to a claim under an applicable agreement.

Some states have sought to include carve-outs and exceptions in international investment agreements that would protect measures adopted in pursuance of legitimate public interests, such as protection of indigenous rights, from being challenged on the basis of non-discrimination and other protections included in agreements. However, several participants noted that such carve-outs and exceptions are found only in a handful of recently negotiated international investment agreements;<sup>11</sup> a majority of agreements currently in

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<sup>9</sup> For further commentary on the Trans-Pacific Partnership, *see e.g.*, Lise Johnson and Lisa Sachs, "The TPP's Investment Chapter: Entrenching, Rather than Reforming, a Flawed System," (November 2015) Columbia Center on Sustainable Investment (CCSI) Policy Paper, available at: <http://ccsi.columbia.edu/files/2015/11/TPP-entrenching-flaws-21-Nov-FINAL.pdf>.

<sup>10</sup> Developing economies received a record high of US\$ 765 billion in foreign direct investment in 2015, 9 percent higher than in 2014. Yet the number of publicly known investor-state arbitrations also peaked – investors initiated 70 publicly known claims in 2015 – and a majority of these claims were brought against developing country respondents. As of January 1, 2016, the number of publicly known claims reached 696. *See* UNCTAD, World Investment Report 2016 (n 6), at 36 and 104-105.

<sup>11</sup> International investment agreements to which Canada is a party often include a specific provision to reserve for Canada the right to adopt or maintain measures concerning "the rights or preferences provided to aboriginal peoples," even where such measures does not conform to provisions contained in the relevant international investment agreement. *See e.g.*, Agreement between Canada and the

force do not include these carve-outs and exceptions. Moreover, even if states parties decide to terminate such agreements, survival clauses often require parties to continue to abide by their obligations under terminated agreements for 10, 15, or 20 years. The threat to indigenous rights posed by such agreements is thus ongoing, even as some states seek to terminate or re-negotiate existing ones.<sup>12</sup>

The ramifications of these substantive obligations are compounded by the strong dispute settlement and enforcement mechanisms included in most agreements, which increase the risk of state actions (or inactions) being challenged through investor-state arbitration. These mechanisms can also provide perverse incentives for governments to prioritize the interests of investors over the interests of indigenous peoples, as explained below.

## *ii. Prioritization of investor interests over indigenous rights*

In addition to the impact of their substantive provisions, most international investment agreements provide for investor-state arbitration—a dispute settlement mechanism that can arguably lead to the prioritization of investors’ interests over those of other groups affected by international investment, including indigenous peoples. Investor-state arbitration gives investors direct access to an international forum for the resolution of investment disputes; awards rendered by investment tribunals can be enforced in most states around the world,<sup>13</sup> and are not subject to appeal.<sup>14</sup> By contrast, mechanisms established to address human rights claims mostly require exhaustion of domestic remedies before a claim can be brought, and enforcement of decisions is often weak. Participants agreed that the disparity between enforcement mechanisms available under international investment law versus international human rights law further entrenches the systemic imbalance between investor interests and human rights. This imbalance may disproportionately affect indigenous peoples, owing to their connection to lands and natural resources frequently targeted for investment.

Prioritization of investor interests can also affect realization of indigenous rights at the domestic level. One participant noted that, although some international investment agreements require investors and their investments to comply with the laws of the host state, and to exhaust domestic remedies prior to bringing a claim, a majority of agreements supplant rather than supplement domestic law. Efforts to hold investors to account at the domestic level can thus be undermined. An example provided by one workshop participant was that of *Chevron v. Ecuador*, where the ongoing investor-state arbitration has undermined a domestic

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Federal Republic of Senegal for the Promotion and Protection of Investments (2016), Annex I; Agreement between Canada and the Republic of Serbia for the Promotion and Protection of Investments, Annex II (2015); Canada-Peru Free Trade Agreement (2009), Annex II.

<sup>12</sup> For information on trends in the conclusion and termination of international investment agreements, see UNCTAD, World Investment Report 2016 (n 6), at 101-103.

<sup>13</sup> See Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) [hereinafter ICSID Convention] and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (opened for signature 10 June 1958, entered into force 7 June 1959) [hereinafter New York Convention]. With some exceptions, the ICSID Convention and New York Convention both enable arbitral awards rendered in one party’s jurisdiction to be enforced in the jurisdiction of any other party to the agreement.

<sup>14</sup> Decisions and awards rendered by investment tribunals are not subject to appeal, and can only be challenged on specific, narrow grounds.

environmental claim brought by local residents from Lago Agrio in Ecuador.<sup>15</sup> The investor-state claim, initially brought in 2006 and followed by a second claim in 2009, has suspended enforcement and recognition of the domestic award for remediation of environmental harms rendered in favor of local residents.<sup>16</sup>

### *iii. Lack of transparency and participation*

Despite its profound impact, the current international investment regime provides little or no opportunity for indigenous peoples to voice their concerns and seek to protect their rights during the negotiation or application of international investment agreements. While efforts have been made to increase the transparency of investor-state arbitration,<sup>17</sup> the means of participation available to third parties—including indigenous peoples—remain extremely limited.

In terms of existing means of “participation” under the current international investment regime, discussions revealed some divergence among participants on the effectiveness of participation as *amici curiae*. While participants agreed that this form of participation is insufficient to ensure that the rights and interests of indigenous peoples will be duly represented before investment tribunals, some participants suggested that such participation can nevertheless allow third parties to raise issues that disputing parties would be unlikely or reluctant to raise themselves.<sup>18</sup> Other participants noted that indigenous peoples may view *amicus* participation as legitimizing the current system, and may thus prefer to refrain from any type of participation in investor-state arbitrations.

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<sup>15</sup> Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. Republic of Ecuador (PCA Case No. 34877); Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador (PCA Case No. 2009-23) (II).

<sup>16</sup> For further information on this dispute, *see e.g.*, Lise Johnson, “Case Note: How Chevron v. Ecuador is Pushing the Boundaries of Arbitral Authority,” Investment Treaty News (April 13, 2012), available at: <https://www.iisd.org/itn/2012/04/13/case-note-how-chevron-v-ecuador-is-pushing-the-boundaries-of-arbitral-authority/>; Business & Human Rights Resource Centre, Texaco/ Chevron Lawsuits, available at: <https://business-humanrights.org/en/texacochevron-lawsuits-re-ecuador>.

<sup>17</sup> For further information on transparency in investor-state arbitration, *see e.g.*, Lise Johnson and Lise Sachs “International Investment Agreements, 2013: A Review of Trends and New Approaches” in Andrea K Bjorklund (ed), Yearbook on International Investment Law & Policy 2013–2014 (Oxford University Press 2015), at 59–64; Lise Johnson, “The Transparency Rules and Transparency Convention: A good start and model for broader reform in investor-state arbitration,” Columbia FDI Perspectives (No. 126) (July 21, 2014), available at: <http://ccsi.columbia.edu/files/2013/10/No-126-Johnson-FINAL1.pdf>.

<sup>18</sup> A series of *amicus curiae* submissions have raised human rights issues before investment tribunals. *See e.g.*, CCSI’s Application to File a Written Submission as an “Other Person” in Bear Creek Mining Corporation v. Republic of Peru, Pursuant to Article 836 and Annex 836.1 of the Peru-Canada FTA (June 9, 2016); Submission as an “Other Person” Pursuant to Article 836 and Annex 836.1 of the Peru-Canada FTA (June 9, 2016); and Response to Procedural Order No. 6 (August 3, 2016), all available at: <http://ccsi.columbia.edu/work/projects/participation-in-investor-state-disputes/>. For investment tribunal decisions permitting third party *amicus* submissions, *see*: Methanex Corp. v. United States of America, UNCITRAL Arb., Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae (Jan. 15, 2001); Aguas Argentinas, S.A v. The Argentine Republic, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae (May 19, 2005); United Parcel Services of America Inc. v. Government of Canada, UNCITRAL Arb., Decision of the Tribunal on Petitions for Intervention and Participation as Amicus Curiae (Oct. 17, 2001); Glamis Gold v. The United States of America, UNCITRAL, Decision on Application and Submission by Quechan Indian Nation (Sept. 16, 2005); Biwater Gauf v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 5 (Feb. 2, 2007); Piero Foresti v. Republic of South Africa, ICSID Case No. ARB(AF)/07/1, Letter from Eloïse M. Obadia, Secretary of the Tribunal, to Non-Disputing Parties (Oct. 5, 2009); Pac Rim Cayman v. The Republic of El Salvador, ICSID Case No. ARB/09/12, Procedural Order No. 8 (Mar. 23 2011); Philip Morris Brand v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Procedural Order No. 3 (Feb. 17, 2015). For further information on *amicus* submissions, *see* Center for International Economic Law, *Guide for Potential Amici in International Investment Arbitration* (January 2014), available at: [http://ciel.org/Publications/Guide\\_PotentialAmici\\_Full\\_Jan2014.pdf](http://ciel.org/Publications/Guide_PotentialAmici_Full_Jan2014.pdf).

Participants also noted that significant distrust between indigenous peoples and their governments may undermine participation as witnesses in investor-state proceedings. One participant provided an example of an investor-state arbitration where the host state respondent invited indigenous peoples to participate in the case before the tribunal. This invitation was rejected, the participant noted, because the indigenous communities invited did not trust the government sufficiently to agree to participate.

## **b) Options for Reform**

Workshop participants highlighted several avenues for reform of current approaches to protection of international investment. Options for improving the effectiveness of the human rights regime are discussed separately in Section 3 below.

### *i. Strengthening domestic law*

Among the key sources of law that govern international investment (contracts, domestic law, and international law), the domestic law of the host state should form the primary source of rules governing inward investment.<sup>19</sup> However, many host states have weak or developing domestic legal frameworks applicable to such inward investment. This leaves significant scope for international investment agreements to address far-reaching issues in a manner that may run counter to broader national and local interests and priorities. In particular, an absence of a strong domestic legal framework can leave the rights of third parties, including indigenous peoples, unprotected and vulnerable to abuse.

Participants unanimously agreed that strengthening domestic legal frameworks must be a priority for host states seeking to support the realization of the rights of indigenous peoples. Two tracks of necessary reforms were identified. First, participants agreed that host states must enshrine protection of the rights of indigenous peoples in domestic law. One participant noted that protecting the right of indigenous peoples to free, prior, and informed consent (FPIC) through domestic law would provide an important starting point. Second, host states must seek to improve domestic regulatory frameworks applicable to inward investment. Such improvements should reflect the public interest priorities of host states, including with respect to sustainable development.

Despite agreement on the need for stronger domestic protection of indigenous peoples' rights, several participants cautioned that, even when such rights are formally protected under domestic law, many governments fail to realize them in practice. A participant who works closely with indigenous communities in Canada noted, for example, that while a comparatively robust legal framework for protection of indigenous rights exists at the domestic level, insufficient access to justice often precludes effective enforcement of indigenous rights: indigenous communities often have insufficient resources and capacity needed to organize and meaningfully engage in consultations with investors, and to bring claims where their

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<sup>19</sup> For further information on the relationship between sources of law governing international investment, *see e.g.*, Kaitlin Y. Cordes, Lise Johnson, and Sam Szoke-Burke, "Land Deal Dilemmas: Grievances, Human Rights, and Investor Protections," (March 2016), at 12-19, available at: [http://ccsi.columbia.edu/files/2016/03/CCSI\\_Land-deal-dilemmas.pdf](http://ccsi.columbia.edu/files/2016/03/CCSI_Land-deal-dilemmas.pdf); Carin Smaller with contributions from Howard Mann, Nathalie Bernasconi-Osterwalder, Laszlo Pinter, Matthew McCandless and Jo-Ellen Parry, "The IISD Guide to Negotiating Investment Contracts for Farmland and Water," (November 2014), at 7-8, available at: [https://www.iisd.org/sites/default/files/publications/iisd-guide-negotiating-investment-contracts-farmland-water\\_1.pdf](https://www.iisd.org/sites/default/files/publications/iisd-guide-negotiating-investment-contracts-farmland-water_1.pdf).

rights are violated. Participants thus agreed that, while strengthening the protection of indigenous peoples' rights in domestic law is crucial, it is not sufficient.

## *ii. Revising the content of IIAs*

Participants agreed that, if states continue to sign international investment agreements, the content of agreements must be revised. Agreements should align with international human rights law, protect host and home state regulatory space, address the imbalance between investor interests and indigenous rights, and promote greater transparency and participation in the investment regime. One prominent suggestion, among the many revisions proposed by participants, was the inclusion of investor obligations in agreements. Integrating investor obligations could help promote compliance with any existing host state laws that protect the rights of indigenous peoples, while also creating new requirements for investors even in the absence of domestic laws.

For states interested in including specific investor obligations in international investment agreements, one participant noted that two model agreements – the South African Development Community Model Bilateral Investment Treaty Template<sup>20</sup> and the International Institute for Sustainable Development Model International Agreement on Investment for Sustainable Development<sup>21</sup> – could provide a starting point. Another participant noted that a handful of recently negotiated agreements already include some limited investor obligations,<sup>22</sup> while other agreements include provisions that seek to deny certain protections to investors where investments have been established through *inter alia* fraud or corruption.<sup>23</sup> Despite these limited examples, most states have not yet sought to substantially re-balance the asymmetry of international investment agreements. Participants thus agreed that, should states choose to continue concluding such agreements, they must include substantive, binding investor obligations.

Several participants also suggested including carve-outs and exceptions to protect host state regulatory space. These provisions seek to carve-out certain matters or policy areas from specific provisions (such as those concerning investor-state arbitration), or to exclude such matters from coming within the scope of the investment agreement as a whole. Provided that they are appropriately worded, carve-outs and exceptions can play a critical role in protecting a host state's ability to comply with its human rights obligations.

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<sup>20</sup> Model Bilateral Investment Treaty Template of the Southern African Development Community (2012), available at: <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf>.

<sup>21</sup> IISD Model International Agreement on Investment for Sustainable Development (April 2005), available at: [https://www.iisd.org/pdf/2005/investment\\_model\\_int\\_agreement.pdf](https://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf).

<sup>22</sup> For further information on investor obligations, see e.g. Lise Johnson, Lise Sachs, and Jesse Coleman, "International Investment Agreements, 2014: A Review of Trends and New Approaches" in Andrea K Bjorklund (ed), *Yearbook on International Investment Law & Policy 2014–2015* (Oxford University Press 2016), at 50-60; Lorenzo Cotula, "Human Rights and Investor Obligations in Investor-State Arbitration," 17 *Journal of World Investment & Trade* 1 (2016), 148-157.

<sup>23</sup> The Comprehensive Economic and Trade Agreement, for example, includes a provision that precludes investors from submitting a claim to investor-state dispute settlement under CETA "if the [relevant] investment has been made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process." Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (text published September 14, 2016), Chapter 8 (Investment), art. 8.18(3) [hereinafter CETA]. Similarly, India's Model Bilateral Investment Treaty (December 2015) also provides that "[a]n investor may not submit a claim to arbitration under this Chapter if the investment has been made through fraudulent misrepresentation, concealment, corruption, money laundering or conduct amounting to an abuse of process or similar illegal mechanisms." India Model Bilateral Investment Treaty, art. 13.4.

### *iii. Increasing transparency and participation*

A substantial part of the workshop discussion focused on the importance of procedure in the negotiation and enforcement of international investment agreements. Several participants highlighted the need for more inclusive consultation and public debate during the negotiation of such agreements, pointing in particular to the need for early engagement between national governments and indigenous peoples. This also requires greater efforts to raise awareness regarding the negotiation of agreements, and their potential ramifications for indigenous peoples, as indigenous communities are sometimes not aware of the potential implications until it is too late. Of course, as participants noted, the lack of transparency and information sharing that characterizes negotiations of international investment agreements also impedes public debate on such agreements.

The need for greater awareness, inclusive public debate, and consultation with indigenous peoples during the negotiation of investment agreements is particularly urgent given the negotiation of “mega-regional” agreements by states with significant indigenous populations.<sup>24</sup> For example, the negotiation of the Trans-Pacific Partnership precluded any meaningful engagement with indigenous peoples. While some more recent agreements have been lauded as constituting a significant step forward in investment treaty drafting, participants representing indigenous communities agreed that recently-negotiated agreements continue to preserve and protect investor interests over the interests of others, and thus fall short of the “innovative” standard claimed by negotiating parties and other proponents.

With respect to participation in investor-state arbitration, several participants noted that a more substantial right to intervene as a third party may provide indigenous peoples with an opportunity to defend their rights against encroachment by investor protections. One participant also argued for host states to involve indigenous peoples in the defense of investor claims before investment tribunals where the measures challenged by investors concern the rights of indigenous peoples. However, several participants also argued that a more substantial right to intervene would be insufficient to guarantee full protection of indigenous rights, due to the cost and cultural barriers associated with participation as a third party. Investor-state arbitrations are often far removed from the cultural, socio-economic, and political contexts in which investment activities take place. A deep practical and contextual disconnect thus exists between the reality on the ground, as experienced by indigenous communities, and the formalistic and removed nature of investor-state arbitration. Improvement of formal options for participation will likely not suffice to address the imbalance that exists between the strength of investor protections and the rights of indigenous peoples in the context of international investment.

### *iv. Resisting investor-state arbitration*

Many workshop participants linked the negative implications of the current international investment regime to investor-state arbitration. This powerful enforcement mechanism has, in many cases, enabled investors to

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<sup>24</sup> “Mega-treaties” or “mega-regionals” are defined herein as “broad economic agreements among a group of countries that have a significant combined economic weight and in which investment is one of the key subject areas covered.” UNCTAD, “Investment Policy Monitor No. 13,” (January 2015), available at: [http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d13\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d13_en.pdf).

challenge host state measures adopted in the public interest.<sup>25</sup> As noted above, the cases brought before investment tribunals often address matters of profound concern for third parties, including indigenous peoples, yet third parties are excluded from meaningfully participating in proceedings. Furthermore, the disparity between, on the one hand, investor-state arbitration as a mechanism for protecting the interests of investors, and, on the other, the mechanisms available for the protection of the rights of indigenous peoples, provides cause for serious concern.

In this context, several participants suggested that states should refrain from including investor-state arbitration provisions in newly negotiated investment agreements. Some states have already adopted this approach: Brazil, for example, has excluded investor-state arbitration from its Cooperation and Facilitation of Investment Agreements,<sup>26</sup> while the European Union has more recently sought to move away from investor-state arbitration and toward a standing “investment court.”<sup>27</sup> Nonetheless, despite some evidence of reform in more recent treaty drafting practice,<sup>28</sup> many states continue to conclude international investment agreements that include investor-state arbitration provisions: the recent negotiation and conclusion of “mega-regional” agreements, including the Trans-Pacific Partnership and Regional Comprehensive Economic Partnership,<sup>29</sup> risks increasing the prevalence of investor-state claims.

## 2. Investor-State Contracts

Large-scale investments are often regulated by contracts between the investor and the host state, which set out obligations for both parties in addition to the obligations that exist under domestic and international law. Such contracts can affect the rights of indigenous peoples in various ways. Where contracts are developed in accordance with internationally recognized rights of indigenous peoples, they may help to establish robust consent procedures and requirements for benefit sharing that go beyond existing domestic law requirements in some jurisdictions. However, investor-state contracts can also imperil indigenous peoples’ rights: stabilization clauses, for example, can limit the host state’s ability to enact regulations strengthening human rights protections. Investor-state contracts also interact with obligations under international investment agreements in complex ways, with investment agreements at times arguably elevating a breach of contractual obligations above domestic law. As with international investment agreements, the negotiation of investor-state contracts rarely includes opportunities for indigenous peoples’ participation.

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<sup>25</sup> For further information on the types of government acts and omissions challenged by investor-state claims in the extractives sector context, *see* Lise Johnson and Jesse Coleman, “International Investment Law and the Extractive Industries Sector,” CCSI Briefing Note (January 2016), at 3-4, available at: [http://ccsi.columbia.edu/files/2016/01/2016-01-12\\_Investment-Law-and-Extractives\\_Briefing-Note\\_1.pdf](http://ccsi.columbia.edu/files/2016/01/2016-01-12_Investment-Law-and-Extractives_Briefing-Note_1.pdf).

<sup>26</sup> Brazil Model Cooperation and Facilitation Investment Agreement (2015), available at: <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4786>.

<sup>27</sup> For further information, *see e.g.*, European Commission Press Release, “CETA: EU and Canada agree on new approach on investment in trade agreement,” (February 29, 2016), available at: [http://europa.eu/rapid/press-release\\_IP-16-399\\_en.htm](http://europa.eu/rapid/press-release_IP-16-399_en.htm); European Commission Press Release, “Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations,” (September 16, 2015), available at: [http://europa.eu/rapid/press-release\\_IP-15-5651\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5651_en.htm).

<sup>28</sup> For further information on recent treaty drafting practice regarding investor-state dispute settlement mechanisms, *see* Johnson, Sachs, and Coleman (n 22), at 43-50.

<sup>29</sup> RCEP negotiations are ongoing at the time of writing, and include ten member states of the Association of Southeast Asian Nations (ASEAN), along with Australia, China, India, Japan, Republic of Korea, and New Zealand.

At the outset of the discussion on investor-state contracts, several workshop participants noted that a significant body of research has already been undertaken on the interface between human rights and investor-state contracts, some of which supported the development of the UN Principles for Responsible Contracts.<sup>30</sup> Existing research has highlighted how investor-state contracts have been used to “contract out” of certain obligations, thereby undermining the protection of human rights. Research has also explored the impact of various types of stabilization clauses, and their potential to affect host state compliance with human rights law.<sup>31</sup>

Despite existing research, significant work remains to be done in practice to ensure that investor-state contracts do not have a negative impact on the rights of indigenous peoples. Participants focused primarily on two issues: first, the role of investor-state contracts and the content contained therein, and second, the contracting process itself.

### a) Role and Content of Investor-State Contracts

One theme running throughout the discussion of investor-state contracts was that contracts should not form the primary instrument governing the relationship between the host state, investors, and indigenous peoples. As stated with respect to international investment agreements, domestic law should form the primary source of law governing investment.

Greater reliance on domestic law rather than investor-state contracts has many advantages, one of which is lessening the risk that host states will lower social or environmental standards during negotiations with investors. A small number of workshop participants suggested that, to the extent that investor-state contracts are used, the establishment of regional model contracts could help avoid this potential “race to the bottom.” Regional models, it was argued, could provide a form of defense or political cover for host states, allowing such states to refuse to lower standards where requested by investors. Other participants were less enthusiastic about this approach, noting that investor-state contracts are generally country- and sector-specific, and any model would therefore require significant adaptation. Indeed, participants questioned whether the current plethora of guidelines and resources available to assist governments in negotiating and drafting these agreements sufficiently account for the particularities that investor-state contracts must address in different contexts.

One participant went beyond questioning the practicality of existing resources to suggest that an unintended consequence of the “responsible contracting” approach has been to give the impression that investors could contract in or out of compliance with human rights. The participant argued that the International Bar

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<sup>30</sup> Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Principles for Responsible Contracts (2011) <http://www.ohchr.org/Documents/Issues/Business/A.HRC.17.31.Add.3.pdf>.

<sup>31</sup> For further information on investor-state contracts, stabilization clauses, and human rights, *see e.g.*, Andrea Shemberg, “Stabilization Clauses and Human Rights,” IFC and the UN Special Representative of the Secretary-General on the issue of human and transnational corporations and other business enterprises (2009), available at: <http://www.ifc.org/wps/wcm/connect/9feb5b00488555eab8c4fa6a6515bb18/Stabilization%2BPaper.pdf?MOD=AJPERES>; Lorenzo Cotula and Kyla Tienhaara, “Reconfiguring Investment Contracts to Promote Sustainable Development” in Karl P. Sauvant (ed) *Yearbook on International Investment Law & Policy 2011-2012* (Oxford University Press 2013), 281-310; and Lise Johnson and Oleksandr Volkov, “Investor-State Contracts, Host State ‘Commitments’ and the Myth of Stability in International Law,” 24 *American Review of International Arbitration* 3 (2013), 361-415.

Association Model Mine Development Agreement, for example, which was designed to serve as a template for negotiating and drafting investor-state mine development agreements in developing countries,<sup>32</sup> had given companies this impression.

With respect to the content of investor-state contracts, participants unanimously agreed on the importance of ensuring that contracts comply with all applicable laws and do not seek to “contract out” of applicable laws, including those concerning human rights. Where domestic legal systems are nascent and contain loopholes that could undermine (or allow a contractual party to undermine) the rights of third parties, including indigenous peoples, some participants suggested that investor-state contracts can be used to “contract in” to higher standards concerning the rights of indigenous peoples.

Several participants noted, for example, that investor-state contracts can formalize benefit-sharing arrangements between investors and indigenous peoples. Others suggested that community development agreements provide a more appropriate mechanism for establishing such arrangements.<sup>33</sup> In both cases, participants stressed that any benefit-sharing arrangements must be established on the basis of prior consultation and FPIC. Without that, benefit-sharing arrangements will likely result in sub-optimal outcomes, and risk breaching the rights of those they are designed to benefit. One participant suggested that tripartite contracts may provide scope for better protection of indigenous peoples’ rights in the context of investment. Making indigenous communities party to the primary investor-state contract might reduce power asymmetries, and could help to ensure that any failure on the part of the investor to comply with benefit-sharing arrangements enshrined in the contract would result in a material breach of the contract. The same participant noted that at least one investment promotion agency in Latin America is exploring development of a model tripartite contract for agreements between investors, the state, and regional indigenous authorities that control lands targeted for investment.

Participants also agreed that the contents of investor-state contracts should be publicly disclosed. One participant highlighted the progress that has been made on transparency in the extractive sector, with disclosure of investor-state contracts governing oil, gas, and mining projects increasingly becoming the “norm.”<sup>34</sup> The same participant noted that disclosure of investor-state contracts concerning commercial agriculture and forestry projects lags far behind the extractive sector, although consensus on the need to promote greater transparency in land-based investment is evident,<sup>35</sup> and several initiatives have sought to do so.<sup>36</sup>

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<sup>32</sup> International Bar Association Model Mine Development Agreement (2011), available at: <http://www.mmdaproject.org/>.

<sup>33</sup> For further information regarding CCSI’s work on Community Development Agreements, see <http://ccsi.columbia.edu/work/projects/community-development-agreements-frameworks-and-tools/>.

<sup>34</sup> For a repository of investor-state oil, gas, and mining contracts and associated documents, see <http://www.resourcecontracts.org/>.

<sup>35</sup> CCSI and Open Contracting Partnership, “Transparency in Land-Based Investment: Key Questions and Next Steps,” (March 2016); CCSI, “Recommending Transparency in Land-Based Investment: A Summary of Relevant Guidelines and Principles,” (March 2016), both available at: <http://ccsi.columbia.edu/work/projects/transparency-in-land-based-investment/>.

<sup>36</sup> See e.g., OpenLandContracts.org, a repository of investment contracts for commercial agriculture and forestry projects, available at: <http://www.openlandcontracts.org/>; The Land Matrix, an online public database on land deals, available at: <http://landmatrix.org/en/>.

## b) Contracting Process

Process-oriented rights and reforms are also important in the context of investor-state contracts. Workshop participants emphasized the need to ensure that the contracting process is itself compliant with the rights of indigenous peoples. Participants noted that it is rare for investors and host states to meaningfully engage with indigenous peoples during the negotiation of investor-state contracts. More common during the contracting phase is repression—at times violent—of opposition to investments. Indeed, indigenous leaders and advocates continue to be targeted in countries across the world; participants highlighted the recent killing of Berta Cáceres, an indigenous Lenca leader and human rights defender who had led opposition against hydropower projects in Honduras, as one example.

Despite the general trend outlined above, participants noted that host states and investors are slowly recognizing the need to engage (or to engage more effectively) with individuals and communities affected by investment. Investors who fail to do so often suffer the consequences of stalled or failed projects. Some investors even acknowledge that failure to obtain a “social license to operate,” a concept that is increasingly used in the extractive sector context, can have a material impact on their investments.<sup>37</sup>

Yet participants agreed that, where host states and investors are engaging with communities, these engagements often fail to meet standards established by human rights law. For example, one participant who works with indigenous communities in Southeast Asia provided multiple examples of investors hiring consultants to engage with affected communities and then purposefully creating and/or exacerbating divisions within communities in order to acquire the requisite level of agreement needed for formal approval of an investment project. This dynamic has also been described in human rights and investor-state proceedings. For example, the Kichwa People of Sarayaku outlined similar experiences in their case before the Inter-American Court of Human Rights, with the Court concluding that the actions of an oil company (coupled with the host state’s failure to act) had created divisions within the Kichwa communities that eventually led to a “climate of conflict” in the area.<sup>38</sup> Allegations regarding the creation of divisions between communities were also made during the course of ongoing investor-state proceedings with respect to a Canadian mining company operating in Peru.<sup>39</sup>

Participants agreed on several process-oriented reforms for strengthening the rights of indigenous peoples in the context of investor-state contract negotiations. First, participants underscored the need for early engagement with indigenous peoples in order to fulfill the right to meaningful consultation and FPIC. They stressed that such communities must be consulted at the inception of investment projects, as well as

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<sup>37</sup> For further information, *see e.g.*, The Munden Project, “The Financial Risks of Insecure Land Tenure: An Investment View,” (2012), available at [http://www.rightsandresources.org/documents/files/doc\\_5715.pdf](http://www.rightsandresources.org/documents/files/doc_5715.pdf); The Munden Project, “Communities as Counterparties: Preliminary Review of Concessions and Conflict in Emerging and Frontier Market Concessions,” (2014), available at [http://www.rightsandresources.org/wp-content/uploads/Communities-as-Counterparties-FINAL\\_Oct-21.pdf](http://www.rightsandresources.org/wp-content/uploads/Communities-as-Counterparties-FINAL_Oct-21.pdf); Rachel Davis and Daniel Franks, “Costs of Company-Community Conflict in the Extractive Sector,” (2014), available at: [https://www.hks.harvard.edu/m-rcbg/CSRI/research/Costs%20of%20Conflict\\_Davis%20%20Franks.pdf](https://www.hks.harvard.edu/m-rcbg/CSRI/research/Costs%20of%20Conflict_Davis%20%20Franks.pdf).

<sup>38</sup> Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, Merits, and Reparations, Inter-American Court of Human Rights (series C), No. 245 (June 27, 2012), at para. 198.

<sup>39</sup> Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Expert Opinion of Antonio Alfonso Peña Jumba (October 6, 2015) and Second Expert Opinion of Antonio Alfonso Peña Jumba (April 13, 2016).

throughout the contracting process. Second, investor-state contracts and associated documents should be disclosed before they have been concluded, and the entire contracting process must be transparent. Third, host states must themselves engage with indigenous peoples during the contracting process, and cannot fulfill their own obligations with respect to the rights of indigenous peoples by delegating these obligations to investors. As noted by one participant, these recommendations align with the requirements established by the Inter-American Court of Human Rights concerning consultation and consent in the context of restrictions of the right to property due to development or investment plans.<sup>40</sup> The Court's jurisprudence thus provides a good starting point for further clarification of host state obligations in the context of investor-state contracts.

### 3. Strengthening the Human Rights Regime

The international human rights regime provides legal protections for a range of rights that might be affected by an investment project or accompanying government actions. Human rights law also includes rights and protections that are specific to indigenous peoples, particularly related to their ownership and use of lands, territories, and resources. These rights are recognized in and protected under a number of human rights treaties and instruments, including but not limited to the UN Declaration on the Rights of Indigenous Peoples<sup>41</sup> and the Indigenous and Tribal Peoples Convention (No. 169).<sup>42</sup> According to Article 31 of the Vienna Convention on the Law of Treaties, all international agreements – which includes investment agreements – must be interpreted in accordance with “any relevant rules of international law applicable in the relations between the parties.” Yet this is complicated in practice, and, at times, host and home state obligations to respect, protect, and fulfill human rights may come into tension with protections granted to investors under international investment agreements.

While states are the primary “duty-bearers” under international human rights law, businesses – including foreign investors protected under investment agreements – also have a responsibility to respect human rights, as articulated by the UN Guiding Principles on Business and Human Rights. These Principles, which have been widely embraced by business, provide guidance for governments and/or investors seeking to avoid, and redress, adverse corporate impacts on human rights. To date, however, extensive acceptance of these norms has fallen far short of ensuring that the rights of indigenous peoples are not undermined by investment agreements and investor-state contracts. More broadly, and as noted above, the enforcement mechanisms within the human rights regime have proven less effective than investor-state arbitration, and recent efforts to improve business impacts on human rights have been unable to address this systemic imbalance between the protection of investor interests and the protection of human rights.

In considering this broader context, workshop participants unanimously agreed that reform of the investment regime alone would be insufficient to guarantee the rights of indigenous peoples. Advocating for the application of human rights law in investor-state arbitration will not, for example, address the asymmetry in enforcement mechanisms available under the investment and human rights regimes, respectively. Participants thus discussed a series of options for improving the human rights regime to address the

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<sup>40</sup> See *e.g.*, Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights (series C) No. 172 (November 28, 2007), at paras. 129-137.

<sup>41</sup> UN Declaration on the Rights of Indigenous Peoples, UN Doc. A/RES/61/295 (October 2, 2007).

<sup>42</sup> Convention concerning Indigenous and Tribal Peoples in Independent Countries, 1650 UNTS 383 (June 27, 1989).

challenges posed by international investment, and for addressing the imbalance that currently exists between investor protections and indigenous peoples' human rights.

### a) Human Rights Narrative on Investment

During the workshop discussion, a common theme emerged regarding the need to strengthen the human rights narrative concerning the implications of international investment. Participants agreed that greater attention - within the human rights sphere - to the actual and potential impacts of international investment on the rights of indigenous peoples and others would be useful, as would a more consistent and coherent approach to addressing these impacts. Encouraging human rights authorities – from regional courts to UN treaty bodies and the Universal Period Review – to more fully articulate approaches for addressing the tensions between investment law and human rights law is also critical, and could ultimately help to strengthen rights in the context of investment. For example, several participants referred to the Inter-American Court of Human Rights' jurisprudence on the collective right to property, noting that a series of cases had resulted in the clarification and strengthening of this right;<sup>43</sup> participants agreed that the same level of engagement with issues at the nexus of human rights and investment should be sought. In addition to human rights bodies, human rights advocates and scholars also have a role to play in building the narrative concerning the impacts of international investment on the rights of third parties, and in clarifying approaches for addressing the tensions between investment law and human rights law.

A stronger human rights narrative, and more robust articulation of how states can meet their human rights legal obligations in the context of investment frameworks, is key to strengthening human rights protections of indigenous peoples affected by investment. This approach could help empower indigenous peoples seeking to challenge international investment impacts, either before investment occurs or in an effort to obtain redress after the fact. In addition, this approach may support host states in defending investor-state claims, when those claims focus on a host state's measures adopted to ensure compliance with its human rights obligations. For example, one participant noted that clarification of the meaning of "public interest" by human rights authorities could strengthen indigenous peoples' claims and host state defenses concerning public interest measures, including those undertaken to protect the rights of indigenous peoples.<sup>44</sup>

Developing a stronger and more coherent body of human rights jurisprudence on international investment could lead investment tribunals to increasingly rely on that jurisprudence in the context of investor-state arbitration. While several participants expressed concern that investment tribunals may not be well-placed to interpret and apply human rights law, as many arbitrators do not have a background in human rights, most participants nonetheless agreed that encouraging greater consideration of human rights issues during the course of investor-state proceedings is one of the many avenues of reform that should be pursued.

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<sup>43</sup> See e.g., *Case of the Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Inter-American Court of Human Rights (series C) No. 125 (June 17, 2005); *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Inter-American Court of Human Rights (series C) No. 146 (March 29, 2006); *Case of the Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Inter-American Court of Human Rights (series C) No. 172 (November 28, 2007); *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits, and Reparations, Inter-American Court of Human Rights (series C), No. 245 (June 27, 2012).

<sup>44</sup> For further information on exceptions to international investment agreements and human rights, see Barnali Choudhury, "Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements," Working Paper No. 2010/13 (June 29, 2010), available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1632437](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1632437).

Strengthening human rights authorities' understanding of human rights and investment could thus constitute an important means of providing guidance on how human rights law should be applied in investor-state proceedings.

## **b) Enforcement Mechanisms**

An issue that featured prominently throughout the discussion was the need for stronger enforcement of human rights and access to more effective remedies for indigenous peoples and other third parties affected by investment. Returning to the asymmetry between respective enforcement mechanisms under human rights and investment law, several participants flagged differences in both access and enforcement. For example, exhaustion of local remedies is in most cases not required by investment agreements: investors can thus bypass domestic courts and bring their claims directly before investment tribunals.<sup>45</sup> By contrast, exhaustion of local remedies is required in most cases before claims can be brought in human rights fora. In addition, the enforcement of determinations rendered by human rights tribunals and authorities often depends on political action;<sup>46</sup> by contrast, decisions rendered by investment tribunals are easily enforceable.<sup>47</sup> In situations where competing determinations are or could be rendered by investment and human rights authorities, some participants thus argued that the former would be likely to prevail over the latter, given the strength of enforcement mechanisms established under international investment law.

Ensuring access to equally effective remedies thus emerged from the discussion as a crucial priority for strengthening the human rights regime. Participants agreed that remedies provided to human rights petitioners need not be identical to those provided to investors in the investment regime. Financial compensation, for example, which is the remedy most often granted by investment tribunals, is generally not sufficient to fully address human rights violations. Providing greater equity in remedies under the two systems is thus more a matter of access and effectiveness.

In addition to improvements within regional and international fora, participants also stressed the importance of strengthening protection of human rights at the domestic level through remedies available in both host and home states.

## **c) Home State Obligations and Measures**

Many participants called for home states to play a more significant role in addressing the negative implications of international investment for the rights of indigenous peoples and other third parties. Scholars and others have increasingly argued that states have extra-territorial human rights obligations that extend

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<sup>45</sup> A 2012 OECD study found that only 8% of a sample selection of 1,660 international investment agreements required investors to exhaust local remedies prior to bringing a claim before an international investment tribunal. *See* David Gaukrodger and Kathryn Gordon, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community," OECD Working Paper on International Investment No. 2012/3 (2012), at 15.

<sup>46</sup> In the context of discussing this point, participants pointed to the Inter-American Court of Human Rights' ruling in the *Yakye Axa* case (n 43), noting that little has been done to implement the decision in that case.

<sup>47</sup> *See* note 14 above.

beyond their own borders.<sup>48</sup> Most participants agreed that home states should enact or strengthen domestic laws regulating outward investment in order to comply with their extra-territorial rights obligations.<sup>49</sup>

Setting aside questions of whether states have binding extra-territorial obligations, participants noted that there are various measures that home states can take to promote rights-compliant outward investment. Home states, for example, should make support for outward investment contingent on compliance with guidelines on responsible investment; as one participant suggested, home states could require investors to comply with the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights. Home states' development finance institutions should also impose such requirements on investors benefiting from project financing.

Home states can also take action with respect to the international investment agreements they sign, as well as the disputes that arise under them. One participant, for example, noted that home states seeking to protect outward investment through new agreements should not, for example, seek to make bilateral aid contingent on the conclusion of such agreements, if those agreements might undermine the rights of indigenous peoples and other third parties. Another participant suggested that home states could screen and approve investor-state claims before they are brought before investment tribunals. Adding this "filter" mechanism would allow home states to play a greater role in curbing disputes that challenge host state measures adopted to comply with their human rights obligations.

#### **d) Human Rights Obligations of Investors**

Apart from including investor obligations in international investment agreements, as was discussed above in Section 1(b)(ii), participants also discussed the establishment of binding human rights obligations for investors through other mechanisms. This could help to address some of the concerning implications of the unique status afforded to foreign investors under international law, whereby they receive a privileged level of protection without attracting a commensurate level of obligation. One participant made reference to the discussions of the Inter-Governmental Working Group on Transnational Corporations and other Business Enterprises, which had recently held its second session on a binding treaty concerning the obligations of transnational corporations.<sup>50</sup> Most participants agreed that the conclusion of such a treaty could be an important component of strengthening the human rights regime and re-balancing the current approach to investor protection under international law. However, several participants cautioned that other reform efforts should be pursued in parallel, given the nascent and political nature of negotiations.

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<sup>48</sup> For a discussion of home state obligations and measures in the context of land-based investment, *see* Kaitlin Y. Cordes and Anna Bulman, "Corporate Agricultural Investment and the Right to Food: Addressing Disparate Protections and Promoting Rights-Consistent Outcomes," 20 *UCLA Journal of International Law & Foreign Affairs* 87 (2016), 87-161, at 154-162.

<sup>49</sup> For a discussion of home country measures enacted by states, *see e.g.*, Lise Johnson, Sophie Thomashausen, and Kaitlin Y. Cordes, "Raising the Bar: Home Country Efforts to Regulate Investment for Sustainable Development," Ninth Annual Columbia International Investment Conference Background Note (November, 2014), available at: <http://ccsi.columbia.edu/files/2014/01/CIIC-Background-Paper-Nov-6.pdf>; CCSI, A4ID and Herbert Smith Freehills, "Home Country Measures Taxonomy: Examples of Home Country Measures to Regulate the Overseas Activities of Individuals and Corporations," (November, 2014), available at: <http://ccsi.columbia.edu/files/2014/01/CCSI-Taxonomy--Nov-10.pdf>.

<sup>50</sup> For further information on the second session of the Inter-Governmental Working Group on Transnational Corporations and other Business Enterprises (held October 24-28, 2016), *see*: <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session2/Pages/Session2.aspx>.

With respect to the UN Guiding Principles on Business and Human Rights, participants noted that investors should be encouraged to consider the implications of investor-state arbitration in the context of investors' responsibility to respect human rights. One participant argued that, in some situations, resort to investor-state arbitration in itself could constitute a violation of an investor's responsibility to respect human rights, given the chilling effect such proceedings are likely to have on a host state's compliance with its obligations under human rights law and the exclusionary nature of investor-state arbitration. Similarly, another participant argued that failure to comply with the UN Guiding Principles should be considered by investment tribunals assessing whether an investor's expectations can be considered to be "legitimate." At the very least, host states should stress that investors must be aware of the responsibility to respect human rights, and must act in accordance with that responsibility when establishing and carrying out their investment activities.

### e) Raising Awareness among Stakeholders

At a more basic level, participants agreed that awareness of the implications of investment for human rights, and of human rights law for investment, must be increased among all relevant stakeholders. The predominant theme of the need for greater transparency in international investment re-emerged in this context: several participants noted that more transparent processes for negotiating and concluding investment agreements and investor-state contracts, and for addressing investor-state disputes, could help to promote increased awareness of the implications of international investment for all stakeholders, including indigenous peoples. Greater awareness of these implications could in turn enable affected individuals and communities to more effectively advocate for their rights, and may also give investors the opportunity to themselves promote investment that is responsible and rights-compliant.

## Conclusion

The challenges of protecting indigenous peoples' rights in the context of international investment are likely to increase, as the scramble for resources pushes investors into more frequent contact with indigenous peoples, and as states continue to weave a more tangled web of international investment agreements.<sup>51</sup> Yet it is possible that these factors also create new opportunities to get things right – to improve meaningful consultations in the process of negotiating either international investment agreements or investor-state contracts; to develop investment approaches that fully respect indigenous peoples' rights and provide more equitable benefit-sharing; and to forge more coherent and equitable legal frameworks at both the domestic and international levels.

Discussions at the May 12 workshop highlighted the urgency of reforming and improving the legal regimes and instruments protecting international investments and human rights, while underlining that there are no simple solutions. The options and solutions put forth, however, provide a mix of shorter- and longer-term goals, as well as both pragmatic steps and ambitious efforts. Taken together, they illustrate how and where improvements could occur to strengthen the rights and interests of indigenous peoples in the context of international investment.

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<sup>51</sup> By mid-2016 alone, almost 150 states were engaged in negotiating at least 57 such agreements. See UNCTAD, World Investment Report 2016 (n 6), at 101.