

## CONCEPT NOTE AND DRAFT AGENDA

### **Asia-Pacific Regional Consultation on International Investment Agreements and Indigenous Peoples Bangkok, Thailand, 2-3 May 2016**

#### **Background**

Successive UN Special Rapporteurs on the rights of indigenous peoples have expressed serious concerns in relation to the growing negative impacts of foreign investment on rights of indigenous peoples worldwide. These investments often involve extraction of natural resources and large scale infrastructure projects in or near the territories of indigenous peoples. They are associated with violations of the land and resource, participation, consultation, consent, self-determination and cultural rights of indigenous peoples. In a number of cases they threaten the very cultural and physical survival of these peoples.

As a result of this alarming trend, the UN Special Rapporteur on the rights of indigenous peoples decided that it was necessary to look into the international legal regime, which serves to facilitate and regulate these investments and protects the rights of foreign investors at the expense of indigenous peoples' rights. This investment regime consist of almost 3,000 Bilateral Investment Treaties (BITs), as well as investment chapters of over 350 Free Trade Agreements (FTAs), collectively referred to as International Investment Agreements (IIAs). These agreements, which have emerged in the last three decades, serve to protect rights granted to investors and enable them to take States to international arbitration under Investor-State Dispute Settlement (ISDS) if they believe their rights protected under the agreements are being unfairly infringed upon. On 7 August 2015, the UN Special Rapporteur on the rights of indigenous peoples presented her annual report to the UN General Assembly, which focused on the impact of these IIAs on the human rights of indigenous peoples (UN Doc A/70/301). That report examined how the international investment regime interacts with and serves to constrain the State duty to protect, respect and fulfil the rights of indigenous peoples.

The Special Rapporteur found that IIAs have contributed to negative impacts on indigenous peoples' territorial, cultural and self-governance rights, including their self-determination based rights to good faith consultation, effective participation and free prior and informed consent. The report identified a range of mining, oil and gas, agribusiness, infrastructure and tourism projects associated with these international investment agreements, which have been associated with indigenous rights violations. The report also pointed to the constraints which IIAs and the associated ISDS place, and will continue to place, unless significant reforms are made, on States' freedom and willingness to protect indigenous peoples' rights. This is particularly the case in light of prohibitive costs and awards associated with ISDS arbitration which lacks transparency, provides no legal certainty, has no appeals system, provides no standing to impacted

human rights holders, such as indigenous peoples, and fails to take their rights into consideration.

The report pointed to these and other issues in the current system of IIAs and made a series of recommendations in relation to how these shortcomings should be addressed in order to ensure respect for the rights of indigenous peoples. It concluded that “a more thorough review of implications of international investment and free trade agreements and a deeper policy and systemic reforms are needed to ensure the respect, protection and fulfillment of indigenous peoples’ rights”. In order to build on these recommendations within the framework of the Special Rapporteurs’ ongoing work in the area of IIAs a series of regional consultations are being held, the first of which will be in Lima, Peru followed by Asia-Pacific and then Africa. These consultations aim to contribute to the supplemental report of the Special Rapporteur towards the second half of this year.

In the late 1990’s, the Asia-Pacific region saw a proliferation of IIAs that have impact on the economic relations in the region. 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 and its failure to include adequate protections for their rights vis-à-vis those of foreign investors. They fear that unless such protections are included, the TPP will facilitate projects and activities, which can 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 UN Declaration on the Rights of Indigenous Peoples and ILO Convention 169 and in keeping with the objectives of the Sustainable Development Goals (SDGs) adopted by States in 2015.

In light of this, the regional seminar for Asia-Pacific will be convened in Bangkok, Thailand on 2-3 May 2016. The seminar will aim to address the impacts on the rights of indigenous peoples of international investment agreements, including the TPP and existing BITs and FTAs, and the extractive and infrastructure megaprojects which they facilitate. Participants will include Special Rapporteurs and independent experts of the United Nations and relevant groups, representatives of indigenous peoples from the Asia and the Pacific, academics and representatives of civil society organizations who are focused on reforming the international investment regime in order to render it more consistent with human rights and sustainable development for indigenous peoples.

## **Objectives of the Regional Consultations**

The seminar will aim to:

- Inform indigenous representatives of issues in relation to BITs & FTAs, including the TPP, and gather additional input in relation to their impacts;
- Act as an input into regional strategy of indigenous peoples in Asia and the Pacific in relation to these agreements and for the report of the Special Rapporteur;
- Gain an understanding of what the new tendencies in BITs and FTA are and how useful innovations in agreements such as the TPP are likely to be in practice in terms of ensuring protection for indigenous peoples' rights;
- Review impacts of mega development / investment projects located in or near indigenous peoples' territories on indigenous peoples' rights and address some case studies that demonstrate these impacts;
- Develop recommendations targeted at State parties to investment agreements (home and host states of companies), international human rights bodies and international investment arbitrators and investors (companies and project funders) in relation to guaranteeing respect for indigenous peoples' rights.

## **Dates**

The consultation will be held on 2-3 May 2016.

## **Draft Agenda**

<b>DAY 1 - MAY 2, 2016</b>	
1.	Orientation and Introduction
2.	Overview of the UNSRRIP 2015 Report on Trade and Investments
3.	General perspective on international investment agreements a. Global regime on International Investment Agreements b. Asia-Pacific landscape on international Investment Agreements c. International Investment Agreements: Relations with Transnational Corporations, International Financial Institutions, and mega-projects
4.	Challenges on the ground: impact on indigenous peoples a. FTAs and BITs in the ASEAN region b. APEC and Free Trade Agreements in the Asia-Pacific region c. Presentation of country studies
<b>DAY 2 - MAY 3, 2016</b>	
1.	Transpacific Partnership Agreement - negotiation, content and implementation implications a. Improvement in TPP over BITs b. TPP and Environment Protection c. Perspective on TPP and potential implications for indigenous peoples' rights d. Research on TPP in Asia/Pacific and impact on indigenous peoples rights

	<p>in the Asia/Pacific context</p> <p>e. TPP and ILO C169</p> <p>f. Perspectives from Malaysia</p>
2.	Investor-state dispute settlement in BITs and FTAs
3.	<p>Foreign investment and mega-projects in or near indigenous territories and their impact on indigenous peoples rights</p> <p>a. Development in business and human rights</p> <p>b. Experiences of indigenous peoples</p>
4.	<p>Impact of investment and free trade agreements on indigenous peoples</p> <p>a. Presentation of country studies</p> <p>b. Statements of key persons</p> <p>c. Messages from indigenous peoples/organizations</p>