

## **Questionnaire to States in relation to International Investment Agreements and the Rights of Indigenous Peoples**

### **1) International human rights law framework as it pertains to indigenous peoples**

- i) Does your national legislative framework afford protection to the collective rights of indigenous peoples and groups who share similar social, cultural and economic characteristics with them?
- ii) Does your State support the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP) and if it has not ratified *International Labour Organization Convention 169 on Indigenous and Tribal Peoples* (ILO Convention 169) would it consider doing so?

### **2) Indigenous peoples' participation in decision-making in relation to IIAs**

- i) What measures, mechanisms and institutional arrangements exist, or could be established, to facilitate good faith consultation, FPIC and effective participation of, indigenous peoples prior to, during, and following IIA negotiations?
- ii) What are the key challenges to realizing this effective participation, and how can they be overcome in the:
  - a) formulation of national policies and action plans in relation to IIAs?
  - b) drafting the text of Model BITs and IIAs?
  - c) negotiation and ratification stages of IIAs?
  - d) conduct of participatory *ex ante* and *ex post* human rights impact assessments for trade and investment agreements in relation to indigenous peoples' rights?
- iii) Do the government departments and agencies that are responsible for protecting indigenous peoples' rights engage in drafting of Model BITs and negotiations around IIAs?

### **3) Consistency of IIAs provisions with the rights of indigenous peoples**

- i) What types of exceptions or standards of protection that are consistent with State human rights obligations and balance the rights and responsibilities of investors could be included in IIAs to guarantee that indigenous peoples' rights are protected by States and respected by investors?
- ii) Where they exist, have exceptions or clauses in IIAs related to indigenous peoples' rights proven effective in protecting those rights, and if not what is necessary in terms of their wording or relationship with other core treaty provisions to overcome their limitations?
- iv) To your knowledge, have existing IIAs resulted in negative impacts on the enjoyment of indigenous peoples' rights, either as a result of claims made by investors or due to the reluctance to regulate arising from the prospect of possible arbitration?

### **4) Ensuring investor respect for the rights of indigenous peoples**

- i) How can IIAs be adapted to enhance and ensure investor respect for indigenous peoples' rights and to guarantee effective remedies when rights violations occur within the context of IIA facilitated investments?
- ii) Specifically, could you envisage, or would you consider desirable, the inclusion of clauses in IIAs in relation to human rights obligations of investors mandating:
  - a) investor conduct of initial and on-going due diligence in relation to indigenous peoples' rights;
  - b) investor acceptance of civil liability in home states;
  - c) investor obligations consistent with host and home State duties under international human rights law?

**5) Investor-State Dispute Settlement (ISDS) reform and scope**

- i) How can ISDS be reformed and more effectively regulated to ensure that due consideration is accorded to human rights law, including the rights of indigenous peoples, and that any future recognition and protection of these rights is not inappropriately restricted by arbitrators through inappropriate interpretations of investor protections such as indirect expropriation, discrimination, and fair and equitable treatment?
- ii) Could treaties include carve outs from investor state disputes settlement in relation to measures taken to recognize and protect indigenous peoples' rights, or can exceptions be designed to guarantee the effective protection of indigenous peoples' rights vis-à-vis core treaty obligations in the context of investor State disputes?
- iii) Could formal standing be granted to indigenous peoples enabling them to participate in dispute affecting their rights or to potentially take counterclaims against investors impacting negatively on their rights, and could investor-State tribunals be required to address indigenous rights' considerations in the context of investor initiated claims?

**6) Investor-State contracts and the rights of indigenous peoples**

- i) How can full and effective indigenous peoples' participation be guaranteed in the negotiation of investor-state contracts that may impact on their territorial, self-governance or cultural rights?
- ii) How can State and corporate obligations to protect and respect indigenous peoples' rights be incorporated as integral components of these contacts or other legal agreements?

In this regard, what are your views on mitigating potential harm to indigenous peoples' rights of investor-State contracts and guaranteeing their right to effective remedies by:

- a. incorporating obligations into the contract requiring respect for indigenous peoples' rights as affirmed in international standards such as the UNDRIP and ILO Convention 169;
- b. entering into multi-actor contractual models, which provide the option for indigenous peoples to become parties to the contract;

- c. facilitating the parallel negotiation of consent-based legal agreements which afford