Submission Re: Criminalization and attacks against indigenous peoples defending their rights: proposals for action to prevent and protect

March 16, 2018

The Columbia Center on Sustainable Investment (CCSI) is grateful for the opportunity to provide this input to the UN Special Rapporteur on the rights of indigenous peoples. As a joint center of Columbia Law School and the Earth Institute, we focus on international investment and its impacts on sustainable development. In this context, we are increasingly concerned about the repression and criminalization of human rights defenders, including indigenous rights defenders, in the context of investment projects—a situation that unfortunately seems to show no sign of abating.

Our input focuses on one specific topic that we believe may be overlooked in general discussions about human rights defenders: the possibility that the international investment law regime, comprised of thousands of bilateral and multilateral treaties, may in a causal way exacerbate the potential for repression and criminalization of human rights defenders. This concern was raised at a one-day roundtable hosted by CCSI and the UN Working Group for Business and Human Rights in October 2017,[1] and we believe it merits further exploration.

Investment treaties serve to place standards on how governments may treat foreign investors. Investor-state arbitration permits foreign investors to directly enforce, typically without first exhausting (or even commencing) domestic remedies, these standards by suing the government hosting their investment for actions taken (or not taken) by that government that have a negative impact on the investment or profits (including future lost profits) of the investment. However, the standards contained in investment treaties are notoriously vague, and arbitration tribunals are inconsistent, and even contradictory, in how they interpret and apply these standards against governments. As such, it is difficult, if not impossible in many cases, for governments to anticipate when their actions (taken by executive, legislative, or judicial authorities, at any level of government, and even if a government actor is acting outside of its/his/her domestic legal or constitutional authorization) may trigger liability. Investors often initiate investor-state legal actions, and tribunals make awards that are adverse to governments or governments choose to settle the claim, in instances when the government has taken the action in question with the intent of realizing social, environmental, or human rights objectives or obligations, but such action also negatively impacted a foreign investor or investment.[2] Furthermore, due to how treaties define

[1] Further information available at http://ccsi.columbia.edu/2017/10/18/roundtable-on-impacts-of-the-investment-regime-on-access-to-justice/ (workshop outcome document forthcoming).

[2] *E.g.* Bear Creek v. Peru, ICSID Case No. ARB/14/21, Award (Nov. 30, 2017) (failure to grant concession amid social unrest); Windstream v. Canada, PCA Case No. 2013-22, Award (Sept. 27, 2016) (moratorium on offshore wind investments amid environmental uncertainty); Bilcon v. Canada, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability (March 17, 2015) (refusal of permit for quarry because of local opposition); Copper Mesa v. Ecuador, PCA Case No. 2012-2, Award (Mar. 15, 2016) (revocation of mining concessions amid social unrest);

covered investments and investors, and how those definitions have been interpreted by tribunals, governments may face claims by multiple investors based on the same measure, thus rendering the question of whether specific instances of government conduct or measures will attract liability even more uncertain.[3]

One particularly problematic substantive obligation from the perspective of criminalization of human rights defenders that is imposed on states in many investment treaties is the requirement to provide investors "full protection and security."[4] This standard in investment law is frequently interpreted to require the host state to provide physical protection and security to an investor,[5] and is often invoked in situations in which an investor, faced with protests against the investment, makes an ISDS claim against the state based on the state's obligation to provide physical security to the investor in the face of such protests. States do not have an absolute obligation akin to "strict liability" but an obligation more akin to an exercise of due diligence, but does require actual action by the state.[6] Providing security to the investor in this context can easily come at the expense of protestors ability to exercise and defend their rights.

On average each such investor-state claim costs nearly US$6 million for a government to defend.[7] Even if the government prevails in the case,[8] tribunals are less likely to shift arbitration costs to

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TransCanada v. United States, ICSID Case No. ARB/16/21, settled (2016) (failure to grant oil pipeline permit amid social opposition); Occidental v. Ecuador, ICSID Case. No. ARB/06/11, Award (Oct. 5, 2012) (termination of oil concession amid social unrest); Vattenfall v. Germany (I), ICSID Case No. ARB/09/6, Award (settlement) (March 11, 2011) (environmental restrictions on coal-fired power plant).

[3] David Gaukrodger, "Investment Treaties and Shareholder Claims: Analysis of Treaty Practice," OECD Working Papers on International Investment, 2014/03 (2014).

[4] *See, e.g.,* Copper Mesa Mining Corporation v Republic of Ecuador, PCA Case No. 2012-2, Award (15 March 2016), para. 6.25 (Finding a breach of FPS for Ecuador's failure to provide security to an investor in the face of social unrest and opposition to a mining investment. Para. 6.83. The tribunal stated, with respect to the government's obligation, that "[p]lainly, the Government in Quito could hardly have declared war on its own people. Yet, in the Tribunal's view, it could not do nothing." Para. 6.83. The tribunal, noting the investor's contributory conduct in firing live ammunition on protestors, rather than dismissing the claim, simply reduced damages against Ecuador (to US$ 19.4 million) to reflect the fact that the investor's "negligence" in engaging with local communities contributed to the collapse of its project. Para. 10.9.).

[5] In some cases tribunals also have extended the obligation to include legal security.

[6] *Copper Mesa*, para. 6.81. This treaty standard to require at least physical security is well-established. *See, e.g.* AES v. Hungary, ICSID Case No. ARB/07/22, Award (Sept. 23, 2010); Tecmed v. Mexico, ICSID Case No. ARB(AF)/00/2, Award (May 29, 2002); Lauder v. Czech Republic; UNCITRAL, Final Award (Sept. 3, 2001); AMT v. Zaire, ICSID Case No. ARB/93/1, Award (Feb. 21, 1997); AAPL v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award (June 27, 1990).

[7] See, among others, Jeffrey P Commission, 'How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years' (*Kluwer Arbitration Blog*, 29 February 2016) http://kluwerarbitrationblog.com/2016/02/29/how-much-does-an-icsid-arbitration-cost-a-snapshot-of-the-last-five-years/ accessed 27 February 2018. The cost to defend a case can greatly increase based on complexity of issues raised in the case.

[8] Of all concluded cases, one third were decided in favor of the State (i.e. the claim was dismissed either on jurisdictional ground or on the merits). In one quarter of cases, investors won and were awarded compensation. One quarter of all cases were settled. Of the remaining cases, either the case was discontinued or the tribunal found that the treaty was breached but did not award

the losing investor when the state successfully defends the claim than they would be to shift costs to the state if the investor had prevailed.[9] Moreover, where a tribunal does shift costs to the unsuccessful investor claimant, governments can have a difficult time recouping the funds that they expended in defending the case.[10] Of course, when a state loses a claim, liabilities are much higher, typically in the millions or even billions of dollars. These awards are highly enforceable in courts around the world, and adverse awards are not subject to appeal (they can only be challenged on very limited grounds). Furthermore, one study found that the mere filing of an investor-state arbitration claim against a state is connected with reduced inward FDI flows, and that inward FDI flows drop even further when the state loses such a case.[11]

While more research is required, it is clear that investor-state arbitration under investment treaties can have high costs, both material and reputational, for host states.[12] These actual and potential costs can place great pressure on states (or individual actors within them) to attend to and address the demands made by foreign investors, including demands to ignore or stop protests of others who may oppose or be concerned about the investors' projects or methods. Moreover, given the vague and inconsistently applied standards relevant in investment law, governments wanting to avoid risks of claims and losses may be unduly responsive to the interests of investors at the expense of other competing interests, which can exacerbate tendencies toward intra-national inequality in favor of large corporations and at the expense of the rights of less powerful groups and individuals.[13]

With respect to indigenous and other human rights defenders, there is a significant possibility that the international investment law regime may exacerbate repression and/or criminalization of human rights defenders in order to avoid costly investor-state claims and even costlier liability.

Example: Bear Creek v. Peru

One pertinent example comes from Peru, where local indigenous Aymara communities in Northern Puno have faced criminalization for their efforts to protect their rights and interests affected by the "Santa Ana" silver mining project, an investment of the Canadian company, Bear Creek Mining Corporation. Some Aymara community members and leaders from the region organized and mobilized to raise concerns regarding the project's potential impacts on the local

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compensation. UNCTAD World Investment Report 2017, at 117, *available at* http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf.

[9] Matthew Hodgson, "Counting the costs of investment treaty arbitration," Global Arbitration Review" (Mar. 24, 2014) at 7.

[10] Memorandum from I. Zarak A. to M. Kinnear, Re: Effective Protection for Respondent States Against Judgment-Proof Claimants, dated Sept. 12, 2016. Statistics cited by Panama indicate that among thirty-five respondent states that had been granted costs awards since Dec. 31, 2013, 49% had been paid in full, 14% had been paid in part, and 37% had not been paid at all.

[11] Todd Allee and Clint Peinhardt, "Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment," 65 International Organization 401 (2011).

[12] For a thorough discussion of the costs and benefits of investor-state dispute settlement *see* Joachim Pohl, "Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence," OECD Working Papers on International Investment (2018).

[13] Lise Sachs and Lise Johnson, "Investment Treaties, Investor-State Dispute Settlement and Inequality: How International Rules and Institutions Can Exacerbate Domestic Disparities" (2018).

environment and water sources.[14] Community members expressed opposition to the project in various ways, including by engagement with the regional government of Puno,[15] at a public hearing in February 2011, and through peaceful protest.[16] In March 2011, a more active social protest movement against the Santa Ana project began. The protests, widely known as "Aymarazo," centered on the rights and interests affected by the project, and grew in intensity until – in June 2011 – the government revoked the decree of public necessity that was one of the legal prerequisites for Bear Creek's ability to mine the Santa Ana project.[17]

In August 2014, Bear Creek filed an investor-state claim against Peru on the basis of the Canada-Peru Free Trade Agreement (FTA), seeking in excess of US$ 500 million in damages for alleged expropriation of its investment, and breaches of other standards in the FTA.[18] In 2017, one of the most active years for the investor-state claim filed by Bear Creek (during which an award was ultimately rendered), at least 18 Aymara community members faced trial for obstruction of public services, aggravated extortion, and disruption of the peace.[19] Walter Aduviri Calizaya, a prominent Aymara community leader and organizer, was sentenced to seven years in prison and a fine of two million soles (US$ 600,000).[20] Concerns regarding Peru's treatment of human rights defenders and groups engaged in social protests have been raised in the past.[21] CCSI is carrying out research to better understand the extent to which the restrictions and pressures placed on the Peruvian government by the Canada-Peru FTA, and the financial, reputational, and political stakes associated with investor-state arbitration, may have influenced the actions taken with respect to Aymara community members.

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[14] Front Line Defenders, "Aymara Community Leaders on Trial," (2017).

[15] Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Amicus Curiae Brief submitted by the Association of Human Rights and the Environment-Puno and Mr. Carlos Lopez, PhD (Non-Disputing Parties), p. 9.

[16] *Id.*, pp. 5-8.

[17] *Id.*, pp. 8-10.

[18] Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21.

[19] Front Line Defenders, "Aymara Community Leaders on Trial," (2017); "Six Years After the 'Aymarazo' Protets in Peru," Intercontinental Cry (June 27, 2017).

[20] Business & Human Rights Resource Center, Human Rights Defenders Portal, Walter Aduviri Calizaya. The sentence was upheld on appeal in December 2017. La Ley, "Caso Aduviri: estudios superiores permiten inaplicar error de prohibición en población indígen," (February 16, 2018). See also Sian Cowman and Aldo Orellana López, "Dura condena contra líder aymara devela política de criminalización de la protesta en Perú," Derechos Humanos y Medio Ambiente Puno (July 30, 2017).

[21] It has been reported that, in days leading up to the Bagua massacre, the US State Department cited the Peru-US Free Trade Agreement in placing pressure on the Peruvian government to address protests by indigenous communities regarding mining in La Oroya, Peru. See Jose De Echave and Lori Wallach, "Peru's 'Bagua massacre' haunts the TPP," The Hill (June 11, 2014). Regarding concerns expressed with respect to Peru's treatment of human rights defenders and social protesters, see generally: UN Working Group on Business & Human Rights, Statement at the end of visit to Peru by the United Nations Working Group on Business and Human Rights (Lima, July 19, 2017); UN Special Rapporteur on the rights of indigenous peoples, Report on the situation of indigenous peoples' rights in Peru with regard to the extractive industries, UN Doc. A/HRC/27/52/Add.3 (July 3, 2014).

The Special Rapporteur has, of course, already analyzed the impact of the international investment regime, as a general matter, on the rights of indigenous peoples.[22] While it is difficult, at this moment in time, to definitively prove the narrower issue of a causal impact of the international investment law regime on the rights of indigenous and other human rights defenders, the example discussed above illustrates how the regime may exacerbate the repression and criminalization that human rights defenders face. In particular, where governments are faced with a choice between protecting the interests of investors, on the one hand, and complying with their obligations to protect, respect, and fulfill the rights of human rights defenders, on the other, the high stakes associated with investor-state arbitration can incentivize governments to prioritize the former even if at the direct expense of the latter.

Recommendations

States should analyze their obligations under international investment agreements to which they are a party and determine how their obligations under such agreements may impact their ability to realize their human rights obligations towards rights-holders, including human rights defenders. To the extent a state's obligations under an international investment agreement may be inconsistent with its obligations under other international legal instruments, states should, through "subsequent agreement" and "subsequent practice" make clear the meaning of their investment agreements to clarify that actions taken that may otherwise be inconsistent with their obligations under international investment agreement but that are taken with the objective of realizing the rights of human rights defenders should not result in treaty violations.[23] In future treaties, states should clarify this directly in the text of the treaty, and could more generally affirm the primacy of their human rights obligations by including specific norm conflict provisions within such future texts. States should terminate, or decline to renew, existing treaties with respect to which their obligations to investors are in theory or practice inconsistent with their obligations to human rights defenders.

Prior to entering into any trade and investment agreement, a human rights impact assessment should be conducted in order to, among other reasons, determine whether a trade and investment agreement would impose on a state any obligations that are inconsistent with its obligations under preexisting instruments.[24] A state should refrain from entering into a trade and/or investment agreement when the obligations under such agreement are inconsistent with its obligations under existing human rights instruments.[25]

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[22] Report of the Special Rapporteur on the rights of indigenous peoples, A/HRC/33/42 (11 August 2016) (analyzing the impacts of international investment agreements, including bilateral investment treaties and investment chapters of free trade agreements, on the rights of indigenous peoples). See also Workshop Outcome Document: International Investment and the Rights of Indigenous Peoples (Nov. 16, 2016) (workshop hosted by CCSI and the Special Rapporteur on the rights of indigenous peoples and international investment law).

[23] Lise Johnson, "Ripe for Refinement: The State's Role in Interpretation of FET, MFN and Shareholder Rights," GEG Working Paper 2015/101 (April 2015); David Gaukrodger, "The legal framework applicable to joint interpretative statements of investment treaties," OECD Working Papers on International Investment," 2016/01 (2016).

[24] *See e.g.*, UN Committee on Economic, Social and Culture Rights, General Comment No. 24 (2017) on State Obligations under the ICESCR in the context of business activities, E/C.12/GC/24 (August 10, 2017), para. 13.

[25] Report of the Special Rapporteur on the right to food, Olivier De Schutter, Guiding principles on human rights impact assessments of trade and investment agreements, A/HRC/19/59/Add.5 (19 Dec. 2011). For a discussion of how investment law and human rights law may compete or

In addition to states, private businesses should identify, prevent, and mitigate human rights abuses against defenders, through both due diligence and their own activities and leverage.[26] Businesses should carefully consider whether the investment context itself may subtly create pressure to repress or criminalize human rights defenders protesting investment projects. Particularly in such a scenario, businesses must make clear to governments that they should not criminalize human rights defenders' protests and efforts to defend their rights and interests in the context of investment projects, and should further participatory decision-making with all interested stakeholders in such scenarios.

To the extent that a business decides to pursue investor-state arbitration arising out of a factual scenario involving the interests of third-parties, including human rights defenders, it should refrain from raising claims about "full protection and security" as they relate to human rights defenders' legitimate efforts to protest investments or defend their rights in the context of investments.

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even conflict with respect to land investments and options for states in this context, see Kaitlin Y. Cordes, Lise Johnson and Sam Szoke-Burke, "Land Deal Dilemmas: Grievances, Human Rights, and Investor Protections," CCSI (March 2016) available at http://ccsi.columbia.edu/files/2016/03/CCSI_Land-deal-dilemmas.pdf.

[26] United Nations, "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" framework" (2011).