Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the right to development; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights; the Special Rapporteur on the rights of indigenous peoples; the Independent Expert on the promotion of a democratic and equitable international order; and the Special Rapporteur on the human rights to safe drinking water and sanitation

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Excellency,

We have the honour to address you in our capacities as Working Group on the issue of human rights and transnational corporations and other business enterprises; Special Rapporteur on the right to development; Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights; Special Rapporteur on the rights of indigenous peoples; Independent Expert on the promotion of a democratic and equitable international order; and Special Rapporteur on the human rights to safe drinking water and sanitation, pursuant to Human Rights Council resolutions 35/7, 33/14, 37/8, 34/3, 33/12, 36/4 and 33/10.

We are independent human rights experts appointed and mandated by the United Nations Human Rights Council to report and advise on human rights issues from a thematic or country-specific perspective. We are part of the special procedures system of the United Nations, which has 56 thematic and country mandates on a broad range of human rights issues. More information about the special procedures system is available at the webpage of the Office of the High Commissioner for Human Rights.

We are writing to you in relation to the ongoing work of the Working Group III on Investor-State Dispute Settlement (ISDS) Reform, which is scheduled to hold its 37th session in New York from 1 to 5 April 2019. Taking note of the Working Group's deliberations and decisions from the 34th to 36th sessions, we wish to draw the attention of the Working Group to the following concerns, which, in our view, warrant consideration at the 37th session. We hope that your Excellency's Government would be able to take them into account and propose them as part of the reform agenda, in its capacity as Member of the Working Group.

1. Need for systemic reform of ISDS

At the outset, we wish to express our overarching concerns that international investment agreements (IIAs) and their ISDS mechanism have often proved to be incompatible with international human rights law and the rule of law. The UN special

procedures mandate holders and other human rights experts have repeatedly highlighted the risks that IIAs and ISDS pose to the regulatory space required by States to comply with their international human rights obligations as well as to achieve the Sustainable Development Goals (SDGs).[1] The inherently asymmetric nature of the ISDS system, lack of investors' human rights obligations, exorbitant costs associated with the ISDS proceedings and extremely high amount of arbitral awards are some of the elements that lead to undue restrictions of States' fiscal space and undermine their ability to regulate economic activities and to realize economic, social, cultural and environmental rights.[2] The ISDS system can also negatively impact affected communities' right to seek effective remedies against investors for project-related human rights abuses.[3] In a number of cases, the ISDS mechanism, or a mere threat of using the ISDS mechanism, has caused regulatory chill and discouraged States from undertaking measures aimed at protection and promotion of human rights.[4]

Therefore, the current ISDS reform presents a critical opportunity to seek systemic structural changes to the architecture of ISDS. While addressing the procedural concerns identified during the previous sessions would contribute to improving the efficacy of the ISDS system, it would not remedy the power imbalance between investors and States, which is so deeply entrenched in the architecture of the ISDS system. The current reform proposals, which are limited in scope and nature, can only offer superficial solutions to symptoms of the fundamental flaws in the ISDS system. We believe what is necessary is a fundamental, systemic change, which entails moving towards a fairer and

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1 See e.g., UN Experts Voice Concern over Adverse Impacts of Free Trade and Investment Agreements on Human Rights (2 June 2015), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031; Investor-State dispute settlement undermines rule of law and democracy, UN expert tells Council of Europe (19 April 2016), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19839&LangID=E; UN Committee on Economic, Social and Cultural Rights, General Comment No. 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, UN Doc. E/C.12/GC/24 (10 August 2017); UN Working Group on the issue of human rights and transnational corporations and other business enterprises, "Access to effective remedies under the Guiding Principles on Business and Human Rights", UN Doc. A/72/162 (18 July 2017); Report of the High Commissioner for Human Rights, "Human Rights, Trade, and Investment" UN Doc. E/CN.4/Sub.2/2003/9 (2 July 2003); Report of the Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, UN Doc A/HRC/33/42 (11 August 2016); Report of the Special Rapporteur on the rights of indigenous peoples on the impact of international investment and free trade on the human rights of indigenous peoples, UN Doc. A/70/301 (7 August 2015); Report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred Maurice de Zayas, UN Doc A/ HRC/33/40 (12 July 2016); Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum, UN Doc A/HRC/19/59/Add.5 (19 December 2011).

2 See UNCTAD, Improving investment dispute settlement: UNCTAD policy tools (Issue 4, November 2017).

3 Columbia Center on Sustainable Investment and UN Working Group on the issue of human rights and transnational corporations and other business enterprises, "Impacts of the International Investment Regime on Access to Justice" (September 2018), https://www.ohchr.org/Documents/Issues/Business/CCSI_ UNWGBHR_InternationalInvestmentRegime.pdf

4 See for e.g.: Philip Morris v. Uruguay; Philip Morris v. Australia; Ethyl Corporation v. Canada. See also: Report of the Independent Expert on the promotion of a democratic and equitable international order, A/70/285 (2015).

more transparent multilateral system, which duly takes into account the rights and obligations of investors and States in line with all applicable international laws and standards concerning human rights, labour rights and environmental rights. A special attention should be paid to differentiated and disproportional negative impact of IIAs and the ISDS mechanism on women as well as on indigenous peoples, particularly in relation to resource extraction in or near indigenous peoples' territories.

In calling for a fundamental reform of the existing ISDS system, we wish to underline the fundamental purposes for which UNCITRAL was established by the UN General Assembly in 1966. UNCITRAL's main objective is to promote the progressive harmonization and unification of international trade law in furtherance of article 1, paragraph 3 of the UN Charter.[5] The said article sets out one of the purposes of the UN, which is "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction."[6] Thus, UNCITRAL's mandate lies in contributing to the development of international trade law in pursuit of greater international co-operation in economic and social fields and respect for human rights. In fact, the General Assembly has long recognized "the importance of fair, stable and predictable legal frameworks for generating inclusive, sustainable and equitable development" and the vital role that UNCITRAL plays in shaping such legal frameworks.[7]

UNCITRAL's role is ever more critical in light of Agenda 2030 and the SDGs, which reaffirm the importance of "an enabling international economic environment, including coherent and mutually supporting world trade, monetary and financial systems, and strengthened and enhanced global economic governance."[8] There is a critical need to fundamentally reform IIAs and ISDS, so that they foster international investments that effectively contribute to the realization of all human rights and the SDGs, rather than hindering their achievement.[9] In our view, such a paradigm change is not only desirable, but also necessary if UNCITRAL is to effectively fulfill its mandate.

We would also like to reiterate that all States, including Member States of the Working Group III, have an obligation to reform the ISDS system in line with their international human rights obligations. The UN Guiding Principles on Business and

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5 United Nations General Assembly, Resolution 2205 (XXI), 17 December 1966, http://daccess-ods.un.org/access.nsf/Get?Open&JN=NR000508

6 United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, art 1(3).

7 United Nations General Assembly, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, A/RES/67/1 (2012), para. 8, available at: https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf

8 United Nations General Assembly, Transforming Our World: The 2030 Agenda for Sustainable Development, Resolution A/RES/70/1, para. 63.

9 The UN Secretary-General has also highlighted the importance of reforming international investment agreements and called on Member States to "…carefully consider formulating comprehensive international investment agreement policies aligned with their national development strategies". Report of the UN Secretary-General, International financial system and development, A/73/280 (31 July 2018), paras. 63 and 73.

Human Rights (UNGPs), which were unanimously endorsed in June 2011 by the Human Rights Council (A/HRC/RES/17/31) following years of consultations with Governments, civil society and the business community, provide authoritative guidance on this. Principle 9 of the UNGPs reminds States to "maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts." Principle 10 further provides that "States, when acting as members of multilateral institutions … should: (a) Seek to ensure that those institutions neither restrain the ability of their Member States to meet their duty to protect nor hinder business enterprises from respecting human rights; (b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights". It is critical, therefore, that any future reform of IIAs and the ISDS system is consistent with the UNGPs and other international human rights norms.

2. Concerns identified as desirable for reform within the existing framework

We take note of the broad categories of concerns identified as desirable for reforms during the previous sessions of the Working Group III, including: (a) concerns pertaining to the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals; (b) concerns pertaining to arbitrators and decision makers; and (c) concerns pertaining to cost and duration of ISDS cases. While we recognize the importance of addressing those concerns, it would be a lost opportunity to narrowly focus on amending the existing procedural rules falling within these three categories. In our view, the aim of the ISDS reform should be to make systemic reforms to bring policy coherence, predictability, legitimacy and effectiveness to the ISDS system as a whole. The current reform proposals, which are narrowly geared towards providing for ad hoc procedural solutions, clearly do not go far enough to effectively address the deep-rooted deficiencies of the ISDS system.

With this caveat, we would like to take this opportunity to comment on some of the identified concerns and suggest ways in which human rights norms could be better reflected within the existing workplan:

(a) Concerns pertaining to the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals

While we agree that some of the already highlighted concerns related to consistency and coherence should be addressed as part of the current process to reform the ISDS mechanism,[10] greater attention should be paid to consistency and coherence of IIAs and their interpretation with international human rights law and the 2030 Agenda.

As pointed out earlier by the Independent Expert on foreign debt and human rights, international human rights law is an integral part of international law and should

[10] A/CN.9/WG.III/WP.150.

be referred to as a source of law in applicable ISDS cases. However, investment tribunals have often dismissed the significance of human rights, or taken them into account in an inconsistent manner.[11] As reflected in the discussions during the 36th session of the Working Group III, the lack of consistency in interpreting and applying substantive protection standards found in different sources of law affects the reliability, effectiveness and predictability of the ISDS regime.

In order to promote greater coherence in the ISDS regime, investment tribunals should systematically and consistently apply international human rights, labour and environmental laws and international standards related to indigenous peoples' rights. In interpreting IIAs and making arbitral decisions, they should give adequate weight to obligations of States to respect, protect and fulfil all human rights under international law as well the responsibility of corporate investors to respect human rights under the UNGPs. Such a wider consistency and coherence of the ISDS mechanism is especially critical because the validity of arbitral decisions could be contested only on very limited grounds. In addition to making substantive changes to IIAs, procedural revisions should have a role to play in achieving this objective.

(b) Concerns pertaining to arbitrators and decision makers

We agree with the concerns relating to the lack of transparency and diversity in appointed decisions makers, repeat appointments, and qualification of decision makers.[12] Broader backgrounds and qualifications of prospective arbitrators and decision makers should be taken into account in their selection and appointment, in order to ensure that ISDS tribunals consistently give adequate weight to the human rights obligations of States, public policy considerations, and local laws and circumstances in making arbitral decisions. Knowledge of public international law, including international human rights, labour and environment laws as well as international standards related to indigenous peoples' rights, should be one of relevant criteria in selecting and appointing arbitrators and decision makers. Diversifying the pool of arbitrators and decision makers by requiring appropriate knowledge and backgrounds in international law could contribute to addressing the abovementioned concern with respect to the divergent interpretations of substantive standards and promote greater consistency and coherence in arbitral decisions.

(c) Concerns pertaining to cost and duration of ISDS cases

We reiterate our concern with respect to the negative impact of extremely high costs and high value of ISDS awards on fiscal and regulatory space necessary for States to protect and promote human rights. One option that could be considered to mitigate this impact may include establishing rules to exclude ISDS claims when they concern

[11] Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, UN Doc. A/72/153 (2017), para. 26.

[12] Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October – 2 November 2018), A/CN.9/964, para. 102.

legitimate measures undertaken in pursuit of public interest, such as human rights, social and environmental concerns, unless such measures are arbitrary, capricious, or an abuse of discretion. The value of potential counter claims by States or affected communities against investors to recoup damage suffered by them should also be considered.

(d) Other concerns: Access to remedy and participation of affected third parties

In light of a possibility to consider at the 37th session any "other concerns not covered by the broad categories of desirable reforms already identified", we wish to draw the attention of your Excellency's Government to two other issues that deserve attention.

First, if the ISDS mechanism continues to allow investors (as third parties to IIAs) a special fast-track path to seek remedies to protect their economic interests, the same pathway should be extended to communities affected by investment-related projects. As the Working Group on Business and Human Rights in its 2017 report to the UN General Assembly highlighted, "all roads should lead to remedy".[13] The ISDS mechanism should, therefore, be used to create additional avenues to hold corporate investors accountable for human rights abuses. This will partly address the systematic asymmetry which we alluded to in the beginning.

The second related issue concerns the inability of affected third parties to meaningfully participate in ISDS proceedings. Currently, there is very little opportunity for affected third parties to participate in the ISDS proceedings, even in cases in which certain investment projects cause a significant adverse impact on the environment and the human rights of communities and individuals. Although some ISDS processes may allow third parties to make a submission as *amicus curiae*, the investment tribunals have the full discretion in determining whether or not to accept an *amicus curiae* submission. In practice, *amicus curiae* submissions are often rejected, or given limited consideration by the tribunals even when they are accepted.[14] They are also limited to written submissions and the petitioners often have no or limited access to information about other case documents or the hearing.[15] *Amicus curiae* submissions thus cannot be considered as an effective form of participation. If the ISDS system is to maintain its legitimacy, it is imperative that affected communities and individuals as well as public interest organizations are able to effectively participate in the ISDS proceedings and present their evidence, views and perspectives in full.[16]

In concluding our observations, we would like to reiterate that the legitimacy and effectiveness of the ISDS reform process will depend on UNCITRAL's fulfilment of its mandate and Member States' commitment to align the reform with their obligation to

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13 A/72/162, paras. 56 and 75-78.

14 See CCSI and UN Working Group on Business and Human Rights, note 3.

15 Lorenzo Cotula and Mika Schröder, Community perspectives in investor-state arbitration (2017), at 23.

16 Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, UN Doc. A/72/153 (2017), para. 74.

realize human rights and the SDGs. We urge your Excellency's Government to place the SDGs and the full realization of human rights at the center of any discussions of reform of international economic governance. We would welcome any opportunity to further engage with your Excellency's Government and the Working Group III on this matter.

Please note that this letter has been transmitted to all Members of the Working Group III and a copy of it to the secretariat of the UNCITRAL.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting website within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

Surya Deva
Chair-Rapporteur of the Working Group on the issue of human rights and transnational corporations and other business enterprises

Saad ALFARARGI
Special Rapporteur on the right to development

David R. Boyd
Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment

Juan Pablo Bohoslavsky
Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights

Victoria Lucia Tauli-Corpuz
Special Rapporteur on the rights of indigenous peoples

Livingstone Sewanyana
Independent Expert on the promotion of a democratic and equitable international order

Léo Heller
Special Rapporteur on the human rights to safe drinking water and sanitation