HAUT-COMMISSARIAT AUX DROITS DE L'HOMME • OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS
PALAIS DES NATIONS • 1211 GENEVA 10, SWITZERLAND

Mandate of the Special Rapporteur in the field of cultural rights; the Independent Expert on the promotion of a democratic and equitable international order; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the rights of indigenous peoples; the Independent Expert on Human Rights and International solidarity; and the Special Rapporteur on the right to privacy

REFERENCE: AL
USA 4/2016:

20 April 2016

Excellency,

We have the honour to address you in our capacity as Special Rapporteur in the field of cultural rights; Independent Expert on the promotion of a democratic and equitable international order; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the rights of indigenous peoples; Independent Expert on Human Rights and International solidarity; and Special Rapporteur on the right to privacy pursuant to Human Rights Council resolutions 28/9, 27/9, 25/2, 24/6, 24/9, 26/6, and 28/16.

In this connection, we would like to bring information we have received to the attention of your Excellency's Government concerning the **alleged adverse human rights impact stemming from certain provisions within the Trans-Pacific Partnership (TPP), a regional trade agreement** signed by Australia, Brunei, Canada, Chile**,** Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America and Vietnam**.**

The potential negative impact of the TPP on access to medicines was the subject of a previous communication sent by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health on 19 July 2011 see A/HRC/19/44 (cases no. AUS 4/2011, BRN 1/2011, CHL 3/2011, MYS 8/2011, NZL 1/2011, PER 3/2011, SGP 2/2011, USA 13/2011 and VNM 5/2011). We appreciate the replies received by some of the concerned States in November 2011 and July/August 2012. The signing of the TPP was also the subject of a Press Release and Statement by the Independent Expert on the promotion of a democratic and equitable international

order, published on 2 February 2016.[1] However, we would like to raise the following issues in the light of the recent signature and release of the official text of the TPP.

According to the information received:

On 5 October 2015, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America and Vietnam announced that they had reached an agreement on the TPP, creating one of the most significant free-trade agreements in the world. On 4 February 2016, the TPP was officially signed by the twelve concerned States. The treaty, which makes no express reference to human rights, will enter into force after it is ratified by the requisite number of States, in accordance with its provisions.

We express concern about the alleged detrimental impact of the TPP on the enjoyment of a number of human rights and freedoms, including in particular those mentioned in the following paragraphs.

Negotiation process

The talks around the TPP began in 2008 and negotiations were reportedly carried out behind closed doors, with very limited opportunities for certain stakeholders to access relevant information, including draft texts, and to take part in the process. In particular, civil society organizations working in the field of human rights, as well as directly concerned groups, such as indigenous peoples, whose right to prior consultation is considered to be a norm of customary international law, were reportedly excluded from the negotiation process.

The extent to which information on the negotiations was released, and stakeholders effectively consulted during the negotiation phase, varied somewhat within each of the twelve signatory States. Information received reveals a general trend towards a serious lack of transparency and little or no consultation with some concerned stakeholders. In those countries where consultations did take place, such processes have allegedly not met international standards, in particular with respect to the right of indigenous peoples to free, prior and informed consent.

In one signatory country, representatives of the indigenous peoples have legally contested the lack of consultation arguing that it surrendered part of the country's sovereignty. We will follow closely the outcome of this legal suit as if successful it could become a good practice for those domestic legal systems providing for such remedy.

Additionally, reports received indicate that the negotiation and signature of the agreement has faced opposition by various groups of the population, including indigenous peoples, in the respective countries.

[1] http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=17006&LangID=E.

For instance, reports indicate that in a number of countries although some consultative meetings were organized, the majority of civil society organizations critical of the treaty, including grass root organizations, were not informed about the consultative meetings. Some organizations were reportedly invited to attend consultative meetings only after the treaty was concluded. In a number of countries violent protests took place due to lack of consultation.

Moreover, it would seem that had the draft text of the TPP not been leaked while it was being negotiated, there would have been scarcely any substantive debate and critical analysis of the text, and various non-governmental stakeholders from a range of countries would not have been in a position to propose alternatives. The text of the TPP was officially released in November 2015, only weeks after it had been agreed to, impeding public debate prior to its being finalized.

In stark contrast to the lack of a consultation process described above, transnational corporations were provided with ample opportunity to take part in the different stages of the negotiation process, thereby creating an imbalance between for-profit interests on the one hand and public freedoms and human rights on the other.

It is also reported that no transparent, independent and participatory human rights impact assessment of trade rules was carried out during the negotiation phase.

Access to medicines and intellectual property provisions

Numerous provisions of the TPP that relate to access to medicines and intellectual property may have serious detrimental effects on the enjoyment of human rights. This is of particular concern given that the standards established by the TPP are likely to have global implications and influence future trade agreements in other parts of the world.

More specifically, provisions contained in Articles 18.46 and 18.48 on patent term extension for unreasonable delays in granting the patent (Article 18.46), or in granting drug regulatory approval (Article 18.48), are seen as potentially problematic as delaying generic entry.

Article 18.50 on chemical pharmaceuticals and Article 18.52 on biologics related to the protection of undisclosed test or other data, establish a period of exclusive marketing based on the protected test data, ranging from five to eight years. While the language appears to be sufficiently flexible to justify a limitation of the protection to five years only under domestic laws, there are concerns that such an approach could be challenged under the investor-State dispute settlement mechanisms established under the TPP (see below).

These provisions also allow the application of a period of protection of at least three years for the disclosure of new clinical information submitted in connection to the marketing approval of previously approved pharmaceuticals covering a new

indication, new formulation or new method of administration (Article 18.50.2(a)); and of at least five years to new pharmaceutical products containing a chemical entity not previously approved in a party (Article 18.50.2(b)).

While the TPP contains a provision (Article 18.50.3) that allows parties to take measures "to protect public health" in connection with the Declaration on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and Public Health (2001), it is reported that the use of the above-mentioned provisions is likely to prolong, in certain cases, the existing monopolies and create more obstacles and undue delays to the manufacturing and marketing of generic medicines.

In some cases, data rights could last longer than patents, where on top of the pharmaceutical product as such, any new clinical information is awarded an additional term of 3 years, or where the product is not protected by a patent and would normally be subject to immediate generic competition.

This is likely to cause an increase in the price of medicines, and create undue barriers to access essential affordable medicines, mainly generic medicines. Thus the right of everyone to the enjoyment of the highest attainable standard of physical and mental health can be seriously jeopardized, as well as the right of everyone to the enjoyment of the benefits of scientific progress and its applications. Lastly, it can contribute to negative public health outcomes and pose unnecessary burdens to public health budgets.

Right to science and culture and intellectual property provisions

The TPP also mandates State parties to provide copyright protection for at least the author's lifetime, plus an additional 70 years after his/her death (Article 18.63).

This new requirement goes much beyond international standards, as set out in the Berne Convention for the Protection of Literary and Artistic Works and the TRIPS Agreement, which requires a minimum copyright protection of the lifetime of the author, plus 50 years; an already very long term. For Brunei, Canada, Japan, Malaysia, New Zealand and Vietnam, this means an additional 20 years of required copyright protection, to the detriment of the public domain and public access to creative and scientific works. For the other signatory States, which already offer protection for 70 or more years after the death of the author, this means that they will have no flexibility to revisit and reduce their own term of protection.

Rights of indigenous peoples and intellectual property provisions

In the case of indigenous peoples, the forms of property rights envisaged in the TPP provide little or no recognition of or protection of their rights as traditional

knowledge holders, as enshrined in article 31(1) of the United Nations Declaration on the Rights of Indigenous Peoples.

The inability of the existing intellectual property systems to protect indigenous peoples' traditional knowledge and cultural expressions are being addressed in some countries. One of the main issues related to existing intellectual property systems is the fact that indigenous peoples' traditional knowledge and cultural expressions, much of which is collective in nature, is inappropriately classified as being in the public domain and therefore is made accessible to all.

Such systems are grossly inadequate to protect indigenous peoples' knowledge in a range of contexts, including in relation to genetic resources and lead to a process, which indigenous peoples refer to as "biopiracy". This could be reinforced under the TPP given that the agreement provides investors with the possibility of challenging infringements to their intellectual property rights in the ISDS mechanisms.

Internet Service Providers

Article 18.82(1)(a) of the TPP requires "legal incentives" for Internet Service Providers to cooperate with copyright owners "to deter the unauthorized storage and transmission of copyrighted materials or, in the alternative, to take other action to deter the unauthorized storage and transmission of copyrighted materials." In particular, under Article 18.82(3)(a) of the TPP, Internet Service Providers are required to "expeditiously remove or disable access to material residing on their networks or systems upon obtaining actual knowledge of the copyright infringement or becoming aware of facts or circumstances from which the infringement is apparent, such as through receiving a notice of alleged infringement".

We are concerned that the provisions of Article 18.82(1)(a) and Article 18.82(3)(a), which effectively enshrine a 'takedown first, ask questions later' approach, may incentivize Internet Service Providers to remove content based on unproven allegations of infringement and therefore have a 'chilling effect' on the right to freedom of expression online. In particular, we are concerned with respect to the online expression of professional and amateur artists and other creators, who often repurpose or re-interpret intellectual property for creative purposes, and are particularly vulnerable to unjustified or overly aggressive takedown requests.

Moreover, Article 18.82 of the TPP provides certain safeguards against invalid takedowns, such as penalties for knowingly false takedown notices (Article 18.82(5)), and the assurance that Internet Service Providers are not required to proactively monitor content (Article 18.82(6)).

While acknowledging that Article 18.82 provides certain safeguards against invalid takedowns, we are concerned that the burden to determine whether content is unlawful still falls largely on privately owned intermediaries, like Internet

Service Providers, which they are ill-suited to fulfill because of resource constraints and potential conflicts of interest (for example, if they have commercial relationships with rights holders, or are themselves rights holders).

Furthermore, the safeguards provided in the treaty do not address other fundamental due process concerns, like the opportunity for users to be heard before content is removed, or a process for appealing removal decisions. And even in cases where removal is justified, these safeguards do not address the need for necessary and proportionate limits on the scope of removal.

International Convention for the Protection of New Varieties of Plants 1991

Article 18.7 of the TPP further requires signatory States to ratify several additional agreements that were previously subject to controversy, such as the International Convention for the Protection of New Varieties of Plants 1991 (UPOV 1991). This is a significant change from the TRIPS Agreement, which requires States to protect plant varieties "either by patents or by an effective sui generis system or by any combination thereof". While some States believe that this is restricted to the UPOV system, there is a wide range of possible other effective *sui generis* systems that may be adapted to national circumstances.

The UPOV 1991 reportedly limits the customary rights of farmers to save and reuse farm-managed seeds and may negatively affect the livelihoods of small-scale farmers, traditional and not-for-profit crop innovation systems, environment and food diversity, including amongst indigenous peoples. In the past, the adoption of laws in the framework of the UPOV in a number of countries were subject to strong opposition from the population, including affected indigenous peoples.

Dispute settlement

The TPP establishes alternative dispute settlement mechanisms to ensure its implementation, including an Inter-State dispute settlement (Chapter 28) and an investor-State dispute settlement mechanism (ISDS) (Chapter 9 Section B). The composition, procedures and jurisdiction of both dispute settlement mechanisms appear not to comply with the right to an effective remedy, to a fair trial and due process guarantees.

In particular, individuals or groups such as indigenous peoples do not have legal standing, effectively denying them of the right to an effective remedy to claim and protect their rights, including labour rights, under the TPP. The labour provisions in Chapter 19 may only be invoked by States and investors, not by other stakeholders, such as trade unions, trade federations and labour advocacy groups. Additionally, the TPP recognizes intellectual property as an investment and thus allows investors to bring intellectual property challenges under the ISDS mechanism (Article 9.1).

Reliance on compulsory licenses and other TRIPS flexibilities is not considered undue expropriation of property rights, provided such reliance is in line with the TRIPS Agreement, as well as Chapter 18 of the TPP (Intellectual Property Chapter, Article 9.7(5)). Fears are expressed that this would enable private arbitrators to interpret the TRIPS Agreement and the TPP's Intellectual Property Chapter, and that such interpretation may not necessarily be sensitive to public health needs and in line with human rights provisions.

Additionally, a challenge may be brought "when a Party considers that a benefit it could reasonably have expected to accrue to it" under various TPP Chapters "is being nullified or impaired as a result of the application of a measure of another Party that is not inconsistent with [the] Agreement" (Article 28.3). Such vaguely worded provisions may allow States' public policies adopted in order to protect and promote human rights to be challenged. They may prevent States from adopting measures to protect and promote public interest to avoid incurring the risk of being challenged for a mere loss of expected profit or perceived barrier to trade. This may affect areas such as public health, indigenous rights, food security, employment benefit, environmental standards, cultural diversity or access to all technologies and innovations essential for a life with dignity. The TPP allows State parties to exclude tobacco control measures from ISDS because of the public health challenges they present (Article 29.5). However, the TPP reportedly fails to ensure the protection and promotion of other public interest concerns.

Aside from this potential "chilling effect", ISDS provisions within the TPP establish a basis upon which corporations could challenge governments over legislation or policies made in the public interest, in particular the realization of human rights. In addition, the ISDS mechanism grants exclusive jurisdiction over the TPP, consequently, national judicial institutions do not have competence to hear potential disputes under the TPP. States could be liable for large damages to be paid to corporations. The loss of public funding, within closed, non-judicial arbitrations, appears to contravene the rule of law and democratic principles and could severely impact resources available to Governments to pursue public interest objectives including the promotion and protection of human rights. This is further exacerbated by the finality of ISDS decisions, which are not subject to appeal before a higher body.

The procedures of these dispute settlement mechanisms require the appointment of three arbitrators or panelists to reach a decision and allow for broad exceptions to transparency of the proceedings under Chapter 29, including essential security interests (Article 29.2). The TPP requires that a Model Rules of Procedure (also referred to as a Code of Conduct) be established, as well as additional guidance on independence and impartiality of arbitrators (see Articles 9.21(6) and 27.2(1)(e)). However, these rules and guidance have not yet been established and would not be legally binding in any case. This raises serious concerns about safeguards for the independence and impartiality of individuals appointed as arbitrators, particularly in relation to possible conflicts of interest.

The substantive component of ISDS decisions, in cases where indigenous peoples' rights are impacted, systematically ignores those rights, despite the potentially profound implications of these decisions for the cultural and physical survival of peoples who are vested with the right to self-determination. The exceptions included in the TPP in relation to indigenous peoples, which mirror existing exceptions in other investment agreements, lack the necessary clarity and force to ensure their rights are given due consideration in ISDS proceedings.

Indigenous peoples have the right to access just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as effective remedies for all infringements of their individual and collective rights, as enshrined in the United Nations Declaration on the Rights of Indigenous Populations (Article 40).

This is particularly evident in the context of remediation for historical injustices and legal issues, which have on-going effects and continue to impact disproportionately on indigenous peoples' enjoyment of their rights. Measures which are required to remedy violations of indigenous peoples' rights, such as restitution of indigenous peoples' lands and resources that were taken without their free, prior and informed consent, could also come into conflict with an arbitrator's interpretations of investors' rights that are protected under the TPP. The effect could be to limit State willingness to ensure remedies for violations of land rights or to address historical injustices on the grounds that doing so may expose the State to significant compensation claims from investors.

Serious concern is expressed at the lack of meaningful public consultation and participation of all stakeholders in the negotiations of the TPP, and at the denial of the right of indigenous peoples to specific, full and effective participation through culturally appropriate prior consultation to obtain their free, prior and informed consent regarding any action involving their rights, interests, development, health, wellbeing, intellectual property, way of life and ancestral territories.

Additionally, deep concern is expressed at provisions of the TPP regarding intellectual property that may adversely impede the realization of human rights, including the right of everyone to the enjoyment of the highest attainable standard of physical and mental health and core obligations contained therein, the right to live in a clean environment, the right to take part in cultural life and the right to enjoy the benefits of scientific progress and its applications.

We also express concern that the provisions on intermediary liability for Internet Service Providers may, despite certain safeguards against invalid content takedowns, unduly restrict the right to freedom of opinion and expression online, including the right to artistic and other creative expression. Such provisions effectively require privately owned intermediaries to remove content based on mere allegations of copyright infringement, without a meaningfully independent process for determining the veracity of these allegations or adequate due process safeguards. This is especially concerning given

that takedown notices are often automated. Despite existing safeguards, we are also concerned about provisions in the TPP which may incentivize Internet Service Providers to remove content based on unproven allegations of infringement, given the chilling effect that this could have on the right to freedom of expression online.

Particular concern is also expressed about the lack of standing of individuals and groups, such as indigenous peoples, in relation to the TPP. Additional concern is expressed about the procedure and jurisdiction of the ISDS mechanism that may not provide the necessary due process guarantees. Concern is also expressed about the possibility of challenges to public policy that may result in decisions contrary to promoting and protecting human rights and fundamental freedoms, thus deterring States from adopting such policy.

We are further concerned that the TPP also limits the progressive realization of indigenous peoples' rights, in particular their right to access just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights.

In connection with the above alleged facts and concerns, please refer to the **Reference to international law Annex** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and any comment you may have on the above-mentioned allegations.

2. Please explain how the elaboration, negotiation and conclusion of the TPP are compatible with international norms and standards relating to the right of everyone to take part in public affairs and the participatory, consultation and consent rights of indigenous peoples.

3. Please explain how the provisions of the TPP related to the protection of intellectual property are compatible with international norms and standards concerning the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, to adequate food, to take part in cultural life and to enjoy the benefits of scientific progress and its applications. Please explain what measures have been taken, or will be taken, to ensure that the provisions of the TPP comply with these international human rights law and standards. Please also explain how the particular context of indigenous peoples and their rights as traditional knowledge holders will be addressed.

4. Please explain how the provisions of the TPP related to the Internet Service Providers are compatible with international norms and standards

concerning the right freedom of opinion and expression, the right to privacy, the right to take part in cultural life and the right to enjoy the benefits of scientific progress and its applications. Please explain what measures have been taken, or will be taken, to ensure that the provisions of the TPP comply with these international human rights norms and standards.

5. Please explain how the provisions related to the dispute settlement mechanisms are compatible with international human rights law, in particular the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights. Please provide information about measures taken to ensure that those mechanisms will duly take into consideration human rights standards in reaching a decision, and more generally to ensure that the commitments of your Excellency's Government under international human rights law will not be adversely impacted by these mechanisms.

We would appreciate receiving a response within 60 days. Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

While awaiting a reply, we urge that the necessary measures be taken to address the concerns raised above, and ensure that the obligations and commitments of your Excellency's Government under international human rights law are upheld.

Kindly note that a similar letter is been sent simultaneously to the other States who have signed the TPP.

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

Karima Bennoune
Special Rapporteur in the field of cultural rights

Alfred De Zayas
Independent Expert on the promotion of a democratic and equitable international order

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

Dainius Pūras
Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

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

Virginia Dandan
Independent Expert on Human Rights and International solidarity

Joseph Cannataci
Special Rapporteur on the right to privacy

Annex
Reference to international human rights law

In connection with above concerns, we would like to refer your Excellency's Government to the right to take part in the conduct of public affairs as set forth in Article 25 of the International Covenant on Civil and Political Rights (ICCPR),[2] as well as to paragraph 8 of General Comment 25 of the Human Rights Committee on the right to participate in public affairs, voting rights and the right of equal access to public service, which states that "Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association" (CCPR/C/21/Rev.1/Add.7, para. 8).

We also refer to the report of the Independent Expert on the promotion of a democratic and equitable international order in which the Independent Expert recommended that States "ensure that parliaments, national human rights institutions and ombudspersons are involved in the process of elaboration, negotiation, adoption and application of trade and investment agreements", including through "independent human rights, health and environmental impact assessments" (A/HRC/30/44, para. 62).

We would also like to refer your Excellency's Government to Articles 18 and 19 of the Declaration on the Rights of Indigenous Peoples, which states that indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions… States should consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. Moreover, we would like to refer to Article 6(b) of the C169 Indigenous and Tribal Peoples Convention 1989,[3] which states that governments shall establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them.

We would also like to refer your Excellency's Government to Articles 25 and 27 of the Universal Declaration of Human Rights (UDHR) as well as Articles 11, 12 and 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),[4] which protect the rights of everyone to adequate food, to the enjoyment of the highest attainable standard of physical and mental health, to take part in cultural life, and to enjoy the benefits of scientific progress and its applications respectively.

[2] Ratified by: Australia in 1980; Canada in 1976; Chile in 1972; Japan in 1979; Mexico in 1981; New Zealand in 1978; Peru in 1978; the USA in 1992; and Vietnam in 1982.
[3] Ratified by: Chile in 2008; Mexico in 1990; and Peru in 1994.
[4] Ratified by: Australia in 1975; Canada in 1976; Chile in 1972; Japan in 1979; Mexico in 1981; New Zealand in 1978; Peru in 1978; Vietnam in 1982; and signed by the USA in 1977.

Regarding access to medicines, we would like to highlight that it is an indispensable part of the right to health and that States have an obligation to ensure that medicines are available, affordable and physically accessible on a non-discriminatory basis to everyone within their jurisdiction (A/HRC/11/12, paras. 8-11). Violations of the obligation to protect follow from the denial of access to health facilities, goods and services to particular individuals or groups as a result of the failure of the State to take into account its legal obligations regarding the right to health when entering into bilateral or multilateral agreements with other States, international organizations and other entities, such as multinational corporations (E/C.12/2000/4, para. 50).

We also deem it pertinent to refer to the report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, which stated that TRIPS-plus standards have an adverse impact on the price and availability of medicines, as they increase medicine prices by delaying or restricting the introduction of generic competition (A/HRC/11/12, para. 69).

In its General Comment 17, the Committee on Economic, Social and Cultural Rights emphasized States' obligations to strike an adequate balance between protecting the moral and material interests of authors and other human rights, including balancing the private interests of authors with the public's interest in enjoying broad access. States should therefore ensure that their legal and other regimes for the protection of the moral and material interests of authors constitute no impediment to States' ability to comply with their core obligations in relation to other human rights. The Committee stressed that intellectual property is a social product with a social function and that States have a duty to prevent unreasonably high costs for access to essential medicines, plant seeds or other means of food production that could undermine the rights of large segments of the population to health and food (E/C.12/GC/17, para. 35).

The former Special Rapporteur in the field of cultural rights stressed that international intellectual property instruments, including trade agreements, should be negotiated in a transparent way, permitting public engagement and commentary (A/HRC/28/57; A/70/279, para 92). They should be subject to human rights impact assessments and contain safeguards for human rights, including freedom of expression, the right to health, to food and to science and culture (A/HRC/28/57, para. 94; A/70/279, para. 95).

She also recalled that the obligations of States under intellectual property treaties must not jeopardize the implementation of their obligations under human rights treaties and should place no limitations upon the rights to health, food, science and culture, unless the State can demonstrate that the limitation pursues a legitimate aim, is compatible with the nature of this right and is strictly necessary for the promotion of general welfare in a democratic society. She stressed that States have a human rights obligation not to support, adopt or accept intellectual property rules that would impede them from using exclusions, exceptions and flexibilities and thus from reconciling patent protection with human rights (A/HRC/28/57, para. 98; A/70/279, paras. 89, 100 and 104).

On the issue of copyright, the former Special Rapporteur recalled that the right to protection of authorship is the right of the human author(s) whose creative vision gave expression to the work. Corporate right holders must not be presumed to speak for the interests of authors. States should further develop and promote mechanisms for protecting the moral and material interests of creators without unnecessarily limiting public access to creative works, through exceptions and limitations and subsidy of openly licensed works. The human right to protection of authorship is fully compatible with an approach to copyright that limits the terms of protection in order to ensure a vibrant public domain of shared cultural heritage, from which all creators are free to draw (A/HRC/28/57, paras. 50, 99, 102 and 107). The former Special Rapporteur also recommended alternatives to criminal sanctions and blocking of contents and websites for copyright infringement (A/HRC/28/57, para. 120).

Regarding the intellectual property rights of indigenous peoples, we would like to refer to Article 31(1) of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which clarifies that indigenous peoples have the right to "maintain, control, protect and develop their … sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora", as well as "the right to maintain, control, protect and develop their intellectual property" over them.

Furthermore, we would like to refer to Article 19 of the ICCPR and the UDHR, which provides for the right to freedom of opinion and expression that includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. Article 19(3) requires restriction on the right of freedom of expression to be narrowly defined and clearly provided by law, as well as necessary and proportionate to achieve one or more of the legitimate objectives of protecting the rights or reputations of others, national security, public order, or public health and morals. In its General Comment 34, the Human Rights Committee has emphasized that "restrictions on the operation of websites, blogs or any other Internet-based, electronic or other such information dissemination system, including systems to support such communication, such as Internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3 [of Article 19]." In this connection, we would like to recall the report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression which reiterates that restrictions on Internet content must be accompanied by "full details regarding the necessity and justification for blocking a particular website" (A/66/290). Furthermore, it states that the "determination of what content should be blocked should be undertaken by a competent judicial authority or a body which is independent of any political, commercial, or other unwarranted influences to ensure that blocking is not used as a means of censorship."

In relation to dispute settlement mechanisms, we would like to remind your Excellency's Government of the right to access an effective remedy as contained in Article 2(3) of the ICCPR and Articles 10 and 8 of the UDHR, respectively.

In addition the Independent Expert on the promotion of a democratic and equitable international order called for the replacement of the existing investor-State dispute settlement system "with an international investment court, State-to-State settlement before the International Court of Justice or by domestic courts bound by Article 14 of the International Covenant on Civil and Political Rights" (A/70/285, para. 60).

Moreover, we would like to highlight the report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, which raises concerns about ISDS mechanisms, which are often opaque and contrary to the principle of fairness and further compromise the integrity of arbitration under international investment agreements (A/69/299, paras. 62 and 65). In particular, we would like to recall the 2001 WTO Doha Declaration on the TRIPS Agreement and public health, which explicitly recognizes that the TRIPS Agreement "can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health", and reaffirmed the right to use the flexibilities included in the Agreement for this purpose.

Finally, in the context of indigenous peoples, we would like to draw your attention to Article 40 of the United Nations Declaration on the Rights of Indigenous Peoples where the right to access just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights, is enshrined. In addition, in the context of indigenous peoples, we would like to draw your attention to the 2015 report of the Special Rapporteur on the rights of indigenous peoples (A/70/301) in which she outlined her concerns regarding the impact of investment agreements on the rights of indigenous peoples.