

The UN Guiding Principles on Business & Human Rights and Indigenous Peoples

Progress achieved, the implementation gap and challenges for the next Decade



INTERNATIONAL
WORK GROUP FOR
INDIGENOUS AFFAIRS



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Championing Indigenous Peoples Rights

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Business & Human Rights and
Indigenous Peoples

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the next Decade**

Jose Aylwin – Johannes Rohr

June 2021

THE UN GUIDING PRINCIPLES ON BUSINESS & HUMAN RIGHTS AND INDIGENOUS PEOPLES

PROGRESS ACHIEVED, THE IMPLEMENTATION GAP AND CHALLENGES FOR THE NEXT DECADE

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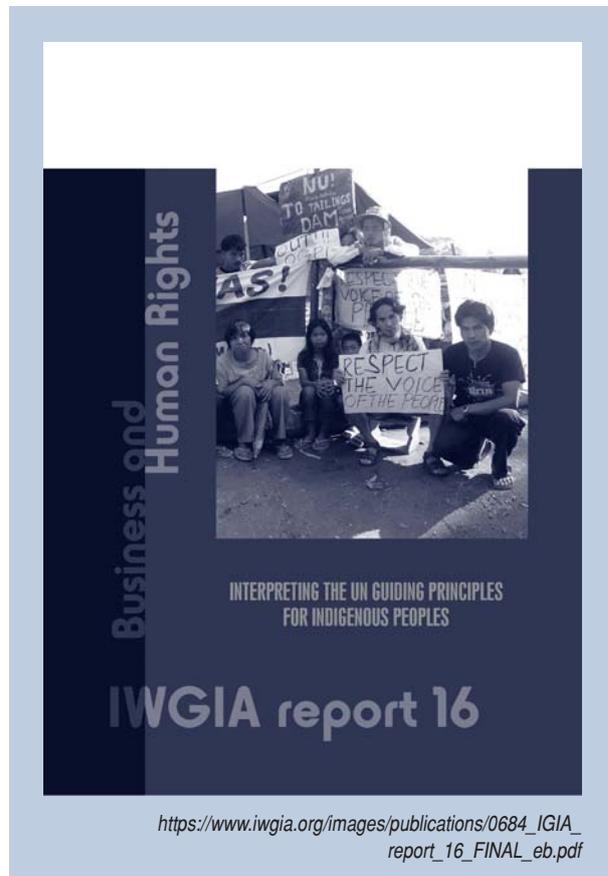
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Introduction



In many countries of the Global South, transnational corporations wield more economic and even political power than the governments of the respective host states. Yet, as non-state actors, these businesses are exempt from legal obligations and accountability mechanisms under international human rights law. At the same time, international investment agreements often afford rights to them that are above national law and against which there is no recourse to appeal. For decades, indigenous peoples have been victimised by such corporations, often exploiting natural resources within their territories without their consent, colluding with host governments in instigating violence against indigenous communities, destroying their natural basis of life and fostering corruption and authoritarianism.

Indigenous peoples and their allies have done their utmost to resist this victimisation and to replace international lawlessness with a new rights-based paradigm. For five decades, there have been attempts, mostly driven by civil society, to introduce regulations regarding business and human rights into international law. After the most recent attempt, the “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” failed in 2003, a process began that led to the unanimous endorsement of the UN Guiding Principles on Business and Human Rights on 16 June 2011 by the UN Human Rights Council. Not being a treaty, these Guiding Principles do not create new legal obligations but rather attempt to clarify the obligations of states that flow from existing international human rights law and the responsibilities of business enterprises; They further provide guidance on how to comply with these obligations and responsibilities in the business context.

While the rhetoric of states and many businesses quickly embraced the UNGP, the response from civil society and indigenous peoples was generally more reserved given the disap-



Resguardo Indígena Cañamomo Lomapieta, Colombia

pointing experience with other non-binding instruments over the preceding decades expectations were therefore generally low. There was also concern that many governments would use the existence of voluntary guidelines as a pretext for not introducing further binding regulations. In 2021, the UNGP will have been in existence for a decade and the time has therefore come to take stock and take a fresh look at the UNGP's contribution to protecting indigenous peoples' rights. Have the UNGP so far lived up to expectations? What has been achieved? What is the general dynamic? Which are the biggest gaps remaining?

The points of departure for our analysis are the 2013 thematic report by the working group entitled "Business-related impacts on the rights of indigenous peoples" (UN Working Group on the Issue of Human Rights and Transnational and Other Enterprises, 2013), the 2014 human rights report on the same topic produced by IWGIA (Rohr & Aylwin, 2014) and, specifically, the recommendations made in both documents. Our preliminary conclusion is that the recommendations made in these reports have not lost any of their relevance but that the efforts undertaken by states and business enterprises to implement them has thus far been insufficient.

It is difficult to establish a causal relationship between many of the steps taken by various stakeholders over the last ten years, and the Guiding Principles, and so we have had to limit ourselves to noting the correlation. Causal relationships could most clearly be established in measures taken by international organisations such as the European Union or the OECD, which explicitly invoke the Guiding Principles. In other cases, the relationship is largely speculative and establishing it would go beyond the scope of this submission.

Besides identifying positive developments that have occurred over the last decade, we also list new and emerging threats, such as increasing violence and killings on indigenous land and of environmental defenders and the growing trend towards criminalisation through "anti-terror" laws. These causes for concern have been corroborated by a series of interviews with leading indigenous human rights defenders from the Americas, Africa, Asia and Russia in order to understand their concerns, perspectives and priorities. In conducting our interviews, we found remarkable consistency across continents and countries with regard to overarching concerns and demands, while we also identified regional differences and particularities.

One of our key findings is that there is a vast gap between policies and declarations, on the one hand, and practice on the ground, on the other. According to our analysis, one central reason for this difference lies in the voluntary nature of most frameworks, which do not en-

force themselves by imposing liability. At the policy level, however, some players have clearly made more progress than others. Verifying the extent to which this translates into a difference in practice on the ground, however, is beyond the scope of this submission.

As for changes on the ground, indigenous peoples themselves have been drivers of relevant positive change on the ground during the last decade. Through the development and implementation of their own autonomous governments and protocols for Free, Prior Informed Consent processes, they have successfully laid the foundations for a truly rights-based engagement between themselves, states, business enterprises and other players. These innovations by indigenous peoples themselves have been arguably the most impactful changes we were able to identify during our research. To be fully effective, these innovations need to be afforded due recognition and respect by state authorities. In multiple instances, courts have obliged governments to do so, but this has not always resulted in governments abiding by such rulings. However, we do note that this is a path to lasting improvements in the human rights situation, and one that has demonstrated its effectiveness over many others and which should therefore be further pursued.

The following section of this report will take stock of the main developments in the field of business and human rights since 2011, as they affect indigenous peoples. We largely follow the structure of the Guiding Principles, such that the first subsection investigates states, the second focuses on business enterprises and the third looks into the issue of remedies. For other stakeholders that do not clearly fit into one of the pillars (international organisations, indigenous peoples and civil society), extra subsections have been added. The content of the subsections is derived both from desk research as well as from a series of interviews conducted with leading indigenous activists and thinkers from Latin America, Africa, Asia and Russia during November 2020. A list of interviews is attached.



Philippines – Photo: Signe Leth

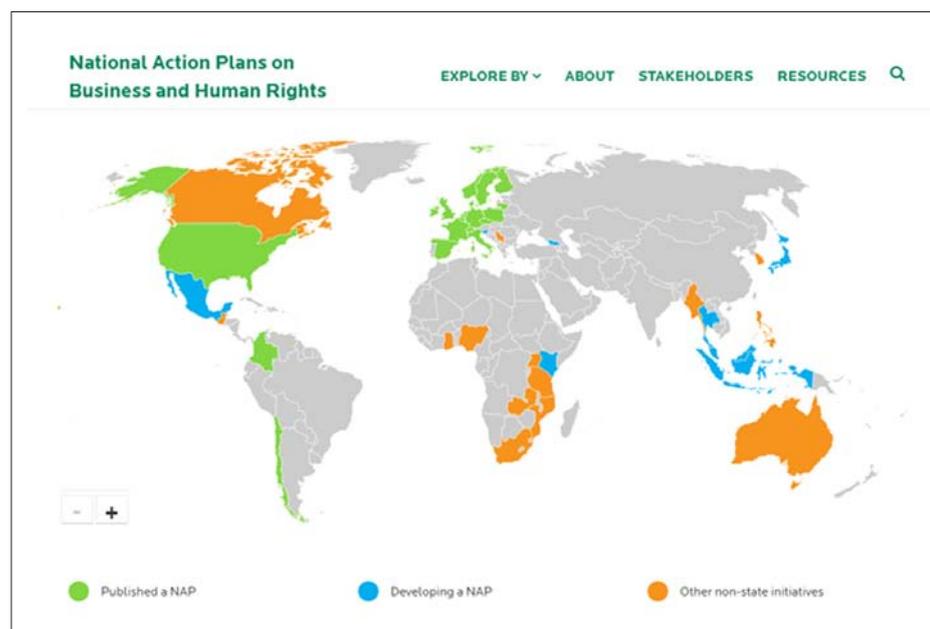
2011-2020: Taking stock

2.1 STATES

Guiding Principle I says that “States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.” This section reviews the extent to which, since the adoption of the UNGP in 2011, states have taken measures in relation to indigenous peoples and the impacts reported by indigenous peoples consulted for this submission in relation to these measures. In the following, we look at National Action Plans (NAP), national legislation, impacts of and measures in relation to investment treaties and, finally, we take a brief look at the efforts made by the European Union.

2.1.1 National Action plans

Ever since the approval of the Guiding Principles (UNGP), the United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises (WG) has encouraged states to produce National Action Plans (NAPs) on Business and Human Rights. In its 2014 report to the Human Rights Council, the WG stated that “...national action plans can be an important means to accelerate implementation of the Guiding Principles. The fundamental purpose of a national action plan is to prevent and strengthen protection against human rights abuses by business enterprises through an inclusive process of identifying needs and gaps and practical and actionable policy measures and goals (Working Group on the Issue of Human Rights and Transnational and other Corporations, 2014, S. 3).” Ac-



Danish Institute for Human Rights

According to the same report, NAPs require the involvement of relevant governmental bodies, meaningful participation of non-governmental stakeholders and transparency.¹ Thus far, 24 NAPs have been finalised and 17 more are in the pipeline.

Of these NAPs, only 13 include specific references to indigenous peoples. Such references range from the need for states to enforce the domestic application of international instruments that concern them in the context of business operations, in some cases with express reference to UNDRIP and ILO Convention 169 (mainly in countries of the Global South), to proposing their consideration by states in their foreign policy. The latter is mainly found in NAPs of Global North states.

However, several problems can be identified in these NAPs with regard to indigenous peoples' rights. Indigenous peoples were rarely involved in their drafting. A survey of 21 NAPs by the Danish Institute for Human Rights (DIHR) found that only eight states had taken steps to involve special interest and vulnerable groups (e.g. indigenous peoples, persons with disabilities).² Seventeen states had established a mechanism for interested parties to submit formal responses or comments to the state, and 10 states had published these formal responses. Twelve states had provided opportunities for stakeholders and rights-holders to comment on a draft version of the NAP. (Morris, 2018). India is one of the states where a NAP is under development. Due to COVID-19, however, no physical consultations have taken place, although the government has put out a call for online consultation. These methodologies, as we know, are not culturally appropriate for indigenous peoples and therefore severely limit meaningful participation.

An interesting exception is that of Peru, whose NAP is - at the time of writing - in the process of development. The government has established a multi-stakeholder roundtable for this purpose, which includes eight indigenous peoples' organisations representing various geographical regions, out of a total of 129 organisations participating in this process.³ Since NAPs are generally issued through administrative or legislative state measures, they should have been, in line with state obligations under ILO169 and UNDRIP, consulted with those indigenous peoples who may be affected by them. There is no evidence of consultations with indigenous peoples having been carried out in any of the existing NAPs. More critically, there is no evidence that they have had a significant impact on the protection of indigenous peoples' rights. A recent research of 21 NAPs existing in 2018 concludes that they "... have done little (yet) to ensure more effective protection in key policy areas, including trade and investment, state-owned enterprises, and particularly in relation to legislative developments and access to remedy." (Cantu Rivera, 2019)

The weakness of NAPs is also related to the fact that they are particularly focused on pillars I and III of the GP, which refer to state actions. Even within the state action, NAPs generally have influence over the executive branch but very little over the legislature or the judiciary (Cantu Rivera, 2019). This difference often weakens the legislative impact of NAPs regarding the state's duty to protect, as set out in the Guiding Principles. It also complicates the provision of effective remedy for human rights abuse in the context of business activities, called for by the Guiding Principles.

The lack of effectiveness of NAPs in strengthening protection of human rights is particularly evident in the case of indigenous peoples. As the Working Group stresses throughout its reports on country visits to states that have enacted NAPs, such as the US and Canada, the rights of indigenous peoples, in particular FPIC and self-determination, are among those more seriously violated in the context of business operations, particularly by extractive industries operating in their lands and territories. (UN Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, 2014) (UN Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, 2018)

1 See <https://globalnaps.org/> It is not clear how many of these vulnerable groups were indigenous.

2 Again, there is no clarity as to how many of these vulnerable groups were indigenous.

3 See <https://observatoriorederechoshumanos.minjus.gob.pe/plan-nacional-de-accion-sobre-empresas-y-derechos-humanos/>



Chile – Photo: Alejandro Parellada

Guiding Principle 1 holds that “States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication”. Further, GP2 says that “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.”

Our interview partners mostly concurred that, since the adoption of the Guiding Principles, their states had failed to enact significant new measures that would bring their legislation into line with the recommendations of the Working Group’s 2013 report, such as affording due recognition to the role of the customary laws, traditions and practices of indigenous peoples, ratifying ILO Convention 169 or enshrining the principle of Free, Prior and Informed Consent. Legislative uptake of the UNGP seems to have remained rather limited, even in countries where NAPs have either been developed or are in the pipeline. We have found no evidence that the adoption of the UNGP caused the home countries of indigenous peoples to take measures either to ratify ILO Convention 169 or, where they had already done so, to take substantive measures to enshrine it in national legislation.

Individual legislative acts that are expected to have a beneficial impact on protection of and respect for human rights in the business sector have been identified. Since these measures are not specific to indigenous peoples, however, they fall short of fulfilling the recommendations of the 2013 report and fail to meet the states’ obligations vis-à-vis their indigenous peoples. One notable legal initiative is the Kenyan Community Land Act No.27 of 2016. This act has the potential to be highly beneficial to pastoralist indigenous communities in Northern Kenya. And yet, according to our informants, only two local communities have so far been successful in registering their land.

In Latin America, in 2011, Peru enacted the Law on the Right to Prior Consultation for Indigenous or Native Peoples (Law 29785). The Law was later regulated in 2012 by Supreme Decree 001-2012-MC, placing Peru among the few states in the region that have managed to enact a law of this kind. Although this law is undeniably a positive step towards better safeguarding of rights,

indigenous peoples' and civil society organisations have criticised its implementation. Most consultations undertaken in the context of mining and oil projects are generally undertaken in the later stages of investment, and are therefore formal procedures ineffective for the purpose for which this right was recognised. There is no evidence that FPIC has been recognised in the context of business operations, as an indigenous advisor interviewed for this report affirms (Vittor, 2020).

In Nepal, the only Asian country to ratify ILO Convention 169 (in 2007), our respondents state that no measures have been taken to enshrine the convention in national law, even though this is the most fundamental treaty obligation of signatories. While it is neither specific to indigenous peoples nor makes specific reference to them, however, Local Government Operation Act 2074 of 2017 does provide certain rights of participation to local communities. What is missing is legislation that unambiguously recognises the right to self-determination, land, territories and resources and recognition of indigenous peoples' customary land law and legal institutions. (Yamphu & Rai, 2020)

From Russia, it was reported that relevant regulations have been adopted in recent years, potentially strengthening rights of participation; however, because of the rapidly shrinking space for civil society within the country, these rights remain mostly theoretical. Where participation rights exist, organisations whose participation is solicited by the state lack independence, and usually rubber-stamp whatever is presented to them. These organisations are often highly materially and politically-dependent on the state. This shows that respect for and protection of indigenous peoples' rights requires a functioning democracy, in which civil society has sufficient protection from reprisals and the judiciary is truly independent. Protection of indigenous peoples' rights is nigh on impossible when respect for human rights at large is insufficient. (Sulyandziga, 2020)

Our interlocutors from India report that, since the adoption of the Guiding Principles, no major legislative achievements have been made at federal level to better protect the rights of indigenous peoples (referred to as "scheduled tribes" in the Indian constitution). Legislation on environmental and social impact assessments predates the UNGP, while measures adopted in recent years, including the "National Guidelines on Responsible Business Conduct", are voluntary and, according to our respondents, have had no discernible impact on the rights of indigenous peoples in terms of business practices. (Gangmei, 2020)

In some cases, regressions have been identified: laws that contribute to the shrinking of space for civil society, including indigenous peoples' organisations, and laws that enable criminalisation of indigenous peoples. In Russia, the 2013 adoption of an amendment to the federal law on non-profit organisations ruled that groups receiving foreign funding and engaging in 'political' activity had to register as foreign agents. The law does not define 'political' and, in practice, the presence of any foreign funding may, where necessary, be sufficient grounds for the Ministry of Justice to classify an organisation as a 'foreign agent'. This has had a chilling effect on the whole of civil society, including indigenous organisations, many of whom have ceased to exist. It diminishes the ability of indigenous peoples to uphold their rights in the business context (mainly, the expansion of extractive industries into their territories). Another regression observed in Russia is that a recent act creates a 'register of persons belonging to indigenous minority peoples'. Only persons included in the register will be effectively recognised as indigenous and thereby eligible to enjoy and exercise rights, such as hunting and fishing rights, which Russian legislation reserves to small-numbered indigenous peoples. This means that, even though its constitution recognises indigenous peoples, for all practical purposes, the state denies their collective existence as distinct groups endowed with collective rights, including the right to freely dispose of their natural wealth, guaranteed by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. (Sulyandziga, 2020)

2.1.3

International Investment Agreements

Guiding Principle 9 provides that states should maintain adequate space for domestic policy to meet their human rights obligations when pursuing investment treaties and contracts. The

Working Group argued in its report on the UNGP and indigenous peoples that, in doing so, states should take into account the specific needs and vulnerabilities of indigenous peoples in order to avoid restricting their ability to meet their obligations towards them. (UN Working Group on the Issue of Human Rights and Transnational and Other Enterprises, 2013) In the same report, the Working Group stressed that policy coherence between the business and investment agendas pursued by states and their human rights policies, in accordance with Principle 8, was of particular importance for indigenous peoples whose rights are frequently affected by business and investment.

Over the last decade, we have seen a rapid increase in the number of bilateral, regional, and international investment agreements (IIA).⁴ Such agreements, generally drafted in a standard format aimed at protecting investors' interests and rights,⁵ have boosted investments by transnational businesses domiciled in the Global North (including China and Russia) in states of the Global South. A large part of these investments is aimed at resource extraction or development, generally impacting indigenous peoples' lands and territories, on which those resources are located.

Despite the inclusion of human rights provisions in recent IIAs entered into by the European Union as well as by Canada and the US,⁶ investments triggered by these have continued to severely affect indigenous peoples' rights. As former UN Special Rapporteur on the rights of indigenous peoples, Victoria Tauli Corpuz says, there are "an alarming number of cases in the mining, oil and gas, hydroelectric and agribusiness sectors whereby foreign investment projects have resulted in serious violations of indigenous peoples' land, self-governance and cultural rights" (UN Human Rights Council, 2016). This is a consequence of a lack of legal recognition or enforcement of indigenous peoples' rights, in particular land rights, which enables land expropriations in order to facilitate such investments on their lands. Further, a lack of consultation leads to the imposition of such investments on indigenous peoples without their FPIC, and a lack of access to remedies in home and host states forces indigenous peoples to resort to increased civic protest, to which states frequently respond with criminalisation and violence, sometimes deadly, as evidenced by Global Witness reports in recent years. (Global Witness, 2020)

Of particular concern are IIA clauses that provide for an investor-state dispute settlement mechanism. Such mechanisms, which generally operate under commercial arbitration tribunals – such as the International Center for Settlement of Investment Disputes (ICSID) –, have continued to be used by investors to seek compensation from states for human rights policies or legislation that might affect them. They do this by arguing that they constitute an expropriation of their interests. This limitation of the ability of states to enforce human rights obligations on businesses and to progressively achieve these rights through policy and legislation has been severely questioned but is still in effect under existing IIAs.⁷

As described in the 2016 report on investment treaties by the former UN Special Rapporteur Tauli Corpuz, this mechanism has been used by investors in the Americas and Africa over

4 According to UNCTAD's International Investment Agreement Navigator, there are currently 2,900 Bilateral Investment Agreements, of which 2,342 are in force. There are also 391 Treaties with Investment Provisions, of which 321 are in force. A large proportion of them have been signed in the last decade. See <https://investmentpolicy.unctad.org/international-investment-agreements>

5 The provisions of said agreements generally consider banning expropriation without compensation; national treatment or non-discrimination, meaning that foreign investors are treated no less favourably than domestic investors; "most favoured nation treatment", requiring the same standard of treatment available to other foreign investors; "fair and equitable treatment", or "minimum international standards of treatment", generally including protection of investors' "legitimate expectations"; and full protection and security for investments. They also provide for investor-state dispute settlement process, whereby investors can bring arbitration cases against a host state for alleged failures to protect their investments (UN SR Tauli Corpuz, 2016)

6 The human rights clause built into EU bilateral agreements, also known as the "democracy clause", (Zamfir, 2019) allows parties to partially or fully suspend an agreement unilaterally if it is breached (European Parliament, 2018). The European Parliament has promoted greater inclusion of the HRC in all new trade agreements negotiated by the EU, including in its recommendation dated September 2017 on the negotiations for the modernisation of the trade pillar of the EU-Chile Association Agreement, and in its resolution of 25 February 2016 on the opening of negotiations for an EU-Tunisia Free Trade Agreement. (European Parliament, 2018)

7 The European Union is proposing in its new investment agreements an Investment Court System to replace the state dispute settlement based on commercial arbitration. Such a Court, considered a first instance tribunal and an appeal tribunal, with qualified judges, would limit the ability of investors to bring a dispute against a state.

the last decade to sue states that adopt measures to protect indigenous peoples' rights, including protection of land rights and the right to consultation and FPIC (UN Human Rights Council, 2016).⁸ Although arbitral tribunals have thus far given a mixed reception to investor arguments, and some arbitrations are still ongoing (Cotula, 2020), it is clear that the existing dispute settlement mechanism poses serious threats to a state's ability to comply with its international obligations on indigenous peoples' rights.

A clear example of the threats posed to indigenous peoples' rights by these IIA can be found in the case of the Trans Pacific Partnership Agreement (TPP). Initially proposed in 2015 by the USA, which left the negotiations under the Trump presidency, this agreement is aimed at creating the world's largest market in the Asia Pacific Rim. Concerns for the adverse implications that this agreement could have on indigenous peoples' rights if approved and entered into effect, in particular their rights to lands, territories and resources, intellectual property, self-determination, and to FPIC, have been expressed by indigenous peoples globally,⁹ particularly by indigenous peoples in Latin America, given the serious threats that past trade and investment agreements have had on indigenous peoples' rights to lands and resources in this region of the world. (Aylwin, Gomez, & Vittor, 2016)

2.1.4 European due diligence legislation

Of the large economic blocs, the European Union, which is a substantial importer of raw materials extracted from indigenous peoples' traditional lands, has made the clearest efforts to enact regulations that establish a legally-binding obligation on business enterprises to conduct human rights due diligence.

On 3 July 2018, the European Parliament adopted a comprehensive resolution on the rights of indigenous peoples. (European Parliament, 2018) This resolution called for the implementation of four mechanisms:



- a grievance mechanism to lodge complaints regarding violations and abuses of their rights resulting from EU-based business activities [art. 45];
- a mechanism to carry out independent impact assessment studies prior to the conclusion of trade and cooperation agreements [art. 72];
- an effective administrative complaint mechanism for victims of human rights violations [art. 81];
- a standing rapporteur on Indigenous Peoples within the European Parliament with the objective of monitoring the human rights situation and, in particular, the implementation of the UNDRIP and ILO Convention No 169 [art. 85].

8 Among those cases cited by SR Taulli Corpuz (2016), and where investors have sued states on the basis of the dispute settlement mechanism considered in these agreements, negatively affecting indigenous peoples' rights, are *South American Silver Mining v. the Plurinational State of Bolivia*, *Bear Creek Mining Corp. v. Peru*, *Chevron v. Ecuador* (2014), and *Von Pezold and Border Timbers v. Zimbabwe* (2015)

9 Maori (Te Wharepora Hou) in New Zealand considered TPP a "death sentence for indigenous rights". See <https://itsourfuture.org.nz/the-tpa-is-a-death-sentence-for-indigenous-rights/>

To date, none of these mechanisms have been established but progress is being made in this regard.

The European Commission has announced its intention to move forward on the issue of EU Human Rights Due Diligence Legislation in order to protect *inter alia* indigenous peoples,¹⁰ after a recent study on due diligence requirements through the supply chain concluded that voluntary measures were insufficient to significantly affect the way companies address their social, environmental and governance impacts and that binding legislation was needed to improve access to justice for victims of corporate-related human rights abuses and environmental damage. (Policy Department for External Relations, 2020)¹¹ Justice Commissioner Didier Reinders announced in April 2020 that he was going to develop corporate due diligence legislation, which is inspired by the UNGP but which is also intended to include environmental duties.¹² The first draft is expected for July-September 2021, but it will take at least two years until a directive is adopted.

While the European Commission has not yet developed the long-awaited EU Action Plan on Business and Human Rights, which would provide a systematic and coherent approach to an EU-wide implementation of the UNGP, there are indications that such a plan may be on the agenda soon, with the upcoming legislation on mandatory human rights and environmental due diligence as one of its centre pieces. At the level of European Member States, there is movement towards binding cross-sectoral regulation of companies' due diligence obligations, e. g. France adopted a law ("Loi de vigilance") in 2017. Germany is expected to adopt a similar law, called *Lieferkettengesetz* or the *Supply chain law* before autumn 2021, and other governments have committed to initiate national processes or support the European process.¹³ The main impact of the French *loi du vigilance* is so far that it has allowed civil society organisations to lodge lawsuits against companies domiciled in France for activities abroad that violate human rights. This includes a lawsuit brought by 11 organisations against the retail giant Casino in March 2021 over deforestation and human rights violations against indigenous peoples in the Brazilian Amazon.¹⁴ Since this lawsuit is recent, there has been no ruling yet. It is therefore too early to judge its effectiveness.

As part of the European green deal, the European Commission's communication on the "EU biodiversity strategy for 2030 - Bringing nature back into our lives" also proposes that the EU ensure a principle of equality. This principle includes notably "respect for the rights and the full and effective participation of indigenous peoples and local communities". Further, the European Commission recommends that, in all of its work, the EU "strengthen the links between biodiversity protection and human rights, gender, health, education, conflict sensitivity, the rights-based approach, land tenure and the role of indigenous peoples and local communities". (Commission, 2020)

On 3 June 2020, the European Commission decided to suspend part of its funding to the World Wide Fund for Nature (WWF) in relation to the planned creation of an EDF-funded project in Messok Dja, Republic of Congo. The decision was taken owing to the recent violations of the human rights of indigenous peoples in the area and following parliamentary pressure. (Heubuch, 2019)

Finally, the European Parliament is currently working on numerous reports and legislative initiatives dealing with issues important to indigenous peoples such as corporate due diligence

10 Announced on 30 April 2020 by Commissioner Reynders during a webinar on due diligence, see <https://responsible-businessconduct.eu/wp/2020/04/30/speech-by-commissioner-reynders-in-rbc-webinar-on-due-diligence/>

11 Specifically related to pillar three, the European Parliament published a study on "Access to legal remedies for victims of corporate human rights abuses in third countries". The Parliament is also currently preparing a legislative opinion to feed into the Commission's legislative proposal next year.

12 ECCJ: Commissioner Reynders announces EU corporate due diligence legislation, 30 April 2020 <https://corporate-justice.org/news/commissioner-reynders-announces-eu-corporate-due-diligence-legislation/>

13 For a summary of due diligence legislation under way in the European Union, see *ECCJ ECCJ publishes updated map and comparative analysis of mHRDD laws and legislative proposals in Europe*, <https://corporatejustice.org/news/16808-eccj-publishes-updated-map-and-comparative-analysis-of-mhrdd-laws-and-legislative-proposals-in-europe>

14 Sherpa: Amazon indigenous communities and international NGOs sue supermarket giant Casino over deforestation and human rights violations, <https://www.asso-sherpa.org/amazon-indigenous-communities-and-international-ngos-sue-supermarket-giant-casino-over-deforestation-and-human-rights-violations>

and corporate accountability, the effects of climate change on human rights and the role of environmental defenders in this regard, protection and restoration of the world's forests, and the impacts of climate change on vulnerable populations in developing countries. It is also advocating for greater consideration and collaboration with indigenous peoples.

The resolution of July 3, 2018 partly influenced these decisions. The resolution is not legally binding but does appear to be contributing to the dynamics in this field.

2.1.5

Latin America: The Escazú Agreement on Access to Information, Public Participation and Justice in Environmental Matters



At the regional level, one area of progress to be considered is that of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, adopted on 4 March 2018 in Escazú, Costa Rica.¹⁵

The Escazú Agreement

On access to environmental information this Agreement affirms:

“Each Party shall facilitate access to environmental information for persons or groups in vulnerable situations, establishing procedures for the provision of assistance, from the formulation of requests through to the delivery of the information, taking into account their conditions and specificities, for the purpose of promoting access and participation under equal conditions.” (article 5.3);

“Each Party shall guarantee that the above-mentioned persons or groups in vulnerable situations, including indigenous peoples and ethnic groups, receive assistance in preparing their requests and obtain a response.” (article 5.4)

On public participation in the environmental decision-making process the Agreement mandates:

“In the implementation of the present Agreement, each Party shall guarantee that its domestic legislation and international obligations in relation to the rights of indigenous peoples and local communities are observed.” (article 7. 15)

And on access to justice in environmental matters, the Agreement affirms each Party shall establish:

“The use of interpretation or translation of languages other than the official languages when necessary for the exercise of that right.” (article 8. 4.d)

¹⁵ *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-18&chapter=27

Indeed, the Escazú Agreement has as its main objective "...to guarantee the full and effective implementation in Latin America and the Caribbean of the rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters, and the creation and strengthening of capacities and cooperation, contributing to the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development." (Article 1). In doing so, it recognises the "multiculturalism of Latin America and the Caribbean and of their peoples (Preamble), as well as the specificity of indigenous peoples and their rights on environmental matters." Such agreement, currently signed by 24 states and recently ratified by 12 states in the region,¹⁶ entered into effect on 22 April 2021. It is the first international treaty of its kind to address a key problem faced by vulnerable communities, including indigenous peoples, in the context of business operations that affect their environmental rights.

The agreement could be of great relevance to advancing the protection of indigenous peoples and communities threatened by business operations in a region of the world where, according to all evidence, indigenous peoples' rights defenders are more at risk in the context of business operations (Global Witness, 2020).

2.1.6 Progress made

Among the positive initiatives undertaken by states in the implementation of the Guiding Principles in relation to indigenous peoples' rights, we have identified the following through our desk study and survey:

Legislative processes in some home states, including Kenya in Africa, Nepal in Asia and Peru in Latin America, have made progress. Some legislative acts, even though their stated purpose is not to safeguard indigenous peoples' rights, do have positive effects in terms of enabling indigenous peoples to register their territories or to be consulted in development plans affecting their communities.

Thirteen NAPs contain explicit references to indigenous peoples, and in one case (Peru) a participatory process involving their representative organisations is being undertaken. Some states (France, Germany, Netherlands) have introduced, or are in the process of introducing, legislation on mandatory human rights due diligence.

The European Union has, in the wake of the EP resolution on indigenous peoples' rights, embarked on a process which should eventually lead to the institution of mechanisms that provide access to remedy for indigenous rights-holders who are potentially affected by the activities of business enterprises headquartered in the EU. Such access is already in place in France due to the *loi due vigilance* of 2017; however, litigation results are still outstanding. It will be at least two years before a European directive on corporate due diligence is adopted. The content of the German *Lieferkettengesetz* are also still subject to negotiation. However, there is a clear tendency to legislate mandatory due diligence throughout the Union.

Latin American and Caribbean states have engaged in a process leading to the approval and subsequent ratification of the Escazú Agreement, the first of its kind globally to acknowledge the rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters, with specific reference to indigenous peoples' rights in these matters.

¹⁶ The Agreement needed 11 State ratifications to enter into effect. The states that ratified it include Antigua and Barbados, Argentina, Bolivia, Ecuador, Guyana, Mexico, Nicaragua, Panama, Saint Vincent and the Grenadines, Saint Kitts and Nevis, Santa Lucia and Uruguay.

2.2

BUSINESSES

There are several cases in which businesses individually or as part of Multi-Stakeholder Initiatives (MSI) have developed strategies or produced guidelines aimed at implementing the GP in general or referring to indigenous peoples' rights, in particular. Below we refer to some of these cases.

2.2.1

Business initiatives

Food and beverage industry: Since the adoption of the UNGP, business in various sectors, particularly in the food and beverage industry and the extractive sector, have in some cases adopted measures to step up respect for indigenous peoples' rights. In line with the UNGP, they have responded to pressure from civil society and adopted important policy changes which, if enforced throughout the enterprises and their supply chains, would yield substantial improvements.

As a result of Oxfam's "Behind the Brands" campaign, several large food and beverage enterprises adopted important policy changes, such as zero tolerance for land grabbing and the requirement to obtain FPIC in specific circumstances.

Although these initiatives are laudable, notable limitations can be identified. For one, when addressing the issue of land grabbing, only some have explicitly committed to a zero tolerance policy, and the degree to which FPIC is considered mandatory varies widely. Commitments are often limited to specific commodities rather than simply required in all cases set out by the UNDRIP.

However, the biggest limitation is that transnational corporations rarely see themselves in a position to ensure that these policy commitments are met at the farm level, which is typically operated by a supplier several tiers removed from the company. Grievance mechanisms are typically not advertised to local indigenous communities and are not available or accessible to them. Even if a local community were eligible, using the process might require knowledge of a foreign language, verbal complaints may not be possible, etc.

Corporations argue that it is often not feasible to trace the farms from which produce is being sourced. This stands at odds with the experience of fair-trade initiatives, which have developed and implemented mechanisms that ensure full traceability.¹⁷

As a matter of practice, companies typically leave the actual implementation of their policy commitments to multi-stakeholder initiatives, whose effectiveness varies widely.

Extractive industries: After decades of pressure from civil society, some industry associations have taken steps to ensure their compliance with indigenous peoples' rights. One significant step was the position statement adopted by the International Council on Metals and Mining (ICMM) on indigenous peoples (ICMM, 2013), which bases the engagement of ICMM members with indigenous peoples firmly on the principle of FPIC. Most large Western transnational mining companies are ICMM members, and so such a commitment is potentially highly significant. The next step would be for ICMM member companies to include this commitment in their policies and then to ensure that such policies are enforced throughout all levels of the company and throughout its supply chain. The language found in the policy of member



Ecuador – Photo: IWGIA's photo archive

¹⁷ See for instance <https://info.fairtrade.net/what/traceability-in-fairtrade-supply-chains>



Colombia – Photo: David Campuzano



Colombia – Photo: David Campuzano

companies, where it mentions FPIC, tends to be ambiguous. For example, BHP says that “activities at our extractive operations are aligned with the principles of free, prior and informed consent for indigenous people (FPIC)” and that “Members must work to obtain the consent of indigenous people for such projects.” (BHP, 2019) It doesn’t say what happens if indigenous peoples are unwilling to enter an FPIC process or ultimately withhold their consent. Freeport McMoran’s human rights policy mentions indigenous peoples once but does not mention FPIC (Freeport McMoran). Rio Tinto’s 2017 ‘Statement of Commitment for Indigenous Peoples’ contains neither the expression ‘Free, Prior and Informed Consent’, nor the word ‘consent’. (Rio Tinto) This sample indicates that the uptake of the ICMM’s statement has remained limited even though, according to ICMM’s rules, it is mandatory for its members.

According to a survey undertaken by Oxfam in 2015, large transnational oil companies, including Shell, ExxonMobile, Chevron, ConocoPhillips, BP had not committed to FPIC, even though most of them have made some general commitment to respecting indigenous peoples’ rights. (Oxfam, 2015) In 2016, Shell was the first company to commit to FPIC “as interpreted by the IFC”.¹⁸ The reason why the oil industry appears to be trailing behind is unclear (Greenspan, 2017) given that the oil producers’ association IPIECA has developed its own FPIC toolkit which, thus far, seems to have been largely ignored by its members. (IPECA, 2020)

18 Shell: *Supporting local communities*, <https://www.shell.com/sustainability/communities/working-with-communities.html>, last accessed 23 November 2020

Since the 1990s, Multi-stakeholder initiatives have proliferated as a method of ensuring business respect for human rights. After 30 years, the picture is very mixed and suggests that MSIs are unfit for the purpose of acting as the principal safeguard for business respect for human rights. A comprehensive review published in July 2020 identifies six key issues:

1. The credibility and influence of MSIs is waning in the wake of criticism from key stakeholders who are stepping away from them. The role of civil society is shrinking while the dominance of corporate interests is growing.
2. Rights-holders such as indigenous peoples rarely form part of the governance structures of MSI. Governance rules and power dynamics favour corporations and disfavour rights-holders and CSO actors.
3. Standards are often too weak and have the effect of creating the false impression that human rights violations are being addressed, rather than actually addressing them.
4. Monitoring mechanisms are often inadequate to detect violations, in particular when indigenous peoples are affected and when the environment may be such that informants are too intimidated to freely speak out. Mechanisms to enforce compliance are often too weak and inadequate.
5. Remedy processes are often extremely drawn out and fail to deliver adequate outcomes to the victims. Local communities and indigenous peoples are often unaware of their very existence and are unable to make use of them without external support because of linguistic, cultural and other barriers.
6. There is little evidence for a positive impact of MSIs on rights-holders such as indigenous peoples or for closing governance gaps.

The report concludes that the role of MSIs needs to be reconsidered, refocusing on mutual learning, engagement and experimentation, while the expectation that they can serve as a fix for governance gaps or as a primary tool to protect human rights is misplaced. Instead, binding regulations, both nationally and internationally, are needed to enforce business respect for human rights (MSI Integrity, 2020).

In the food and beverage sector, two of the best known MSIs are the **Round Table for Sustainable Palm Oil (RSPO)** and **Bonsucro** for the sugar sector, involving the participation of companies from various tiers of the supply chain, financial institutions and civil society organisations. Their primary functions are certification grievance mechanisms, and as a platform for multi-stakeholder dialogue. The RSPO requires its members to respect indigenous peoples' and local communities' granting or withholding of FPIC and released detailed guidance in 2015. (RSPO Human Rights Working Group, 2015) Bonsucro's code of conduct contains no such requirement. (Bonsucro, 2020)

Despite its detailed guidelines, the RSPO has been criticised for its insufficient verification mechanisms and its failure to emphasise rights-compatible outcomes. In 2015, a report by the Environmental Investigation Agency found that the RSPO's monitoring and certification mechanisms were highly inadequate, e.g. they had insufficient provisions to prevent conflicts of interest, weak requirements for FPIC verification, auditors had poor knowledge and failed to identify indigenous peoples' land claims, and there was a serious lack of transparency with regard to certification bodies. (Environmental Investigation Agency, 2015) In 2018, it released new and improved Principles and Criteria, the major improvement of which was a better protection for the



India – Photo: Signe Leth

right to FPIC; however, whether the new FPIC guidelines will affect the situation on the ground remains unclear. The EIA has reported several recent cases in which companies developed large plantations without submitting New Plantation Procedure (NPP) notices. The complaints system continues to lack safeguards against conflicts of interest and is unable to detect violations before considerable harm has occurred, takes too long to process complaints and lacks transparency. One case is mentioned whereby a land conflict that is widely known throughout the country has not even been acknowledged by the auditors to exist. (Environmental Investigation Agency, 2019) Given that palm oil is present in a considerable share of food products available globally, the importance of the question whether RSPO - as a voluntary certification scheme - can significantly affect the situation cannot be understated.

Another commodity that is universal is sugar, whose leading MSI is **Bonsucro**, established in 2008. It refers to FPIC only in its non-mandatory guidance and only in a very limited fashion.¹⁹ A 2019 evaluation report describes the impact of certification at mill level as “minimal” and draws particular attention to the fact that auditor reports are not made public, so there is no way of identifying assessor errors, even though such errors are a problem that has long plagued MSIs in the food and beverage sector. At the same time, the establishment of a grievance mechanism is not essential for achieving certification. (Business and Human Rights Clinic – University of Columbia, 2019) Bonsucro has been sharply criticised by civil society groups for failing rights-holders in their attempts to seek justice.²⁰

19 The sole mention of FPIC is a suggestion to operators to “ensure that dispute, grievances and conflicts aimed to be resolved through negotiated agreement between parties based on Free, Prior and Informed Consent (FPIC)” <https://www.bonsucro.com/wp-content/uploads/2017/04/Bonsucro-PS-GDC-English-v4.2.pdf>

20 The best known case is that of the Thai sugar producer Mitr Phol, which was allegedly responsible for the forced eviction of over 700 families in Cambodia in 2008-2009 and which Bonsucro, despite being notified by the Thai Human Rights Commission of the allegations, did not even suspend. Victims have still not been compensated in any way, see: Earthsight: Sugar industry faces new complaint over Thai firm’s violations in Cambodia. 12 May 2019, <https://www.earthsight.org.uk/news/idm/sugar-industry-thai-firm-rights-violations-cambodia>



Republic of Congo – Photo: Marianne Wiben Jensen

The **Forest Stewardship Council (FSC)** is the most important MSI in the forestry sector globally and the one in which most businesses of this sector are involved.²¹ Although FSC Principle 3, which calls for companies seeking to be certified by its standards to “identify and uphold indigenous peoples’ legal and customary rights of ownership, use and management of land, territories and resources affected by management activities” has been in effect since 1994, a new set of Principles and Criteria were adopted in 2014. (Forest Stewardship Council, 2015) In line with the UNGP, the right of indigenous peoples to FPIC prior to forest management activities that may affect them was included in these Principles. Subsequently, International Generic Indicators were developed by the FSC in 2018 to provide guidance to FSC National Standards Development Groups on essential elements to include in new national standards.²²

The implementation of FPIC in the context of FSC-certified companies, however, varies greatly from context to context. Although there seems to be some progress in some states, such as Canada, where indigenous peoples have been actively participating in the governance of FSC Canada, this does not seem to be the case in other states, such as Chile, where indigenous peoples are not part of the governance of this entity. Monocultures have been imposed by FSC-certified companies on the Mapuche in this latter country not only without FPIC but even without consultation. This has triggered severe conflicts. (Millamán & Hale, 2016)

21 The FSC currently has more than 190 million of hectares of total certified area distributed across 82 countries and more than 31,250 chain of custody-certified companies in a total of 120 countries. See <http://www.forest-in.eu/partner/fsc-international>.

22 The International Generic Indicators (Forest Stewardship Council, 2018) provide guidance on FPIC in Indicator 3.2.4: “Free, prior and informed consent is granted by Indigenous Peoples prior to management activities that affect their identified rights through a process that includes: 1) Ensuring Indigenous Peoples know their rights and obligations regarding the resource; 2) Informing the Indigenous Peoples of the value of the resource, in economic, social and environmental terms; 3) Informing the Indigenous Peoples of their right to withhold or modify consent to the proposed management activities to the extent necessary to protect their rights, resources, lands and territories; and 4) Informing the Indigenous Peoples of the current and future planned forest management activities.”

**FPIC in FSC Principles and Criteria for
Responsible Forest Management FSC-STD-01-001 V5-2 ES
(Forest Stewardship Council, 2015)**

According to Principle 3 Criterion 3.2:

“The Organization* shall recognize and uphold* the legal and customary rights* of Indigenous Peoples* to maintain control over management activities within or related to the Management Unit* to the extent necessary to protect their rights, resources, and lands and territories. Delegation by Indigenous Peoples of control over management activities to third parties requires Free, Prior and Informed Consent*.”



According to Principle 3 Criterion 3.3:

“In the event of delegation of control over management activities, a binding agreement between The Organization* and the Indigenous Peoples* shall be concluded through Free, Prior and Informed Consent*. The agreement shall define its duration, provisions for renegotiation, renewal, termination, economic conditions and other terms and conditions. The agreement shall make provision for monitoring by Indigenous Peoples of The Organization’s compliance with its terms and conditions.”

And in accordance with Principle 3 Criterion 3.6:

“The Organization* shall uphold* the right of Indigenous Peoples* to protect and utilize their traditional knowledge and shall compensate Indigenous Peoples for the utilization of such knowledge and their intellectual property*. A binding agreement as per Criterion 3.3 shall be concluded between The Organization and the Indigenous Peoples for such utilization through Free, Prior and Informed Consent* before utilization takes place and shall be consistent with the protection of intellectual property rights.”

2.2.2.3

Extractive industries

The **IRMA (Initiative for Responsible Mining Assurance)** standard is currently the most advanced standard in the extractive sector with regard to indigenous peoples’ rights. It distinguishes itself by being a genuine multi-stakeholder effort. It stipulates that only such new mines for which indigenous peoples’ FPIC has been obtained are certifiable. Further, it is among the few documents that explicitly say that FPIC can only take place if the affected community agrees to enter an FPIC process in the first place and is relatively clear in saying that the right to FPIC implies the right to withhold consent and that such decision must be respected. IRMA does not therefore allow a fall-back to “broad community support” if FPIC cannot be obtained. IRMA has very recently conducted its first audit.²³ While it appears to be the most advanced

²³ Announcement of first audit report: <https://responsiblemining.net/wp-content/uploads/2020/10/IRMA-Press-Release-First-Audit-21Oct2020.pdf>

From IRMA's Free, Prior and Informed Consent (FPIC) Requirements

[...] The operating company shall have a publicly available policy that includes a statement of the company's respect for indigenous peoples' rights, as set out in the **United Nations Declaration on the Rights of Indigenous peoples**. The operating company shall ensure that indigenous peoples potentially affected by the company's mining-related activities are aware of the policy.



[...] The operating company shall conduct **due diligence** to determine if the host government conducted an adequate consultation process aimed at obtaining indigenous peoples' informed consent prior to granting access to mineral resources. The key findings of due diligence assessments shall be made publicly available and shall include the company's justification for proceeding with a project if the State failed to fulfill its consultation and/or consent duties.

[...] If indigenous peoples' representatives clearly communicate, at any point during engagement with the operating company, that they do not wish to proceed with FPIC-related discussions, the company shall recognize that it does not have consent, and shall cease to pursue any proposed activities affecting the rights or interests of the indigenous peoples. The company may approach indigenous peoples to renew discussions only if agreed to by the indigenous peoples' representatives.

[...] For new mines, **IRMA certification is not possible if a mining project does not obtain free, prior and informed consent** from indigenous peoples.

Engagement with indigenous peoples continue throughout all stages of the mining project.

MSI in terms of respecting indigenous peoples' rights, it is still fairly young and evidence is therefore still very limited.

It will be crucial to see whether the IRMA standard and certification scheme are robust enough to prevent bad actors from gaming the system by exploiting loopholes, such as the fact that no FPIC is required to certify existing mines. In the latter case, companies are only required to demonstrate "that they are operating in a manner that seeks to achieve the objectives of this chapter".²⁴

The latter is described as

"To demonstrate respect for the rights, dignity, aspirations, culture, and livelihoods of indigenous peoples, participate in ongoing dialogue and engagement, and collaborate on strategies to minimize impacts and create benefits for indigenous peoples, thereby creating condi-

²⁴ https://responsiblemining.net/wp-content/uploads/2018/07/IRMA_STANDARD_v.1.0_FINAL_2018-1.pdf



Colombia – Photo: David Campuzano

tions that allow for indigenous peoples’ free, prior and informed consent and decision-making regarding mining development.”

While detailed guidance is given for the conduct of an FPIC process, there is no specified protocol for companies to follow for existing mines, where no FPIC is required, especially where FPIC will only be required in case of substantial changes to the *modus operandi*. While this is most likely not a problem with good-faith actors, other actors who are poised to do a bare minimum to get their mines certified, might try to exploit loopholes. For example, in an undemocratic, authoritarian environment, they might try to obtain agreement from state-controlled indigenous associations or use intimidation to get communities to consent. Such intimidation may be very difficult to uncover, as the auditor has to have the time and resources to really spend time with affected communities and build up a genuine relationship of trust such that interviewees are absolutely convinced that no repercussions will arise from openly talking to the auditor.

Bettercoal is an MSI launched in 2013 for the coal sector. In its current version 1.1, the Bettercoal code does not adequately reflect the rights of indigenous peoples as set out in the UNDRIP. This is demonstrated by para 5.2.3 of the code which requires FPIC inter alia in the case of ‘the involuntary relocation of indigenous communities’. (Bettercoal, 2018) It is surprising that the inherently glaring contradiction between ‘free’ and ‘involuntary’ was not immediately apparent to the authors and reviewers of the code; it is likewise astonishing that the authors apparently did not thoroughly cross-check the code against the UNDRIP, which clearly says that involuntary relocation of indigenous peoples is not permissible. This ill-begotten language has not been fixed in the current draft of the Bettercoal code 2.0.²⁵

25 Provision 5.5.: “Companies will follow the principles of Free, Prior and Informed Consent (FPIC) where new mining operations or major changes to existing operations involve:
a) significant direct impacts to ancestral territories of indigenous and tribal peoples and natural resources contained therein irrespective of recognition by the relevant state;
b) the **involuntary relocation** of indigenous communities; and
c) the destruction of places of indigenous cultural and spiritual *significance*.” <https://bettercoal.org/resource/bettercoal-code-2-0-translations/> last accessed 23 November 2020

2.2.3 Progress made

Most large food and beverage enterprises as well as most large mining companies and the forestry industry have acknowledged the rights of indigenous peoples in some way, including FPIC, either through the adoption of new policies or by virtue of being members of a business association that has. Some multi-stakeholder initiatives have adopted detailed guidance and guidelines on FPIC. At least one of them, IRMA, has demonstrated that a genuine multi-stakeholder effort, where all stakeholders have equal power in the process, is possible and has explicitly acknowledged that the right to FPIC entails the right not to enter into a process or not to grant consent as the result of a process. The FSC has made relevant progress in its new standards on the protection of customary land rights and FPIC of indigenous peoples. Its implementation in practice as identified in the referenced case study reflects that there are still important challenges in the enforcement of such standards. This is when the role of states in the regulation and enforcement of indigenous peoples rights cannot be substituted by business.

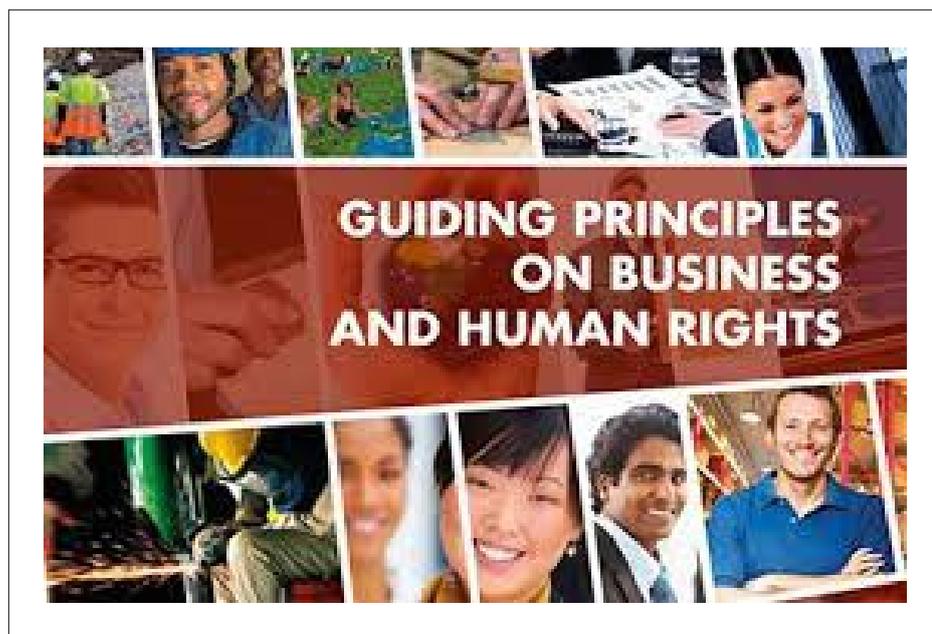
2.3 INTERNATIONAL ORGANISATIONS

2.3.1 United Nations



Since the Guiding Principles were approved by the Human Rights Council in 2011, they have had a significant impact within the UN system as a whole. Far beyond the initiatives undertaken by the Working Group on Business and Human Rights – including its thematic and annual reports, forums and others – aimed at promoting the implementation of these Principles in accordance with its mandate, this impact has cut across and been visible in almost all UN branches and entities. Indeed, the Guiding Principles, in particular the reference to the duty of states to protect and the responsibility of business to respect human rights in the context of business activities, are reflected in most UN documents, including declarations, guidelines, general comments and observations, reports as well as case jurisprudence concerning business and human rights that has emerged from various UN bodies. This includes UN treaty bodies, Special Procedures as well as specialised branches such as the Food and Agriculture Organization (FAO) and the International Labour Organization (ILO).

The impact and influence of the Guiding Principles is also visible in those documents emanating from bodies and procedures that deal with the generally conflict-ridden relationship existing between business entities and indigenous peoples. Reference to the adverse impacts of business



entities on indigenous peoples' rights, as well as recommendations to states on the need to take steps to effectively implement the Guiding Principles, including the need to regulate business operations as a means of protecting them against human rights abuses in the context of business operations, are common in observations made to states by different treaty bodies. The three pillars and the framework of state duties and business responsibilities with regard to indigenous peoples adversely affected by business operations is frequently referenced in observations made to states when considering their periodic reports on fulfilment of their human rights treaty obligations by the Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social and Cultural Rights.²⁶

They are also reflected in General Observations made by these treaty bodies. A clear example of this can be seen in General Comment 24 issued in 2017 by the Committee on Economic, Social and Cultural Rights on state obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities. In this General Observation, aside from acknowledging the disproportionate and adverse impact of business activities on indigenous peoples and their rights, and underlining the state's and business obligations and responsibilities on these matters, the Committee makes strong recommendations to both stakeholders in order to prevent such impacts or mitigate and remediate them where they occur.

The Guiding Principles have also had a significant impact on the procedures of the Universal Periodic Review (UPR) instituted by the Human Rights Council in 2006. The UPR Info Database lists 1,761 recommendations concerning indigenous peoples' rights made by the UN member states to their peers since its first review cycle in 2008-2011 - during which the Guiding Principles were finalised and adopted - up until the present. A significant portion refers to the need of states to take legislative or administrative steps to protect indigenous peoples' rights to their ancestral territories and to implement their right to consultation and Free, Prior and Informed Consent in the context of business operations. They have also addressed the need of the home states of business enterprises to adopt measures to ensure that such corporations do not harm the rights of indigenous peoples when operating outside the borders of those states.²⁷

²⁶ UN Treaty Bodies and Special Procedures jurisprudence concerning indigenous peoples has been compiled and published by Forest Peoples Programme from 1993 to 2019. This can be found at: <https://www.forestpeoples.org/en/UN-jurisprudence-report-volume-viii>

²⁷ See UPR Info Database. Available at [https://upr-info-database.uwazi.io/library/?q=\(searchTerm:%27INDIGENOUS%20PEOPLES%27\)](https://upr-info-database.uwazi.io/library/?q=(searchTerm:%27INDIGENOUS%20PEOPLES%27))

Committee on Economic, Social and Cultural Rights General comment No. 24 (2017)

8. Among the groups that are often disproportionately affected by the adverse impact of business activities are women, children, indigenous peoples, particularly in relation to the development, utilization or exploitation of lands and natural resources, peasants, fisherfolk and other people working in rural areas, and ethnic or religious minorities where these minorities are politically disempowered.
12. The obligation to respect economic, social and cultural rights is violated when States parties prioritize the interests of business entities over Covenant rights without adequate justification, or when they pursue policies that negatively affect such rights. This may occur for instance when forced evictions are ordered in the context of investment projects. Indigenous peoples' cultural values and rights associated with their ancestral lands are particularly at risk. States parties and businesses should respect the principle of free, prior and informed consent of indigenous peoples in relation to all matters that could affect their rights, including their lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired.
17. States parties should ensure that, where appropriate, the impacts of business activities on indigenous peoples specifically (in particular, actual or potential adverse impacts on indigenous peoples' rights to land, resources, territories, cultural heritage, traditional knowledge and culture) are incorporated into human rights impact assessments. In exercising human rights due diligence, businesses should consult and cooperate in good faith with the indigenous peoples concerned through indigenous peoples' own representative institutions in order to obtain their free, prior and informed consent before the commencement of activities. Such consultations should allow for identification of the potentially negative impact of the activities and of the measures to mitigate and compensate for such impact. They should also lead to design mechanisms for sharing the benefits derived from the activities, since companies are bound by their duty to respect indigenous rights to establish mechanisms that ensure that indigenous peoples share in the benefits generated by the activities developed on their traditional territories.

UN specialised bodies and independent experts on indigenous peoples' rights have relied on the Guiding Principles in their analyses of the impacts of business operations on indigenous peoples' rights. This has also been the case when identifying the responsibilities of different stakeholders – states and businesses – in addressing and remediating such adverse impacts. The UN Special Rapporteurs on the rights of indigenous peoples, for instance, have generally made use of the three pillars to address the levels of responsibility and actions to be taken by states and business entities to avoid abuses of indigenous peoples' rights in the context of business activities. The report of the former UN Special Rapporteur Tauli Corpuz on investment treaties, referred to above, is an example of this use.

Another example, in this case of a specialised UN body, is that of the UN Expert Mechanism on the Rights of Indigenous Peoples.

Uptake of the Guiding Principles by specialized branches of the UN is evident in the of Food and Agriculture Organization's (FAO) Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security. (Food and Agricultural Organisation, 2012) These Guidelines, which were issued in 2012, after a global participatory process involving states, civil society, and business,²⁸ are clearly informed by the Guiding

²⁸ See endorsement by the International Agri-Food Network http://www.fao.org/fileadmin/user_upload/newsroom/docs/Statement-by-private-sector-FINAL.pdf

Report on investment treaties by the former UN Special Rapporteur Tauli Corpuz (2016)

96. Investment dispute settlement bodies addressing cases having an impact on indigenous peoples' rights should promote the convergence of human rights and international investment agreements by:
 - (c) Taking into account the human rights responsibilities of investors as outlined in the Guiding Principles on Business and Human Rights;
 - (d) Ensuring that applicable law includes all international human rights law treaties ratified by either State party, and the United Nations Declaration on the Rights of Indigenous Peoples as an interpretative guide for their application to indigenous peoples;

98. International investment agreements should:
 - (a) Address the corporate responsibility to respect human rights, including the requirement to conduct human rights due diligence, and to prevent, mitigate and remedy human rights' harms in which they may be involved, in particular in relation to vulnerable groups such as indigenous peoples;

102. Home States should adopt and enforce extraterritorial regulation in relation to the impacts of their corporations on indigenous peoples overseas and ensure they are held to account for any rights violations, including the denial of protections under international investment agreements.



Principles. This is evident when they identify state and business responsibilities, and when making specific reference to indigenous peoples' rights. The Guidelines explicitly refer to the duty of states and non-state actors to respect indigenous peoples' customary tenure rights to lands, fishing areas and forests used and controlled by them, as well as to consultation and FPIC rights recognised by Convention 169 of the ILO and UNDRIP.²⁹

Uptake of the Guiding Principles by specialised branches of the UN is evident in the Food and Agriculture Organization's (FAO) Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (Food and Agricultural

²⁹ See Guideline 9 on Indigenous peoples and other communities with customary tenure systems. <http://www.fao.org/3/a-i2801e.pdf>

**Expert Mechanism on the Rights of Indigenous Peoples
Advice No. 11 on indigenous peoples and FPIC,
A/HRC/39/62, 10 August 2018**

3. States should establish an appropriate regulatory mechanism or mechanisms at the national level, preferably at the constitutional or legislative level, to regulate consultations in situations where free, prior and informed consent is required or is sought as the objective of the consultation. It should include references to the Declaration. The establishment of such a mechanism itself necessitates a process of consultation with indigenous peoples in a context of trust and good faith, and should be accompanied by the development of adequate implementing institutions, employing well-trained officials and ensuring adequate funding. Such a mechanism could also act as an oversight mechanism.
4. States should engage directly with indigenous peoples. When direct negotiations between indigenous peoples and private enterprises are sought by indigenous peoples themselves, companies must exercise due diligence to ensure the adequacy of the consultation procedures. States remain responsible for any inadequacy and should ensure measures are in place to oversee and evaluate procedures undertaken by business enterprises,



Organisation, 2012). These Guidelines, which were issued in 2012 following a global participatory process involving states, civil society and business,³⁰ are clearly informed by the Guiding Principles. This is evident when they identify state and business responsibilities, and when making specific reference to indigenous peoples' rights. The Guidelines explicitly refer to the duty of states and non-state actors to respect indigenous peoples' customary tenure rights to lands, fishing areas and forests used and controlled by them, as well as to consultation and FPIC rights recognised by Convention 169 of the ILO and UNDRIP.³¹

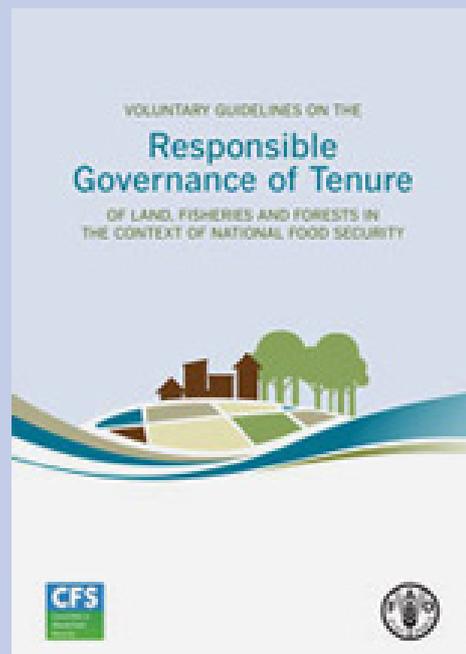
In 2014, the FAO issued further Guidelines, this time specifically referring to FPIC (Food and Agricultural Organisation, 2014) and reinforcing the need of states to hold good-faith consultation to obtain the FPIC of indigenous peoples under international law instruments, including UNDRIP,

30 See endorsement by the International Agri-Food Network http://www.fao.org/fileadmin/user_upload/newsroom/docs/Statement-by-private-sector-FINAL.pdf

31 See Guideline 9 on Indigenous peoples and other communities with customary tenure systems. <http://www.fao.org/3/a-i2801e.pdf>

FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (2012)

- 9.1 State and non-state actors should acknowledge that land, fisheries and forests have social, cultural, spiritual, economic, environmental and political value to indigenous peoples and other communities with customary tenure systems.
- 9.3 States should ensure that all actions are consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments.
- 9.8 States should protect indigenous peoples and other communities with customary tenure systems against the unauthorized use of their land, fisheries and forests by others. Where a community does not object, States should assist to formally document and publicize information on the nature and location of land, fisheries and forests used and controlled by the community
- 9.9 States and other parties should hold good faith consultation with indigenous peoples before initiating any project or before adopting and implementing legislative or administrative measures affecting the resources for which the communities hold rights. Such projects should be based on an effective and meaningful consultation with indigenous peoples, through their own representative institutions in order to obtain their free, prior and informed consent under the United Nations Declaration of Rights of Indigenous Peoples and with due regard for particular positions and understandings of individual States.
- 12.12 Investors have the responsibility to respect national law and legislation and recognize and respect tenure rights of others and the rule of law in line with the general principle for non-state actors as contained in these Guidelines. Investments should not contribute to food insecurity and environmental degradation.



without intimidation and through processes conducted in a climate of trust (Principle 9.9). The principles of consultation and participation in these Guidelines should be applied to investments that use the resources of other communities. (Principle 12.7)

Being voluntary, genuine application of these guidelines, in particular those concerning the right of indigenous peoples to FPIC, however, seems to be the exception. In a report on their application in Latin America, case studies concerning indigenous peoples in Guatemala, Colombia and Chile show shortcomings and challenges posed by their implementation, in particular in the rights to customary tenure rights and FPIC (Gomez, 2015).



**Inter-American Court
of Human Rights**

As Latin America is a region with a resource-based economy, the IAHR System has long dealt with issues of business and human rights. Since their establishment, both the Inter-American Commission on Human Rights (IA Commission) and the Inter-American Court of Human Rights (IA Court) have continuously analysed conflicts triggered by human rights violations related to business operations, with the goal of both protecting rights-holders from further violations and ensuring redress and restoration for injuries sustained.

Due its large indigenous population, and the abuses suffered by their communities from extractive industries in particular, many of the IA Commission's resolutions and the rulings issued by the IA Court refer to the rights of indigenous peoples. Such resolutions and rulings are grounded in regional human rights instruments of general application such as the American Declaration on the Rights and Duties of Man, as well as the American Convention on Human Rights. They also rely on global instruments specific to indigenous peoples, such as ILO Convention 169, which constitutes part of the *corpus juris* applicable to these peoples. It was only in 2016 that the IAHR System, which is autonomous but formally-dependent on the Organization of American States (OAS) approved a dedicated instrument dealing with the rights of indigenous peoples, the American Declaration on the Rights of Indigenous Peoples.³²

**Inter-American Commission recommendations
concerning the obligation of specific guarantees for
indigenous and tribal peoples and Afro Descendant communities
in the context of natural resource developments (2015)**

15. Adopt legislative, administrative, and other measures necessary to fully implement and enforce, within a reasonable time, the right to consultation, and where appropriate, prior and informed consent of the indigenous and tribal peoples and Afro-descendent communities affected, according to international standards and with the full participation of the peoples and communities.
16. Modify the legislative, administrative and other measures that prevent the full and free exercise of the right to prior consultation, which shall ensure the full participation of indigenous and tribal peoples and Afro-descendent communities.
17. Consult the peoples and communities in a prior, adequate and effective manner, and in full compliance with international standards applicable to the matter, in the eventual case that it is intended to carry out any activity or project of extraction of natural resources in their lands and territories, or development plan of any kind that involves potential impact on their territories. (page 79)
18. With regard to the concessions already granted or in implementation, establish a mechanism that allows for assessments concerning any need to modify the terms of the same to preserve the physical and cultural survival of the indigenous and tribal peoples and Afro-descendent communities at issue.

32 See <https://www.oas.org/en/sare/documents/DecAmIND.pdf>



http://www.oas.org/en/iachr/media_center/photos.asp

Given the growing importance of the issue of business and human rights for the IAHR System in recent years there has been significant development of guidance on this matter, which has been strongly informed by the UNGP. In 2014, under the IA Commission, the OAS approved a resolution on the Promotion and Protection of Human Rights in Business, which recognises the relevance of the UNGP and urges member states to follow and disseminate the principles.³³

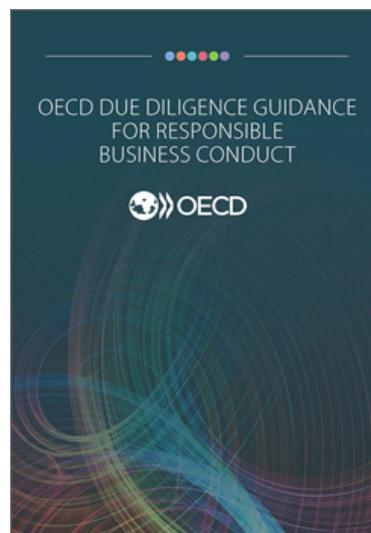
In 2015, the IA Commission issued a report on indigenous peoples, Afro-descendant communities, and protection of their human rights in the context of the extraction, exploitation and development of natural resources. Grounded in the IA system's extensive jurisprudence on this matter, the report identifies specific state obligations with regard to these activities. Clearly influenced by the Guiding Principles, it identifies general state obligations to design and enforce adequate legal frameworks, addressing inter alia the role of foreign companies to prevent, mitigate and eradicate negative impacts on human rights, to supervise resource development and extraction, to guarantee effective participation and access to information, to prevent illegal activities and forms of violence against the population in areas affected by extractive or development activities as well as to ensure access to justice (Inter-American Commission on Human Rights, 2015).

Moreover, it developed specific guidelines applicable to indigenous peoples and Afro-descendant communities, including compliance with the international law of expropriation; non-approval of any project that would threaten the physical or cultural survival of the group; and approval only after ensuring effective participation –and, where applicable, consent–, a prior environmental and social impact assessment conducted with indigenous participation, and reasonable benefit-sharing (Ibid).

The IA Commission's guidance on this matter was further developed in a thematic report on Business and Human Rights published in 2019. The report recommends that states adopt special measures to ensure respect for the right to free, prior, and informed consultation and consent and the right to self-determination in the context of natural resource extraction activities involving the rights of indigenous and tribal Afro-descendant peoples (Inter-American Commission on Human Rights, 2019, S. para 448). Moreover, quoting the UNGP explicitly, it underlines the responsibility of businesses to adopt appropriate human rights due diligence policies and procedures for their operations. In particular, they should establish safeguards for respecting the rights to prior and informed consultation and consent as to the self-determination of indigenous and tribal Afro-descendant peoples, as well as the right to a healthy environment (Ibid, para 453).

³³ See https://www.oas.org/en/sla/dil/docs/AG-RES_2840_XLIV-O-14.pdf

In May 2018, the OECD Council of Ministers published its Due Diligence Guidance for Responsible Business Conduct, (OECD, 2018) which, if applied by enterprises, would significantly improve the prospects for businesses to show respect for indigenous peoples. It is intended to be used in all sectors. Attached to the guidance is a recommendation that commits governments of member countries to promote, disseminate, support, and monitor its implementation. The guidance's prime objective is to prevent harm from occurring in the first place and directs companies to address risks by order of severity, so that the most significant risks are addressed first. For indigenous peoples and local communities, it is particularly important that a strong emphasis is placed on stakeholder engagement, which has to be bidirectional and which requires that information be shared in a timely manner, in good faith, and transparently.³⁴



From the OECD Due Diligence Guidance For Responsible Business Conduct:

Meaningful stakeholder engagement is important throughout the due diligence process. Engaging with impacted and potentially impacted stakeholders and rightsholders may be especially relevant when an enterprise is:

- identifying actual or potential adverse impacts in the context of its own activities.
- engaging in assessment of business relationships with respect to real or potential adverse impacts.
- devising prevention and mitigation responses to risks of adverse impacts caused or contributed to by the enterprise.
- identifying forms of remedy for adverse impacts caused or contributed to by the enterprise and when designing processes to enable remediation.
- tracking and communicating on how actual or potential identified human rights impacts in the context of its own activities are being addressed.

Additionally, in some cases, stakeholder engagement or consultation is a right in and of itself.

For example, the UN Declaration on the Rights of Indigenous Peoples provides that States consult and cooperate with indigenous peoples concerned in order to obtain their free, prior and informed consent (FPIC) in a number of situations, including the approval of projects affecting their land and territories or other resources (see Articles 19 and 32). The ILO Convention No. 169, which is legally binding for countries that have ratified it, requires State Parties to consult with indigenous peoples with the objective of reaching agreement or consent on proposed measures (see Article 6).

³⁴ See also joint briefing by OECDWatch and Amnesty International: *OECD Due Diligence Guidance for Responsible Business Conduct: A Briefing for civil society organisations on the strongest elements for use in advocacy*. June 2018, <https://www.oecdwatch.org/2018/06/01/the-oecd-due-diligence-guidance-for-responsible-business-conduct/>



http://www.oas.org/en/iachr/media_center/photos.asp

Even more significant for indigenous peoples is that rights-holders take centre stage in consultations on actual and potential human rights impacts. Rights-holders are, whenever there is a potential or actual impact on human rights, clearly identified as the most important stakeholders. Footnote 8 on page 50 cites in which cases FPIC is required according to the UNDRIP and ILO169. This is, however, the sole mention of FPIC in the 100-page document. There is no specific guidance on engagement with indigenous peoples. We have been unable to identify any specific evidence for its uptake by enterprises and, specifically, whether it has been brought to bear in any situations involving indigenous peoples.

2.3.4

Development banks

Just like other enterprises, development banks have a responsibility to carry out due diligence in order to identify, prevent and mitigate human rights violations, regardless of whether or not the state is fulfilling its human rights obligations.

In recent years, some banks have taken measures to ensure their compliance with this responsibility. This effort has been spearheaded by some of the development banks which, for decades, have been the subject of intense campaigning from civil society and advocacy groups.

The first development bank to formally commit to FPIC was the European Bank for Reconstruction and Development in 2005, with the adoption of **Performance Requirement 7**, thus several years before the adoption of the UNGP (EBRD, 2005). This stresses the need to respect indigenous peoples' customary rights to land and resources. Further, it explicitly states that relocation of indigenous peoples requires their FPIC. It does not mention other specific cases in which FPIC is mandatory, nor does it explicitly state what happens when consent is ultimately withheld or what happens when indigenous peoples refuse to enter into an FPIC process.

The World Bank had long advocated for a watered-down version of FPIC, which it referred to as "free, prior and informed *consultation*", falling short of acknowledging the importance of consent. In 2012, shortly after the adoption of the UNGP, however, the World Bank Group's private **International Financial Corporation (IFC)** adopted its **Performance Standards (PF)**, including **PF7 on indigenous peoples**, which requires indigenous peoples' FPIC in those circumstances where it is also required by the UNDRIP. This notably includes a ban on the involuntary relocation of indigenous peoples.



Izvatas people (Russian Federation) © Committee to Save Pechora

The PF are a contractual requirement, which also means that indigenous peoples affected by IFC-funded projects are entitled to submit complaints to the IFC Compliance Advisor/Ombudsman. Some half of the IFC's lending is done through intermediaries, in which case a lack of transparency may prevent communities from knowing of the IFC's involvement and thus from accessing the Ombudsman. Use of the grievance mechanism requires expert knowledge and resources, such that indigenous peoples typically have to rely on external support from civil society organisations or NHRIs to access it.

As the EBRD's performance requirement, only in the case of relocation does PF7 expressly state that a project cannot commence without FPIC having been obtained. It bases the need for FPIC on the particular vulnerability of indigenous peoples and does not refer to indigenous peoples' right to self-determination. Nor does it point out that indigenous peoples are not obliged to enter into an FPIC process and should be in control of such process.

The **World Bank's Environmental and Social Standard (ESS) 7** lumps indigenous peoples together with "sub-Saharan African historically underserved traditional local communities". Like the aforementioned standards, it does not cite the right of indigenous peoples to self-determination, rather it cites poverty reduction and sustainable development as the goal of ESS7. It requires FPIC in case of adverse impacts on land and resources subject to traditional ownership or under customary use or occupation, relocation from these lands as well as in case of significant impacts on culture, ceremonial and spiritual aspects. The ESS7 explicitly notes that a withholding of consent must be respected.³⁵ It came into force in 2018, is contractually binding and communities have access to a grievance mechanism. However, for all practical purposes, indigenous peoples require assistance from CSOs or NHRIs to use this grievance mechanism, given the level of expert knowledge required.

The Equator Principles are voluntary guidelines adopted by 97 financial institutions in 37 countries. They adopt the IFC PFs albeit with the limitation that they only apply to projects with a volume of over USD 100 mn and that FPIC is only applied in "non-designated" countries, that

35 "When the FPIC of the affected Indigenous Peoples/Sub-Saharan African Historically Under-served Traditional Local Communities cannot be ascertained by the Bank, the aspects of the project relevant to those affected Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities for which the FPIC cannot be ascertained **will not be processed further**. Where the Bank has made the decision to continue processing the project other than the aspects for which the FPIC of the affected Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities cannot be ascertained, the Borrower will ensure that no adverse impacts result on such Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities during the implementation of the project." <http://pubdocs.worldbank.org/en/837721522762050108/Environmental-and-Social-Framework.pdf#page=89&zoom=80>

is, non-OECD countries. Another limitation is that there is neither a grievance mechanism nor an independent mechanism for monitoring compliance with the EP.

The Asian Development Bank does not have a contractual requirement for lenders to observe indigenous peoples' FPIC. Instead, its "planning and implementation good practice sourcebook" only requires "consent" or "broad community support" (BCS).³⁶ In the interviews we conducted, the ADB was mentioned multiple times during interviews as a donor behind problematic projects.

2.3.5

The Legally Binding Instrument / Binding Treaty on Business and Human Rights (draft)

Following an initiative by Ecuador and South Africa, at its 26th session on 26 June 2014, the Human Rights Council adopted resolution 26/9, authorising a new "open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights" to elaborate "an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."³⁷

This instrument would impose legal obligations on certain non-state actors such as transnational enterprises operating in or near indigenous territories. It should be borne in mind that this treaty, if adopted, will suffer from the same weakness as other UN covenants and conventions, which are all legally-binding on their signatories, namely that there is no enforcement mechanism so compliance varies greatly. The treaty process is not the first attempt at imposing legal obligations on transnational corporations. The "Draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights"³⁸ of 2003 failed to garner sufficient support, after which the process began that led to the eventual adoption of the voluntary Guiding Principles. If the treaty is eventually finalised, another question arises as to whether it will be widely subscribed to by states and, if so, by which states. Most rich industrial states have been opposed to the treaty process. This may, of course, change over time, just as most states originally opposing the UNDRIP eventually revised their positions.

At the time of writing, the working group has published the second revised draft of the legally-binding instrument.³⁹ This instrument mentions indigenous peoples five times. In the first instance, it references the UNDRIP. In three places, indigenous peoples are mentioned in the context of other vulnerable groups. However, the fifth mention is a major improvement compared to the prior version as article 6 (Prevention) now specifically refers to FPIC. This is, however, called a "standard" and not a right, and only framed as something enterprises have to comply with during their consultations with indigenous peoples. The text does not mention FPIC as a primary obligation of the state as the principal duty-bearer.

Indigenous peoples' own involvement in the treaty process has so far been modest, while civil society has been participating very actively. There is thus a danger that the final treaty may not adequately reflect the rights of indigenous peoples. One area in which this danger is apparent is that of Free, Prior and Informed Consent, where civil society organisations are advocating for

36 *Indigenous Peoples Safeguards. A Planning and Implementation Good Practice Sourcebook. Draft Working Document*, June 2013 <https://www.adb.org/sites/default/files/institutional-document/33748/files/ip-good-practices-sourcebook-draft.pdf>

37 Human Rights Council: *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights* UN Doc A/HRC/RES/26/9, dated 14 July 2014, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9

38 Draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights <https://undocs.org/E/CN.4/Sub.2/2003/12> dated 30 May 2003

39 OEIGWG Chairmanship Second Revised Draft *Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises*, 6 August 2020 https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf

opening it up to most affected groups and even individuals,⁴⁰ thus decoupling it from the right to self-determination which, according to international human rights law, is vested in peoples. This suggests that indigenous peoples and their allies need to get much more actively involved in the treaty process than they currently are.

2.3.6 Progress made

The Guiding Principles have had a notable positive impact, both within the UN System and the IA Human Rights System.

In the case of the UN System, the influence of the Guiding Principles exceeds what could have been expected.

One example is that of the FAO voluntary guidelines, which follow a clear rights-based approach and have embraced the concept of rights-holders, furthermore putting the avoidance of human rights violations before other considerations.

The same can be said for the IAHR System.

The OECD, similar to the FAO voluntary guidelines, follows a valuable rights-based approach. It goes significantly beyond the earlier OECD Guidelines for Multinational Enterprises, which were far weaker on human rights.

Most international development banks now recognise the rights of indigenous peoples, including the right to FPIC, including its “consent” part, and prohibit involuntary relocation of indigenous peoples, even though a link to the right to self-determination is missing and, in this regard, an acknowledgement of the right of indigenous peoples not to enter into an FPIC process if they do not wish to. The IFC’s PF7 is also of wide application outside the bank itself. The OECD Common Approaches stipulate that export credit agencies should apply either the World Bank or IFC standards,⁴¹ and this is reflected in the policies of some export credit agencies.⁴²

2.4 REMEDIES

2.4.1 Judicial remedies

There is little evidence that, since the adoption of the UNGP, states have taken appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses that affect indigenous peoples’ rights (GP 26). Measures proposed by the UN WGBHR in 2013 to remove indigenous peoples’ barriers to equal access to the state justice system and encouraging recognition by the state justice system of the customary laws and tradi-

40 See, for instance, the Global Campaign to reclaim peoples sovereignty, dismantle corporate power and stop impunity / October 2020: Comments and Amendments on the Second Revised Draft of the Legally Binding Instrument on Transnational Corporations and other Business Enterprises with regard to Human Rights (published on the 06.08.2020) https://www.stopcorporateimpunity.org/wp-content/uploads/2020/10/Position-paper-Global-Campaign_2nd-revised-draft-TNCs_FINAL-2.pdf

41 See <http://www.oecd.org/trade/topics/export-credits/environmental-and-social-due-diligence/>

42 For instance, the German Hermes Kreditversicherungs AG demands compliance with the IFC performance standards for project funding. See: *Prüfung von Umwelt-, Sozial- und Menschenrechtsaspekten (USM) bei Exportgeschäften: Die Common Approaches* https://www.agaportal.de/_Resources/Persistent/7234ec8b987040b602b9aea4119aa020314789c6/hds_common-approaches-dt.pdf

tions of indigenous peoples, including those referred to customary ownership over their lands and natural resources, are hard to identify.

As the Report by the former UN Special Rapporteur on the rights of indigenous peoples Tauli Corpuz (UN Human Rights Council, 2019) stresses, access to ordinary justice continues to be severely limited for indigenous peoples globally. Indigenous peoples are often less likely to receive favourable rulings than non-indigenous litigants. Even in cases where courts rule in favour of an indigenous person or community, the judgments are far less likely to actually be enforced. Further, compensation or redress are generally non-existent or not culturally appropriate with regard to their needs. Structural discrimination in the justice system, the cultural inadequacy of justice procedures, language barriers, the cost of access to justice, and the lack of legal aid are among some of the barriers that indigenous peoples face in accessing the justice system.

In many contexts, judicial remedies continue to be open only to individual complaints rather than collective ones. This is particularly critical when indigenous peoples allege violations of the right to communal property.⁴³

Of particular relevance in assessing the effectiveness of state judicial remedies is the response of judiciaries to claims made by indigenous peoples demanding fulfilment of their right to consultation and FPIC in the context of business operations that affect their lands and resources. Relying on international and domestic law that guarantees this right, as well as on the jurisprudence of international human rights mechanisms such as the UN treaty bodies and regional bodies such as the Inter American Court of Human Rights and the African Commission on Human and Peoples' Rights, indigenous peoples have sought recognition of their rights through the domestic courts. Of particular importance are lawsuits concerning large-scale projects impacting their lands and resources and imposed without their FPIC. The response to these demands by the state justice system has been mixed. Some courts have recognised indigenous rights to FPIC in such contexts. Examples of positive rulings on FPIC can be found in the case of Canada⁴⁴ and Colombia⁴⁵ in the Americas. In Asia, rulings by the supreme courts of Nepal⁴⁶ and India⁴⁷ have upheld the rights of indigenous peoples to be consulted on projects affecting them.

Even when indigenous peoples have managed to successfully challenge projects in court and when injunctions have been ordered, companies and governments very often move ahead with projects in defiance of judicial orders to suspend them. As former SR Tauli Corpuz (UN Human Rights Council, 2018) has also affirmed, high courts have sometimes ordered consultations to take place *after* the initiation of large-scale projects in an attempt to claim retroactively that international norms have been complied with.

43 The Inter-American Court of Human Rights has recognised the need for States to ensure access of indigenous peoples to justice in a collective manner, in accordance with their culture. (*Yakye Axa Indigenous Community v. Paraguay*; *Saramaka People v. Suriname*, 2007).

44 In the *Tsilhqot' Nation v. British Columbia* [2014], the Supreme Court of Canada recognised the Tsilhqot'in people held Aboriginal title to its traditional territory, stating that Aboriginal title constitutes a beneficial interest in the land, the underlying control of which is retained by the Crown. Rights conferred by Aboriginal title include the right to decide how the land will be used; to enjoy, occupy and possess the land; and to proactively use and manage the land, including its natural resources. Consequently, the Court recommended that governments and individuals proposing to use or exploit land could avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.

45 The Constitutional Court of Colombia has on various occasions held that, in view of the particularly adverse effects of development projects on the collective territory of indigenous peoples, the duty to ensure their participation is not exhausted by consultation. Rather, their free, informed, and express consent must be obtained as a precondition for their approval. (Judgment T-376 of 2012; Judgment T-704 of 2016)

46 Cultural Survival: *Community Radio Helps Indigenous Peoples Win Legal Battle Against Nepalese Government*, 19 June 2019, <https://www.culturalsurvival.org/news/community-radio-helps-indigenous-peoples-win-legal-battle-against-nepalese-government>

47 Survival International: *Dongria tribe's views to be heard in Indian Supreme Court*, April 14, 2016, <https://www.survivalinternational.org/news/11211>; Business and Human Rights Resource Centre: *Indian Supreme Court orders state govt. to re-submit petition requesting mining exploration in Dongria ancestral lands*, 15 April 2016 <https://www.business-humanrights.org/en/latest-news/indian-supreme-court-orders-state-govt-to-re-submit-petition-requesting-mining-exploration-in-dongria-ancestral-lands/>

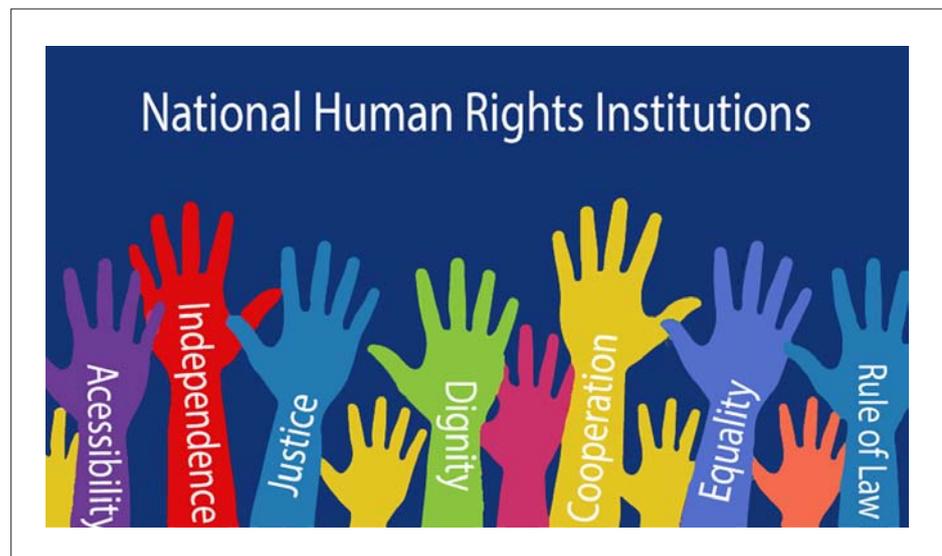
Of particular concern is the rampant **impunity** resulting from the failure of judicial systems to punish crimes committed against indigenous leaders and community members who are victimised in the context of their opposition to large projects relating to extractive industries, agribusiness, infrastructure, hydroelectric dams and logging. According to Ms Tauli Corpuz (UN Human Rights Council, 2018), indigenous human rights defenders opposing large-scale projects are frequently “subject to undue criminal prosecution and other acts, including direct attacks, killings, threats, intimidation, harassment and other forms of violence.” (para 6).

Those responsible for killings of and violence against indigenous human rights defenders for the most part remain unpunished under state judicial systems. This applies not only to state agents but to corporate entities involved in such crimes. As the Corporate Legal Accountability Annual Briefing of 2017 stresses, criminal investigations and prosecutions against companies involved in these cases remain extremely rare, despite widespread involvement of companies in abuse, rising to the level of potential crimes (Business and Human Rights Resources Centre, 2017).

On the contrary, indigenous leaders who oppose large-scale projects, demanding the right to participate in consultations and to give or withhold their Free, Prior and Informed Consent, are targeted with criminal charges. Prosecution of indigenous individuals through the use of different criminal provisions, including anti-terrorism laws,⁴⁸ is marked by prolonged pre-trial detention, sometimes lasting several years. Interpreting assistance is rarely available within the ordinary judicial system. Little consideration is given to the customs, traditions and legal systems of indigenous peoples (UN Human Rights Council, 2018).

2.4.2

Non-judicial remedies: National Human Rights Institutions



Although there is an assortment of non-judicial remedies, National Human Rights Institutions (NHRI) appear to be the most active mechanisms nationally in promoting the implementation

⁴⁸ An emblematic case to this regards was the application of the Anti Terrorist Act in the conviction of eight Mapuche leaders in the context of social protest events against forestry companies. The Inter-American Court of Human Rights in its ruling in the case of *Norín Catrín et al. vs. Chile* (2014) concluded that the application of in these cases of such legislation violated, among other rights, the legality and presumption of innocence, judicial guarantees, and personal liberty. (Inter- American Court of Human Rights, *Norín Catrín y otros (Lonkos, dirigentes y activistas del pueblo indígena Mapuche) vs. Chile*, 2011)

of the GP in relation to indigenous peoples' rights. Respondents have reported in several cases that NHRIs have functioned as key allies in halting particularly harmful projects and in embarking on remedy processes that they would not have been able to undertake without such support. In various states, NHRIs - being public autonomous entities -⁴⁹ have accepted, investigated and addressed complaints of violations of indigenous peoples' rights in the context of business operations (Dungdung, 2015). In some states, they have litigated such cases in domestic courts as well as asserted pressure on business companies whose operations are affecting the rights of indigenous peoples. In those states where NAPs have been approved or are being developed, NHRIs have also been relevant stakeholders, promoting the inclusion of measures in them aimed at protecting and implementing indigenous peoples' rights.

Examples of the engagement of NHRI in the protecting indigenous peoples' rights from the adverse impacts of business operations in Latin America include a case from Guatemala, whose Human Rights Ombudsman has issued opinions to prevent the harmful impacts of hydroelectric dams and palm monoculture on indigenous peoples' lands. It has also issued regulations to ensure that FPIC processes are conducted prior to the approval of business operations (Danish Institute for Human Rights, 2020). The Peruvian Ombudsman, who has had an active role in monitoring socio-environmental conflicts of business operations, mainly on indigenous peoples' lands, has been emphasizing the UNGP and the need to ensure indigenous peoples' rights. (Ibid)

A relevant role has also been played by the Colombian Ombudsman in the documentation and support of indigenous and Afro-descendant communities whose rights have been impacted by business operations, whose report has a section devoted to "ethnic groups", a category that also includes Afro-descendants.⁵⁰ Over the last decade, the NHRI in Chile has not only investigated and issued at least a dozen reports on the impacts of specific business sectors (mining, forestry and power plants) on indigenous peoples but has increasingly litigated complaints by indigenous peoples through the domestic courts – in many cases with positive outcomes.⁵¹ In the case of these latter three states, their NHRIs have been active participants in the process aimed at producing or implementing NAPs, as in the case of Chile and Colombia.

Similar initiatives have been undertaken by NHRIs in Africa. The Kenya National Commission on Human Rights has been particularly involved in the inclusion of different stakeholders, including indigenous peoples, in the drafting of the NAP. The South African Human Rights Commission has also engaged in strategic impact litigation to advance principles of business and human rights on cases concerning the rights of indigenous peoples and vulnerable communities (Danish Institute for Human Rights, 2020).

A notable case from Asia where an NHRI has played a key role is that of Mitr Phol, a Thai sugar producer that is accused of land grabbing in Cambodia, expropriating the land of 700 Cambodian families. The Thai Human Rights Commission has been documenting the case and bringing it to the grievance mechanism of the sugar MSI Bonsucro (see section 2.2.2.1). In similar fashion, respondents from other Asian countries have reported that their NHRIs are using their resources and expertise to play a key role in bringing cases before the grievance mechanisms of development banks as well as advocating on behalf of the affected group vis-à-vis their national government. Even though NHRIs wield no plenary power, they seem to have the greatest effect of all the non-judicial remedy mechanisms considered. However, to be effective, both their independence and minimal societal freedom need to be guaranteed. In Russia, indigenous rights ombudsman's offices have been established in three regions.⁵² However, their role, which used to be relatively important a decade ago, has been reported as waning lately, concurrent with the consolidation of authoritarian rule.

49 According to the UN Paris Principles approved in 1993 by the General Assembly, NHRI have to meet among other requisites, autonomy from Government, independence guaranteed by statute or Constitution, pluralism and adequate resources; and adequate powers of investigation.

50 See <https://www.defensoria.gov.co/es/delegadas/12/>

51 See <https://www.indh.cl/>

52 Kamchatka territory, Krasnoyarsk territory and Sakha republic (Yakutia)

A specific mention should be made of the Danish Institute for Human Rights (DIHR). Although not specifically active in the implementation of non-judicial remedies concerning indigenous peoples, the DIHR has been a key player in promoting the implementation of the GP globally. It has done this through research and by developing tools and partnerships with both companies and governments and international organisations. As part of its efforts, the DIHR has provided advice to states in the drafting of NAPs, promoting the participation of indigenous peoples in their production as well as the inclusion of indigenous peoples' rights within these plans.⁵³ The DIHR has also encouraged the adoption of due diligence measures by business entities for the respect of indigenous peoples' rights (Danish Institute for Human Rights, 2019). It has also provided guidance on engaging with indigenous communities during due diligence processes, addressing human rights challenges in the renewable energy transition, ensuring responsibility in the finance sector, and establishing regulatory frameworks.⁵⁴

2.4.3 Progress made

In several countries, including Peru, Nepal, India, Brazil and Colombia, national courts have played an important role in standard-setting, adopting rulings that oblige the state and business to respect indigenous peoples' consultation rights, and affording recognition to indigenous peoples' FPIC protocols. Beyond the mere technicality of consultation processes, this is also an important affirmation of the right to self-determination, and one on which the procedural rights of indigenous peoples are based. National Human Rights Institutions have strengthened their roles as key allies of indigenous peoples in a number of countries.

2.5. INDIGENOUS PEOPLES' INITIATIVES

2.5.1 Indigenous peoples' FPIC Protocols and autonomies

In recent years, indigenous peoples who have experienced that FPIC - as practised by governments and corporations - was in many cases just a tool to gain access to their resources, have developed their own FPIC protocols. A first wave of FPIC protocols was developed by Canadian First Nations in order to regulate their interactions with mining companies in the early 2000s (Doyle, Weitzner, Okamoto, & Rojas-Garzon, 2019, S. 18). The second wave of protocols started in the late 2000s; these were the so-called bio-cultural protocols, developed in the context of Article 8j on Access and Benefit-Sharing of the Convention on Biological Diversity. These protocols emerged primarily in Africa and Asia and were, owing to their background, less grounded in international human rights law. The third category are the more recent protocols that are being developed primarily in Latin America and which are known as "autonomous FPIC protocols". These protocols are firmly based in international human rights law and primarily address the state's obligations. It is not by accident that Latin America has been the birthplace of these protocols, given most ratifications of ILO Convention 169 have been by Latin American states. Plus, with the Inter-American Human Rights System, there is a set of widely recognised legal institutions that have been very actively adjudicating

⁵³ See <https://www.humanrights.dk/business-human-rights>

⁵⁴ https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/hrd_2020/nhri_case_stories/denmark_nhri_bhr_case_study_2020.pdf

Excerpts from indigenous statutes and protocols

Wampis Statute, art. 33

Prior consultation must comply with the provisions established in ILO Convention 169..., in the [UNDRIP], in the jurisprudence of the Constitutional Court of Peru and in the jurisprudence of the [IACtHR], as well as in the national regulations that develop the adequate implementation of these principles and procedures. ... consultations must be carried out in accordance with the forms determined by the consulted peoples and nations.

Wampis Statute, art 34.1

No one may take advantage of communal autonomy to justify decisions which should be taken by the Wampis Nation as a whole, in accordance with ILO Convention 169, an in conformity with our own traditional and autonomous ways of resolving and making decisions, as defined in this Statute

From: **Protocolo para la Consulta y Consentimiento, Previous, Libres e Informado del Pueblo Negro Norte-Caucano. Palenke Alto Cauca-PCN**

Consent is a right of the Black People of North Cauca, and it is the purpose and end goal of consultation. The decision of the Community Councils is not exhausted in the consultation process—the Black People of Cauca will define its decisions autonomously and consent can be negative or positive with regards to the intervention of third parties in their territories that affect their social, cultural, economic and political life.

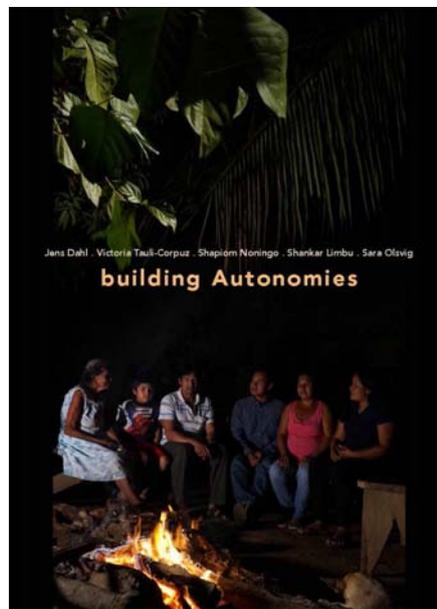
The cultural and environmental objection to projects, activities, administrative and legislative measures is a criterion to determine the consent, or not, of the intervention of third parties

indigenous peoples' rights for decades. In Asia, the protocols are often referred to as community protocols and have been developed i.a. in Nepal, Malaysia and India.⁵⁵

One common feature is that protocols are being developed in response to encroachment, and the failure of state authorities and business to respect their right to consultation, often defining the scope of consultations so narrowly as to render them meaningless. FPIC protocols are living self-government documents that vary a great deal in terms of specific detail and technicalities. They are often a documentation of laws and oral traditions that have governed interaction with outsiders for centuries and which were preserved despite colonisation.

Protocols often devote special attention to types of activities with a potentially significant impact and some even forbid specific types of activities. Some protocols are framed as elements of a wider self-governance strategy.

For example, the people of the Xingu in Brazil refer to their Management Plan for the Xingu Territory, in which they define guidelines for culture, territory, economic alternatives, food sov-



https://www.iwgia.org/images/publications/new-publications/2020/Building_Autonomies_IWGIA.pdf

⁵⁵ Some 50 different FPIC protocols across all continents can be found at <https://fpic.enip.eu>



Wampis Nation, Peru – Photo: Pablo Lasansky

ereignty, education, and the health of their peoples. Further, they may regulate relationships with all levels of state government that need to be governed by recognition of their right to self-determination.

Protocols often formulate the specific pre-conditions that must be in place for any meaningful consultation process and which are therefore non-negotiable under any circumstance. This may include the state recognising the integral and unified nature of their territories (rather than a fragmented patchwork of indigenous settlements whose surrounding territories are not considered to be theirs). When the state's recognition of the indigenous territory is incomplete, the protocols often list outstanding claims. Protocols usually explicitly require respect for the indigenous peoples' customary laws and governance institutions.

Through autonomous FPIC protocols, indigenous peoples are reasserting control over any negotiation process. A crucial aspect of this includes setting the timing, the sequence of events and the locations. A general principle is that timeframes and dates for consultations shall be determined on the basis of community activities and calendars; they also must consider the specific geographic conditions, and times required for trips to other remote communities.⁵⁶

Protocols typically identify the sequence of events/the stages involved in a consultation project, starting with a negotiation request to a community, and a process by which the community decides whether it is willing to engage in negotiations. The process itself involves multiple iterations of internal information and decision-making gatherings and engagement with the negotiation partner after which consent is ultimately granted or withheld. This is typically not the end of the story, however, because significant changes or new stages in the process may require a renewal of consent. Likewise, the "where" of any negotiations is key to being genuinely in control. Protocols therefore usually stipulate that negotiations must take place within the indigenous community's territory.

FPIC protocols draw from and unite a variety of legal sources, which can be broadly broken down into the indigenous community's own customary law and legal institutions, international human rights law and national legislation, but also including regional instruments, treaties, jurispru-

56 For a recent example from Nepal, see: *Free, Prior and Informed Consent Protocol by Communities Affected by the EIB-Funded 220 KV Marsyangdi Corridor in Nepal*. https://www.iwgia.org/en/resources/publications/3886-fpic_protocol_communities_marsyangdi_corridor_nepal.html

dence and even colonial laws. They may also require the participation of certain external parties such as the national human rights institution, federal prosecutors, etc.

Another important aspect of many protocols is the question of who is to be consulted and how decisions are to be taken. They usually emphasise inclusivity, that is, they make specific provisions on the mandatory consultation of elders, youth, women, persons with disabilities, warriors and guards as well as traditional community leaders. A related albeit distinct aspect is that of who is authorised to represent the community vis-à-vis third parties. This person should be well-versed in specific types of both indigenous and non-indigenous knowledge. It goes without saying that authorisation to represent the community does not imply the right to take decisions on behalf of the community. These decisions are typically taken collectively, rarely by vote but rather by consensus. However, there is usually no individual veto. Protocols also emphasise the importance of not allowing individuals to be singled out and isolated by the government or businesses in order to influence their decision.

FPIC protocols have been a cornerstone of indigenous peoples' efforts to reassert control over their territories and develop their autonomies. In several countries, in Latin America and Asia, high courts have afforded recognition to protocols and thereby reaffirmed both the state's duty to consult and the indigenous peoples' right to be consulted and to give or withhold consent. For instance, in 2018, the Juruna in Brazil won an important legal case in the Federal Court suspending the Belo Sun mining project and affirming the need to respect their FPIC Protocol. Its subsequent application led to an environmental approval for the Belo Sun mine being declared invalid.

The Embera Chamí people of the Cañamomo Lomaprieta Indigenous Reserve, in Caldas, Colombia, developed a regulatory framework in 2012, including an FPIC protocol, to govern all forms of mining on their territory in response to attempts to impose external mining concessions. In 2016, the Colombian Constitutional Court affirmed the need to respect the Embera Chamí protocols and procedures in relation to FPIC (Case T-530/2016) (Doyle, Weitzner, Okamoto, & Rojas-Garzon, 2019).

While the struggle for their recognition by states and companies remains an uphill battle, the development of FPIC protocols is therefore a key aspect of standard-setting, both internationally and within many countries, that is being driven by indigenous peoples.

2.5.2 Progress made

Efforts made by indigenous peoples to develop their autonomies and to develop and implement their own FPIC protocols have seen a new dynamic over the last decade, mostly in Latin America but also in some Asian countries. In our view, this development is in many countries the single most significant contribution to increased protection of the rights of indigenous peoples. While in most countries, the executive and legislative branches of government do not take proactive steps to ensure respect for such protocols, recognition has come after hard-fought legal battles, in the form of rulings from the highest court in the land in a number of countries. The protocols do not follow the logic of the guiding principles. Their authors tend to be rather critical of their voluntary, non-binding nature. However, it can be speculated that the growing trend towards their recognition by courts is to some degree influenced by the paradigm shift of which the UNGP are a reflection. Even when no recognition is forthcoming from the state, protocols are instrumental in strengthening the coherence of indigenous peoples and their collective decision-making procedures and thereby reinforce their collective agency with regard to the reassertion and defence of their rights.



India – Photo: Signe Leth

Civil society organisations, both at international and domestic level, have been instrumental in promoting the implementation of the UNGP, as well as in identifying gaps and challenges in the relationship between business and human rights. Without their active involvement in monitoring the implementation of the GP, developing and monitoring NAPs, and documenting human rights violations, the impact of business on human rights would likely have been more severe.

Although not exhaustive, the following are worthy of note among those NGOs that have been more active in this regard:

2.6.1

Business and Human Rights Resource Center (BHRRC)

BHRRC was central in disseminating information on the UN process that led to the approval of the UNGP in 2011, facilitating the participation of different stakeholders in this process, including that of indigenous peoples. Since then BHRRC and its website has, in different languages, provided a space for allegations to be made of human rights abuses by businesses in all regions of the world. Many of these allegations are related to violations of indigenous peoples' rights.

These include reporting on the situation of indigenous peoples' rights defenders in different regions of the world. Its website also has opened a Company Response Mechanism that allows for business to present their views, sometimes generating dialogue.⁵⁷



**Business & Human Rights
Resource Centre**

⁵⁷ See <https://www.business-humanrights.org/en/>. According its website BHRRC has tracked over 10,000 companies with the aim of eradicating business abuse on vulnerable communities.

BHRRRC has partnered with indigenous peoples as well as with civil society organisations to organise debates, caucuses and forums at regional and global level, to open up space for indigenous voices and perspectives on breaches in and a lack of implementation of the GP, or on the need to introduce and/or strengthen the international framework for protecting human rights in general and indigenous rights in particular in the context of business operations. In this context, the reflections and contributions of the BHRRRC on the process aimed at producing a Legally Binding Instrument (LBI) to regulate the activities of transnational corporations and other business enterprises is of particular relevance.

2.6.2

International Federation for Human Rights

The International Federation for Human Rights (FIDH), an international federation of 192 human rights organisations from 117 countries, has played a crucial role in promoting the accountability of business entities in relation to the harm they do to human rights.

Since the approval of the UNGP, the FIDH has been active in identifying the limits and opportunities of the UNGP and ensuring corporate accountability for human rights violations caused directly or indirectly by business operations.⁵⁸ Along with other national and international NGOs, FIDH promotes the implementation of community-based human rights impact assessments (COBHRA) for business operations, with the active participation of indigenous peoples and local communities, through the use of the Getting it Right tool.⁵⁹ This step-by-step methodology guides communities and NGOs to measure the actual or potential impact on human rights, recognised both by international and domestic laws, and suggests available avenues for redress, including judicial remedies and grievance mechanisms, by which to allocate responsibilities between the states and businesses involved, and enables the drafting of a final report and recommendations, in line with the three pillars of the UNGP.

Up to 2018, around 20 community-led assessments of business impacts on indigenous peoples and their lands had been conducted in the Americas, Africa and Asia, around half of which concerned extractive industries, predominantly oil and mining.⁶⁰ Such HRIA have empowered indigenous peoples and local communities by allowing them to deepen their knowledge and understanding of their rights and of the UNGP and of the responsibilities of states and business for the human rights violations caused. They have also allowed the affected communities to make use of domestic judicial and non-judicial remedies, business grievance mechanisms, as well as international mechanisms to prevent or mitigate abuses and harm to their rights.

Aware of the limitations of the UNGP in enforcing protection and respect for human rights in the context of business operations, FIDH has actively participated in the UN process aimed at drafting a Legally Binding Instrument (LBI) to regulate the activities of transnational corporations and other business enterprises. Among the contributions made by FIDH in this process

58 See FDIH: *Business and human rights: enhancing standards and ensuring redress*, Briefing paper March 2014 / N°629a https://www.fidh.org/IMG/pdf/201403_briefing_paper_enhance_standards_ensure_redress_web_version.pdf

59 Tool at <http://hria.equalit.ie/en/> See a brief description about the methodology: <https://www.fidh.org/en/issues/globalisation-human-rights/business-and-human-rights/community-based-human-rights-impact-assessments>; and the training manual about the methodology: https://www.fidh.org/IMG/pdf/cobhra_training_manual.pdf

60 For some examples of cases documented in the Americas see FIDH and CEDHU, "Large-Scale Mining in Ecuador and Human Rights Abuses", 2011, available at: <https://www.fidh.org/en/region/americas/ecuador/8921-large-scale-mining-project-in-ecuador-urgent-need-for-a-moratorium-to>; FIDH and CAJAR, "The Human Cost of Oil", 2016, available at: <https://www.fidh.org/en/region/americas/colombia/oil-extraction-in-colombia-report-reveals-the-human-and-environmental> ; and Africa FIDH and FHRI, "New Oil, Same Business ?", 2020, available at : <https://www.fidh.org/en/region/Africa/uganda/companies-must-take-action-to-respect-rights-of-communities-at-risk/>; Also see <http://nomogaia.org/community-led-hrias/>. Also information provided by Caroline Brodeur, advisor on Business and Human Rights for Oxfam America.

are those that have stressed the need to include provisions on recognition and protection of indigenous peoples' rights by transnational corporations and other business enterprises, as well as their right to FPIC.⁶¹

2.6.3 The Zero Tolerance Initiative



Photo: Zero Tolerance Initiative

Mention should also be made of the efforts undertaken by the Zero Tolerance Initiative (ZTI), a global coalition led by indigenous peoples, local community representatives and supportive NGOs working collectively to address the root causes of killings of and violence against human rights defenders, many of them indigenous, linked to business activity and global supply chains. The initiative works to support communities to enhance their capacity to defend themselves and to hold companies and investors to account. It supports them to engage meaningfully with states, businesses and investors to seek verifiable and effective zero tolerance commitments against reprisals of environmental human rights defenders, and to implement policies that achieve those commitments.⁶² Of particular relevance is its Geneva Declaration in which the ZTI asserts the urgent need for direct and effective action to tackle the root causes of threats and violence against individuals, communities and peoples, many of them indigenous, in the context of business operations. In this Declaration, the ZTI:

...calls on States, businesses and investors to commit to take urgent action to turn the tide of rising levels of violence against human rights defenders. These actors should be led by those of us on the frontline and focus on addressing the drivers of violence. (Zero Tolerance Initiative, 2019)

61 See <https://www.fidh.org/en/issues/globalisation-human-rights/fidh-advocates-for-the-adoption-of-an-international-legally-binding>

62 The ZTI coalition is composed of 35 organisations, including several indigenous peoples, Afro-descendant organisations and NGOs from around the world. See <https://www.zerotoleranceinitiative.org/about>

Civil society has made important progress that needs to be recognised. As previously mentioned, civil society organisations, both at international and domestic level, have been instrumental in promoting implementation of the UNGP, as well as in identifying gaps and challenges in the relationship between business and human rights. Without their active involvement, including in monitoring the implementation of the UNGGP, developing and monitoring NAPs, and documenting human rights violations, the impacts of business on human rights would likely have been more severe. Civil society is generally the driving force when it comes to introducing corporate accountability and ending impunity for business-related human rights violations. One area where civil society is particularly visible is thus the treaty process for the development of a new legally-binding instrument on business and human rights.

However, it must be borne in mind that even though there is substantial overlap, the goals and interests of civil society and indigenous peoples are not identical. This is particularly noticeable in civil society's attempts to extend the right to FPIC to a far wider group of business-affected people, while indigenous peoples clearly conceive of FPIC as a right that is necessarily grounded in their right to self-determination as collective rights-holders.



Wampis Nation, Peru – Photo: Pablo Lasansky

Gaps and Challenges

In the above, we have reviewed the steps undertaken by different stakeholders, including states, business enterprises, multi-stakeholder initiatives, international organisations, civil society and indigenous peoples, since the adoption of the Guiding Principles, to promote or enforce the application of these Principles to indigenous peoples and their rights.

Despite the many steps taken, and the policies and frameworks adopted by these and other stakeholders, named above, there seems to be a consensus among international human rights bodies, civil society organisations and victims' representatives that there are still many gaps to be addressed to ensure consistency. It is also a matter of consensus that indigenous peoples continue to be among the groups whose rights are most affected by business activities in almost all regions of the world.

Far from decreasing over the last decade, the impact of business operations, particularly those of the extractive industry, on indigenous peoples and their lands, territories and resources continues to be critical and, in some contexts, has become even more severe. This is evidenced in most UNWG country visit reports to different regions of the globe in which indigenous peoples live.

Among the concerns addressed by the WG in these reports are the fact that indigenous peoples have been disproportionately affected by large-scale development projects, with a significant and negative impact on their environment, their right to health and their livelihoods and cultural way of life (Thailand, 2019); the lack of meaningful consultations with these peoples and non-compliance with the requirement of Free, Prior, Informed Consent for business activities on their lands (Canada, 2018); the fact that consultations have not been held prior to decisions that may affect the rights of indigenous peoples and before concessions for potential mining activities on indigenous land are issued (Peru, 2019); and the fact that indigenous rights defenders are at serious risk of attack, including killings, criminalisation, harassment and smear campaigns because of their work to promote and protect human rights in the context of developments and investment projects (Honduras, 2020).

As stated by Dante Pesce, Vice Chair of the UN Working Group, the continuing and serious impact of extractive projects on indigenous peoples' lands and resources is a consequence of the lack of a legal framework to protect their rights to lands and resources. Further, it is due to the fact that the right to FPIC, although recognised by international law and by some states, is not being sufficiently enforced. He also acknowledges that although some efforts are being made by businesses, human rights due diligence is not yet a common practice. He adds that there is a clear imbalance of power between business enterprises and indigenous peoples, particularly when it comes to indigenous peoples' access to justice as well as legal support to enable such access.⁶³

Indigenous peoples themselves have repeatedly voiced their concerns throughout the last decade, denouncing the failure of states and businesses to protect and respect their rights as mandated by the Guiding Principles and as interpreted by the Working Group. A lack of legal recognition and implementation of indigenous peoples' rights, in particular rights to lands, territories and resources and to FPIC in the context of business operations, appears to be a common concern of their organisations. As the Asia Indigenous Peoples' Pact stated at this year's UN Forum:

Indigenous Peoples occupy lands rich in natural resources (waters, forests and minerals) that are valuable for business operations. However, their rights, including to their lands, territories and resources and Free, Prior and Informed Consent (FPIC), are very often not recognized and/or effectively implemented in business contexts. Laws, plans and activities related to business and development (narrowly understood as economic growth) are mostly designed and implemented without meaningful participation of Indigenous Peoples, particularly indigenous women, even when those laws and projects directly affect them. Those result in pro-

⁶³ Interview with Dante Pesce, Vice Chair of the UN WG, November 21, 2020

*found negative human rights impacts, including forced evictions/resettlements and loss of lands, resources and livelihoods of Indigenous Peoples.*⁶⁴

Similar concerns have been expressed by indigenous peoples from Latin America. In addition to denouncing the proliferation of business activities - extractive, agribusiness, infrastructure or energetics - in violation of indigenous peoples' rights, they accuse states in the region of promoting legislative measures and administrative decisions that facilitate extractivism and other business activity, directly affecting them. Moreover, they affirm that:

...consultation procedures in relation to such measures - when they are promoted – have become informational and merely administrative procedures, without considering in them our free, prior and informed consent as affected peoples. This is serious not only for the loss of trust in these procedures, but also because they do not consider, and therefore, violate, a fundamental right, which is the right to self-determination and the right to autonomy as an expression of the first in the context of business activities (Acevedo, 2019)

This sentiment was echoed in all interviews held during the preparation of this submission with indigenous representatives from different regions of the world. Although some pointed to the enactment of specific legislation and regulations on consultation and FPIC, the lack of commitment of states to implement legislation and regulation has weakened their effectiveness in practice. Most business enterprises limit their human rights due diligence processes, where they have such processes, to domestic laws that fall short of international standards applicable to indigenous peoples' rights. (Vittor, 2020)

The lack of adequate grievance mechanisms, both on the part of the state and business enterprises, through which to enforce FPIC or to obtain redress for the harm caused to indigenous peoples by business operations was also identified as a central obstacle to the enforcement of their rights (lonko, 2020) (Cubillos, 2020). Experiences of grievance mechanisms are often negative. They cannot usually be used without specialised knowledge and thus are not accessible to local indigenous communities. Grievance processes often take many years and fail to deliver rights-compatible outcomes.

This helps to explain the growing number of unresolved conflicts that business projects operating or proposed on indigenous lands and territories of traditional occupation have triggered. Another likely contributing factor is that more and more communities are becoming aware of their rights and claiming them. Such conflicts can be found in almost all regions of the world. A recent report focusing on indigenous peoples and SDGs in Latin America identified 1,223 conflicts affecting indigenous land rights triggered by the imposition of development or investment projects in 13 states of Latin America between 2015 and 2019. 43% of these involved mining operations, 20% hydrocarbon projects, and 19% power initiatives. As mentioned, such conflicts are frequently accompanied by acts of violence against indigenous peoples' rights defenders. As the same report identifies, 232 indigenous land rights defenders in nine Latin American states have been murdered over the same five years. (Comisión Económico para América Latina y el Caribe, 2020)

This finding was corroborated by Global Witness in its 2020 report, which identifies a total of 212 land rights and environmental defenders, two-thirds of them from Latin America, who were killed in 2019. While only 5% of the world's population is indigenous, 40% of these murder victims were indigenous. Similarly, over the last five years, indigenous people accounted for more than a third of the victims. The same report states that, of last year's killings, 50 were committed in the context of mining, followed by agribusiness where 34 defenders were killed (Global Witness, 2020)

Such killings, as we know, are only the tip of the iceberg. Behind those cases there are many others corresponding to death threats, beatings, acts of torture and cruel treatment, generally committed with the collusion of states and business enterprises. There are also cases of criminalisation of indigenous rights defenders, often through application of special legislation, such as

64 *Preventing business-related human rights abuses: The key to a sustainable future for people and planet* <https://aippnet.org/preventing-business-related-human-rights-abuses-key-sustainable-future-people-planet/>

anti-terrorist laws.⁶⁵ The continuing impunity for these crimes due to lack of access to justice has already been stressed. Indeed, the overwhelming majority of human rights violations committed against indigenous rights defenders remain unpunished.

Further, in countries where authoritarian regimes have caused the space for civil society to shrink to a minimum, and where indigenous as well as many civil society organisations tend to be heavily state monitored or even controlled, consultation of indigenous peoples often amounts to mere window dressing. When the very concept of rights-holders is not sufficiently embedded in political culture, genuine consultation, participation and consent are not to be expected.

Finally, there is a persistent gap in relation to human rights harms and abuses for which transnational corporations, whose investments are protected by international investment agreements (IIA), are responsible. Such IIA, as has been referred to, allow investors to seek compensation from states in commercial arbitration tribunals for human rights policies or legislation they adopt that might affect them, arguing that this constitutes expropriation of their interests. Moreover, most states where transnational corporations are domiciled have no effective mechanisms to make them accountable for human rights violations, as has been recommended by UN treaty bodies. The adoption of these mechanisms is essential to fulfil their extraterritorial obligations on human rights.



Mapuche People, Chile – Photo: Alejandro Parellada

65 One of the countries where anti-terror laws have been widely used against indigenous human rights defenders is the Philippines, where even the UN Special Rapporteur on the rights of indigenous peoples, along with many other indigenous rights defenders, was placed on a terror list. See e.g. Philipp Jacobson: *UN's Tauli Corpuz, accused of terrorism in her native Philippines, plans to keep investigating 'atrocities' against indigenous peoples at home*. Mongabay 20 March 2018 <https://news.mongabay.com/2018/03/uns-tauli-corpuz-accused-of-terrorism-in-her-native-philippines-plans-to-keep-investigating-atrocities-against-indigenous-peoples-at-home/>

4

Conclusions and recommendations



United Nations – Photo: Lola Garcia-Alix

Almost a decade after the adoption of the GP, indigenous peoples continue to be among the groups most affected by the adverse human rights impacts of business activities. Expectations that, due to their universal acceptance, the Guiding Principles would contribute substantially to ensuring respect and protection of the human rights of business-affected indigenous peoples throughout the world have so far not been fulfilled.

This is in part due to the fact that their interpretation and operationalisation was not firmly grounded in the rights affirmed by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), in conjunction with ILO Convention 169. Neither are they grounded in the interpretation of these rights provided by the jurisprudence of relevant UN and regional human rights mechanisms, such as the recent recommendations by the UN CERD made to various home states of transnational corporations.⁶⁶

This holds true not only for states but also for business enterprises. As we have seen, States have not taken sufficient steps to protect against the abuse of indigenous peoples by

⁶⁶ See e.g. CERD concluding observations on Canada, CERD/C/CAN/CO/21-23, para 21-22,

business enterprises nor to prevent, investigate, punish and redress such abuses through effective policies, legislation, regulations and adjudication as demanded by the UNGP.

Most business enterprises have not adopted measures sufficient to fulfil their independent responsibility to avoid harming the rights of indigenous peoples either directly or indirectly.

Neither states nor business enterprises have ensured sufficient access to effective remedies to prevent violation of indigenous peoples' rights, nor to provide remediation when those rights have been breached in the context of business activity, whether the violations are ongoing or not.

Consequently, in order to ensure that indigenous peoples' rights are adequately protected and respected, the next ten years of the GP will require a much stronger commitment by states and business enterprises as well as by other stakeholders. In particular, they should take into consideration, the following core rights:

The right to self-determination

The right to self-determination is the most fundamental right of indigenous peoples, reaffirmed by ICCPR, ICESCR and UNDRIP, and from which all other rights flow. All too often, Indigenous peoples are still treated as a mere vulnerable group among many, or as part of civil society, yet what sets them apart is that they are collective subjects of international law who, while not having statehood, are endowed with the inalienable right to freely dispose of their natural wealth and to decide on their own path of development.

It has been observed that there is a danger of indigenous peoples' procedural rights being understood as "a trade-off for or exchangeable with indigenous peoples' substantive rights to their lands, territories and resources." (Human Rights Council, 2011) Mechanisms that allow indigenous peoples to participate in the drafting of policy commitments, to submit complaints or to have access to information are meaningless unless they actually ensure that their substantive rights to self-determination, to lands, territories and resources, are respected, protected and fulfilled.

Participation, Consultation and Consent



Wampis Nation, Peru – Photo: Alejandro Parellada

The principle of Free, Prior and Informed Consent (FPIC) has gained prominence in recent years, including by adaptation into the national legislation of some states and recognition by some business associations and enterprises. FPIC is indeed an indispensable aspect of the full operationalisation of the Guiding Principles in the indigenous rights context and states are duty-bound under the UNDRIP to obtain the FPIC of indigenous peoples in a number of instances, including all measures affecting their territories and livelihood. However, there is strong evidence that FPIC, if understood as a mere compliance mechanism, may easily mutate into a simple box-ticking exercise, failing to prevent human rights harm from occurring.

In response to this misapprehension, indigenous peoples of all continents have developed and implemented their own **FPIC protocols** (see section 1.5.1), which are not only an expression of the right to self-determination but appear to be the most effective safeguard mechanism, ensuring a genuine FPIC process. States and business enterprises should recognise these protocols and commit to abiding by them.

FPIC must be understood and practised as just one expression of a rights-based relationship between indigenous peoples, states and businesses, predicated on full recognition of the whole set of rights laid out in the UNDRIP, with emphasis on the rights to participation, consultation and consent.

Right to effective remedy and redress

Complementary to the state duty to protect and the corporate responsibility to respect, the third pillar of the UNGP should be construed as the right-holders' right to remedy and redress, as affirmed by the International Bill of Rights. Indigenous peoples whose human rights are harmed due to business operations have the right to effective remedy and redress.

This includes the right to judicial recourse, to a prompt cessation of violations, and a guarantee of non-repetition, restitution and compensation. There is a wealth of judicial and non-judicial remedy mechanisms available at many different levels, from international human rights mechanisms through to the national judiciary, from the compliance mechanisms of development banks to operational-level grievance mechanisms. Each of these mechanisms has its distinct challenges as regards the degree to which it recognises and incorporates indigenous peoples' rights, its preparedness to adjudicate their grievances, its accessibility on the part of indigenous peoples, its impartiality and, crucially, its ability to enforce compliance and its effectiveness in restoring the victims to justice.

Indigenous victims of human rights violations who are barred from seeking judicial redress in their home countries have other avenues to hold those responsible to account, either through the judicial system (or effective non-judicial mechanisms) of the perpetrator's home country or, should the home country fail to discharge its extraterritorial obligations, via effective international mechanisms.

Indigenous peoples also have much to bring to the table. They have flexible and restorative systems of customary law that seek not only to determine and redress material damage but to restore peace and harmonious relationships. Increased use of such mechanisms offers great potential benefit to all parties involved; however, these systems cannot be isolated from the broader indigenous rights context nor utilised as a mere instrument to increase the efficiency of grievance mitigation.

Moving beyond the GP

The lack of progress over the last decade demonstrates that a voluntary framework, in particular the concept of business responsibility to respect human rights in Pillar 2,⁶⁷ is insufficient to ef-

fectively curb violations of indigenous peoples' rights. While there has been progress in some areas, the situation is deteriorating further in others. It has become evident that these Principles need to be accompanied by binding mechanisms to ensure consistency of business activities with human rights in general and with indigenous peoples' rights in particular. Pillar 2 is only then likely to become a reality, when states take measures such as mandatory due diligence legislation to enforce business respect for human rights. This is currently something that few states are doing.

To ensure that business respect for human rights becomes a global reality, the production and approval of a Legally Binding Instrument to regulate the activities of transnational corporations and other business enterprises as being drafted by the UN Open-ended intergovernmental working group (IGWG) on this matter is a necessary and urgent next step.

Projections suggest that the future impacts of business enterprises, including the extractive industries, the agro-industrial sector and the energy sector, are going to increase substantially, as is the risk of more gross abuses of indigenous peoples' rights in connection with these operations. The provision of adequate mechanisms to prevent and remedy business-related human rights violations should therefore be treated by all parties concerned as a matter of the utmost urgency. In the light of these developments, we would like to make the following recommendations to states, business enterprises, international organisations and financial institutions, and civil society. This takes into consideration the binding human rights obligations incumbent upon these parties. We would also like to propose a number of recommendations to business-affected indigenous peoples which, in the light of the evidence, would appear to offer promising avenues for better protection and restoration of their rights.

These recommendations revisit the recommendations made by IWGIA in a report in 2014 (Rohr & Aylwin, 2014), most of which have not lost their relevance. In some areas, new challenges have emerged, in others, new possibilities have surfaced, and the recommendations have thus been modified and amended as appropriate.

4.1

TO STATES

- States should review their legislation to ensure compliance with indigenous peoples' rights as set out in the UNDRIP and ILO Convention No. 169. This in particular to ensure that business activity is carried out in such a manner that their right to self-determination is protected and respected, including their rights over lands, territories and resources traditionally occupied.
- All states should respect and protect the right to **Free, Prior and Informed Consent (FPIC)** as set out by the UNDRP. States should recognise indigenous peoples' own **FPIC** protocols where such exist and support indigenous peoples to develop them where they have not yet done so but wish to. They should make sure that business enterprises within their jurisdiction also respect indigenous peoples' **FPIC** protocols and their granting or withholding of **FPIC**.
- All states should ensure that **National Action Plans (NAPs)** are produced, implemented and revised with the participation of and in consultation with indigenous peoples. NAPs should include specific provisions to protect indigenous peoples' rights, in particular the right to self-determination. NAPs should stipulate the enactment of mandatory due diligence legislation for business enterprises, including for their operations abroad. Further, NAPs of home states and host states should include measures to identify and close any gaps that are preventing indigenous peoples affected by business operations from accessing effective remedies.

67 We have expressed the view in this report that the obligation of states to protect human rights in the context of business activities is grounded in binding international law and, consequently, is not voluntary but mandatory.

- NAPs of the home states of transnational corporations operating in territories used or inhabited by indigenous peoples should include roadmaps for implementing the provisions of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and ratifying ILO Convention No. 169, whether or not indigenous people reside within their territories. These measures will ensure that, even if the host state is unable or unwilling to provide them, remedies will be accessible to communities affected by the activities of foreign businesses and that states will exercise adequate oversight.
- OECD Member States should ensure that National Contact Points (NCP) are independent, impartial, fully equipped and trained to address indigenous peoples' complaints. This includes knowledge of indigenous peoples' rights, including FPIC, and familiarity with indigenous methods of decision-making and customary law. They should be equipped with the necessary authority to undertake fact-finding and investigations and to make a public determination of whether or not a breach of the OECD Guidelines has occurred and have the authority to follow up on cases. OECD states should introduce sanctions for non-compliance with decisions taken by NCPs, such as exclusion of the company in question from public procurement and from the investment guarantees of Export Credit Agencies. Compliance with the OECD Due Diligence Guidance for Responsible Business Conduct should be mandatory for state support through Export Credit Agencies.
- Countries should include the requirement for FPIC as a condition in all investment agreements with multinational enterprises whose operations will potentially have an impact on indigenous communities. It is recommended that the responsibility of the given enterprise to cover the financial burden associated with full protection of the rights of indigenous peoples be clearly regulated in the terms of such agreements.
- To ensure policy coherence, states need to conduct human rights impact assessments prior to entering into International Investment Agreements (IIA), as well as to systematically assess them in order to ensure that they do not contradict the human rights obligations of states, including those towards indigenous peoples. If they are not in conformity with these human rights obligations, they should be amended or rejected by states to ensure that human rights are not harmed by them. Settlement of disputes arising from investments by arbitral tribunals set up in these agreements should not limit their decision to commercial clauses but consider human rights as core elements. These tribunals should also be accessible to indigenous peoples and bound in their decisions by the relevant international human rights standards, including the UNDRIP and ILO Convention 169.
- States should ensure that indigenous peoples' organisations have sufficient access to technical and financial assistance, as required by Art. 39 of the UNDRIP, for the purpose of expanding their knowledge and building their capacity for the efficient use of relevant national, regional and international human rights standards, instruments and judicial as well as non-judicial mechanisms.
- States should adopt measures to prevent the killings, threats and other forms of violence, including criminalisation of indigenous peoples defending their lands and environment in the context of business activity. States should refrain from using special legislation such as the anti-terrorist laws that are currently being used to prosecute indigenous peoples, resulting in long pre-trial detentions or long-term incarceration. Moreover, they should combat impunity by actively participating in the investigation and prosecution of those responsible for violent acts against indigenous human rights defenders.
- States should reverse detrimental laws and regulations that have been passed during the COVID-19 pandemic period and which curtail indigenous peoples' rights to par-

ticipation, consultation and consent in relation to business operations and immediately stop using COVID-19 as a pretext for the illegal appropriation of indigenous peoples' lands, territories and resources.

- National Human Rights Institutions should strengthen their role in promoting the implementation of the UNGP in matters that concern indigenous peoples' rights. This in particular by receiving, investigating and resolving complaints related to the violation of indigenous peoples' rights in the context of business operations. Also by promoting the inclusion of indigenous peoples' rights in the contexts of NAPs. States should support NHRI efforts on this matter, guaranteeing their independence and ensuring sufficient funding.

4.2

RECOMMENDATIONS TO INTERNATIONAL ORGANISATIONS

- The **UN Open-ended intergovernmental working group (IGWG)** should ensure that the Legally Binding Instrument, developed to regulate the activities of transnational corporations and other business enterprises, clearly references the rights affirmed in the UNDRIP and ILO Convention 169. In particular, it should reference the right to FPIC and customary rights to lands, territories and resources. In its drafting process, it should generate a mechanism to enable the active participation of indigenous peoples.
- The **UN Human Rights Council** should encourage an assessment of the Guiding Principles' effectiveness and limitations and, where necessary, consider their revision. It should also encourage the Special Procedures to take an active role in documenting and analysing the relationship between business and human rights, including the rights of indigenous peoples, in their thematic and annual reports and in their country visits.
- Monitoring guidelines for Special Procedures regarding indigenous peoples should be based on the provisions of the UNDRIP and ILO Convention 169. They should include the identification of capacity building needs among indigenous peoples, states and business enterprises.
- The **UN Working Group** should provide further advice on the implications of the Guiding Principles for indigenous peoples' rights, especially rights to FPIC and to lands, territories and resources. It should also revise its allegations procedure, enabling it to respond in a timely manner to the criminalisation of indigenous human rights defenders and business-related violence against indigenous peoples.
- With the involvement of the **UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)**, the **UN Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises** should undertake a broad empirical study looking into the efficacy of existing remedy mechanisms available to indigenous peoples, including judicial and non-judicial mechanisms, extraterritorial remedies as well as indigenous dispute resolution methods with the goal of developing fact-based comprehensive guidance for states, international institutions, business enterprises and indigenous peoples. Such a study should consider both process and outcome effectiveness.
- The **OECD** should amend its Guidelines for Multinational Corporations with specific provisions regarding indigenous peoples and set out clear guidelines, including for process and outcome effectiveness of the National Contact Points.

- **Regional human rights systems**, including the Inter-American Commission and the African Commission on Human and Peoples' Rights, should adopt guidelines on the implications of business activity for the rights of indigenous peoples. They should also open up a space for indigenous peoples' participation in debates leading to the production of such guidelines. They should also develop procedures to protect indigenous rights defenders who are victims of business activity.
- **International development banks** should refrain from any measures that limit indigenous peoples' access to their compliance mechanisms, such as the introduction of 'judicial clauses'. Those banks that have not yet included FPIC requirements in their standards should do so, while "Broad Community Support" (BCS) should no longer be a sufficient benchmark.

4.3

TO ENTERPRISES

- Corporations whose operations affect indigenous communities, their territories, lands and resources should develop a full understanding of the rights of these peoples as set out in the UNDRIP and ILO Convention 169. They should adopt a **policy commitment** to respect these rights at all levels and throughout their value and supply chains. This commitment should be communicated, including to indigenous peoples directly or indirectly affected by them, and its implementation needs to be adequately monitored.
- Corporations should also develop a clear understanding of their potential impact on and responsibility towards **future generations** of indigenous peoples affected and, through good-faith consultations, identify ways of addressing these. In doing so, transnational corporations should commit not only to the legal framework of those states where they are operating but also to international human rights law applicable to indigenous peoples.
- Business enterprises should formally commit to respecting indigenous peoples' right to **Free, Prior and Informed Consent (FPIC)**, including their right to define the process by which FPIC is achieved and to withhold consent. Where these exist, corporations should abide by indigenous peoples' **FPIC protocols**. Corporations should embrace a holistic understanding of consultation, participation and consent as a process of building long-term good-faith relationships with indigenous peoples, which may require renewal at various stages of a given project rather than a mere compliance mechanism.
- Human rights due diligence requires that business enterprises employ **participatory human rights impact assessments (HRIA)** to ensure respect for indigenous peoples' rights, in particular for projects aimed at the development, exploration or extraction of natural resources. The outcomes of those HRIA should be made available to the communities involved and to wider general public.
- Human rights due diligence procedures should, **at the earliest possible stage, identify indigenous peoples potentially affected** by their activities, determine how they will be affected and assess the land and resource rights to which indigenous peoples may lay claim on the basis of their traditional use and occupation.
- Corporations should develop a sufficient understanding of indigenous peoples' **customary law, including customary approaches to dispute resolution**. Such learning processes should be guided by the realisation that indigenous peoples' customary laws and decision-making processes are flexible and dynamic and closely related to those specific

environmental and social contexts in which they have evolved. Such learning processes hence need to take place in each individual case.

- Corporations should ensure that **effective and equitable dispute resolution mechanisms** are set up by mutual agreement prior to any project activities in order to enable mitigation and prevention of conflict. Such mechanisms should be predicated on the acknowledgement of the traditional owners of a given territory and thus respect and embrace their customary laws to the fullest extent possible.
- With regard to redress and compensation, business entities should **abide by any ruling, decisions or recommendations of any judicial and/or non-judicial mechanism proceeding** and also consider providing additional redress/compensation, where appropriate, for the purposes of acknowledging special losses or harm such as with respect to indigenous sacred sites.
- Business enterprises should ensure that indigenous peoples share the benefits generated by business activities. Such **benefit-sharing** should be regarded as a means of complying with a right, not as a charitable award or favour granted by the company in order to secure social support for the project.⁶⁸
- Business enterprises should refrain from asking indigenous peoples' consent in exchange for provision of the basic social services to which they are entitled as humans and citizens of their country.

4.4

RECOMMENDATIONS TO INDIGENOUS PEOPLES

- Indigenous peoples should develop and implement their own **FPIC** protocols, taking into account the experience and advice of indigenous peoples who have already done this in the past. If indigenous peoples wish to apply their **customary law as remedy mechanisms** in relation to business enterprises, they should ensure that such laws are described, restated or revised in order to assist in their application, and that such laws are understandable and accessible to business entities or states, while retaining their underlying characteristics.
- Indigenous peoples may consider **reviewing their own institutions** in order to identify a possible need to set up representative structures, through their own decision-making procedures, in order to facilitate their relationship with business activities, regarding FPIC, redress, compensation and/or benefit-sharing.
- Indigenous peoples might consider **seeking assistance** to expand their knowledge and build their capacity with regard to the efficient use of relevant national, regional and international human rights standards, instruments and judicial as well as non-judicial mechanisms.
- Indigenous peoples might consider **strengthening their networks** with other indigenous peoples and civil society organisations in order to share experience, knowledge and skills regarding the defence of their human rights in a business context and to explore opportunities for mutual support in concrete cases.

⁶⁸ Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya A/HRC/15/37, 19 July 2010, paras. 81-91.

- CSOs should strengthen the network of NGOs and community organisations that has been engaged in the implementation of community-based human rights impact assessments (COBHRA) of business operations, with the active participation of indigenous peoples and local communities, in order to empower indigenous peoples affected by business activities to use these tools for the protection of their rights.
- CSOs should support indigenous peoples' participation in the UN process aimed at the drafting of a Legally Binding Instrument (LBI) to regulate the activities of transnational corporations and other business enterprises. This both by disseminating the central topics and challenges of the LBI and by supporting their representatives to attend the meetings in which this instrument is being debated.
- CSOs should build and strengthen alliances between civil society organisations and indigenous peoples with the aim of documenting, monitoring and preventing the violence, threats, prosecution and other forms of criminalisation that indigenous peoples increasingly face while defending their rights from business activity. In particular, civil society should monitor the implementation of UN Human Rights Council Resolution 40/11 of 2019, which recognises the contribution of environmental human rights defenders, including indigenous peoples, to enjoyment of human rights, environmental protection and sustainable development.
- Promote the elaboration of an international independent system, similar to others existing in different fields, including business and human rights,⁶⁹ for state and/or business compliance with the Guiding Principles, with a particular focus on indigenous peoples' rights. This with the aim of creating a ranking of the compliance of states and/or businesses for investors, banks and other stakeholders to generate awareness of a given context. ○



Wampis Nation, Peru – Photo: Pablo Lasansky

69 See Corporate Human Rights Benchmark at <https://www.corporatebenchmark.org/>. See also International Trade Union Confederation (ITUC) Global Rights Index at <https://www.ituc-csi.org/ituc-global-rights-index-2020>

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