



IWGIA

INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS

Submission

to the UN Working Group on Business
and Human Rights

***UN Guiding Principles on
Business and Human Rights +10
Process***

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1 Introduction

This submission responds to the open call for input issued by the UN Working Group on the Issue of Human Rights and Transnational and other Enterprises for the UNGP +10 project. In it, we try to identify steps taken by all stakeholder that are aligned with the Guiding Principles, in regard to the rights of indigenous peoples since their adoption by the Human Rights Council in 2011. Our points of departure are the 2013 thematic report by the working group "Business-related impacts on the rights of indigenous peoples" (UN Working Group on the Issue of Human Rights and Transnational and Other Enterprises, 2013) and the 2014 human rights report on the same topic issued 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 in order to implement them has been, so far insufficient.

For many of the steps taken by various stakeholders over the last ten years, it is difficult to establish a causal relationship with the Guiding Principles, therefore we have 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 the present 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 of indigenous land and environmental defenders and the growing trend of criminalization 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 that there is a vast gap between policies and declaration on the one hand and practice on the ground on the other hand. According to our analysis one central cause for this difference lies in the voluntary nature of most frameworks, which do not enforce themselves by imposing liability. On the other hand, at the policy level, some players clearly have made more progress than others. Verifying to what extent this translates to a difference in practice on the ground, however would exceed the scope of the present 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 could 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, which however, does not always mean that governments abide by such rulings. However, we do note, that this is a path to lasting improvement of the human rights situation, which has demonstrated its effectiveness over many others and therefore should be further pursued.

The following section of the submission will be taking 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, so that the first subsection investigates states, the second focuses on business enterprises and the third 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 contents of the subsections are derived from both desk research as well as from a series of interviews conducted with leading indigenous activists and thinkers from Latin America, Africa, Asia and Russia, conducted during November 2020. A list of interviews is attached.

2 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, to which extent states since the adoption of the UNGP in 2011 have taken measures in relation to indigenous peoples and which impact indigenous peoples who were consulted for this submission, report in relation to these measures. Below, we look at National Action Plans (NAP), national legislation, impacts of and measures in relation to investment treaties and finally, we have a brief look at the efforts undertaken by the European Union.

2.1.1 National Action plans

Early since the approval of the Guiding Principles (GP) the United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises (WG) has encouraged states to elaborate 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) According to the same report NAPs require the involvement of relevant governmental bodies, meaningful participation of non-governmental stakeholders and transparency.¹ Until today, 24 NAPs have been finalized, 17 more are in the process of development.

Of these NAPs, only 13 include specific references to indigenous peoples. Such references range from the need of 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 regards to indigenous peoples' rights. Indigenous peoples were rarely involved in their elaboration. A survey of 21 NAPs by the Danish Institute for Human Rights (DIHR) found that only 8 states took steps to involve special interest groups and vulnerable groups (e.g. indigenous peoples, persons with disabilities).² 17 states established a mechanism for interested parties to submit formal responses or comments to the state, and 10 states published such formal responses. 12 states provided opportunities for stakeholders and rights-holders to comment on a draft version of the NAP. (Morris, 2018). India is

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

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

one of the states where a NAP is under development. Due to COVID19, no physical consultations have taken place, while the government has put out a call for on-line consultation. These methodologies, as we know, are not culturally adequate 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 established a multi-stakeholder roundtable for this purpose, which includes eight indigenous peoples' organizations representing various geographical regions, out of a total of 129 organizations participating in this process.³ Since NAPs are generally issued through administrative or legislative state measures, they should have been, in keeping with the state obligations under ILO169 and UNDRIP, consulted with the 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 implication for 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 that refer to state actions. Even within the state action, NAPs generally have influence on the Executive branch, but hardly on the Legislature or the Judiciary of the state. (Cantu Rivera, 2019) This difference often weakens the legislative impact of NAPs regarding the state duty to protect, set out by 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, 2015) (UN Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, 2018)

2.1.2 Legislative measures in home states of indigenous peoples

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 have failed to enact significant new measures that would align their legislation 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 under development. We have found no evidence, that the adoption of the UNGP caused home countries of indigenous peoples to take measures to either ratify ILO Convention

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

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 the protection and respect for human rights in the business sector have been identified. However, since these measures are not specific to indigenous peoples, they fall short of fulfilling the recommendations of the 2013 report and fail to fulfil the states' obligations vis-a-vis their indigenous peoples. Among the notable legal initiatives 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. However, according to our informants, so far only two local communities have been successful in registering their land.

In Latin America, Peru enacted in 2011 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 rights, indigenous peoples' and civil society organizations have criticized its implementation. Most consultations undertaken in the context of mining and oil projects are generally undertaken in the last stages of investments, and therefore are formal procedures ineffective for the purpose this right was recognized. There is no evidence that FPIC has been recognized 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), according to our respondents, no measures have been taken to enshrine the convention in national law, even though this is the most fundamental treaty obligation of signatories. However, the Local Government Operation Act, 2074 of 2017, while it is neither specific to indigenous peoples, nor makes specific reference to indigenous peoples, does provide certain participation rights of 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 participation rights, however, because of the rapidly shrinking space for civil society within the country, these rights remain mostly theoretical. Were participation rights exist, organisations whose participation is solicited by the state are lacking independence, so that they usually rubber-stamp whatever is presented to them. Usually, these organisations are materially and politically highly dependent on the state. This demonstrates that respect for and protection of indigenous peoples' rights requires a functioning democracy, where civil society has sufficient protection from reprisals and the judiciary is truly independent. Protection of indigenous peoples' rights is all but 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 predate the UNGP while measures adopted in recent years, including the "National Guidelines on Responsible Business Conduct", are voluntary and, according to our respondents, had no discernible impact on the rights of indigenous peoples on business practices. (Gangmei, 2020)

In some cases, regressions have been identified: Laws that contribute to the shrinking of spaces for civil society including indigenous peoples' organisations and laws that enable criminalization of indigenous peoples. In Russia, the 2013 adoption of an amendment to the federal law on non-profit organisations rules that groups that receive foreign funding and engage in 'political' activity, must register as foreign agents. The law does not define 'political', and in practice, any presence of

foreign funding may, when needed, be sufficient grounds for the Ministry of Justice, to classify an organization as 'foreign agents'. 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 recognized 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 the state, even though its constitution recognizes indigenous peoples, denies, for all practical purposes, 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 domestic policy space to meet their human rights obligations when pursuing investment treaties and contracts. The Working Group argued in its report on the GP and indigenous peoples (UN Working Group on the Issue of Human Rights and Transnational and Other Enterprises, 2013) 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. In the same report the WG stressed, that policy coherence between the business and investment agendas pursued by States and their human rights policies in accordance with GP 8, is of particular importance for indigenous peoples whose rights are frequently affected by business and investment.

During 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 the protection of investors interests and rights⁵, 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 where those resources are located.

Despite the inclusion of human rights provisions in recent IIA entered into by the European Union as well as by Canada and the US⁶, investments triggered by them have continued to severely affect indigenous peoples' rights. As former UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz says, "an alarming number of cases in the mining, oil and gas,

⁴ According to UNCTAD's International Investment Agreement Navigator there are currently 2900 Bilateral Investment Agreements, of which 2342 are in force. There are also 391 Treaties with Investment Provisions, of which 321 are in force. A large part of them have been signed in the last decade. See <https://investmentpolicy.unctad.org/international-investment-agreements>

⁵ The provisions of the said agreements generally consider prohibiting 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";⁵ 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 called the 'democracy clause') allows parties to partially or fully suspend an agreement unilaterally in case it is breached. The European Parliament has promoted strengthening of the inclusion of the HRC in all new trade agreements negotiated by the EU, including in its recommendation dated September 2017 on the negotiations of 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)

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, as a consequence of a lack of legal recognition or enforcement of indigenous peoples' rights, in particular land rights which enables land expropriation in order to facilitate such investments on their lands. Further, 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 criminalization and violence, including something deadly violence, as has been 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 -as the International Center for Settlement of Investment Disputes (ICSID) -, have continued to be used by investors to seek compensation from States human rights policies or legislation that might affect them. This by arguing that they constitute 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 the existing IIA.⁷

As described in the 2016 report on investment treaties by the former UN Special Rapporteur Tauli-Corpus, this mechanism has been used by investors in the Americas and Africa over the last decade to sue States when adopting measures to protect indigenous peoples rights, including the protection of land rights and right to consultation and FPIC. (UN Human Rights Council, 2016)⁸ Although arbitral tribunals have so 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 states ability to comply with their 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 under the Trump presidency left the negotiations, 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, if approved and entered into effect, on indigenous peoples rights, in particular to their rights to lands, territories and resources, intellectual property, self-determination, and to FPIC, have been expressed by indigenous peoples globally.⁹ This in particular by indigenous peoples in Latin America, taking into account 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 Due diligence legislation

Of the large economic blocks, 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 for business enterprises to conduct human rights due diligence.

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

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

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

On 3 July, 2018 the European Parliament adopted a comprehensive resolution on the rights of indigenous peoples. (European Parliament, 2018) The 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].

To date, none of these mechanisms have been established yet, but progress is being made towards their realisation.

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 are insufficient to significantly affect the way companies address their social, environmental and governance impacts and that binding legislation is needed to improve access to justice for victims of corporate-related human rights abuses and environmental damage. (Policy Department for External Relations, 2020)¹¹ Whilst the European Commission has not yet developed the long-awaited EU Action Plan on Business and Human Rights, that 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 has adopted a law ("Loi de vigilance") in 2017, as of December 2020, the German government is debating cornerstones of a law proposal, and other governments have committed to initiate national processes or support the European process.¹²

As part of the European green deal, the European Commission also proposes in its communication on the "EU biodiversity strategy for 2030 - Bringing nature back into our lives" that the EU ensures a principle of equality. This principle includes notably "the 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) related to the planned creation of an EDF-funded project in Messok

¹⁰ Announced 30 April 2020 by commissioner Reynders during a webinar on due diligence, see <https://responsiblebusinessconduct.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 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>

Dja, Republic of Congo. The decision was taken owing to the recent violations of the human rights of Indigenous Peoples in the area and followed 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 and corporate accountability, effects of climate change on human rights and the role of environmental defenders on this matter, protection and restoration of the world's forests, and impacts of climate change on vulnerable populations in developing countries. It also advocates for greater consideration and collaboration with Indigenous Peoples.

The resolution of July 3, 2018 partly influenced these decisions. The resolution is not legally binding, nevertheless it appears to contribute to the dynamics in this field.

2.2 Businesses

There are several cases in which businesses individually or as part of Multi-Stakeholder Initiatives (MSI) have developed strategies or elaborated guidelines aimed at the implementation of the GP in general or referring to indigenous peoples' rights in particular. Following we will 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, namely 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, responding to pressure from civil society, 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 to be lauded, notable limitations can be identified. For one, when addressing the issue of land grabbing, only some have explicitly committed to a zero-tolerance policy, though, and the degree to which FPIC is considered mandatory varies widely. Often, commitments are 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 the 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 is eligible, using the process might require knowledge of a foreign language, verbal complaints may not be possible etc.

Corporations argue that often it is not feasible to trace from which farms produce is being sourced. This stands at odds with the experience of fair-trade initiatives, who have developed and implemented mechanisms which ensure full traceability.¹³

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

¹³ See for instance <https://info.fairtrade.net/what/traceability-in-fairtrade-supply-chains>

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 in the principle of FPIC. Most Western large transnational mining companies are ICMM members, therefore such a commitment is potentially highly significant. The next step would be for ICMM member companies to include this commitment into their policies and then to ensure that such policies are enforced throughout all levels of the company and throughout its supply chain. Language found in the policy of member companies, if it mentions FPIC, tends to be ambiguous. E.g. 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 in case that indigenous peoples are unwilling to enter an FPIC process or ultimately withhold 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”.¹⁴ The reason why the oil industry appears to be trailing behind is unclear (Greenspan, 2017), given that the oil producer association IPIECA has developed its own FPIC toolkit, which up to the present, seems to be largely ignored by its members. (IPECA, 2020)

2.2.2 Multi-stakeholder initiatives (MSI)

Since the 1990, 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 July 2020 identifies six key issues:

1. Credibility and influence of MSIs is waning, in the wake of criticism by key stakeholders who are exiting from them. The role of civil society is shrinking while the dominance of corporate interests grows.
2. Rights-holders such as indigenous peoples are rarely part of the governance structures of MSI. Governance rules and power dynamics favour corporations and disfavour rights-holders and CSO actors.
3. Often, standards are too weak and have the effect of creating the false impression that human rights violations are being addressed, rather than actually addressing them.
4. Often, monitoring mechanisms are 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

¹⁴ Shell: *Supporting local communities*, <https://www.shell.com/sustainability/communities/working-with-communities.html>, last accessed 23 November 2020

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 and for closing governance gaps.

The report concludes that the role of MSIs needs to be reconsidered, refocusing on mutual learning, engagement and experimenting, 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)

2.2.2.1 MSIs in the Food and beverage sector

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 platform for multi-stakeholder dialogue. The RSPO requires its members to respect indigenous peoples' and local communities' granting or withholding of FPIC and has 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 criticized for its insufficient verification mechanisms and a lacking emphasis on 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 conflict 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 it found was a better protection for the right to FPIC, however, whether the new FPIC guidelines affect the situation on the ground remains unclear. EIA reports several recent cases, where companies developed large plantations without submitting a New Plantation Procedure (NPP) notices. The complaints system continues to lack safeguards against conflict of interest and is unable to detect violations before considerable harm has occurred, takes too long to process complains and lacks transparency. One case is mentioned, where 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 the 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.¹⁵ 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 that 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, establishment of a grievance mechanism is not essential for achieving certification. (Business and Human Rights Clinic – University of Columbia,

¹⁵ 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>

2019) Bonsucro has been sharply criticised by civil society groups for failing rights-holders in their attempts to seek justice.¹⁶

2.2.2.2 Forest Stewardship Council

The **Forest Stewardship Council (FSC)** is the most important MSI in the forestry sector globally in which most businesses of this sector are involved¹⁷. 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 which 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 standards¹⁸.

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 in this last context to the Mapuche not only without FPIC but even without consultation. This triggered severe conflicts. (Millamán & Hale, 2016)

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. Also, it is among the few documents that explicitly say that FPIC can only take place if the affected community agrees to entering an FPIC process in the first place and which is relatively clear in saying that the right to FPIC implies the right to withhold consent and that such a decision must be respected. So, IRMA does *not* allow falling back to “broad community support” in case that FPIC cannot be obtained.

¹⁶ The best known case is that of the Thai sugar producer Mitr Phol, which is allegedly responsible for the forced eviction of over 700 families in Cambodia in 2008-2009 which Bonsucro, despite being notified by the Thai Human Rights Commission about the allegations, did not even suspend. Victims have still not been compensated in any form, 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>

¹⁷ Currently FSC has more than 190 million of hectares as total certified area distributed in 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>.

¹⁸ 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.

IRMA has very recently conducted its first audit.¹⁹ While it appears to be the most advanced MSI in terms of respecting indigenous peoples' rights, it is still fairly young, and its footprint therefore is still limited. **Bettercoal** is an MSI launched in 2013 for the coal sector. In its current version 1.1, the Bettercoal code does not adequately reflect 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 case of 'the involuntary relocation of indigenous communities'. (Bettercoal, 2018) It is surprising that the inherent glaring contradiction between 'free' and 'involuntary' was not immediately apparent to the authors and reviewers of the code, likewise is it 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 2.0.²⁰

2.3 International organisations

2.3.1 FAO voluntary guidelines on land tenure/UNEP

The 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) were issued in 2012 by the United Nations Food and Agriculture Organization. The Guidelines, which were elaborated through a participatory process involving active participation of states, civil society and business²¹ globally, and built in the frame of the GP identifying state and business responsibilities, make 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 recognized by Convention 169 of the ILO and UNDRIP²²

In 2014 the FAO issued further Guidelines, this time specifically referring to FPIC (Food and Agricultural Organisation, 2014) reinforcing the need of states to hold good faith consultation to obtain FPIC of indigenous peoples, under international law instruments, including UNDRIP, without intimidation and through processes conducted in a climate of trust. (Principle 9. 9). The principles of consultation and participation of these Guidelines should be applied for 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. Case studies concerning indigenous peoples in Guatemala, Colombia and Chile in a report on their application in Latin America show shortcomings and challenges posed by their implementation, in particular on the rights to customary tenure rights and FPIC. (Gomez, 2015)

¹⁹ Announcement of first audit report <https://responsiblemining.net/wp-content/uploads/2020/10/IRMA-Press-Release-First-Audit-21Oct2020.pdf>

²⁰Provision 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

²¹ See endorsement by the International Agri-Food Network http://www.fao.org/fileadmin/user_upload/newsroom/docs/Statement-by-private-sector-FINAL.pdf

²² See Guideline 9 on Indigenous peoples and other communities with customary tenure systems. <http://www.fao.org/3/a-i2801e.pdf>

2.3.2 OECD Due Diligence Guidance for Responsible Business Conduct

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 prospects for business respect for indigenous peoples. It is intended to be used in all sectors. Attached to the guidance is a recommendation which 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 made on stakeholder engagement, which has to be bidirectional, which requires that information is being share timely, in good faith and transparently.²³

Even more significant for indigenous peoples is that rights-holders take centre stage in consultations about 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 mentioning of FPIC in the 100 pages 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 they have come to bear in any situations involving indigenous peoples.

2.3.3 Development banks

Just as other enterprises, development banks have the responsibility to carry out due diligence in order to identify, prevent and mitigate human rights violation, regardless of whether or not the state fulfils 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 had been the subject of intense campaigning by 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)

The World Bank long advocated for a watered-down version of FPIC, that it referred to as “free, prior informed *consultation*”, falling short of acknowledging the importance of consent. In 2012 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 that no involuntary relocation of indigenous peoples is permitted.

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. About half of the IFC's lending is done through intermediaries, in which case, a lack of transparency may prevent communities from knowing about the IFC's involvement and thus from accessing the ombudsman. Use of the grievance mechanism requires expert knowledge and resources, so that indigenous peoples typically have to rely on external support by civil society organisations or NHRIs to access it.

²³ See also joint briefing OECDWatch and Amnesty International: *the 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/>

The **World Bank's Environmental and Social Standard (ESS) 7** 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.²⁴ It came into force 2018, is contractually required and communities have access to a grievance mechanism. However, for all practical purposes, for using this grievance mechanisms by indigenous peoples require assistance by CSOs or NHRIs, given the level of expert knowledge requires.

The **Equator Principles** are voluntary guidelines adopted by 97 financial institutions in 37 countries. They adopt the IFC PFs, but with the limitation that they only apply for projects of a volume of over 100 mio USD and that FPIC is only applied for "non designated" countries, that is, for 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)²⁵ In the interviews we conducted, the ADB was mentioned multiple times as a donor behind problematic projects. [XXX]

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

At the regional level, a 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.²⁶

Such agreement, currently signed by 24 states²⁷ and ratified by 10 states in the region²⁷, if it entered into effect, would be 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. Indeed, the Escazu Agreement obliges states to **facilitate access to environmental information for persons or groups in vulnerable situations**, taking into account their conditions and specificities, for the purpose of promoting access and participation under equal conditions. (article 5.3); to eliminate barriers to participation (article 7. 14) it guarantees that its **domestic legislation and international obligations in relation to the rights of indigenous peoples and local communities are observed**. (article 7. 15); and guaranteeing the right of access to justice in environmental matters, mechanisms for redress, such as restitution to the condition prior to the damage, restoration and compensation and non repetition considering the circumstances specific to each individual case. (article 8. 3 g)

²⁴ "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>

²⁵ 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>

²⁶ 18. *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

²⁷ The Escazú Agreement needs 11 State ratifications to enter into effect.

There is an urgent need of such agreement in the 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)

2.4 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 impacting indigenous peoples' rights (GP 26). Measures proposed by the UN WGBHR in 2013 to remove indigenous peoples' obstacles to equal access to state justice system and encouraging the recognition by states courts of customary laws and traditions 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 SR 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. As the former SR Tauli-Corpuz stresses, compensation or redress are generally non-existent or not culturally appropriate with regard to their needs. Structural discrimination in the justice system, cultural inadequacy of justice procedures, language barriers, the cost of access to justice, and the lack of legal aid are among the barriers that indigenous peoples face in their access to the justice system.

In many contexts, judicial remedies continue to be open only to individual complaints, but not to collective complaints. This is particularly critical when indigenous peoples alleged violations of the right to communal property²⁸.

Of particular relevance in the assessment of the effectiveness of state judicial system 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 impacting their lands and resources. Relying on international and domestic law which guarantees this right as well as on the jurisprudence of international human rights mechanisms such as the UN treaty bodies as well as regional bodies such as the Inter American Court of Human Rights and the African Commission on Peoples and Human rights, indigenous peoples have sought the recognition of their rights in domestic courts. Of particular importance are lawsuits concerning large scale projects impacting their lands and resources imposed without their FPIC. The response to these demands by state courts has been mixed. Some courts have recognized indigenous rights to FPIC in such contexts.

²⁸ The Inter-American Court of Human Rights has recognized 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).

Examples of positive rulings on FPIC can be found in the case of Canada²⁹ and Colombia³⁰ in the Americas. In Asia, rulings by the supreme courts of Nepal³¹ and India³² 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 on many occasions move ahead with projects in defiance of judicial orders to suspend them. Also, as former SR Tauli Corpuz (UNHRC 2018) has 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.

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 victimized in the context of their opposition to large projects relating to extractive industries, agribusiness, infrastructure, hydroelectric dams and logging. As the UN SR Tauli Corpuz (UN Human Rights Council, 2018) indigenous human rights defenders opposing to 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 (Corporate Legal Accountability, 2017), 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.

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 though the use of diverse penal provisions, including anti-terrorism laws³³, is marked by prolonged pre trial detention, at times lasting several years. Interpreter assistance is rarely available within the ordinary judicial system. Little consideration is given to customs, traditions and legal systems of indigenous peoples. (UN Human Rights Council, 2018)

²⁹ In the *Tsilhqot’Nation v. British Columbia* [2014], the Supreme Court of Canada recognized 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. Consistently, the Court recommended that governments and individuals proposing to use or exploit land can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group.

³⁰ The Constitutional Court of Colombia has held on different decisions that in view of 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)

³¹ 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>

³² 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/>

³³ 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 *Norin Catrimán 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, *Norin Catrimán y otros (Lonkos, dirigentes y activistas del pueblo indígena Mapuche) vs. Chile*, 2011)

2.4.2 Non-judicial remedies: National Human Rights Institutions

Although there is a bouquet of non-judicial remedies, at the national level, National Human Rights Institutions (NHRI) appear to be the most active mechanisms in promoting the implementation 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 which they would not have been able to without such support. In various states NHRIs, being public autonomous entities³⁴, have accepted, investigated and addressed complaints over 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 affect the rights of indigenous peoples. In those states where NAPs have been approved or are being developed, NHRIs have also been relevant stakeholders promoting in them the inclusion of measures, aimed at the protection of indigenous peoples' rights, as well as in their implementation.

Examples for the engagement of NHRI in the protection of indigenous peoples' rights against adverse impacts of business operations in Latin America include a case from Guatemala, whose Procuraduría de Derechos Humanos has issued opinions to prevent harmful impacts of hydroelectric dams and palm monocultures on indigenous peoples' lands. It has also issued regulations to ensure the conduct of FPIC processes prior to the approval of business operations. (Danish Institute for Human Rights, 2020) Also, the Defensoría del Pueblo in Peru, who has had an active role in monitoring socio-environmental conflicts, caused by business operations, mainly on indigenous peoples lands, has been emphasizing the UNGP and the need to ensure indigenous peoples rights. (Ibid)

Also a relevant role in the documentation and support of indigenous and afro-descendant communities whose rights have been impacted by business operations has been played by the Defensoría del Pueblo of Colombia, whose report has a dedicated section on "ethnic groups" a category that includes also afro-descendants 35. In the last decade, the Instituto Nacional de Derechos Humanos 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 in domestic courts – in multiple cases with positive outcomes 36. In the case of these latter three states, their NHRI have been active participants in the process aimed at the elaboration, or the implementation of NAPs, as in the case of Chile and Colombia.

Similar initiatives have been undertaken by NHRI in Africa. The Kenya National Commission on Human Rights has been particularly involved in the inclusion of different stakeholders, including indigenous peoples in the elaboration of the NAP. Also, the South African Human Rights Commission has engaged in strategic impact litigation to advance principles of business and human rights, on cases concerning 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 which is accused of land-grabbing in Cambodia, expropriating 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 with their resources and

³⁴ 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.

³⁵ See <https://www.defensoria.gov.co/es/delegadas/12/>

³⁶ See <https://www.indh.cl/>

expertise played a key role in bringing cases to 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 offices have been established in three regions³⁷ however, their role, which used to be relatively important a decade ago, has been reported to be waning lately, concurrent to the consolidation of authoritarian rule.

A specific mention should be made to The Danish Institute for Human Rights (DIHR). Although not specifically active in the implementation of on non-judicial remedies concerning indigenous peoples, the DIHR has been a key player in promoting the implementation of the GP globally. 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 elaboration of NAPs, promoting the participation of indigenous peoples in their elaboration, as well as the inclusion of indigenous peoples' rights as part of these Plans³⁸. The DIHR has also encouraged the adoption of due diligence measures by business entities for the respect of indigenous peoples' rights (DIHR, 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 frameworks³⁹.

2.5 Indigenous peoples' initiatives

2.5.1 Indigenous peoples' FPIC Protocols and autonomies

In recent years, indigenous peoples who made the experience that FPIC as practiced by governments and corporations is in many cases just a tool in order to get 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, to a lesser degree grounded in international human rights law. The third category are the more recent protocols which 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 ratification of the ILO Convention 169 are by Latin American states and with the Inter-American human rights system, there is set of legal institutions with wide recognition that has been very actively adjudicating indigenous peoples' rights for decades. Indigenous peoples in Latin America. In Asia, the protocols are often referred to as community protocols and have been developed i.a. in Nepal, Malaysia and India.⁴⁰

A common feature is that protocols are developed in response to encroachment, a failure by state authorities and business to respect their right to consultation, who often define the scope of consultations so narrowly as to render them meaningless. FPIC protocols are living documents of self-government that vary a great deal in terms of specificity and technicality. Often, they are a

³⁷ Kamchatka territory, Krasnoyarsk territory and Sakha republic (Yakutia)

³⁸ See <https://www.humanrights.dk/business-human-rights>

³⁹ https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/hrd_2020/nhri_case_stories/denmark_nhri_bhr_case_study_2020.pdf

⁴⁰ About 50 different FPIC protocols from all continents can be found at <https://fpic.enip.eu>

documentation of laws and oral traditions that have governed interaction with outsiders for centuries and were preserved despite colonization.

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

Protocols often formulate specific pre-conditions, that must be in place for any meaningful consultation process and that therefore are non-negotiable under any condition. This may include that the state recognizes the integral and unified nature of their territories (rather than 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 enlist outstanding claims. Usually, protocols explicitly require respect of the indigenous peoples' customary laws and governance institutions.

Through autonomous FPIC protocols, indigenous peoples reassert control over any negotiation process, a crucial aspect of which is fixing timing, the sequence of events and locations. A general principle is that time frames and dates for consultations are determined based on community activities and calendars, they also must consider the specific geographic conditions, times required for trips to other remote communities.⁴¹

Typically, protocols identify the sequence of events/the stages involved in a consultation project, starting with a negotiation request to 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 ultimately consent is granted or withheld, which typically is not the end of the story, because significant changes or new stages of 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 regional instruments, treaties, jurisprudence and even colonial laws can be invoked. 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 who is to be consulted and how decisions are being taken. They usually emphasize 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 who is authorised to represent the community vis-a-vis third parties. This person should be well-versed both in indigenous and non-indigenous specific types of knowledge. It goes without saying that the 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, rather by consensus. However usually there is no individual veto. Protocols also emphasize the importance of not allowing individuals to be singled out and isolated by the government or businesses in order to influence their decision.

⁴¹ 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

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 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 Resguardo Indígena Cañamomo Lomapieta, in Caldas, Colombia developed a regulatory framework in 2012, including an FPIC protocol, governing all forms of mining in 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)

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

2.6 Civil Society

Civil society organizations, both at the international and domestic level, have been instrumental in promoting the implementation of the UN GP, as well as in identifying gaps and challenges in the relationship between business and human rights. Without their active involvement, including in the monitoring the implementation of the GP, the development and monitoring of NAPs, the documentation of human rights violations, business impacts on human rights would likely have been more severe.

Although not exhaustive, among those NGOs that have been more active in this regard, the following are to be mentioned:

BUSINESS AND HUMAN RIGHTS RESOURCE CENTER (BHRRC)

BHRRC was central in disseminating information on the UN process that led to the approval of the UN GP in 2011, facilitating the participation in this process of different stakeholders, including that of indigenous peoples. Since then BHRRC and its website, in different languages, has provided space for allegations of human rights abuses by businesses companies in all regions of the world. Many of these allegations are related to the violation of indigenous peoples' rights. These include allegations of 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 dialogue⁴².

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

INTERNATIONAL FEDERATION FOR HUMAN RIGHTS:

⁴² 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.

Further, the International Federation for Human Rights (FIDH), an international federation of currently 192 human rights organizations from 117 countries has played a crucial role in promoting accountability of business entities for its harms on human rights.

Since the approval of the UNGPs the FIDH has been active in identifying the limits and opportunities of the UNGP in ensuring corporate accountability for human rights violations caused directly or indirectly by business operations.⁴³ FIDH, along other national and international NGOs promotes the implementation of community-based human rights impact assessments (COBHRA) of business operations, with the active participation of indigenous peoples and local communities, through the use of the Getting it Right tool⁴⁴. This step-by-step methodology guides communities and NGOs to measure the actual or potential impact on human rights, recognized both by international and domestic laws and suggests available redress avenues, including judicial remedies and grievance mechanisms, to allocate responsibilities to States and business involved, and enables the drafting of a final report and recommendations, in line with the three pillars of the UNGPs.

Until 2018, around 20 community-led assessments of business impacts on indigenous peoples and their lands have been conducted in the Americas, Africa and Asia, about half of which concerned extractive industries, predominantly oil and mining.⁴⁵ 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 the responsibilities of states and business for the human rights violations caused. They have also allowed the impacted communities to make use of domestic judicial and non-judicial remedies, business grievance mechanisms, as well as international mechanisms to prevent or mitigate the abuses and harms to their rights.

Aware of the limitations of the UNGPs to enforce protect and respect of human rights in the context of business operations, FIDH has actively participated in the UN process aimed at the elaboration of a Legally Binding Instrument (LBI) to regulate the activities of transnational corporations and other business enterprises. Among those contributions made by FIDH in this process are those that have stressed the need to include provisions on recognition and protection of indigenous peoples rights by of transnational corporations and other business enterprises, as well as their right to FPIC.⁴⁶

THE ZERO TOLERANCE INITIATIVE

A mention should also be made to the efforts undertaken by the 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 and violence against human rights

⁴³ 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

⁴⁴ 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

⁴⁵ 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.

⁴⁶ See <https://www.fidh.org/en/issues/globalisation-human-rights/fidh-advocates-for-the-adoption-of-an-international-legally-binding>

defenders, many of them indigenous, linked to business activity and global supply chains. The initiative works to support communities in enhancing 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 the reprisals of environmental human rights defenders, and the implementation of policies which realise those commitments⁴⁷. Of particular relevance is its Geneva Declaration where the ZTI asserts the urgent need for direct and effective actions to tackle with the root causes of the 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)

3 Progress made

Among those positive initiatives in the implementation of the Guiding Principles in relation to indigenous peoples' rights, we have been identifying through desk study and the above survey, the following are to be mentioned:

States

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

13 NAPs contain explicit references to indigenous peoples, in one case (Peru), a participatory process involving their representative organizations 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 remedies to indigenous rights-holders who are potentially affected by activities of business enterprises headquartered in the EU.

Business Enterprises

Most large food and beverage enterprises as well as most large mining companies have in some form acknowledged rights of indigenous peoples, 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 to not enter into a process or not to grant consent as the result of a process.

International Organisations

⁴⁷ The ZTI coalition is composed by 35 organizations, including among them several indigenous peoples, afro descendant organization, as well as NGOs from around the world. See <https://www.zerotoleranceinitiative.org/about>

Some voluntary guidelines and guidance adopted by some international organisations, such as the FAO and the OECD follow a clear rights-based approach and have embraced both the concept of rights-holders and put the avoidance of human right violations first.

Most international development banks now recognize the rights of indigenous peoples, including the right to FPIC, including its “consent” part, and prohibit involuntary relocation of indigenous peoples. The IFC’s PF7 has also wide application outside of the bank itself, e.g.. The OECD Common Approaches stipulate that export credit agencies should apply either the World Bank or IFC standards⁴⁸ which is reflected in the policies of some export credit agencies.⁴⁹

Remedies

In several countries, including Peru, Nepal, India, Brazil and Colombia, national courts have played an important role in standard-setting, by adopting rulings that oblige 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, in which the procedural rights of indigenous peoples are based.

Indigenous peoples

Efforts by indigenous peoples to develop their autonomies and to develop and implement their own FPIC protocols have seen a new dynamic during the last decade, mostly in Latin America but also in individual Asian countries. In our view, in many countries, this development is the single most significant contribution to increased protection of the rights of indigenous peoples.

4 Gaps and Challenges

Above, we have reviewed steps undertaken by different stakeholders, including States, business enterprises, multi-stakeholder initiatives, international organizations, civil society and indigenous peoples, since the adoption of the Guiding Principles, in their promotion or implementation with regards to the application of these Principles to indigenous peoples and their rights.

Despite the many steps undertaken, policies and frameworks adopted by these and other stakeholders, named above, there seems to be a consensus of, *inter alia*, international human rights bodies, civil society organizations and victim representatives, that there are still many gaps to address 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.

The impacts of business operations, particularly of the extractive industry, on indigenous peoples and their lands, territories and resources, far from decreasing in the last decade, 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, where indigenous peoples live.

Among those concerns addressed by the WG in these reports is the fact that indigenous peoples were disproportionately affected by large-scale development projects, with a significant negative impact on the environment, the right to health and their livelihoods and cultural way of life. (Thailand, 2019); the lack of meaningful consultations with these peoples and non-compliance

⁴⁸ See <http://www.oecd.org/trade/topics/export-credits/environmental-and-social-due-diligence/>

⁴⁹ 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

with the requirement of Free, Prior, Informed Consent for business activities on their lands (Canada, 2018); the fact that consultations were not held prior to decisions which may affect the rights of indigenous peoples and before concessions for potential mining activities on indigenous land are issued (Peru, 2019); and that indigenous rights defenders are at serious risk of attacks, including killings, criminalization, 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 serious impact of extractive projects on indigenous peoples' lands and resources is a consequence of the lack of legal framework that would protect their rights to lands and resources. Further, it is due to the fact that the right to FPIC, although recognized 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 access⁵⁰.

Indigenous peoples themselves have repeatedly voiced their concern 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 their interpretation 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 appear to be a common concern of their organizations. As the Asia Indigenous Peoples' Pact stated in 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 profound negative human rights impacts, including forced evictions/resettlements and loss of lands, resources and livelihoods of Indigenous Peoples.⁵¹

Similar concerns have been expressed by indigenous peoples from Latin America. Along with 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 (Indigenous Peoples Workshop Position regarding the Fourth Latin America and the Caribbean Regional Consultation about Companies and Human Rights, 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

⁵⁰ Interview with Dante Pesce, Vice Chair of the UN WG, November 21, 2020.

⁵¹ *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/>

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, when they have such processes, to domestic laws that fall short of international standards applicable to indigenous peoples' rights. (Vittor, 2020)

Lack of adequate grievance mechanisms, both on the side of state and business enterprises, to enforce FPIC or to obtain redress for the harms caused by business operations on indigenous peoples was also identified as central obstacle for the enforcement of their rights. (Nahuel, 2020; Cubillos, 2020) Experiences with grievance mechanism are often negative. Usually, they cannot be used without specialized knowledge, they 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 which 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 become aware of their rights and claim 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, identifies 1223 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 them involve 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 9 Latin American states have been murdered during 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 with 34 defenders killed (Global Witness, 2020)

Such killings, as we know, are only the tip of the iceberg. Behind those cases there are many other corresponding to death threats, beatings, acts of torture and cruel treatment, generally committed with the collusion of states and business enterprises. Also, cases of criminalisation of indigenous rights defenders, on many occasions through the application of special legislation, such as anti terrorist laws.⁵² The continuing impunity for these crimes due to the 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 spaces for civil society to shrink to a minimum and indigenous as well as many civil society organisation tend to be heavily state monitored or even controlled, consultation of indigenous peoples often amounts to mere simulation. 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 persistent gap related to human rights harms and abuses of 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

⁵² One of the countries where anti terror laws have been widely used against indigenous human rights defenders are 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/>

in commercial arbitration tribunals for human rights policies or legislation they adopt which might affect them, arguing that they constitute expropriation of their interests. Moreover, most states where transnational corporations are domiciled have no effective mechanisms make them accountable for human rights violations as has been recommended by UN treaty bodies. The adoption of those mechanisms is essential to the fulfilment of their extraterritorial obligations on human rights.

5 Conclusions and recommendations

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 the ILO Convention 169. Neither have they been 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 to various home states of transnational corporations.⁵³

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 abuse of indigenous peoples by 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 which are sufficient to fulfil their independent responsibility to avoid harming the rights of indigenous peoples directly or indirectly.

Neither states nor business enterprises have ensured sufficient access to effective remedies to prevent violation of indigenous peoples' rights, or to provide remediation when those rights have been breached in the context of business activity, whether these 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, 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 the natural wealth and to decide on their 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."⁵⁴ Mechanisms which allow indigenous peoples to participate in the drafting of policy commitments, to submit complaints or to have access to information are

⁵³ See e.g. CERD concluding observations on Canada, CERD/C/CAN/CO/21-23, para 21-22,

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

The principle of Free, Prior and Informed Consent (FPIC) has gained prominence in recent years, including by adaptation into 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 2.5.1) 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 recognize 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 the 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 the national judiciary, 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 which 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 and 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 2⁵⁵, is insufficient to effectively curb violations of indigenous peoples' rights. While there has been progress in some areas, in others, the situation is deteriorating further. 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, which presently, few states are doing

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

Projections suggest that 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 to 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 taking 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 2014⁵⁶, most of whom have not lost their relevance. In some areas, new challenges have emerged, in others, new possibilities have surfaced, so that the recommendations are modified and amended as appropriate

5.1 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 recognize indigenous peoples' own **FPIC protocols**, where such exist and support indigenous peoples in developing them where they haven't done so yet but wish to do so. They should make sure that business

⁵⁵ We have expressed in this report the view that obligations of states to protect human rights in the context of business activities are grounded on binding international law, and consequently, are not voluntary but mandatory.

⁵⁶ Johannes Rohr & José Aylwin: *Business and Human Rights: Interpreting the UN Guiding Principles for Indigenous Peoples*. IWGIA report 16. Copenhagen, August 2014 <https://www.iwgia.org/en/resources/publications/308-human-rights-reports/3166-business-and-human-rights-interpreting-the-un-guiding-principles-for-indigenous-peoples-.html>

enterprises within their jurisdiction to also respect indigenous peoples' FPIC protocols and their granting or withholding of FPIC.

- All states should ensure that **National Action Plans (NAPs)** are elaborated, 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 closure of any gaps that prevent indigenous peoples affected by business operations from having access to effective remedies.
- NAPs of 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, 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 the OECD Due Diligence Guidance for Responsible Business Conduct should be mandatory for state support through Export Credit Agencies.
- Host 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 the full protection of the rights of indigenous peoples is 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 regarding 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 the use of special legislation, such as the antiterrorist laws, that are currently being used when prosecuting indigenous peoples, resulting in long pre trial detentions or on long term incarceration. Moreover, they should combat impunity, by taking active participation in the investigation and prosecution of those responsible for violent acts against indigenous human rights defenders.
- States should reverse detrimental laws and regulations have been passed during the COVID-19 pandemic period, which curtail indigenous peoples' rights to participation, 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 GP 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 independency and ensuring sufficient funding.

5.2 Recommendations to international organisations

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

5.3 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 the 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 operate, 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 those 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 the public opinion in general

- 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.⁵⁷
- Business enterprises should refrain from asking indigenous peoples' consent in exchange for the provision of basic social services to which they are entitled as humans and citizens of their country.

5.4 Recommendations to indigenous peoples

- Indigenous peoples should develop and implement their own **FPIC protocols**, taking into account experience of and advice by indigenous peoples who have already done so 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

⁵⁷ 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.

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.

5.5 Recommendations to Civil Society Organizations

- CSO should strengthen the network of NGOs and community organizations 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 impacted by business activities to use of these tools for the protection of their rights.
- CSO should support indigenous peoples' participation in the UN process aimed at the elaboration 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 organizations and indigenous peoples with the aim of documenting, monitoring and preventing the violence, threats, prosecution and other forms of criminalization 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 recognizes 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 rights⁵⁸, of 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 business for investors, banks and other stakeholders generating awareness of a given context

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