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**Promotion and protection of human rights:
human rights situations and reports of
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**Human rights and transnational corporations and other
business enterprises**

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, submitted pursuant to Human Rights Council resolution 17/4.

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Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises

Summary

This report explores the challenges faced in addressing adverse impacts of business-related activities on the rights of indigenous peoples through the lens of the United Nations Guiding Principles on Business and Human Rights. The focus is how the Guiding Principles can bring clarity to the roles and responsibilities of States, business enterprises and indigenous peoples when addressing these impacts. It identifies implementation gaps and challenges with regard to the State duty to protect against business-related human rights abuses and the corporate responsibility to respect human rights, and the corresponding obligations relating to access to effective remedy. Finally, the Working Group makes recommendations to States, business enterprises and indigenous peoples for the effective operationalization of the Guiding Principles with regard to the rights of indigenous peoples.

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I. Introduction

1. The issue of business-related impacts on the rights of indigenous peoples has been addressed by a number of United Nations mechanisms, including United Nations treaty bodies¹, the Expert Mechanism on Indigenous Peoples² and the Special rapporteur on the rights of indigenous peoples³. Such studies have highlighted the specific features of indigenous cultures, namely their deeply rooted spiritual and cultural special relationship to lands, territories and resources which indigenous peoples traditionally occupy or use. They have noted their overall social and economic marginalisation, which limits their ability to successfully assert their rights. It has also been documented that indigenous peoples are among the groups most severely affected by the activities of the extractive sector⁴, the agro-industrial and the energy sectors. Reported adverse impacts⁵ range from impacts on indigenous peoples' right to maintain their chosen traditional way of life, with their distinct cultural identity⁶; to discrimination in employment and accessing goods and services (including financial

¹ UN Committee on Economic, Social and Cultural Rights (CESCR): General Comment No. 7 (1997) The right to adequate housing: forced evictions, para 10, E/1998/22, annex IV; General Comment No. 15 (2002) The right to water, E/C.12/2002/11, paras. 7, 16; UN Committee on the Rights of the Child (CRC): General Comment No. 11 (2009): Indigenous children and their rights under the Convention, CRC/C/GC/11 (2009), par. 16; General Comment No. 14 (2013): State obligations regarding the impact of the business sector on children's rights.

² A/HRC/EMRIP/2012/CRP.1; A/HRC/21/55.

³ A/HRC/24/41; A/HRC/FBHR/2012/CRP.1.

⁴ A/HRC/18/35; A/HRC/22/43; A/HRC/FBHR/2012/4. Cathal Doyle, Jill Cariño: Making Free Prior & Informed Consent a Reality. Indigenous Peoples and the Extractive Sector. London 2013.

⁵ U.N. Doc. E/CN.4/2006/97 (2006), para 25; Rights and Resources Initiative: Impact of the extractive industry on the collective land and forest rights of peoples and communities: A summary, 2012. http://www.rightsandresources.org/documents/files/doc_5915.pdf

⁶ Human Rights Committee Communication No. 511/1992, *Länsman and others v. Finland*, Views adopted on 26 October 1994; *Saramaka People v. Suriname*, Judgment (IACtHR, 12 Aug. 2008).

services); access to land and security of land tenure⁷; to displacement through forced or economic resettlement and associated serious abuses of civil and political rights, including impacts on human rights defenders⁸, right to life and bodily integrity.⁹

2. As indigenous peoples face a heightened risk of overall social and economic marginalisation, some are even more vulnerable to human rights abuses connected to business activities and are excluded from agreement processes and other consultations that irrevocably influence their lives. These include indigenous women being described as “third class citizens”¹⁰ and often subject to multiple forms of discrimination, based on gender and ethnicity. While economic development may offer opportunities for indigenous women, it can deprive them of their existing livelihood, increase their vulnerability to abuse and violence and undermine their social status¹¹. Further groups at risk of multiple discrimination include indigenous children, older persons, youth, people with disabilities as well as LGBT people.

⁷ A/65/281.

⁸ A/HRC/19/55.

⁹ Inter-American Commission on Human Rights, OEA/Ser.L/V/II Doc 66, 31 December 2011; A/HRC/16/51/Add.3, Para 34.

¹⁰ E/C.19/2004/23, Para. 3; E/C.19/2012/3. United Nations Office of the Special Adviser on Gender Issues and Advancement of Women and the Secretariat of the United Nations Permanent Forum on Indigenous Issues: Briefing Note No. 6, Gender and Indigenous Peoples' Human Rights.

¹¹ The Report of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism notes that the use of counter-terrorism laws to suppress indigenous groups' claims for economic, social and cultural rights has particular adverse impacts for women within those communities, including in some instances, killings of indigenous women leaders (UN Doc A/64/211, Para 28.).

3. Additionally, indigenous peoples feel the cumulative effect of vulnerabilities which individually affect other groups who face increased risk of human rights violations, such as peasants, seasonal workers, the landless and ethnic minorities. They are often targets of racial discrimination, are politically and economically marginalized, lack formal titles over their land and are often excluded from the regular labour market. Indigenous women often suffer specific forms of discrimination or abuse, such as sexual violence.

II. The United Nations Guiding Principles on Business and Human Rights

4. The Human Rights Council unanimously endorsed the United Nations Guiding Principles on Business and Human Rights in 2011 (the “Guiding Principles”)¹², the first comprehensive global standard on business and human rights, which have received widespread political support.

5. Within its mandate to “give special attention to persons living in vulnerable situations”¹³, the Working Group decided to highlight the impact of business operations on the rights of indigenous peoples, and to demonstrate the value of using the Guiding Principles in this specific context. The Working Group held an open consultation during its 4th session and received a number of submissions and suggestions from all

¹² A/HRC/Res/17/4.

¹³ A/HRC/Res/17/4, paragraph 6(f).

stakeholders¹⁴. Particular attention was paid to exchange and dialogue with indigenous peoples and their organizations, as well as seeking the views of the business community and individual business representatives, through meetings and workshops at various international fora. Reports produced by United Nations bodies mandated with the protection of indigenous peoples' rights were examined as primary sources of interpretation and application of those rights. The Working Group wishes to express its sincere appreciation to all those who engaged with it throughout the development of this report.

III. Part I - The State duty to protect indigenous peoples' rights

6. The Commentary to Guiding Principle 1 reaffirms that States as parties to international human rights treaties are the principal bearers of human rights obligations, and that they have a duty to respect, protect and fulfil the human rights of individuals within their territory and/or jurisdiction. The duty to protect implies that States must take measures to prevent or end infringement upon the enjoyment of a given human right caused by third parties. In the context of indigenous peoples' rights, such third parties are often business enterprises.

7. The duty to protect is derived from existing human obligations or commitments that States have undertaken and which are widely recognised by the international community. The most significant international instruments in the field of indigenous peoples' rights are the United Nations

¹⁴ A/HRC/WG.12/4/1.

Declaration on the Rights of Indigenous Peoples (UNDRIP)¹⁵; and International Labour Organization (ILO) Convention 169¹⁶. Significant progress has been made in recent years and indigenous peoples' rights to lands have been constitutionally or legally acknowledged¹⁷. Nonetheless, indigenous peoples continue to face many obstacles to the full enjoyment of their rights, beyond limitations on rights as are prescribed by law and necessary to protect the rights and freedoms of others, and in the interests for example of national security, public safety, and public order¹⁸. In some countries, legislation concerning indigenous peoples or human rights is inconsistent with other sectoral laws, in particular those related to mining or natural resource exploitation which often fail to include provisions ensuring respect for indigenous peoples' traditional ownership rights. Finally, the "implementation gap" between the legislation and the administrative, political or juridical practice of States, is still of concern particularly with regard to land programmes.¹⁹

8. The State duty to protect against human rights abuse by third parties is a standard of conduct. Therefore, States are not per se responsible for abuse

¹⁵ A/RES/61/295.

¹⁶ ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries. See also ILO Convention 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries.

¹⁷ Constitution of Nicaragua; *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-American Court of Human Rights, Judgment of 31 August 2001, Series C N0. 66, para. 151; Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, African Commission on Human and People's Rights, 276/2003 (4 February 2010), para. 209.

¹⁸ Limitations are expressed in various forms in international human rights laws, and are themselves interpreted restrictively.

¹⁹ Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, E/CN.4/2006/78.

of indigenous peoples' rights by private actors. However, States may breach the duty to protect where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse.²⁰ States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations; and States should, amongst other measures, provide effective guidance to business enterprises on how to respect human rights throughout their operations²¹. As noted in the Commentary to Guiding Principle 3, States should consider a smart mix of measures to foster business respect for human rights. A basic measure could be the requirement that business operations specifically and effectively consider the risks of impacting the rights of indigenous peoples; and provide guidance to this end.

A. Free, prior and informed consent and the State duty to protect

9. Free, prior and informed consent (FPIC) is a fundamental element of indigenous peoples' rights, on which the ability to exercise and enjoy a number of other rights rest. States have an obligation to consult and cooperate in good faith in order to obtain FPIC before the adoption of legislation or administrative policies that affect indigenous peoples²²; and the undertaking of projects that affect indigenous peoples' rights to land,

²⁰ Commentary to Guiding Principle 1.

²¹ Guiding Principles 2 and 3(c). See Guiding Principle 7 with regard to State support in conflict-affected areas.

²² Article 19 UNDRIP.

territory and resources, including mining and other utilization or exploitation of resources²³. In certain circumstances, there is an obligation to obtain consent of the indigenous peoples concerned, beyond the general obligation to have consent as the objective of consultation²⁴.

10. UNDRIP ties the enjoyment of many indigenous-specific rights to the requirement of seeking to obtain FPIC, including the rights to land, culture, development and subsistence, which are often affected by business impacts. FPIC is thus both an indicator of whether the State duty to protect has been observed, and an instrument to prevent adverse impact on human rights. For indigenous peoples, FPIC is an expression of their right to self-determination, and consequently, to control their own territories, resources and destinies. As such, any FPIC process should be as far as possible determined and controlled by the particular indigenous community.²⁵

11. The components of FPIC have generated much research and debate at national²⁶ and regional²⁷ level, and international human rights bodies²⁸ have provided useful guidance. While FPIC does not necessarily require

²³ Article 32 UNDRIP.

²⁴ Article 10 UNDRIP (relocation of indigenous peoples from their lands or territories); article 29 UNDRIP (storage or disposal of hazardous materials on indigenous peoples' lands or territories).

²⁵ Doyle & Cariño, p. 17.

²⁶ For example, see El Diquís hydroelectric project in Costa Rica (A/HRC/18/35/Add.8).

²⁷ The Inter American Court of Human Rights held that in the context of large-scale development projects within the ancestral territories of indigenous and tribal peoples which have a significant impact on their property rights and on the use and enjoyment of such territories, States had a duty to consult them and to obtain their free, prior, informed consent according to their customs and traditions (I/A Court H.R., Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, par. 134-137).

²⁸ A/HRC/12/34; A/HRC/24/41, paras 26-36; CERD General Recommendation XXIII on indigenous peoples urges that no decisions directly affecting these peoples' interests are taken without their consent; Human Rights Committee Communication No. 1457/2006, Ángela Poma Poma v Peru, Views adopted on 27 March 2009.

unanimity and may be achieved even when individuals or groups within the community explicitly disagree²⁹, the alleged difficulty of the identification of legitimate representatives of indigenous peoples is of particular importance, as well as the definition of “consent” in the context of indigenous customary institutions. Further challenges lie in applying FPIC where consent involves customary decision-making processes (for instance, if these exclude a significant proportion of the community, such as women), and knowing whether ‘consent’ which is given at the outset of an investment could be withdrawn at a later stage. States (and business enterprises, as per Part II below) are advised to seek an open and inclusive dialogue with attention to both men and women, including, where applicable, with national federations and umbrella organisations of indigenous peoples. When such an approach is taken, indigenous peoples will themselves identify their legitimate representatives. Likewise, the indigenous peoples affected should determine autonomously how they define and establish consent, while extra attention must be given to ensuring that women and other potentially disenfranchised groups are included in the process. Mechanisms and procedures should be established to verify that FPIC has been sought. This would also serve to ensure that businesses enterprises are not seen to create division within communities in relation to a proposed activity. In order for these mechanisms to function properly, indigenous peoples must be included in their development. If it is

²⁹ For example, IFC Performance Standard 7 para 12.

determined that the elements of FPIC have not been respected, it may lead to the revocation of consent given. There may be cases where the legitimacy of community representatives is disputed or where communities do not reach informed consent according to their own decision-making modes. In such cases, additional time and effort from all sides are required and responses should be guided by the principle of FPIC which flows from the rights of indigenous peoples and which cannot, where it is required by UNDRIP, be replaced by seemingly easier ways to obtain consent.

B. The State-Business nexus

12. State-owned or controlled corporations appear to be playing an increasing role in business activities which adversely impact on indigenous peoples, including in Latin America, Africa and Asia³⁰. Many of these enterprises are investing in resource extraction (mining, forestry or oil drilling) or infrastructure projects (dams, roads, pipelines, etc.) that affect indigenous lands and territories.

13. Large state-driven development programmes are often initiated and planned at senior government levels and implemented in close interaction between government bodies and large private or state-owned corporations. In many cases, such programmes affect territories inhabited or used by indigenous communities and carry a high risk of adverse impact on indigenous communities. When a State assigns strategic importance to the

³⁰ Kowalski, P, M Büge, M Sztajerowska and M Egeland (2013), *State-Owned Enterprises: Trade Effects and Policy Implications*, OECD Trade Policy Paper, No. 147, OECD Publishing.

realisation of a given project, indigenous communities are at an increased risk of political and economic marginalisation.

14. In situations where business enterprises are owned or controlled by the State, or receive substantial support from State agencies, the Guiding Principles provide that States should take additional steps to protect against human rights abuses by those business enterprises³¹ in order to meet their duty to protect the rights of indigenous peoples. This could be achieved through the development of a comprehensive policy framework prior to the planning and development of such programmes. Such a framework should, *inter alia*, ensure the full recognition and operationalization of the right of indigenous peoples to self-determination and to participate in decision-making in matters affecting their rights; their right to “determine and develop strategies for exercising their right to development” and “for the development or use of their lands or territories or other resources”³², and the principle of FPIC, which flows from these rights. In addition, the framework should establish effective remedy mechanisms, which should be binding for State authorities and the private or state-owned enterprises involved (see further Part III below).

C. Ensuring policy coherence

15. Free trade agreements (FTAs) and bilateral investment agreements (BITs) entered into by States with the aim of promoting trade and

³¹ Guiding Principle 4.

³² Articles 23 and 32 UNDRIP.

investment have a significant impact on indigenous peoples³³. Such agreements are reported to have been entered into on many occasions without proper consultation. They often concern investments in natural resource extraction in indigenous lands and territories, with risk of adverse impacts on the rights of indigenous communities, impacting livelihoods, culture, and indigenous peoples' ability to decide their own paths to development. Further, laws enacted and policies implemented further to these agreements can weaken the protection of indigenous lands and resources. In some cases, States have criminalized indigenous protests against such agreements by prosecuting indigenous leadership, or by repressing communities that have demonstrated against them³⁴.

16. While the aim of FTAs and BITs includes increasing economic growth by promoting and protecting international trade and investment, they can weaken States' abilities to regulate domestically, and as a consequence, restrict the ability of States to implement international human rights obligations, or to adhere to new obligations or evolving standards.³⁵

17. In this regard, Guiding Principle 9 provides that States should maintain adequate domestic policy space to meet their human rights

³³ Bilateral and multilateral investment agreements have grown from 300 in 1990 to 3000 in 2010. Aust, Anthony, *Handbook of International Law* 345 (2nd ed., 2010).

³⁴ Inter-American Commission on Human Rights, 2011, loc. cit, A/HRC/16/51/Add.3, Para 34.

³⁵ Pahis, Stratos, *Bilateral Investment Treaties and International Human Rights Law: Harmonization through Interpretation*, International Commission of Jurists, Geneva, 2011. The well-known risks of so-called stabilization clauses led the former Special Representative John Ruggie to encourage States to ensure a new model of trade agreements that "combine robust investor protections with allowances for bona fide public interest measures, including human rights, applied in a non discriminatory manner" (A/HRC/14/27, par.23).

obligations when pursuing investment treaties and contracts. In doing so, States should take into account the specific needs and vulnerabilities of indigenous peoples, which are gender sensitive, to avoid restricting their ability to meet their obligations towards them. Guiding Principle 8 addresses the need for policy coherence between business and investment agendas pursued by States and their human rights policies³⁶, which is of great relevance to indigenous peoples whose rights are frequently impacted by business and investment. States should also refer to United Nations Conference on Trade and Development's Investment Policy Framework for Sustainable Development³⁷ and the Principles for Responsible Contracts³⁸ for further guidance.

IV. Part II - The corporate responsibility to respect indigenous peoples' rights

18. Guiding Principle 11 provides that business enterprises have a responsibility to respect human rights, meaning that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. Guiding Principle 22 stipulates that where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes. Business enterprises may undertake other

³⁶ Guiding Principle 10 makes similar points for States acting as members of multinational institutions that deal with business-related issues.

³⁷ http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf.

³⁸ A/HRC/17/31/Add.3.

commitments, such as ensuring that local communities benefit from employment opportunities, which may contribute to the enjoyment of rights³⁹. But this does not offset a failure to respect human rights throughout their operations.

19. While business enterprises generally do not have direct human rights related legal obligations emanating from international instruments, they will often have legal obligations resulting from State laws that incorporate international standards, or contractual obligations with regards to respecting international standards. The Guiding Principles specify that the responsibility of business enterprises to respect human rights refers to “internationally recognized human rights”⁴⁰ and that business enterprises can have an impact on virtually the entire spectrum of these rights, as including the International Bill of Rights and the principles concerning fundamental rights set out in the ILO’s Declaration on Fundamental Principles and Rights at Work⁴¹. Depending on circumstances, business enterprises may need to consider additional standards⁴², such as UNDRIP and ILO Convention 169, where they may have an adverse impact on the

³⁹ See the impact benefit agreements signed by the Inuit of Nunavik and the Raglan mining company before the development of the Raglan mine (Canadian Centre for Community Renewal et. al., *Aboriginal Mining Guide*, 2009).

⁴⁰ Guiding Principle 12. The Commentary to Guiding Principle 23 states that in conflict-affected areas, business enterprises should treat the risk of being complicit in gross human rights abuses committed by other actors (e.g. security forces) as a legal compliance issue.

⁴¹ Adopted on 18 June 1998 (including the provisions on indigenous peoples in ILO Convention concerning Forced or Compulsory Labour (No. 29) and Convention concerning Discrimination in Respect of Employment and Occupation (No. 111)).

⁴² Commentary to Guiding Principle 12, including the standards of international humanitarian law in situations of armed conflict.

rights of individuals, both men and women, belonging to specific groups or populations that require particular attention, such as indigenous peoples⁴³.

20. There is a growing understanding by business enterprises of the need to address the legacy of past wrongs inflicted on indigenous communities as a result of business activities, which can in itself result in additional challenges in seeking to address potential adverse impacts going forward⁴⁴. Engaging in dialogue over legacy issues and developing an understanding of any continued impacts can be an important aspect of building a relationship with indigenous communities that enables effective implementation of the Guiding Principles and respect of indigenous peoples' rights.

21. Going forward, and in line with FPIC, good faith consultation and participation is crucial particularly in respect of business decisions that will have a substantial impact on indigenous peoples' rights, including large "community footprint" projects such as mining, agri-business and infrastructure. In practice, to avoid adverse impacts as well as business risks, businesses need to ensure that the State-led FPIC process is adequate. In the absence of an adequate State-led FPIC process, a business enterprise needs to consider carefully whether it can proceed with the project without the risk of causing or contributing to adverse impacts on the rights of indigenous peoples: the failure to inform, engage and consult with indigenous peoples, both men and women, not only undermines the ability

⁴³ See the Global Compact's upcoming Business Reference Guide on Indigenous Peoples' Rights (http://www.unglobalcompact.org/Issues/human_rights/indigenous_peoples_rights.html).

⁴⁴ Doyle, Cariño, loc. cit p 47.

of a business enterprise to respect rights (as it may not be aware of its potential or actual impacts), but it also fosters mistrust between communities and business enterprises and can lead to disruptions of operations.

A. Policy commitment

22. Guiding Principle 15 states that in order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances. As a basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a high-level public statement, making this commitment a clear, overarching policy that will determine their actions. The policy commitment is distinct from the operational policies and procedures necessary to embed the commitment through the business enterprise which help translate the high-level commitment into operational terms.⁴⁵

23. Guiding Principle 16 clarifies how this policy commitment should be developed. In the case of potential impacts on indigenous peoples, business enterprises should translate and make the policy commitment easily available to potentially affected indigenous groups, for example through outreach meetings and consultations. In making the policy commitment available and known to potentially affected indigenous peoples, business

⁴⁵ OHCHR Interpretive Guide on the Corporate Responsibility to Respect Human Rights, p. 26.

enterprises should take into account differences in language of groups, literacy levels (particularly among women and vulnerable groups), and cultural preferences for the way in which information is transmitted and received. It may be that in particular circumstances, business enterprises should be further encouraged to include specific provisions on its relationship with indigenous peoples, in order to acknowledge the specificities of their situations. In such cases, the clauses should be developed through a participatory process involving indigenous representatives and human rights experts, and be adopted, as with all policy commitments, at the most senior level.

24. A key element of such a policy commitment should be respect for indigenous peoples' specific rights, in particular respect for collective rights to lands and resources in accordance with their own customary laws, traditions and practices. Any policy commitment specifically referencing indigenous peoples should also lay out principles for engagement with indigenous communities, including good faith consultations, and when and how the business enterprise will seek to ensure respect for the principle of FPIC, flowing from the rights of indigenous peoples⁴⁶.

⁴⁶ Article 18 UNDRIP. See also the Canadian Supreme Court's ruling that in the context of Aboriginal title, the Crown's obligation to consult affected Aboriginal group(s) "must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue."; and that "the Crown is under a moral, if not a legal, duty to enter into and conduct negotiations [with Aboriginal peoples] in good faith (*Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010).

25. A number of inter-governmental agencies and international financial institutions have incorporated FPIC into their policies and programmes on indigenous peoples⁴⁷. In May 2013, the International Council on Mining and Metals (ICMM) adopted a policy statement on indigenous peoples⁴⁸, with a commitment to work to obtain the consent of indigenous peoples for new projects (and changes to existing projects) that are located on lands traditionally owned by or under customary use of indigenous peoples and are likely to have significant adverse impacts on indigenous peoples.

26. Beyond the development of the policy commitment, a review of corporate best practice⁴⁹ suggests that the following approaches to embedding the commitment into relevant policies and procedures are conducive to the effective implementation of the commitment:

27. First, business enterprises should, through their policy commitment, seek to build a work environment that is culturally aware, gender sensitive and inclusive, and insist on adequate understanding by employees and contractors of the specificities of indigenous peoples, and the respect of the rights, cultures and customs of indigenous peoples within the communities

⁴⁷ Strategy for Indigenous Development and its Operational Policy on Indigenous Peoples adopted by the Inter-American Development Bank (2006); European Bank for Reconstruction and Development. Guidance Note on Indigenous Peoples (2010).

⁴⁸ International Council on Mining and Metals, Indigenous Peoples and Mining, Policy Statement, May 2013. <http://www.icmm.com/publications/icmm-position-statement-on-indigenous-peoples-and-mining>. The policy statement has been criticised by some indigenous groups.

⁴⁹ Much has been done in extractives in comparison to other sectors such as agriculture, construction, or pharmaceutical (which often source plants for medicines using traditional knowledge and traditional lands). See ICMM, 2010, Good Practice Guide: Indigenous Peoples and Mining (<http://www.icmm.com/library/indigenouspeoplesguide>); IPIECA, 2012, Indigenous Peoples and the oil and gas industry: context, issues and emerging good practice. (<http://www.ipieca.org/publication/indigenous-peoples-and-oil-and-gas-industry-context-issues-and-emerging-good-practice>).

in which the projects are located. In this regard, business enterprises should organise specific trainings as an obligatory part of the contracting procedure.

28. Further, business enterprises should, in their policy commitment, recognize that land rights and tenure, including land-use and ownership rights based on customary laws, traditions and practices, can be the root of disputes between companies and indigenous peoples. They should identify ways in which to prevent such disputes and engage in reasonable efforts to prevent them, and if they occur resolve them through culturally appropriate mediation, using third parties that indigenous peoples trust.

29. With regard to consultation⁵⁰, business enterprises should include in their policy statement a requirement to ensure that information is conveyed in a manner that can be understood and to both men and women. Business enterprises need to be aware of the imbalance of power and take specific measures to address this, so that they and the community meet on an equal footing.

B. Human rights due diligence

30. Guiding Principles 17 to 21 define the parameters for human rights due diligence to be undertaken by business enterprises in order to identify, mitigate and account for how they address adverse human rights impacts. The Commentary to the Guiding Principles state that business enterprises

⁵⁰ Article 18 UNDRIP.

should pay special attention to any particular human rights impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization, such as indigenous peoples; and that they should seek to understand the concerns of potentially affected stakeholders by consulting them directly. Guiding Principle 19 states that in order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from impact assessments across relevant functions and processes, and take appropriate action. This action will vary according to whether the business enterprise causes or contributes to an adverse impact or whether it is involved solely through a business relationship; and the extent of its leverage in addressing the adverse impact.

31. Given the specificities of adverse impacts on indigenous peoples, generic Environmental, Social and Health impact assessments may not be sufficient to fully identify and address potential human rights risks⁵¹, especially with regard to their collective rights to land, resources and self-determination contained in UNDRIP⁵². Indigenous peoples' rights can be adversely impacted by acts of commission and omission. There may also be unintended consequences that may not be easily identified from standard impact assessments. Therefore, the requirement of meaningful consultation with indigenous peoples in the human rights due diligence process may be

⁵¹ Various industry initiatives address due diligence. See IPIECA, 2012, Human rights due diligence process: a practical guide to implementation for oil and gas companies (<http://www.ipieca.org/publication/human-rights-due-diligence-process-practical-guide-implementation-oil-and-gas-companies>).

⁵² A/66/288, paragraphs 93-102.

particularly important to enable business enterprises to identify the full range of actual and potential impacts, particularly to identify and address gender differentiated impacts. Business enterprises should ensure that impact assessment processes provide for an evidence-based and gender disaggregated review of socio-anthropological issues, pertaining to any adverse impacts on indigenous peoples living in project affected areas. Further, business enterprises should ensure that impact assessments are robust enough to detect differentiated impacts on possible vulnerable groups who may sustain greater adverse impacts from the same operation due to political, economic or social marginalization within the indigenous community.

V. Part III - Access to effective remedy

32. Guiding Principle 25 clarifies that States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when business-related human rights abuses occur, those affected have access to effective remedy. This includes considering ways to reduce legal, practical and other relevant barriers, such as those based on gender. Of particular relevance to indigenous peoples are the provisions for remedies included in UNDRIP⁵³ and in ILO Conventions 169, 29 and 111. The Inter American Court of Human Rights⁵⁴ has recognized the need for

⁵³ See Articles 8, 11, 27, 28, 32, 34, 37 and 40 UNDRIP. See EMRIP's Study on Access to justice in the promotion and protection of the rights of indigenous peoples (A/HRC/24/50).

⁵⁴ The Court has affirmed that indigenous peoples have the right to the existence of effective and prompt administrative mechanisms to protect, guarantee and promote their rights over ancestral territories.

States to ensure access of indigenous peoples to justice in a collective manner, in accordance with their culture. In doing so, it highlighted that judicial remedies which are only available to persons who claim the violation of their individual rights to private property are not adequate or effective to repair alleged violations of the right to communal property of indigenous and tribal peoples⁵⁵ and other forms of discrimination that could lead to a denial of access to remedy.

A. State-based judicial mechanisms

33. Guiding Principle 26 provides that States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy. The Commentary to the Guiding Principles recognises that legal barriers to access to remedy could include instances where certain groups, such as indigenous peoples, are excluded from the same level of legal protection of their human rights that applies to the wider population; and that individuals from groups at heightened risk of vulnerability or marginalization can face additional impediments to using mechanisms.

States must establish administrative procedures to resolve land claims in such a way that these peoples have a real opportunity to recover their lands. Such procedures should be accessible and simple and the mechanisms should be granted the necessary technical and material conditions to provide a timely response to the requests (I/A Court H.R., Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125, par. 102).

⁵⁵ I/A Court H.R., Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, par. 179.

34. Additional measures may therefore be required to ensure non-discrimination against indigenous peoples in the judicial sphere through the identification and removal of obstacles to equal access, including in the use of indigenous languages. States should ensure that legal systems recognise indigenous peoples as subjects of international law and take into account the social realities of their specific status. This may require States to allow and require courts to recognise indigenous peoples' customary laws, traditions and practices, and customary ownership over their lands and natural resources in judicial proceedings⁵⁶.

B. State-based non-judicial mechanisms

35. The Guiding Principles recognise that State-based non-judicial mechanisms can play an essential role in complementing and supplementing judicial mechanisms. Even where judicial systems are effective and well-resourced, they cannot carry the burden of addressing all alleged abuses.⁵⁷ Non-judicial mechanisms may be more accessible, imply significantly lower costs and pursue a dialogue-oriented approach, potentially allowing for a speedier resolution of a dispute. In order to ensure their effectiveness, non-judicial mechanisms should meet the criteria in Guiding Principle 31 (namely that they be legitimate, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning). While the mechanisms described in this report can play a very important role for

⁵⁶ A/HRC/24/50.

⁵⁷ Commentary to Guiding Principle 27.

the purposes of accountability, the extent to which they comply fully with the criteria laid down in Principle 31 should be explored further.

36. National Human Rights Institutions or Ombudsman offices have an important role to play in addressing indigenous peoples' grievances regarding business-related human rights abuses, in particular those referred to natural resource exploitation⁵⁸. As with judicial mechanisms, States should consider ways to address any imbalance between the parties to business-related human rights claims; and any additional barriers to access faced by indigenous peoples. This could arise when for example mechanisms are unable, due to lack of funding or human resources, to effectively reach out to all those affected across the whole territory of the State, thereby making it difficult for indigenous peoples to gain access to the mechanism; or where language barriers impede access. The mechanisms should be granted adequate human, financial and technical resources (including training and expertise in business-related impacts) and their capacity increased to effectively monitor human rights impacts on indigenous peoples, including those arising from business. They should be mandated to investigate complaints; to verify the accuracy of information submitted by the parties, including, where necessary to undertake site visits; to reach a determination of whether rights have been violated; and to make their decisions public. The mechanisms should be further mandated to make

⁵⁸ See the statement of the Ibero-American Federation of Ombudsmen acknowledging the need to guarantee the right to consultation as a means to ensure the right to decide their own priorities in development (25 April 2013).

recommendations beyond a particular case, such as encouraging changes in State or corporate policies. They should be mandated to follow up on their decisions, and States should carry out awareness-raising campaigns amongst indigenous peoples for these remedies. Finally, the mechanisms should be required to take guidance from the Guiding Principles when investigating individual complaints relating to business-related impacts on indigenous peoples' rights.

C. Extraterritorial activities of business enterprises

37. The Commentary to the Guiding Principles acknowledges that, at present, States are not generally required under international human rights law⁵⁹ to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction⁶⁰. However, nor are they prohibited from doing so. Many States have recognised the strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, and have adopted a number of approaches in this regard. This is particularly important in conflict-affected areas, where the host State may be unable to protect human rights adequately due to a lack of effective control. Where transnational corporations are involved, their home States have roles to play in assisting those corporations and host States to ensure that

⁵⁹ Several treaty bodies have called for extraterritorial jurisdiction over business enterprises (CESCR General comment No. 15 on the right to water; CERD/C/CAN/CO/19-20 CERD/C/NOR/CO/19-20).

⁶⁰ Cfr. The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, developed by a group of experts.

businesses are not involved with human rights abuse⁶¹. These approaches have sought in part to address the challenges faced by victims to get access to effective remedy in their home country. As with all grievance mechanisms, States should take into account the specificities of indigenous peoples and ensure that any barriers to their access to the mechanisms are addressed and removed. The Commentary to Guiding Principle 26 identifies some of the legal, practical and procedural barriers to accessing judicial remedy, which include “where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim”.

38. The measures which have been adopted range from international agreements which require States to exercise extraterritorial jurisdiction over corporations⁶²; to national laws⁶³ and measures with extraterritorial implications⁶⁴; and to state-based non-judicial mechanisms such as the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises.

⁶¹ Commentary to Guiding Principle 7. See also General Principle 3.2 of the FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, 2012.

⁶² Article 3 of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; Articles 5(2) and 8 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Article 9(2) of the International Convention for the Protection of All Persons from Enforced Disappearances.

⁶³ See for example The Hague district court’s decision on 30 January 2013 in A.F. Akpan & anor -v- Royal Dutch Shell plc & anor C/09/337050/HAZA 09-1580.

⁶⁴ For example, a reporting requirement imposed on the corporate parent with regard to a company’s overall human rights impacts, which may include those of its overseas subsidiaries; Burma Responsible Investment Reporting Requirements, which requires any US company investing more than 500,000USD in Myanmar to report on their human rights impacts according to the Guiding Principles.

39. The OECD Guidelines are recommendations by governments covering all major areas of business ethics, including corporate steps to obey the law and observe internationally-recognised standards. The Guidelines were updated in 2011 and have a human rights chapter aligned with the Guiding Principles. They are supported by a mechanism of National Contact Points (NCPs)⁶⁵, established by adhering governments to promote and implement the Guidelines, and which assist business enterprises and their stakeholders to take appropriate measures to further the observance of the Guidelines. NCPs provide a mediation and conciliation platform for resolving practical issues that may arise with the implementation of the Guidelines, which has been used by indigenous peoples⁶⁶.

40. Currently, companies can voluntarily decide whether to participate or not in a mediation. Some stakeholders have suggested that NCPs should have further tools at their disposal to encourage companies to engage in mediation in cases brought before them under the “specific instances”

⁶⁵ <http://www.oecd.org/daf/inv/mne/ncps.htm>. They also include a new provision regarding stakeholder engagement (Chapter II.14) and the OECD is currently exploring the potential for a user guide for stakeholder engagement and the extractive industry under the OECD Guidelines.

⁶⁶ See for example complaint brought by Survival International with the UK NCP against British mining corporation Vedanta Resources. In its statements, the NCP confirmed the substance of the allegations and opined that Vedanta acted in breach of the OECD Guidelines (Initial Assessment, 27 March 2009; Final Statement, 25 September 2009; Follow up to Final Statement, 12 March 2010). The NCP recommended that the company work with the Dongria Kondh people to explore alternatives to resettlement and to include a human rights impact assessment in its project management process. The Supreme Court of India recently issued a ruling effectively banning Vedanta from constructing the mine without the Dongria Kondh’s consent (Orissa Mining Corporation Ltd. V. Ministry of Environment & Forest & Others, Judgment of the Supreme Court of India, 18 April 2013).

procedure⁶⁷; and make appropriate recommendations on the implementation of the Guidelines in situations involving indigenous peoples.

D. Non-State based grievance mechanisms / operational-level grievance mechanisms

41. Guiding Principle 28 provides that States should consider ways to facilitate access to effective non-State based grievance mechanisms dealing with business-related human rights harms, and Guiding Principle 29 states that business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely affected⁶⁸. Given the requirement that access be provided to an *effective* remedy, the performance of operational-level grievance mechanisms needs to be appropriately assessed. The development of performance indicators that can be used by stakeholders to encourage proper functioning of grievance mechanisms is important, and can be used by stakeholders to understand how operational-level grievance mechanisms are working, and to hold business enterprises accountable.

42. Experience also suggests that the development of grievance mechanisms cannot be separated from the broader dialogue and engagement with indigenous communities⁶⁹. Such engagement should be based on the

⁶⁷ OECD Guidelines Procedural Guidance, Part C.

⁶⁸ The OECD Guidelines and the International Finance Corporation's Performance Standards on Environmental and Social Sustainability specifically mention the need for operational-level grievance mechanisms.

⁶⁹ Further to broad protests, Sakhalin Energy Investment Company Ltd. negotiated a development plan for the indigenous peoples of Sakhalin, including a distinct community grievance mechanism in addition to its existing grievance mechanism. This was as a result of consultations which noted the

acknowledgement of the status of indigenous peoples as collective rights-holders and where required by UNDRIP, be framed in an FPIC process. In this regard, the process of FPIC itself can provide an important remedial mechanism⁷⁰. Given the recognition in UNDRIP of the specificities of indigenous peoples' laws and customs, business enterprises should consider identifying adequate and culturally and gender appropriate remedy mechanisms, as an integral part of any contractual relationship with indigenous peoples.

43. The Guiding Principles require that operational-level grievance mechanisms reflect the criteria in Principle 31 to ensure their effectiveness in practice. Operational level mechanisms should furthermore be based on engagement and dialogue, implying consultation with the stakeholder groups for whose use they are intended and focusing on dialogue as a means to address and resolve grievances. A grievance mechanism can only serve its purpose if the people it is intended to serve know about it, trust it, and are able to use it. In this regard, it is important for grievance mechanisms to be constructed in a gender sensitive manner.

44. Various initiatives are being undertaken by business enterprises, industry associations, as well as multistakeholder groups, to further advance

specific nature of complaints raised by indigenous peoples, more often related to environmental harm and impacts on their traditional livelihoods. It also set up a Community Liaison network (with one IP-specific liaison) tasked with ensuring daily communication with communities, including on grievances. Natalia Novikova, Emma Wilson: The Sakhalin-2 project grievance mechanism, in: Emma Wilson, Emma Blackmore (eds): *Dispute or Dialogue? Community perspectives on company-led grievance mechanisms*. IEED March 2013, p. 88. See also IPIECA, 2012, *Operational level grievance mechanisms: good practice survey*.

⁷⁰ In particular articles 28 and 32 UNDRIP.

good practices. The Working Group recalls its on-going project to build capacity to enhance access to judicial and non-judicial remedy in the area of business and human rights⁷¹. The following elements have emerged as good practices for business enterprises in handling grievances from indigenous peoples. Namely, mechanisms should be developed in the context of a consultation process with the indigenous community. Specific attention should be paid to ensuring accessibility, responsiveness and local ownership of the mechanism: this can help ensure that it meets indigenous peoples' needs, that it will be used in practice, and that there is a shared interest in ensuring its success. This is particularly crucial for indigenous peoples who continue to suffer from power imbalances, and where legitimacy of any grievance mechanism will be key. Capacity building should be undertaken to develop relevant legal knowledge and skills, and the grievance log should be accessible to the parties, ensuring a basic starting principle in favour of transparency, but with due regard for the protection of victims in cases where reprisals or pressure are likely. Finally, to ensure the independence and legitimacy of grievance mechanisms, any periodic review of the mechanism should incorporate feedback from indigenous communities.

E. Customary institutions as non-judicial grievance mechanisms

45. Indigenous peoples have developed a wealth of dispute resolution mechanisms and judicial systems, based on their respective customary laws,

⁷¹ A/HRC/23/32, para. 64.

traditions and practices.⁷² While the primary use for indigenous dispute resolution mechanisms is the resolution of disputes and grievances between members of the same community, cases have been documented where such mechanisms have been successfully applied to remedy abuses of indigenous peoples' rights by business enterprises. Increasingly⁷³, international human rights practice and jurisprudence⁷⁴ recognize the importance of indigenous peoples' customary laws, traditions and practices as a remedial instrument. Studies suggest that their use is more efficient in addressing indigenous peoples' grievances than sole reliance on national legal systems or other non-judicial remedy mechanisms.⁷⁵

46. Their approach has often been described as participatory and dialogue-oriented, and could prove a useful additional mechanism for business enterprises to build trust with indigenous peoples by recognising the importance that indigenous peoples' customary laws, traditions and practices place on restoring peace and harmonic relations. A settlement

⁷² In Tanzania, for example, "customary laws are widely used and accepted in most rural areas in solving local water conflicts. Respondents reported that most disputes are settled by water user groups and customary institutions." Leticia N. Nkonya: 'Customary Laws for Access to and Management of Drinking Water in Tanzania', 2/1 Law, Environment and Development Journal (2006), p. 50.

⁷³ Katrina Cuskey: Customs and Constitutions: State recognition of customary law around the world (Gland: IUCN, forthcoming) notes that 112 national constitutions contain provisions relevant to recognition of customary law.

⁷⁴ See the case law of the Inter-American Court of Human Rights (I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs. Judgment of January 31, 2001. Series C No. 79, par. 151. I/A Court H.R.; Yakye Axa v. Paraguay, 2005; Sawoyamaka v. Paraguay, 2006 ; I/A Court H.R., Saramaka People v. Suriname, par. 139); the Canadian Supreme Court (Calder v. Attorney General of British Columbia, 1973; Delgamuukw v. British Columbia, 2007; Taku River Tinglit v. British Columbia (2004); the Constitutional Court of South Africa (Case Cct 19/03 Alexkor Limited (First Appellant); The Government of the Republic of South Africa (Second Appellant) versus The Richtersveld Community and others 14 October 2003).

⁷⁵ Maria Roda L Cisnero: Rediscovering Olden Pathways And Vanishing Trails To Justice And Peace: Indigenous Modes Of Dispute Resolution And Indigenous Justice Systems.in: Justice Reform Initiatives Support Project (ed): A SOURCEBOOK ON ALTERNATIVES TO FORMAL DISPUTE RESOLUTION MECHANISMS, 2008, pp. 91-128.

based on customary laws, traditions and practices has the potential of ensuring sustainable, longer-lasting results acceptable to all involved parties, including business enterprises, which may be less likely to result from a judicial process. Further, customary grievance mechanisms are often significantly easier to access, and are free of the costs associated with the judicial system.

47. For indigenous peoples, using customary laws, traditions and practices as a remedy instrument in relation to business operating in their territories offers the potential of feeling empowered over their own destiny, as well as fully engaged in decision-making relating to their resources and territories. At the same time, such an approach puts a very substantial responsibility on indigenous communities, including to ensure that the mechanism is in conformity with the effectiveness criteria laid out in Guiding Principle 31.

F. International and regional human rights mechanisms

48. As noted in the Commentary to Guiding Principle 28, the complaints procedure provided by the ILO's Constitution⁷⁶, United Nations treaty monitoring bodies⁷⁷ and regional human rights mechanisms are also deemed non-State-based grievance mechanisms. In particular, the consideration of

⁷⁶ Article 24 of the ILO Constitution has been used by indigenous peoples for cases of State infringement of their obligations under various articles of Convention 169 (including Articles 6, 14 and 15) in the context of business activities.

⁷⁷ In addition to examples highlighted elsewhere in this report, CERD has adopted concluding observations acknowledging racial discrimination against indigenous peoples as a consequence of land policies and extractive industries activities; urged States to adopt policies and legislation to end such discrimination; and noted the need for States to develop consultation and obtain FPIC of indigenous peoples in the case of the exploitation of natural resources on their lands and territories (CERD/C/CHL/CO/15-18; CERD/C/PER/CO/14-17; CERD/C/ARG/CO/19-20; CERD/C/PAN/CO/15-20; CERD/C/RUS/CO/19).

individual communications by United Nations treaty bodies has provided an avenue for remedy for indigenous peoples⁷⁸, despite the challenges faced by treaty bodies⁷⁹. States should raise awareness of, or otherwise facilitate access to, such international and regional⁸⁰ monitoring bodies, alongside the mechanisms provided by the State itself.

G. Multilateral Development Banks' accountability mechanisms

49. Multilateral development banks (MDBs)⁸¹ provide indigenous peoples with the possibility to access their accountability mechanisms, in order to raise concerns or lodge a complaint about projects supported by MDBs affecting them or their environment. These mechanisms have proven to be a means of holding MDBs accountable for actions that cause or threaten to cause harm to affected complainants or the environment; as well as for actions that are inconsistent with MDBs' own operational policies and procedures⁸², including safeguard policies created for the purpose of preventing harm to indigenous peoples⁸³.

⁷⁸ See footnote 28.

⁷⁹ See the intergovernmental process launched to strengthen and enhance the effective functioning of the treaty body system (<http://www.ohchr.org/EN/HRBodies/HRTD/Pages/TBStrengthening.aspx>).

⁸⁰ See discussions above on the jurisprudence of the Inter American Human Rights System.

⁸¹ Leonardo A. Crippa, *Multilateral Development Banks and Human Rights Responsibility*, 25 AM. U. INT'L. REV. 533 (2010).

⁸² Daniel D. Bradlow, *Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions*, 36 GEO. J. INT'L L. 408 (2005).

⁸³ The International Finance Corporation created a Compliance Advisory Ombudsman with a compliance, advisory and dispute resolution mandate with regard to its Performance Standards, including Performance Standard 7 on Indigenous Peoples http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines_2013.pdf; http://www1.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES. The Inter-American Development Bank set up the Independent Consultation and Investigation Mechanism with a similar mandate and an added "judicial clause" which prohibits

H. Effectiveness of remedy and indigenous peoples

50. Guiding Principle 31 lays down criteria to assess whether a particular judicial or non-judicial remedy can be deemed to be ‘effective’.

51. First, in order to meet the requirement of ‘legitimacy’, remedy mechanisms should be set up in such a way as to fully acknowledge the status of indigenous peoples as having the right to the full enjoyment, as a collective or individuals, of all human rights and freedoms as recognised in international human rights law, and take into account rights and standards associated with this status. Second, remedy mechanisms should afford due recognition to the role of indigenous peoples’ customary laws, traditions and practices and the authority of their governance institutions, both for substantive and for procedural reasons; while ensuring that they respect the rights and freedoms of others. Such recognition should acknowledge that existing indigenous peoples’ internal grievance mechanisms may be empowered to address violations occurring within territories under their traditional jurisdiction. In this regard, the Working Group highlights that any non-judicial grievance mechanism, including traditional mechanisms of indigenous peoples should be rights-compatible (in process and outcome).

52. Further, in line with the requirement of ‘accessibility’ in Guiding Principle 31, remedy mechanisms should be specifically accessible to indigenous peoples, including both men and women. Accessibility includes

admissibility of complaints if they “raise issues under arbitral or judicial review by national, supranational or similar bodies”
(<http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35074768>, Article 37(i) Exclusions).

their physical accessibility, e.g. the place and timing of proceedings should be chosen in such a manner allowing indigenous representatives to be physically present. As indigenous peoples often settle in remote, peripheral regions of their respective states, ensuring physical accessibility of remedy mechanisms often requires special measures. It also includes linguistic, cultural and gendered accessibility.

53. More broadly, and although the Guiding Principles do not address the issue of the content of the remedy per se, Article 28 of UNDRIP⁸⁴ elaborates what would amount to a rights-compatible outcome of grievance mechanisms for indigenous peoples when their lands have been confiscated, taken, occupied or damaged without their free, prior and informed consent⁸⁵: “indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation”; and that “unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress”.

⁸⁴ See also CERD General Comment 23 of 1995 and Articles 15, 16 and 20 ILO Convention 169.

⁸⁵ Indigenous peoples are also entitled to redress with respect to cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent (article 11 UNDRIP).

VI. Conclusions and recommendations

A. Conclusions

54. The Guiding Principles provide an authoritative guide for States, business enterprises and indigenous peoples to meet international standards and enhance practices with regard to preventing and addressing adverse business-related impacts on the human rights of indigenous peoples, so as to achieve tangible results. As highlighted in the Guiding Principles, particular attention should be paid throughout to the rights, needs and challenges faced by those at heightened risk of becoming vulnerable or marginalised. This is crucial for indigenous peoples, who are often disproportionately adversely impacted by business activities: States and business enterprises should therefore address indigenous peoples' rights when meeting their respective State duty to protect against human rights abuses; and the corporate responsibility to respect human rights. The Working Group urges relevant bodies and stakeholders to conduct further studies into the effectiveness of existing remedy mechanisms available to indigenous peoples, including judicial and non-judicial mechanisms, extraterritorial remedies, as well as indigenous dispute resolution modes, with the goal of developing fact-based comprehensive guidance

for States, international institutions, business enterprises and indigenous peoples⁸⁶.

B. Recommendations

55. Recommendations to States:

(a) Consider ratification of International Labour Organization Convention 169 and pursue a range of measures to fully implement the United Nations Declaration on the Rights of Indigenous Peoples; particularly for home states of transnational corporations operating in territories used or inhabited by indigenous peoples, even if no indigenous populations reside within their borders;

(b) Use the Guiding Principles to clarify the duties and responsibilities of actors in preventing and addressing the human rights impacts of businesses on indigenous peoples' rights;

(c) State the expectation that all business enterprises domiciled in its territory respect human rights throughout their operations; set expectations and obligations of business enterprises and other actors in addressing business-related impacts on indigenous people's human rights, particularly in conflict-affected areas; encourage business enterprises to communicate and engage on their policies and procedures for addressing their human rights impacts and be accessible to all, including both men and women;

⁸⁶ See A/HRC/23/32, para. 64. A/HRC/24/41; A/HRC/EMRIP/2013/2.

(d) Ensure that strengthened monitoring and enforcement mechanisms are put in place to prevent and address any adverse human rights impacts of businesses, including integrating and applying gender sensitive human rights considerations into relevant domestic laws, policies, regulations and contracts such as bi-lateral investment treaties and host-government agreements, and the granting of concessions for the exploration or extraction of natural resources;

(e) Ensure that they maintain adequate policy space to meet their human rights obligations relating to the rights of indigenous peoples when pursuing investment treaties or contracts, by taking into account the specific needs and vulnerabilities of indigenous peoples;

(f) Ensure that indigenous peoples who are actually or potentially impacted by business activities have complete and timely access to all relevant information to ensure they are able to participate effectively in key decisions that affect them; and that meaningful gender sensitive consultations with indigenous peoples become an essential component of all contracts entered into with international investors;

(g) When developing a national action plan for the implementation of the Guiding Principles, consider the particular impacts of business activities on indigenous peoples and the necessary remedy measures;

(h) Refer to United Nations Conference on Trade and Development Investment Policy Framework for Sustainable Development and the

Principles for Responsible Contracts for guidance on investment contracts, and integrate the management of human rights risks into State-investor contract negotiations, particularly as relevant to the rights of indigenous peoples;

(i) Members of the Organization for Economic Cooperation and Development should ensure that National Contact Points are independent, impartial and fully resourced to address indigenous peoples' grievances. This includes knowledge of indigenous peoples' rights including FPIC, and familiarity with indigenous modes of decision-making and customary laws, traditions and practices; as well as making appropriate recommendations on implementation of the OECD Guidelines in cases involving indigenous peoples;

(j) Home States of multinational enterprises consider ways to ensure that indigenous peoples affected by the operations of those enterprises abroad have access to effective remedy;

(k) Develop a comprehensive policy framework prior to the planning and development of projects involving business enterprises owned or controlled by the State, or receiving substantial support from State agencies, laying out the additional steps to protect the rights of indigenous peoples;

- (l) Consider ways to ensure that policies and regulations in place enable the effective implementation of FPIC requirements in the context of business activities;**
- (m) Review and amend existing remedial mechanisms, as appropriate, to ensure alignment with the Guiding Principles, and assess their appropriateness and effectiveness for protecting the rights of indigenous peoples;**
- (n) Reinforce the capacity of judges, lawyers and prosecutors to address grievances brought by indigenous peoples related to business activities; ensure that mandatory training for judges and lawyers includes gender sensitive international human rights obligations, including standards relating to business and human rights and indigenous peoples;**
- (o) Devote adequate human, financial and technical resources to national human rights institutions, and increase their capacity to effectively monitor and address impacts on indigenous peoples' rights;**
- (p) Carry out awareness-raising campaigns, together with relevant stakeholders, to allow indigenous peoples within its jurisdiction to avail themselves of the legal and non-legal remedies available to assist them;**
- (q) Carry out capacity-building for indigenous peoples to develop their own representative structures, to ensure they are able to participate effectively in key decisions that affect them**

56. Recommendations to business enterprises:

(a) Comply with their responsibility to respect human rights, including by adopting a gender sensitive human rights policy, carrying out human rights impact assessments with regard to their current and planned operations, and addressing any adverse human rights impacts that they cause, contribute to or are linked to, including through exercising leverage in their business relationships to address the adverse impact; and paying particular attention to any operations in indigenous peoples territories and lands;

(b) Commit to respecting the United Nations Declaration on the Rights of Indigenous Peoples and International Labour Organization Convention 169 in their policy commitments; human rights due diligence process; and remediation processes;

(c) Ensure that operational-level grievance mechanisms reflect the criteria in Guiding Principle 31; that they are based on gender sensitive engagement and dialogue, by consulting indigenous peoples and focusing on dialogue as a means to address and resolve grievances;

(d) Consult and engage regularly and directly with men and women in the communities where their operations take place, and inform them as to the way their lifestyles, livelihoods and human rights may be affected, giving due attention to the different methods of informing and consulting that may be required, due to culture and language, as distinct from the rest of the population;

(e) Share their experiences broadly in meeting their responsibility to respect indigenous peoples' rights with other enterprises within and across sectors; and encourage all sectors to develop guidance within their industries.

57. Recommendations to indigenous peoples

(a) Ensure that their decision-making protocols with regard to any FPIC process are developed, described, strengthened through their own representative institutions and in accordance with their own procedures and where possible codified, in a way that brings greater specificity to assist in their application; that such law(s) are understandable and accessible to business enterprises and States; and that the processes and laws are fully in conformity with international human rights law;

(b) Consider strengthening their institutions, through their own decision-making procedures, in order to set up representative structures, including both men and women, that facilitate their relationship with business activities, in particular in relation to processes of consultation and of FPIC when these activities may have an impact or directly affect them or their lands and resources, as well as those dealing with their right to redress or compensation and/or benefit sharing from the same activities.
