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International expert group meeting on the theme “Indigenous peoples, business, autonomy and the human rights principles of due diligence, including free, prior and informed consent”

Note by the Secretariat

Summary

The international expert group meeting on the theme “Indigenous peoples, business, autonomy and the human rights principles of due diligence, including free, prior and informed consent” was held virtually from 6 to 10 December 2021. The present note contains the report of the meeting.



Report of the international expert group meeting on the theme “Indigenous peoples, business, autonomy and the human rights principles of due diligence, including free, prior and informed consent”

I. Introduction

1. Many indigenous peoples occupy lands rich in natural resources and biological diversity that are valuable for business operations. According to a 2008 World Bank report, traditional indigenous territories encompass up to 22 per cent of the world’s land surface and coincide with areas that hold 80 per cent of the planet’s biodiversity, while only 11 per cent of world forest lands are legally owned by indigenous peoples and communities.¹ Further, a recent report states that indigenous peoples and local communities² customarily claim and manage over 50 per cent of the world’s land while they legally own just 10 per cent. As a result, at least 40 per cent of the world’s land surface – around 5 billion hectares – remains unprotected and vulnerable to commercial pressures, including land-grabbing by more powerful entities such as governments and corporations, as well as environmental destruction.³

2. Although the rights of indigenous peoples, inter alia, to self-determination, lands, territories, resources and free, prior and informed consent, including in business contexts, are guaranteed in international standards, those rights are very often not recognized or effectively implemented in many countries. Even in countries, where indigenous peoples have legal recognition of their rights, those rights are often violated for projects such as mining and logging concessions, conservation, mono-cropping and biofuel plantations, mega-dams and other investments.

3. Laws and activities related to business and development (narrowly understood as economic growth) are frequently designed and implemented without the meaningful participation of indigenous peoples, even when those laws and projects directly affect them. Legal norms, including international investment agreements, generally privilege businesses and their profits as part of a free market-based capitalist system, resulting in indiscriminate exploitation of natural resources at the expense of indigenous peoples dependent on those resources.

4. The human rights impacts on indigenous peoples include dispossession of their lands and resources; loss of their livelihoods, knowledge, cultures and languages; disintegration of their social bonds; and erosion of their overall identity. Additionally, indigenous peoples often have very limited access to effective remedy or justice for such human rights violations. Furthermore, when indigenous peoples defend their rights against harmful business activities, they frequently face reprisals and risks,

¹ Claudia Sobrevila. “The role of indigenous peoples in biodiversity conservation: the natural but often forgotten partners” (Washington, D.C., International Bank for Reconstruction and Development and World Bank, 2008).

² There is no recognition of “local communities” under international law, but they are considered to encompass communities that do not self-identify as indigenous but that share similar characteristics of social, cultural and economic conditions that distinguish them from other sections of the national community, whose status is regulated wholly or partially by their own customs or traditions, and who have long-standing, culturally constitutive relations to lands and resources. See <https://ipccresponse.org/home-en>.

³ Rights and Resources Initiative, “Who owns the world’s land? A global baseline of formally recognized indigenous and community land rights” (Washington, DC, 2015). Available at https://rightsandresources.org/wp-content/uploads/GlobalBaseline_web.pdf.

such as harassment, criminalization, disappearance and the killing of their leaders and human rights defenders.⁴

5. Indigenous peoples also face discrimination in receiving benefits from business operations, or poor working conditions in those operations. At the same time, businesses and governments frequently appropriate indigenous knowledge and cultures for commercial profit without any consultation or the consent of the communities concerned.

6. The issue of business-related impacts on the rights of indigenous peoples has been addressed by a number of United Nations mechanisms, including treaty bodies and bodies mandated to deal specifically with indigenous peoples.⁵

7. The United Nations Declaration on the Rights of Indigenous Peoples provides that indigenous peoples have the right to self-determination, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development (art. 3). Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions (art. 4). The Declaration also affirms that indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development (art. 23).

8. Of particular relevance in business contexts are their rights to lands, territories and resources guaranteed in the Declaration. According to the Declaration, indigenous peoples have the right to lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired, and States should give legal recognition and protection to these lands, territories and resources (art. 26). States should also establish and implement processes to recognize and adjudicate indigenous peoples' rights in relation to their lands, territories and resources (art. 27).

9. The Declaration explicitly requires obtaining the free, prior and informed consent of indigenous peoples, which is considered a way of exercising their right to self-determination, before:

- Their relocation from their lands or territories, after an agreement on just and fair compensation and, where possible, with the option of return (art. 10)
- Adopting and implementing legislative or administrative measures that may affect them (art. 19)
- Storage or disposal of hazardous materials on their lands or territories (art. 29.2)
- Approval of any project affecting their lands or territories and other resources, in particular in connection with the development, utilization or exploitation of mineral, water or other resources (art. 32).

10. The Guiding Principles on Business and Human Rights provide a global normative framework for preventing and addressing the risks of human rights impacts of business activities, with the objective of enhancing standards and practices with regard to business and human rights.

11. In the commentary to the Guiding Principles, indigenous peoples are recognized as one of the groups facing challenges to their rights, explicitly referred to as follows:

- In meeting their duty to protect, States should provide guidance to business enterprises on respecting human rights, advising on how to consider effectively

⁴ See [A/HRC/39/17](#).

⁵ See, for example, [A/68/279](#), [A/71/291](#), [A/HRC/18/35](#), [A/HRC/24/41](#) and [A/HRC/33/42](#).

issues of gender, vulnerability and/or marginalization, while “recognizing the specific challenges that may be faced by indigenous peoples [among others]”

- Within the corporate responsibility to respect internationally recognized human rights, business enterprises, depending on circumstances, might need to consider additional human rights standards
- Under access to remedy through State-based judicial mechanisms, States should take appropriate steps to ensure the effectiveness of those mechanisms in addressing business-related human rights abuses, including to reduce legal barriers.

12. Since the adoption of the Guiding Principles, many States have formulated or are in the process of formulating national action plans for the implementation of the Guiding Principles. While the effective involvement of indigenous peoples in the drafting of the national action plans has been rare, in countries such as Chile and Kenya indigenous peoples have been separately consulted and their representatives included in the mechanisms for the follow-up, monitoring and review of the plans.⁶

13. While many States in North America and Latin America have adopted legislation, practices and guidelines on consulting with indigenous peoples to obtain their free, prior and informed consent, indigenous peoples are also establishing their own protocols related to such consent as tools in preparing States and other parties to engage in consultations or consent processes with them setting out how, when, why and whom to consult. Those protocols are commonly developed in response to the encroachment and failure of State authorities and businesses to respect the need to obtain the free, prior and informed consent of indigenous peoples.⁷

14. There are also various measures being undertaken by business enterprises, industry associations and multi-stakeholder initiatives to implement the Guiding Principles in general and with specific references to indigenous peoples’ rights. For example, in May 2013, the International Council on Mining and Metals adopted a position statement on indigenous peoples.⁸ Similarly, the Forest Stewardship Council updated the Principles and Criteria for Forest Stewardship in 2014 to include the right of indigenous peoples to free, prior and informed consent related to forest management activities that may affect them.⁹ Although these business and multi-stakeholder initiatives have been welcomed, indigenous peoples have noted limitations in their implementation and effectiveness.

II. Overview of the discussions of the meeting

15. Every year, the Department of Economic and Social Affairs of the Secretariat organizes an international expert group meeting on a theme identified by the Permanent Forum on Indigenous Issues and endorsed by the Economic and Social Council. The present report is of the expert group on its 2021 meeting, which was on the theme of “Indigenous peoples, business, autonomy and the human rights principles of due diligence, including free, prior and informed consent”. The meeting gathered information and analysis from some of the world’s leading experts on the issue in preparation for the 2022 session of the Permanent Forum, which will also be on the same theme.

⁶ See <https://globalnaps.org/country/chile> and <https://globalnaps.org/country/kenya>.

⁷ See <https://fpic.enip.eu>.

⁸ See www.icmm.com/en-gb/about-us/member-requirements/position-statements/indigenous-peoples#1.

⁹ See <https://fsc.org/en/for-people/indigenous-peoples>.

16. The main aims of the meeting were as follows:

- Identify indigenous peoples' own business initiatives and enterprises for development of their lands, territories and resources as an exercise of their self-determination and related rights
- Analyse the principles of human rights due diligence vis-à-vis the need to obtain the free, prior and informed consent of indigenous peoples for business operations affecting them
- Assess the situation of reprisals against indigenous communities and their defenders, including indigenous women defenders, in relation to their activism for their rights in the context of business operations
- Take stock of complementary approaches to ensuring respect of human rights in business contexts in relation to the rights of indigenous peoples, including national action plans, regional initiatives and the proposed legally binding instrument on transnational corporations and other business enterprises with respect to human rights
- Examine access to effective remedy, or lack thereof, for indigenous peoples negatively affected by business activities
- Share good practices on States' recognition and protection of, as well as engagement with, businesses, investors and United Nations mechanisms that ensure protection of the rights of indigenous peoples in business contexts
- Put forward recommendations and next steps to ensure respect for the rights of indigenous peoples in business contexts.

17. The virtual meeting was held from 6 to 10 December 2021. It consisted of five two-hour sessions, held over five days, on an online platform and at different times of the day to facilitate participation from all regions. It was attended by members of the Permanent Forum and the Expert Mechanism on the Rights of Indigenous Peoples (see annex I). Many indigenous and non-indigenous experts, including from academia, civil society, national human rights institutions and the United Nations system, also participated in the meeting. The programme of work (see annex II) and other documents of the meeting are available on the website of the Permanent Forum.¹⁰

A. Indigenous peoples' business enterprises and autonomies

18. In his opening remarks, Alexey Tsykarev, member of the Permanent Forum on Indigenous Issues, highlighted that the rights of indigenous peoples were far too often violated when their lands and resources were taken without their consent for mining, logging, oil and gas extraction, industrial agriculture and other business operations. Indigenous defenders – many of them women – faced reprisals and risks, such as harassment, attacks, rapes, disappearances and killings, for defending their communities and the environment against harmful activities. As indigenous peoples saw few benefits from external business activities on their lands and territories in terms of employment or financial gain, they were currently expanding their own business initiatives and enterprises to promote their self-determination, as well as to protect the environment. In recent years, there had been some positive developments with regard to ensuring the realization of human rights, including the rights of

¹⁰ See www.un.org/development/desa/indigenouspeoples/news/2021/12/expert-meeting-on-indigenous-peoples-business-autonomy-and-the-human-rights-principles-of-due-diligence-including-free-prior-and-informed-consent.

indigenous peoples, in business contexts, such as in terms of the development of national action plans and environmental due diligence. He noted, however, that much more needed to be done to ensure that corporate activities were not merely guided by profits but advanced human rights for all and respected the integrity of nature and the environment.

19. Kate R. Finn, Executive Director of First Peoples Worldwide, indicated that indigenous economies had often been rendered invisible through colonization, land dispossession and forced removal from traditional territories. Although that situation persisted, tribal sovereignty and increased self-governance had created new economic and employment opportunities for some indigenous peoples. Markets also needed to shift as economic opportunity grew, and indigenous economic power must be built in a rights-based way to influence capital markets to respect the rights of indigenous peoples, including self-determination. That included investment that must respect indigenous peoples' rights, including self-determination and autonomy. At the same time, corporate and shareholder engagement and coalition-building were critical strategies to provide a way out of detrimental cycles of bad business practices, including appropriation of indigenous resources and knowledge.

20. Álvaro Pop, former member of the Permanent Forum, noted that indigenous peoples' businesses had an objective of collective good and should be differentiated from individual enterprises of indigenous persons. Indigenous peoples' businesses sought equitable management of resources and functioning based on dignity with the aim of achieving "good living" or "well living". In that context, autonomy was essential. However, the loss of indigenous lands and resources not only affected their entrepreneurship opportunities but also created other challenges, such as food insecurity. Conversely, the conservation of indigenous livelihoods and systems helped tackle the climate crisis and various other problems.

21. Kristen Carpenter, professor at the University of Colorado, stressed that the economic redress and empowerment of indigenous peoples was important in the context of their dignity and the diversity of their cultures, as guaranteed in the United Nations Declaration on the Rights of Indigenous Peoples. The Indigenous and Tribal Peoples Convention, 1989 (No. 169), of the International Labour Organization also recognized the importance of rural and community-based industries, subsistence economies and the traditional activities of indigenous peoples in the maintenance of their cultures and in their economic self-reliance and development. Relatedly, the Sustainable Development Goals emphasized inclusive and sustainable economic growth, full and productive employment and decent work for all.

22. She noted that the centuries-long exploitation of the lands and resources of indigenous peoples by others was one of the most significant barriers to indigenous peoples' rights in the business context. Such expropriations of indigenous lands and resources had been quantified only in very exceptional circumstances. It was necessary to have more accounting for those lands and resources and more remedies for them around the world, including through land titling, demarcation and restitution. Therefore, the safeguard of free, prior and informed consent was critical in determining whether specific resources could be commodified or not.

23. Furthermore, intellectual property laws seldom protected indigenous traditional knowledge and cultural expressions from appropriation because these tended to be part of oral traditions. There were, however, positive examples of how indigenous peoples had advanced models for the protection of traditional knowledge, such as through the proposal of national legislation to recognize culture-based textiles and designs by Mayan weaver organizations in Guatemala, and a negotiated agreement by Khoikhoi and San people in South Africa with the rooibos tea industry.

24. Mark Sevestre, Reconciliation and Responsible Investment Initiative, explained how trust funds had been created as vehicles for land claims settlement for First Nations in Canada. Initially, the funds had not been regulated and had included non-indigenous investors with some fiduciary responsibilities, whose investments often did not align with indigenous peoples' values. Later, an association of trust funds had been created that promoted responsible and accountable investments, including from non-indigenous investors. Thus, the Investment Initiative advanced a financial system that empowered indigenous perspectives, recognized the role of community values in investment decision-making and contributed to indigenous rights and title.

25. Meeting participants reiterated the need to draw a line between which indigenous resources could be commodified and which could not, and to distinguish between enterprises led by indigenous persons and indigenous community-led businesses working for the good of the community. Participants also shared the experiences of indigenous communities working with tourism enterprises for the sustainable respectful promotion of their cultures and resources.

26. The International Indigenous Women's Forum noted that indigenous community economies were collective and cooperative systems based on care and protection, taking advantage of nature's gifts for the common good and seeking to ensure the future of generations to come. The main values supporting the economic autonomy of indigenous women were community, joy, service, collective work, honesty and honour, the collective distribution of benefits, collective responsibility and justice. The Forum had underlined that economic autonomy was a means to an end and that indigenous women faced many challenges in that regard, such as macroeconomic adjustment policies; discriminatory laws related to land rights, natural resources and financial services; and climate change.

B. Indigenous Peoples, free, prior and informed consent and human rights due diligence

27. Rune Fjellheim, Owner and Chief Executive Officer of Rune Fjellheim AS, listed a range of questions that businesses should ask themselves when entering or operating in the domain of indigenous peoples to implement free, prior and informed consent in their due diligence processes:

- Have we truly recognized indigenous peoples and their representatives as rights holders?
- Are we sure that the indigenous peoples have understood the consequences of our activities?
- Have we asked if our activity is okay with them? If not, are we prepared to pull out?
- Did we ask early enough to adjust the project or to pull out?
- Are we ready to share some of the benefits?
- Is it possible to make the activity positive for both parties and reach an agreement on that? Do we have such agreements related to our activities in indigenous peoples' areas?

28. He noted that a free, prior and informed consent process could be difficult and that it required true commitment and mutual understanding from all sides. Businesses should be able to document their standing on such consent and indigenous peoples in their portfolios for public scrutiny. If they did not have agreements on their activities

with the indigenous peoples concerned, they failed to meet the Guiding Principles on Business and Human Rights. Two recent examples illustrated positive and negative examples of businesses respecting indigenous peoples' right to such consent: (a) indigenous Sami people had constructively made an agreement with Walt Disney Animation Studios on the use of their cultural elements in the animated movie Frozen and (b) construction of windmills on the Fosen Peninsula of Norway without the consent of Sami reindeer herders had been deemed illegal by that country's Supreme Court.

29. Antonina Gorbunova, Executive Director of the Union of Indigenous Peoples "SOYUZ", pointed out that the principle of free, prior and informed consent was not clearly articulated in the domestic legislation in the Russian Federation, although some of its elements were being used in practice. The implementation of such consent was still lacking because the parties involved, including indigenous peoples, had limited capacities and expertise. Free, prior and informed consent was not only a result when indigenous peoples said "yes" or "no" but also a process of creating relationships based on good faith. For example, a mining company operating on the Taimyr Peninsula had voluntarily invested in seeking such consent for the relocation of indigenous peoples in the village of Tukhard. The villagers had agreed to engage in such a consent process with the company, and they would be able to say "yes" or "no". In the case of "no", the State authorities must engage with the citizens and decide on next steps. As the indigenous peoples did not have their own decision-making body, they had established a representative to participate in all stages of obtaining consent. The most critical element of free, prior and informed consent was that the community and stakeholders were informed in advance and in a culturally appropriate manner, including in indigenous languages, and that vulnerable groups needed to be consulted and fully included in the consent process.

30. Sheryl Lightfoot, member of the Expert Mechanism on the Rights of Indigenous Peoples, elucidated how the international system had defined indigenous peoples' rights to free, prior and informed consent and human rights due diligence; however, enormous challenges still occurred when those rights collided with proposed major projects. She emphasized that free, prior and informed consent was a necessary element of the right of indigenous peoples to self-determination. It included the right to say "yes", the right to say "no" and the right to say "yes, with conditions". It was not the same as a veto, which implied complete and arbitrary power, regardless of the facts and law in any given case. As expounded in the Organisation for Economic Co-operation and Development Due Diligence Guidance for Responsible Business Conduct, due diligence by businesses should be preventative and risk-based. A human rights approach to business played a double role: it helped the businesses of indigenous peoples reclaim their rights, and businesses could also serve as a tool for enhanced enjoyment of rights by indigenous peoples.

31. Colleen Connors, Senior Manager for Human Rights and Decent Work of the United Nations Global Compact, stated that the human rights principles championed by the Global Compact were derived from the Universal Declaration of Human Rights, as well as the Guiding Principles on Business and Human Rights; indigenous peoples' rights fell under the purview of both those instruments. Free, prior and informed consent was a manifestation of the right of indigenous peoples to self-determination, which consisted of their interrelated and cumulative rights to be consulted and to participate, and to their territories and resources. Importantly, consultation did not equal consent, and once consent had been given, it could be withdrawn at any stage. Furthermore, such consent enabled indigenous peoples to negotiate the conditions under which a project would be designed, implemented, monitored and evaluated.

32. She further pointed out that while States' interpretations of free, prior and informed consent varied, the right of indigenous peoples to be consulted was firmly established under international law. Companies should thus build upon their existing consultation processes so that they could demonstrate that they had obtained such consent for their activities. Yet, obtaining this consent in a "check-the-box" manner was insufficient, as the consent was not an end in and of itself, but rather a process, which in turn protected a broad spectrum of internationally recognized human rights. Therefore, companies should undertake an assessment of their actual and potential impacts on the rights of indigenous peoples, focused on their own business activities and their relationships with third parties. She stressed that the Global Compact would continue to support all efforts to develop legislation on mandatory human rights due diligence while also providing new tools and resources to help businesses move beyond compliance.

33. Saúl Vicente Vázquez, National Institute of Indigenous Peoples of Mexico, stated that the existing international legal framework had loopholes that favoured businesses, in particular transnational corporations. Special measures should be adopted for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned, as provided in ILO Convention No. 169 (art. 4). As businesses often violated the rights of indigenous peoples to their lands, territories and resources, relevant provisions in the United Nations Declaration on the Rights of Indigenous Peoples and Convention No. 169 (arts. 13–15), as well as the recommendations of the Permanent Forum, should be taken into consideration in due diligence by businesses for the respect of those rights.

34. He noted the duty of care law of France requiring due diligence by businesses,¹¹ benefits-sharing agreements between extractive companies and indigenous communities in Australia and the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazu Agreement)¹² as a few relevant positive developments in recent times. States must ensure the full and effective participation of indigenous peoples in processes related to national action plans on business and human rights, including by giving indigenous peoples preference to initiate their own businesses as part of their right to self-determination. In that regard, it was important that the proposed international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, which would allow States to regulate the activities of such entities, be adopted. The Permanent Forum should urge States to adopt that instrument.

35. In the general discussion, panellists noted that respecting free, prior and informed consent benefited businesses in the long term, allowing them to avoid political and social risks and reducing costs. States and businesses should hold complementary roles in obtaining such consent from indigenous peoples. For example, in Canada, there were more than a dozen impact benefit agreements between indigenous peoples and companies. States should oversee the implementation of such agreements as part of their duty to obtain free, prior and informed consent even though they were not party to those agreements. Participants also raised questions about how to deal with complexity in the identification of indigenous peoples in some countries, for example, in the Asia and Pacific region. Some recent international instruments that grouped together indigenous peoples and local communities further complicated matters, especially those related to the right to self-determination.

¹¹ See www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626 or www.business-humanrights.org/en/latest-news/frances-duty-of-vigilance-law.

¹² See www.cepal.org/en/escazuagreement.

C. Effective remedy and redress for the human rights impacts of businesses on indigenous peoples

36. Luis Rodríguez-Piñero, Senior Human Rights Officer of the Office of the United Nations High Commissioner for Human Rights Accountability and Remedy Project, explained that the Guiding Principles provided for access to remedy for victims as part of the State's duty to protect, as well as corporate responsibility to respect human rights. The Guiding Principles referred to State-based judicial mechanisms and non-judicial mechanisms, as well as non-State-based grievance mechanisms, for access to remedy. Indigenous peoples had the right to an effective remedy through competent national tribunals for the resolution of disputes with States or other parties for violations of their rights based on, inter alia, the Universal Declaration of Human Rights (art. 8) and the United Nations Declaration on the Rights of Indigenous Peoples (art. 40). Such resolution should also give due consideration to the customary laws and legal systems of indigenous peoples. At the same time, grievance mechanisms should also adapt to the specific circumstances of indigenous peoples and be designed with their participation.

37. José Aylwin, President of the Citizen Observatory of Chile, said that States had not taken adequate steps to increase the effectiveness of their judicial mechanisms. He stressed that access to remedy for indigenous peoples remained limited owing to lack of cultural appropriateness, as well as the costs and complexities of judicial mechanisms. In many cases, those mechanisms considered only individual harms and not those of a collective nature, while impunity for violations by large corporations was also indicative of the lack of effective remedy. Non-judicial mechanisms, such as national human rights institutions, had made some advances in certain countries in promoting access to remedy for indigenous peoples, while multi-stakeholder initiatives had not been very effective. Thus, States must ensure that indigenous peoples had access to technical and financial resources to access remedy. National human rights institutions should strengthen their complaint-receiving and investigation functions, as well as their activities to promote indigenous peoples' rights. National action plans should include the formulation of laws for mandatory human rights due diligence by businesses, and the establishment of mechanisms to guarantee the participation of indigenous peoples in due diligence processes. The international community should expedite the process for adopting the international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, with explicit provisions for the rights of indigenous peoples (such as in the Escazu Agreement). Companies must cooperate with remedial mechanisms to redress their human rights impacts, and indigenous peoples must develop their own protocols not only for obtaining their free, prior and informed consent but also for access to effective remedy for violations of their rights.

38. Elifuraha Laltaika, senior lecturer at Tumaini University, focused on non-State-based non-judicial grievance mechanisms and why they were needed. He noted that such mechanisms could be important in the context of the impacts of businesses on the sacred sites of indigenous peoples, which could be particularly concerning. In that regard, those mechanisms should be able to promptly resolve disputes; be transparent, consultative, culturally appropriate and less costly, or not costly at all; and not supplant other judicial and administrative remedies. The mechanisms should involve indigenous leaders and representatives and use traditional means for remediation, including customary laws and procedures. They should include non-material compensation schemes, which were often absent in formal grievance mechanisms but had special significance for many indigenous peoples, as well as recognition of wrongdoing, guarantee of non-repetition, disclosure of truth, and apologies. Businesses should not hide behind weak national laws but instead should be guided

by international legal norms, including the United Nations Declaration on the Rights of Indigenous Peoples, in particular to remedy the impacts on the spiritual and cultural attachment of indigenous peoples to their lands and resources.

39. Sek Sophorn, Attorney-at-Law, informed the meeting of the serious challenges faced by indigenous Bunong people in the Monduliri Province of Cambodia in accessing remedy for the negative impacts on their land rights of land concessions for rubber plantations on their lands. These land concessions had been made to a local company financed by a French group. After spending years trying to access remedies via local and national processes, 80 Bunong took a civil claim against the group to a French court in 2015. They accused the company of illegally seizing their lands and sacred forest and destroying their places of life and worship. Six years later, in 2021, the court ruled the civil action “inadmissible for lack of quality and interest to act”, as none of the Bunong could “justify a real or personal right to exploit the disputed lands”.¹³

40. Carla Fredericks, The Christensen Fund, provided a different perspective on remedial and grievance mechanisms, in which the market punished companies that did not act to respect human rights. She gave an example of how shareholder pressure had forced Rio Tinto, the world’s second-largest mining company, to cancel bonuses of the chief executive officer and two other executives, who were later terminated, after the company destroyed a series of ancient cave structures in the Juukan Gorge in western Australia. Those cave structures had not only been sacred to Australian indigenous peoples, but also priceless archaeological treasures. Similarly, in the case of the Dakota Access Pipeline in the United States of America, vociferous opposition by indigenous peoples, environmentalists and the investing public, including investors with significant assets under management, had affected the company’s stock price, resulting in substantial material losses to the company and its shareholders. Banks financing the construction of the pipeline had also experienced financial losses and reputational harm as customers moved billions in funds to other banking institutions. In some cases, the banks themselves had backed out of the project, at a likely loss to their shareholders as well.

41. Nevertheless, corporate punishment was only a deterrent at best and not a remedy itself. Therefore, companies must respect human rights in line with the Guiding Principles and not force investors to take matters into their own hands. Investors must understand their own obligation to the Guiding Principles to go beyond market remedy and corporate punishment to ensure that there were protections in place. The existence of remedies must be part of any due diligence to consider the potential of harm before it occurred, and investors must act to avoid and mitigate human rights impacts. Everyone should engage to ensure that due diligence was undertaken for the corporation to protect its shareholders and the planet.

42. Viswanathan Ramasubramanian, Asian Development Bank (ADB) Accountability Mechanism, explained how the Mechanism functioned as the option of last resort when there were grievances against projects financed by ADB. While grievance mechanisms had been established across all projects financed by ADB and were effective in most of the cases, the structural inequalities on the ground, the remoteness of indigenous communities, their incremental vulnerability caused by project impacts and the lack of project capacities for handling their issues had been barriers for them in effectively accessing those mechanisms. Implementation of provisions agreed as part of problem-solving functions of the Mechanism sometimes became a challenge because, in several countries, those measures for indigenous peoples might be over and above the national requirements, such as in the contexts of benefits-sharing and

¹³ See www.business-humanrights.org/en/latest-news/cambodia-97-bunong-indigenous-families-lose-a-court-case-in-france-civil-society-decries-french-courts-decision-to-drop-lawsuit-against-companies.

recognition of customary lands. Nonetheless, there had been several success stories in projects financed by ADB, in which special measures had been taken for indigenous peoples, for instance, in benefit-sharing arrangements in hydropower projects in South Asia and targeted support for indigenous cultivation practices and marketing assistance for their produce in a geothermal project in Indonesia. Grievance redress had been effective in contexts in which there was a true commitment and mutual upfront understanding between the parties and in which the project development process had been more inclusive in working with indigenous communities, consistent with their aspirations and respecting their culture and practices. At the same time, there remained a critical need to build capacities at all levels to achieve effective redress of grievances across ADB operations.

43. In the interactive discussion, participants raised questions about the complementarity of the international legally binding instrument on transnational corporations and other business enterprises with respect to human rights to the implementation of the Guiding Principles, the lack of effectiveness of the multi-stakeholder and operational-level grievance mechanisms of businesses and the role of indigenous laws and customs in non-judicial mechanisms. Panellists suggested that adopting an international legally binding instrument to regulate the activities of business enterprises was important. While the instrument might not be a silver bullet, it could help address the accountability gap that the Guiding Principles were designed to fill with regard to violations of human rights in business contexts. It was stressed that indigenous legal or justice systems were important to bringing cultural appropriateness to remedy and grievance mechanisms, which was mostly lacking in State-based judicial and non-judicial and non-State-based grievance mechanisms. Participants also expressed interest in learning about organizations that could support communities in investor monitoring, in particular of mining companies, including to enhance the awareness of investors.

D. Business operations and reprisals against indigenous peoples, their defenders and the impact on indigenous women

44. Joan Carling, Indigenous Peoples Major Group for Sustainable Development, noted that legitimate actions of indigenous peoples and their defenders to defend their lands and other rights against destructive business operations were frequently met with reprisals. Those reprisals included direct violations of their civil and political rights, such as freedom of expression and assembly, as well as arbitrary arrest or detention and torture. Indigenous leaders faced criminalization on false charges, intimidation and threats and social stigmatization (as being anti-development or terrorists, for example), and were even disappeared or killed. Impunity for infringements of the individual and collective rights of indigenous peoples was a particular concern. At the same time, there was limited effective access to justice for those affected. Indigenous women faced specific profound impacts from harmful business operations in indigenous territories, which affected their reproductive health, caused the loss of their traditional livelihoods and increased their vulnerability, including to sexual abuse.

45. Patricia Gualinga, Pueblo Kichwa de Sarayaku, painted a grim picture of communities in which she worked where State agencies did not protect the indigenous peoples and businesses did not respect their rights. Instead, they created divisions among the people to advance their interests while free, prior and informed consent was confined to symbolic consultations rather than obtaining the consent of the people. She noted that the resistance of indigenous peoples had maintained some balance in the natural environment, which the oil and other companies sought to exploit. However, in the course of such resistance, there had been threats and attacks

against defenders, with continued impunity for violations of indigenous peoples' rights and reprisals against their defenders, as well as additional challenges of sexual violence against and insecurity among women.

46. Mario Alberto Erazo, member of the Siona people, added that when companies violated human rights, they were often protected by State agencies and security forces that were in alliance with the companies. At the same time, some businesses fuelled armed conflicts, as they contributed to the resources of the armed forces.

47. Christen Dobson, Business and Human Rights Resource Centre, stated that the Centre had documented more than 3,660 attacks against human rights defenders working in business contexts since 2015, 20 per cent of which had been against indigenous defenders. In 2020, one third of all fatal attacks against defenders had been against indigenous defenders. At least one in three attacks recorded against human rights defenders had been linked to a lack of meaningful participation or access to information and consultation, or the failure to secure the free, prior and informed consent of indigenous communities. The main drivers of those attacks included:

- Dominance of extractive and exploitative profit-seeking models and practices that favoured economic interests over the rights of peoples and nature
- Deficits in democratic and rights-respecting governance, including a lack of respect for indigenous peoples' rights to self-determination and free, prior and informed consent
- Widespread impunity for attacks and corporate harm, and non-existent or inadequate protection mechanisms for human rights defenders
- Long-standing racism and discrimination.

48. She noted that the most common type of attack was judicial harassment, which included arbitrary detention and strategic lawsuits against public participation, followed by killings, intimidation and threats, beatings and other forms of violence. Attacks against human rights and indigenous defenders were happening worldwide, with the highest numbers occurring in Latin America and South-East Asia. The largest number of attacks were linked to the mining sector, followed by agribusiness, oil, gas, coal, logging and renewable energy. Governments should take a range of actions to protect indigenous peoples and defenders, including implementing the United Nations Declaration on the Rights of Indigenous Peoples and the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. She stressed that passing mandatory human rights and environmental due diligence legislation was an action that all governments need to carry out. Finally, it was noted that some business actors were beginning to recognize the important work of human rights defenders and their responsibility to respect human rights and address risks to defenders in their own operations and business relationships, and that engaging with rightsholders and human rights defenders early in their human rights due diligence processes could mitigate legal and financial risks. At least 30 companies had policies that mentioned defenders, and some explicitly stated a zero-tolerance approach to reprisals.

49. Participants raised questions about specific protection measures needed to guarantee the protection of defenders, in particular in the context of illicit activities such as illegal logging and drug trafficking. Participants also discussed how indigenous women defenders and their organizations were documenting instances of reprisals and sharing them with corporate leadership for action. Governments should begin by collecting data on attacks against defenders to strengthen their protection. Currently, most of the reporting on Sustainable Development Goal 16 concerning killing and other reprisals against human rights defenders came from civil society. States should recognize the legitimate actions of human rights defenders, create an

enabling environment for them and strengthen the rule of law to address impunity for reprisals against them. Documentation of reprisals was being undertaken and shared with companies but should also be increasingly used for lobbying investors. However, there were also challenges to documentation, in particular in Asia and Africa, due to the remoteness of communities where reprisals occurred, as well as language barriers. At the same time, women defenders faced risks that reporting might lead to further reprisals. Nonetheless, indigenous women defenders and their organizations were building their documentation capacities, although they still required support. Panellists stressed the need for cross-border solidarity to increase the protection of defenders in business contexts, as many large companies were based in the global North and the reprisals against defenders were occurring in the global South.

E. Addressing the implementation gap through national action plans, proposed treaty on business and human rights and other initiatives

50. Benito Calixto Guzman, Coordinadora Andina de Organizaciones Indígenas, pointed out that there continued to be violations of indigenous peoples' rights in business contexts despite the adoption of the United Nations Declaration on the Rights of Indigenous Peoples, ILO Convention No. 169 and the Guiding Principles on Business and Human Rights. Those international norms, as well as the Escazu Agreement in the context of the Latin America and the Caribbean region, needed to be translated into national laws. Indigenous defenders should be protected from reprisals for legitimate activism for rights. Indigenous peoples should be included in human rights due diligence by businesses in a genuine good faith manner. In line with the recommendation of the Working Group on the issue of human rights and transnational corporations and other business enterprises, indigenous laws and customs that took into account not only physical damages, but also spiritual impacts, should be considered as part of remedial measures. Finally, States needed to adopt the proposed international legally binding instrument to regulate the activities of business enterprises. The past decade had shown that voluntary implementation of the Guiding Principles was not sufficient.

51. Pavel Sulyandziga, former member of the Working Group on the issue of human rights and transnational corporations and other business enterprises, stated that businesses were greenwashing their human rights and environmental impacts through public relations campaigns to build their reputations in international forums. However, the realities on the ground remained of concern, as indigenous communities faced direct and indirect threats from both private and State entities when they resisted development that was harmful to them and their livelihoods. Negotiations could occur only between equal parties and not when guns were pointed at indigenous peoples. A legally binding instrument on business activities and their effects on human rights, similar to World Trade Organization decisions that were mandatory for Governments, was needed. He emphasized that trade agreements should also advance human rights, including the rights of indigenous peoples, and that the proposed mandatory human rights due diligence law in the European Union should include harsh penalties for businesses violating human rights.

52. June Lorenzo, International Indian Treaty Council, summarized the work of the Working Group on the issue of human rights and transnational corporations and other business enterprises. The latest draft of the international legally binding instrument being developed by the working group referred to indigenous peoples, recognizing the distinctive and disproportionate impact of business-related human rights abuses on them. She noted that States should ensure that human rights due diligence measures undertaken by business enterprises included ensuring that consultations

with indigenous peoples were undertaken in accordance with the internationally agreed standards of free, prior and informed consent.

53. Birgitte Feiring, Danish Institute for Human Rights, provided an overview of the national action plans developed to implement the Guiding Principles on Business and Human Rights in various countries worldwide, including how indigenous peoples fared under those plans. Thus far, 25 States had published such plans, while 18 States were developing them and there were other non-State initiatives in 25 countries to formulate such plans. An evaluation of the national action plans by the Danish Institute had found several challenges related to them, including in terms of action orientation, having a smart mix of legal or mandatory and voluntary measures, attention to access to remedy for violations, the participation of vulnerable groups such as indigenous peoples, the allocation of resources for implementation of the plans and follow-up framework and mechanisms for the plans. She noted that the national action plans of Chile, Colombia, Japan, Kenya and Uganda included specific measures aimed at or references to the rights of indigenous peoples. In contrast, the plans of Denmark, Finland, Norway, Sweden, Thailand and the United States did not contain any reference to, or specific measures aimed at, indigenous peoples. Therefore, indigenous peoples and their organizations in the countries where national action plans were being developed should become more involved in those processes.

54. Pablo Rueda-Saiz, University of Miami, stressed the need for dialogue among indigenous peoples on which strategies had worked and which had not for the realization of their rights in business contexts, including in the context of various practices of autonomy. He pointed to the need to support the implementation of international treaties through effective national judicial and other mechanisms, although indigenous communities used those mechanisms differently. He stressed the importance of leveraging reputational and other financial risks for companies, citing the example of how such risks included in the corporate laws in the United States had acted as an effective deterrent against companies not complying with their responsibility to respect human rights.

55. Surya Deva, Chair of the Working Group on the issue of human rights and transnational corporations and other business enterprises, referred to the limitations of the Guiding Principles raised by earlier speakers, which could be addressed by the national action plans on business and human rights that were being developed by States. However, while there were references to indigenous peoples in some national action plans, there was poor implementation of those plans, as identified in the road map for the second decade since the adoption of the Guiding Principles.¹⁴ It was important for indigenous peoples to participate in the development and implementation of those national action plans.

56. He noted that human rights due diligence processes had often merely become legitimization exercises and that, even when indigenous peoples did not provide their consent or set conditions, businesses considered that as undertaking free, prior and informed consent. The Working Group saw the process of developing an internationally legally binding instrument on business and human rights as complementary to the Guiding Principles and called for the active participation of States in the process.

¹⁴ See Working Group on the issue of human rights and transnational corporations and other business enterprises, “Raising the ambition: increasing the pace – UNGPs 10+: a roadmap for the next decade of business and human rights” (Geneva, 2021), available at www.ohchr.org/Documents/Issues/Business/WG/ungps10plusroadmap.pdf.

III. Recommendations

57. The discussions during the expert group meeting pointed to the urgent need for actions to ensure the promotion and protection of the rights of indigenous peoples at all levels, but specifically on the ground. Experts at the meeting made various recommendations to that end, including the following key recommendations:

(a) The Permanent Forum on Indigenous Issues should undertake a comprehensive study on the business initiatives of indigenous peoples, including challenges facing such initiatives. The focus should be on businesses undertaken by communities for the good of the communities. At the same time, there are also businesses led by indigenous entrepreneur(s) that contribute to the advancement of indigenous rights;

(b) The Permanent Forum should recommend that States immediately adopt the proposed international legally binding instrument to regulate the activities of transnational corporations and other business enterprises in international human rights law. Member States must actively participate in the process to develop the legally binding instrument or treaty, which should align with relevant international human rights standards, including explicit provisions on the rights of indigenous peoples to their lands, territories and resources and free, prior and informed consent;

(c) Governments should support the business enterprises of indigenous peoples, including through intercultural or culturally sensitive approaches necessary to empower indigenous initiatives;

(d) Indigenous peoples should strengthen their engagement to build their economies in a rights-based way to influence capital markets to respect the rights of indigenous peoples, including through corporate and shareholder advocacy and coalition-building;

(e) Businesses, in their human rights due diligence processes, should meaningfully engage with indigenous peoples to obtain their free, prior and informed consent in business decisions and outcomes affecting them. Indigenous peoples should be considered not only as stakeholders, but also as rights-bearers, and free, prior and informed consent should be understood as their right to give or withhold consent;

(f) States must act to address the drivers of attacks against indigenous and other human rights defenders in business contexts, including by ensuring strong legal protection of indigenous peoples' rights and passing mandatory human rights and environmental due diligence legislation. Businesses and investors need to adopt a zero-tolerance approach to attacks on defenders in their operations, value chains, business relationships and investments, and engage in human rights due diligence, including safe and meaningful stakeholder engagement;

(g) In line with the recommendations of the Working Group on the issue of human rights and transnational corporations and other business enterprises (A/68/279), businesses should:

(i) Commit themselves to respecting the United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169 in policy commitments, human rights due diligence processes and remediation processes;

(ii) Comply with the responsibility to respect human rights, including by adopting a gender-sensitive human rights policy, carrying out human rights impact assessments with regard to current and planned operations and addressing any adverse human rights impacts that they cause, contribute to or are linked to, including by exercising leverage in business relationships to

address adverse impacts and paying particular attention to any operations in the territories and lands of indigenous peoples;

(iii) Ensure that grievance mechanisms at the operational level are based on gender-sensitive engagement and dialogue, by consulting indigenous peoples and focusing on dialogue as a means to address and resolve grievances;

(h) Businesses should take additional voluntary actions aimed at promoting and advancing human rights, including indigenous peoples' rights, whether through core business activities, strategic social investments, philanthropy, advocacy and public policy engagement and/or partnerships, or collective action. Voluntary actions to support and champion indigenous peoples' rights must be in addition to – and not a substitute for – actions taken to respect their rights, which should be guided by the core principles of their rights, including their rights to self-determination and free, prior and informed consent, as well as full and effective participation in decision-making;

(i) In the development and implementation of national action plans to implement the Guiding Principles on Business and Human Rights, States should include specific measures aimed at promoting and protecting the rights of indigenous peoples and should facilitate the effective participation of indigenous peoples in their development and implementation.

Annex I

Programme of work

*Date/time**Programme***Monday, 6 December 2021**

10–11.30 a.m.

Traditional opening ceremony by Yidid Jhoana Ramos Montero, traditional leader, Kankuamo pueblo, Colombia

Opening remarks by Alexey Tsykarev, member of the Permanent Forum on Indigenous Issues

Session 1: indigenous peoples' business enterprises and autonomies

Moderator: Rosemary Lane, officer-in-charge, Indigenous Peoples and Development Branch – Secretariat of the Permanent Forum on Indigenous Issues, Division for Inclusive Social Development, Department of Economic and Social Affairs

Presentations:

Kate R. Finn, Executive Director, First Peoples Worldwide

Álvaro Pop, former member of the Permanent Forum on Indigenous Issues

Kristen Carpenter, Professor, University of Colorado

Mark Sevestre, Reconciliation and Responsible Investment Initiative

General discussion

Tuesday, 7 December 2021

9–10.30 p.m.

Session 2: indigenous peoples, free, prior and informed consent and human rights due diligence

Moderator: Alexey Tsykarev, member of the Permanent Forum on Indigenous Issues

Presentations:

Antonina Gorbunova, Executive Director, Union of Indigenous Peoples "SOYUZ"

Rune Fjellheim, Owner and Chief Executive Officer, Rune Fjellheim AS, Norway

Sheryl Lightfoot, member, Expert Mechanism on the Rights of Indigenous Peoples

Saúl Vicente Vázquez, National Institute of Indigenous Peoples, Mexico

Colleen Connors, Senior Manager, Human Rights and Decent Work, United Nations Global Compact

General discussion

*Date/time**Programme***Wednesday, 8 December 2021**

10–11.30 a.m.

Session 3: effective remedy and redress for human rights impacts of businesses on indigenous peoples

Moderator: Tove Søvndahl Gant, member of the Permanent Forum on Indigenous Issues

Presentations:

José Aylwin, President, Citizen Observatory, Chile

Elifuraha Laltaika, senior lecturer, Tumaini University, United Republic of Tanzania

Sek Sophorn, Attorney-at-Law, Cambodia

Carla F. Fredericks, The Christensen Fund

Viswanathan Ramasubramanian, Asian Development Bank Accountability Mechanism

Luis Rodríguez-Piñero, Senior Human Rights Officer, Office of the United Nations High Commissioner for Human Rights Accountability and Remedy Project

General discussion

Thursday, 9 December 2021

9–10.30 p.m.

Session 4: business operations and reprisals against indigenous peoples, their defenders and the impact on indigenous women

Moderator: Darío José Mejía Montalvo, member of the Permanent Forum on Indigenous Issues

Presentations:

Joan Carling, Indigenous Peoples Major Group for Sustainable Development

Patricia Gualinga, Pueblo Kichwa de Sarayaku, Ecuador

Mario Alberto Erazo, member of the Siona people, Colombia

Christen Dobson, Business and Human Rights Resource Centre

General discussion

Friday, 10 December 2021

10–11.30 a.m.

Session 5: addressing the implementation gap through national action plans, proposed treaty on business and human rights and other initiatives

Moderator: Anne Nuorgam, Chair of the Permanent Forum on Indigenous Issues

Date/time

Programme

Presentations:

Benito Calixto Guzman, Coordinadora Andina de Organizaciones Indígenas

June Lorenzo, International Indian Treaty Council

Pavel Sulyandziga, former member, Working Group on the issue of human rights and transnational corporations and other business enterprises

Birgitte Feiring, Danish Institute for Human Rights

Pablo Rueda-Saiz, University of Miami

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

General discussion

Annex II

List of participants

Members of the Permanent Forum on Indigenous Issues

Anne Nuorgam, Chair
Alexey Tsykarev
Darío José Mejía Montalvo
Phoolman Chaudhary
Simón Freddy Condo Riveros
Tove Søvndahl Gant
Xiaoan Zhang

Members of United Nations mechanisms relevant to the rights of indigenous peoples

Sheryl Lightfoot, member, Expert Mechanism on the Rights of Indigenous Peoples
Surya Deva, Chair, Working Group on the issue of human rights and transnational corporations and other business enterprises

Experts

Yidid Jhoana Ramos Montero
Kate R. Finn
Álvaro Pop
Kristen Carpenter
Mark Sevestre
Antonina Gorbunova
Rune Fjellheim
Saúl Vicente Vázquez
Colleen Connors
José Aylwin
Elifuraha Laltaika
Sek Sophorn
Carla F. Fredericks
Viswanathan Ramasubramanian
Luis Rodríguez-Piñero
Joan Carling
Patricia Gualinga
Mario Alberto Erazo
Christen Dobson
Benito Calixto Guzman
June Lorenzo
Pavel Sulyandziga
Birgitte Feiring
Pablo Rueda-Saiz
