



*Indigenous Peoples' Issues & Participation at the UN
Forum on Business and Human Rights:
Progress to date and Potential for the Future*

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Indigenous Peoples' Issues & Participation at the UN Forum on Business and Human Rights: Progress to date and Potential for the Future

The European Network on Indigenous Peoples (ENIP) strives to ensure that all European actors comply with their obligations and responsibilities to fulfil, respect and protect the rights of indigenous peoples upon whom they impact across the globe. ENIP member organizations collaborate to promote the rights of all indigenous peoples who are affected by Europe.

Current ENIP members are:

- Almáciga
- Forest Peoples Programme (FPP)
- International Work Group for Indigenous Affairs (IWGIA)
- Institute for Ecology & Action Anthropology (INFOE) and
- Indigenous Peoples' Links (PIPLinks).



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1. Introduction

The issue of corporate impacts on indigenous peoples' rights has been to the fore of the United Nations (UN) engagement on the question of business and human rights since the 1990's. The UN Centre for Transnational Corporations, responsible for drafting the UN Code of Conduct (1973- 1994), produced a series of reports on the issue of business impacts on indigenous peoples' rights between 1990 and 1994.¹ Likewise, corporate impact on indigenous peoples' rights received considerable attention in the subsequent UN standard setting process under the Sub-commission on Human Rights, which resulted in the production of UN Norms on Transnational Corporations (1999-2003). These Norms, while they were not endorsed by the Commission on Human Rights, explicitly recognized the need for corporations to respect indigenous peoples' rights and interests, and their associated commentary affirmed the requirement for free prior and informed consent in order to guarantee this respect. The UN Framework and Guiding Principles on Business and Human Rights were developed by the Special Representative of the Secretary General on human rights and transnational corporations and other business enterprises in accordance with the 2005 and 2008 resolutions of the UN Commission on Human Rights and Human Rights Council (HRC) respectively.² The Guiding Principles were adopted unanimously by the HRC in 2011. They continue the tradition of affirming the requirement to uphold indigenous peoples' rights in the context of corporate activities by affirming that businesses must respect all human rights, including those affirmed in specific UN standards addressing indigenous peoples.

In its 2011 resolution 17/4 endorsing the Guiding Principles on Business and Human Rights, the HRC established a five member Working Group on the issue of human rights and transnational corporations and other business enterprises. Under the resolution, which extends to 2014, the Working Group is tasked with the promotion and "effective and comprehensive dissemination and implementation of the Guiding Principles". To achieve this the Working Group is mandated to: facilitate the exchange and promotion of good practices and lessons learned; make recommendations to all concerned actors; promote capacity building, and where requested provide "advice and recommendations regarding the development of domestic legislation and policies relating to business and human rights".³ Its mandate also extends to the conduct of country visits, where invited to do so by States, and to according special attention to "persons living in vulnerable situations". The Working Group is not expected to operate autonomously from the Human Rights regime, but is instead required to "work in close cooperation and coordination" with UN and regional Human Rights bodies and organizations. Finally, it is required to "report annually to the Human Rights Council and the General Assembly" and to guide the work of the UN Forum on Business and Human Rights established pursuant to the resolution.⁴

The Forum on Business and Human Rights serves as a space "to discuss trends and challenges in the implementation of the Guiding Principles and promote dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices".⁵ The importance of systematic engagement with indigenous peoples in the pursuit of the Working Group's mandate is affirmed in the resolution which requires it to "develop a regular dialogue and discuss possible areas of cooperation with ... representatives of indigenous peoples".⁶

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The first annual Forum was held in December 2012 and the second in December 2013. This paper provides a synthesis of the treatment of indigenous peoples' issues in these two Forums, with a particular focus on the participation of indigenous peoples in the 2013 Forum. It also offers a brief commentary on the first annual report of the Working Group to the General Assembly in 2013, which is dedicated to addressing the nexus of indigenous peoples' rights and corporate activities and the role of the Guiding Principles in relation to that nexus. This paper then concludes with some observations on the effectiveness of the Forum in assisting corporations to realize their responsibility to respect indigenous peoples' rights, and offers some suggestions to the Working Group with regard to the agenda for future Forum sessions aimed at realizing this objective. The intended audience includes: a) indigenous peoples seeking to make use of the UN Framework on Business and Human Rights and the associated Guiding Principles, b) corporations, in particular extractive industry corporations, with existing or planned activities in or near indigenous peoples territories c) members of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises d) other UN entities, States, civil society actors and academics directly involved in, or concerned with, overseeing and regulating corporate impacts on indigenous peoples' rights.

2. Indigenous peoples and the 2012 Forum on Business and Human Rights

In light of the historical attention by the UN to the issue of corporate impacts on indigenous peoples' rights, and the specific reference in the Working Group's mandate to the need for dialogue and cooperation with representatives of indigenous peoples, it was natural that the situation of indigenous peoples should emerge as an area of particular concern during the first UN Forum on Business and Human Rights held from the 3rd to the 5th of December 2012.⁷

In the opening plenary session of the 2012 Forum the civil society representative, Debbie Stothard of the International Federation for Human Rights and Altsean-Burma, highlighted the serious abuses of indigenous peoples' rights by both governments and corporations. This issue of indigenous rights abuses arising from corporate activities received further attention in a session dedicated to the critical implementation challenges for the Guiding Principles in the context of indigenous peoples. However, despite the attention accorded to indigenous rights, the manner in which the 2012 Forum's sessions were structured afforded limited opportunities for indigenous peoples to engage in dialogue with panellists, or to raise their concerns and perspectives to State and corporate actors attending the Forum.

In the 2012 Forum's concluding session, Chief Wilton Littlechild, then chairperson of the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), again drew attention to the disturbing reality which indigenous peoples face in the context of corporate activities in their territories. He nevertheless suggested that change was possible, as new opportunities existed to transform the relationship between indigenous peoples, States and corporations. In particular, he expressed hope that the decision of the Working Group to dedicate its first thematic report to the issue of indigenous peoples' rights reflected its intention to give serious and on-going consideration to indigenous peoples' issues in its work and in all subsequent Forums which it would facilitate.

3. The first annual report of the Working Group to the General Assembly

The Working Group's 2013 annual report (A/68/279), presented to the 68th session of General Assembly, "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".⁸ The report addresses a number of core issues in the context of indigenous peoples' rights. It offers important clarifications on the scope of the obligations which are inherent in the Guiding Principles in relation to the State protection of and corporate respect for indigenous peoples' collective and individual rights, and the mechanisms which are necessary to guarantee effective remedies in cases where those rights are violated. The report therefore constitutes a valuable and necessary contribution to the pressing issue of ensuring respect for indigenous peoples' rights in the context of corporate activities. However, it also suffers from some significant limitations which are worth of future attention. Many of these limitations are reflective of the time and resource constraints which restricted the full and effective participation of indigenous peoples in the report's elaboration. Others appear to reflect the fact that the Working Group itself is still in the process of developing a full understanding of the extant normative framework of indigenous peoples' rights and the implications of this framework for how the Guiding Principles should be interpreted and implemented in context of indigenous peoples.

Three aspects of the report are particularly noteworthy and represent important contributions of the Working Group to the realization of indigenous peoples' rights in the context of corporate activities. First is the report's affirmation of the fact that the duties and obligations outlined in the Guiding Principles have to be interpreted by States, businesses and other actors in a manner which is consistent with the UN Declaration on the Rights of Indigenous Peoples and International Labour Organization's Indigenous and Tribal Peoples Convention 169. Second is the report's acknowledgement that indigenous peoples own customary judicial systems are on a par with other grievance mechanism, and the requirement that these traditional systems be accorded due consideration by State and corporate actors. Third is the emphasis placed in the report on indigenous peoples' free prior and informed consent (FPIC) as "fundamental element of indigenous peoples' rights, on which the ability to exercise and enjoy a number of other rights rest." In relation to this latter point the report recognizes that the requirement for FPIC is derived from indigenous peoples' collective rights and is a component of the State duty to protect, as well as the corporate obligation to respect human rights. It also recognizes that indigenous peoples' right to self-determination implies that, to the extent possible, FPIC processes must be determined and controlled by indigenous peoples themselves.⁹

On the other hand, two of the report's more significant shortcomings are its relatively limited focus on the relationship between FPIC and the fundamental rights of indigenous peoples, and the rather cursory consideration it gives to the pressing need for home States to ensure access to effective remedies for indigenous peoples impacted by corporations registered in their jurisdictions. The former shortcoming results in an overly restrictive interpretation of the circumstances under which FPIC is required. It also leads to inadequate attention being directed to the necessary preconditions for the effective realization of FPIC processes. The latter shortcoming tends to underplay the importance of extraterritoriality in ensuring access to remedies and justice, and the increasing attention being placed on home State obligations in this regard by a range of actors. In doing so, the report failed to engage with the need, identified by the UN Human Rights treaty and charter bodies

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and recognized in the third pillar of the UN Guiding Principles, to move beyond the “inadequacy of the status quo” in the context of extraterritorial obligations, in particular in relation to protecting indigenous peoples rights.¹⁰

Greater attention to this issue of extraterritorial responsibility would have been consistent with the Working Group’s mandate to a) to “explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities, including those in conflict areas” and b) to “work in close cooperation and coordination with other relevant special procedures of the Human Rights Council, relevant United Nations and other international bodies, the treaty bodies and regional human rights organizations.”¹¹ Therefore, while the report offers important guidance in relation to the protection of and respect for indigenous peoples’ rights it also represented a missed opportunity for the Working Group to realize certain components of its mandate in relation to necessary remedies for violations of those rights.

4. Perspectives emerging from the 2013 indigenous peoples’ caucus

Indigenous Peoples Caucus
at the II Annual Forum on Business and Human Rights

Caucus de los Pueblos Indígenas
durante el II Foro Anual de Empresas y Derechos Humanos

1st of December 2013 • 1 de Diciembre 2013
10h00 - 17h00
Centre International Reformé John Knox - Flory Room
Chemin des Crêts-de-Pregny 27, 1218 Grand Saconnex, Genève, Switzerland

How to get there?
Option 1: Bus F from the Cornavin Railway Station in direction of Ferney-Mairie/Gex-Zac. Get off at the "Vy-des-Champs" bus stop.
Option 2: Bus 5 from the Cornavin Railway Station in direction of "Aeroport". Get off at the "Grand Saconnex Place" bus stop.

Cómo llegar?
Opción 1: Toma Bus F de la estación Cornavin en dirección de Ferney-Mairie/Gex-Zac. Baja en la parada "Vy-des-Champs".
Opción 2: Toma Bus 5 de la estación Cornavin en dirección de "Aeroport". Baja en la parada "Grand Saconnex Place".

Lunch available. Please confirm assistance with Joan Carling (joan@aippnet.org) in English
Almuerzo disponible. Por favor, confirma su asistencia con Luis Vittor (luisvittor@coordinadoraaoi.org) en español

Indigenous peoples' 2013 caucus brochure produced by CAOI

On the 1st of December 2013, prior to the commencement of the second Forum which was held from the 2nd to the 4th, an indigenous peoples’ caucus was convened and facilitated the Coordinadora Andina de Organizaciones Indígenas (CAOI) and the Asian Indigenous Peoples Pact (AIPP). It was attended by the Working Group member Pavel Sulyandziga, himself an indigenous representative from Russia, who actively participated in the caucus meeting and in a subsequent caucus meeting held during the Forum. The caucus discussed a range of issues, including the need for the Working Group to go beyond its current focus on best practices, and to anchor its work in concrete cases, such as those involving violations of indigenous peoples’ rights.

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The strengths and limitations of the annual report were also addressed. Emphasis was placed on the fact that the Working Group should ensure that international human rights norms and standards, such as those pertaining to indigenous peoples' FPIC, and recommendations of UN treaty and charter bodies in relation to extraterritorial jurisdiction in the context of violations of indigenous peoples rights overseas, are not weakened through interpretations or the implementation of the Guiding Principles. Also discussed was the importance of strengthening the Working Group's cooperation with the three UN mechanisms dedicated to addressing indigenous peoples' rights, namely, the Special Rapporteur on the Rights of Indigenous Peoples, the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) and the Permanent Forum on Indigenous Issues (UNPFII). It was proposed that indigenous peoples should be included as a standing agenda item in both the Working Group's meetings and the annual Forum on Business and Human Rights.

The importance of ensuring dissemination of the Guiding Principles by the Working Group at the local level was discussed. It was agreed that dissemination necessitates ensuring the Guiding Principles are accessible to indigenous peoples in a language and format comprehensible to them¹² and also requires building an awareness and understanding among businesses and States of how the Guiding Principles are to be implemented in manner consistent with the rights of indigenous peoples. The caucus discussions also placed particular emphasis on the urgent need, in both home and host States, for domestic legislation and policy aimed at implementing the Guiding Principles as they pertain to indigenous peoples' rights, while noting the importance of guaranteeing the full and effective participation of indigenous peoples in the formulation of such measures. Participants also raised the importance of guaranteeing continued indigenous representation within the Working Group membership following the expiration of its current mandate at the end of 2014. The full set of recommendations emerging from the caucus session is attached in Annex 1.

5. Indigenous peoples' issues and participation at the 2013 Forum

The agenda of the 2013 Forum was, in the main, facilitative of a greater degree of interactive dialogue than had been the case in 2012. As a result indigenous representatives were provided with an opportunity to raise many of the issues addressed in the caucus throughout the three days of Forum sessions which followed.¹³ One feature of the 2013 Forum which facilitated this was the fact that indigenous peoples were recognized as a distinct "stakeholder group" entitled to their own pre-forum session on the 2nd of December and to a dedicated slot, along side States, corporations and civil society, for raising questions during the plenary interactive dialogues held throughout the Forum.

i. Indigenous peoples' pre-Forum session

The pre-Forum session organized by CAOI and AIPP was hosted by indigenous representatives, Carlos Mamani of Bolivia and Beverly Longid of the Philippines. Its primary focus was on how greater policy coherence in the arena of business and indigenous peoples' rights could be achieved at the international level. To this end panellists were asked to address the following questions in their interventions:

- What initiatives is your institution / organization taking and/or planning to take in relation to the implementation of the United Nations Guiding Principles in the context of indigenous peoples' rights?

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- What proposals do you have to address the lack of policy coherence at the international level in relation to indigenous peoples' rights and business activities?
- What specific proposals do your institution / organization have with regard to the 3rd pillar of the Framework addressing remedy and reparation?

In order to provide context for the discussions indigenous representatives from each of the global regions described how their rights are impacted as a result of business activities in or near their territories. Their statements focused on the increasingly pervasive on-going violations of indigenous rights, in particular in the context of extractive industry activities, the inadequate nature of policy measures currently taken avoid such violations and the persistent failure to provide adequate remedies. The statement delivered on behalf of the Asian indigenous peoples' caucus and the Asian Indigenous Peoples Extractive Industry Network is representative of the issues raised in these interventions and is included in Annex 2.

In response to these statements, and the questions addressed to them, representatives of the Norwegian National Contact Point (NCP) of the Organization for Economic Cooperation and Development (OECD) (Hans Petter Graver), the International Council for Mining and Metals (ICMM) (Aidan Davy) and the UN Global Compact (Michelle Lau), as well as the three United Nations mechanisms dedicated to indigenous peoples, the Special Rapporteur (James Anaya), the UNPFII (Paul Kanyinke Sena), and the secretariat of the EMRIP (Juan Núñez on behalf of Chief Wilton Littlechild), presented their activities in relation to indigenous peoples' rights and business. An ILO representative was invited by CAOI and AIPP to present but was unable to attend.

a. OECD Guidelines on Multinational Enterprises

Mr Graver noted that the OECD Guidelines on Multinational Enterprises were the only State backed Corporate Social Responsibility (CSR) initiative with a specific problem solving mechanism. The revision of the Guidelines in 2001 ensured their coherence with, and support for the implementation of, the UN "Protect, Respect and Remedy Framework". Mr Graver also explained that while the OECD Guidelines were voluntary for corporations, compliance with their requirements, which includes establishing a complaint mechanism, in the form of NCPs, was mandatory for the 34 OECD, and 11 other non-OECD, signatory States.¹⁴ These 46 States, which span 5 continents, account for 85% of all foreign investment and consequently have an important role to play in ensuring respect for indigenous peoples' rights in the context of corporate activities.

Illustrative of the role which the Norwegian OECD NCP had played in addressing indigenous peoples' rights, Mr Graver outlined three cases of Norwegian companies which involved alleged and actual violations of indigenous peoples' rights: the Mindoro Nickel Project of Intex Resources Inc in the Philippines; a proposed windmill park in Sami territory; and a fishing project of a Norwegian company in Western Sahara. In the Mindoro case, following a fact finding trip commissioned by the NCP, a final statement had been issued finding breaches of the OECD Guidelines. The statement affirmed that the FPIC process was flawed as it failed to include all impacted indigenous communities and also found that the environmental impact assessment was inadequate and in breach of the Guidelines. In the Western Sahara case the company undertook to establish a grievance mechanism, the effectiveness of which the parties would assess once it had been in operation for a year. The Sami case was currently entering into a negotiation phase which was being facilitated through the good offices of the NCP.

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In terms of policy coherence across the 46 NCPs with regard to remedies, Mr Graver noted that the main challenge is to achieve a functional equivalence between the different NCPs. While this has not yet been achieved, and there are significant variations across NCPs, they are nevertheless collaborating and working together within the OECD framework towards this end.

b. International Council for Mining and Metals (ICMM)

In responding to the three questions on behalf of the ICMM, Mr Davy explained that the organization had been founded by mining companies and constituted a catalyst for improvements around sustainable development. The ICMM functions based on a membership model, consisting of 22 of the world's biggest mining companies, responsible for 30-50% of global production, with these leading companies working together on the basis of a leadership commitment. The ICMM also has association members, giving it access to an additional 1,500 companies.

The main areas of activity of the ICMM in relation to the Guiding Principles have been around the corporate responsibility to respect human rights and ensuring access to remedy at mining sites. In this regard, in 2012, the ICMM published a guidance document on integrating human rights due diligence into mining company practice. The ICMM felt that sector specific translation of the Guiding Principles was important in order to ensure that activities of its members do not infringe on the rights of host communities – both indigenous and non-indigenous. The document aims to provide practical guidance around examining existing due diligence processes - environmental impact assessments, political risk assessments, and pre-acquisition assessments - and how they can be adapted to address the rights affirmed in the International Bill of Rights. Beyond the due diligence framework the ICMM has also adopted an issue based focus, addressing specific areas such as indigenous peoples, artisanal and small scale mining and mining in conflict areas.

To move beyond documentation of good practices towards implementation guidance, the ICMM held four regional workshops involving operational managers in May of 2013. Two days were devoted to indigenous peoples and two days to human rights. The first day of the workshops focused on identifying the key challenges from the perspective of civil society while the second day was an ICMM member only day aimed at facilitating peer to peer learning.

In relation to furthering policy coherence at international level, Mr Davy suggested that the ICMM members adopted a leadership role by demonstrating "the art of the possible". The ICMM had updated their 2008 position statement on indigenous peoples and mining. Mr Davy emphasised that this was not just a policy paper but has to be implemented on the ground, and that consequently the ICMM good practice guide would be updated accordingly. One of the six principles affirmed in the new policy, which comes into effect by May 2015, is that ICMM members are committed to "work to obtain consent for new projects or changes to existing projects".

c. UN Global Compact

Ms Lau outlined the content of Global Compact which she explained is premised on the advocating the principle that business should do no harm.¹⁵ Six of the Global Compact's ten principles directly concern human rights. The Compact is complementary to UN Guiding Principles, with its first principle constituting an affirmation of the corporate responsibility to respect human rights. Ms Lau explained how, in a certain regard, the Compact goes beyond the Guiding Principles, by also focusing on the positive role that companies can play, encouraging businesses to take positive actions in addition to respecting human rights in order to contribute to sustainable development.

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At present there are over 10,000 participants in the Global Compact, with in the region of 7,500 business participants all of whom acknowledge the corporate responsibility to respect human rights. The Global Compact team has collaborated closely with the UN Office of the High Commissioner on Human Rights (OHCHR) in the context of its work on human rights due diligence, impact assessments and reporting. The Global Compact is also involved in promoting tools developed by other organizations, and regards the promotion of the Guiding Principles as one of its top objectives. It is currently finalizing a good practice note on FPIC which should be available next year.

In terms of policy coherence Ms Lau also explained that the Global Compact is collaborating with women and UNICEF, and has worked with the UNPFII on a Business Reference Guide on the Declaration on the Rights of Indigenous Peoples. This Guide was being officially launched at the Forum and had just gone live on the Global Compact website.¹⁶ Ms Lau also noted that one of the major issues around corporate respect for indigenous peoples' rights is that businesses lack sufficient understanding of the content of those rights. While there is growing interest around indigenous peoples' rights, in particular in relation to FPIC, there remains a lack of understanding necessary to respect and support them in practice. To attempt to breach this gap in understanding the Global Compact's Business Reference Guide makes use of the UN Declaration on the Rights of Indigenous Peoples as its primary reference point. Part one of the Business Reference Guide builds on the Guiding Principles and the Protect Respect Remedy Framework. Part two of the Guide invokes the UN Declaration as key point of reference, reaffirming it as authoritative standard in the context of corporate and State human rights duties and responsibilities. A practical supplement including examples of business respect for indigenous peoples' rights was also developed, and the Global Compact remains open to receiving further case studies on an on-going basis.¹⁷ The guide was the product of a one year consultation process. Assistance was provided by First Peoples Worldwide, which helped convene a consultation with indigenous peoples at the 2013 session of the UNPFII. Ms Lau summarized the objective of the Guide as a means to promote understanding of, and dialogue on, indigenous peoples' rights.

In the context of remedies Ms Lau explained that the Global Compact supports the establishment of non-judicial grievance mechanisms and has facilitated presentations from Rio Tinto, Sakhalin and Cerrejon based on their experiences. It also supports transparency on business impacts on human rights through links to the Business and Human Rights Resource Centre company profiles. Stakeholders can also raise concerns to the Global Compact in relation to companies if they believe systematic abuses exist. The Human Rights and Business Dilemma Dialogue forum includes a section on indigenous peoples and a section on cumulative impacts.

d. Response: UN Special Rapporteur on the rights of indigenous peoples

In his response to the presentations of indigenous representatives and the panellists Mr Anaya, the Special Rapporteur on the rights of indigenous peoples, provided an outline of his work in relation to the Guiding Principles.¹⁸ The Rapporteur noted that his 2009 report on the duty of States to consult with indigenous peoples is a central component of the State duty to protect human rights. The objective of these consultations is to achieve FPIC, which constitutes a safeguard for indigenous peoples' rights, whenever the State or a third party may affect indigenous peoples. If FPIC is not obtained and there is potentially a significant negative impact on indigenous peoples' rights the project should not move forward. The duty to protect also includes the need to develop clear

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regulatory frameworks, including laws and regulations affecting corporate behaviour impacting on indigenous peoples. This is particularly the case in the context of the extractive sector.

The Rapporteur's 2010 report anticipated the Guiding Principles articulation of the corporate responsibility to respect human rights and highlighted the need for this to be understood as including respect for the rights affirmed in the UN Declaration on the Rights of Indigenous Peoples, ILO Convention 169, regional instruments and international and regional human rights jurisprudence. The Rapporteur expressed his satisfaction that the OECD's commentary on the implementation of its guidelines includes specific reference to indigenous peoples' rights. Nevertheless, the connection between the Guiding Principles, the OECD guidelines and indigenous peoples' rights remains widely misunderstood at the operational level by corporate and State actors. The Rapporteur therefore urged the Working Group to focus on raising awareness on this relationship, and noted that the Working Group's 2013 report goes somewhat towards this objective by stating that indigenous peoples' instruments have to be read in tandem with the Guiding Principles.

The Rapporteur's 2011 report provided a synthesis of experiences recounted by indigenous peoples, many of which echoed those relayed by the indigenous speakers present. The report identified the need for a greater understanding among all stakeholders. It also emphasised the importance of maintaining a focus on the substantive rights to self-determination and land territories and resources and not exclusively focusing on safeguards such as consultation and FPIC. His 2013 report is a synthesis of the Rapporteur's observations over the previous years and aims at building an understanding of what good practices should, or could, be in the context of the extractive industry. In his engagements with indigenous peoples the Rapporteur observed an increasing number of communities developing their own enterprises, including extractive enterprises. While clarifying that he was not proposing extractive activities should occur in indigenous territories, the Rapporteur suggested that, should such activities occur, experience demonstrates that the best outcomes are achieved when those activities are under the control of the impacted indigenous peoples themselves. However, the Rapporteur acknowledged that for most part indigenous peoples are not currently in a position to realize this.

The Rapporteur also noted that there is increasingly a greater sensitivity among companies to indigenous peoples' rights and that indigenous peoples are reaching agreements with such companies. In his reports the Rapporteur identified the necessary conditions for extractive activities to take place on indigenous peoples' territories in a way that respect their rights. Essential components include indigenous peoples being real participants and partners with outside actors and genuinely benefiting from any activities, as well as the need for adequate State regulatory mechanisms.

e. Response: UN Permanent Forum on Indigenous Issues

Speaking on behalf of the UNPFII Paul Kanyinke Sena suggested that the Guiding Principles need to be looked at not only from the perspective of safeguards, but also from the perspective of how indigenous peoples can develop with culture and identity. He pointed out that the World Bank safeguard policies are based on doing no harm and that there is considerable focus on safeguarding rights. However, he suggested that it is important for indigenous peoples to have an opportunity to say what they regard as being good for them. In this regard the UNPFII is trying to shift from a focus

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which centres around complaints towards a focus on identifying good practices and providing a platform to build on them.

Mr Sena suggested that this model of engagement was critical given that the Millennium Development Goals had failed to deliver for indigenous peoples and that discussions are currently underway in relation to the post 2015 Sustainable Development goals. Mr Sena therefore felt that indigenous peoples should be focusing on the potential partnerships they might want with the private sector in order to achieve these goals. Addressing the issue of capacity building Mr Sena noted that it had implications for corporations, States and indigenous peoples. The lack of private sector understanding of indigenous rights prevents private sector recognition of those rights, while issues such as access to information, transparency and good governance, which the UNPFII will focus on in its next session, are all necessary components of capacity building for indigenous peoples. Mr Sena also pointed out that consultations are paramount if indigenous peoples' rights are to be respected, as if consultations are held in good faith, through recognized structures, leaders and institutions of indigenous peoples, there will be less need for remedies. Finally, Mr Sena touched on the importance of indigenous peoples developing global strategic partnerships among themselves and with NGOs.

f. Response: Expert Mechanism on the Rights of Indigenous Peoples

Juan Núñez, the secretariat for EMRIP, conveyed a statement on behalf of Chief Littlechild focusing on the issues and challenges around the implementation of the Guiding Principles. The statement noted that the Guiding Principles are of particular importance in the context of guaranteeing indigenous peoples' right to participation and that the most important initiative taken by EMRIP in relation to them was its report on the right to participate, its 2012 follow up and its companion comment or advice (EMRIP Advice no. 4 of 2012).

Drawing from EMRIP Advice no. 4, the statement focused primarily on the extractive sector and touched on issues such as the obligation to address indigenous peoples' rights in bilateral and multilateral investment and trade agreements and the need for greater awareness in State departments of their obligations in relation to protecting indigenous peoples' rights. Ensuring that pre-existing agreements with indigenous peoples are not overwritten by such agreements between States, or between States and corporations is a component of these State and corporate obligations. The statement also noted that Advice no. 4 placed particular emphasis on the fact that FPIC is underpinned by the right to self-determination and the corollary duty of States to obtain FPIC. This underscores the necessity to recognize FPIC as a right and also to ensure that indigenous peoples' right to self-determination is fully recognized.

The statement also noted that dialogue is of critical importance for ensuring policy coherence, as it is only when business is engaged in dialogue can this objective be achieved. Equally important, however, for the Guiding Principles to be implemented is need for engagement of State and corporate actors with indigenous peoples in a manner that is supportive of sustainable development and indigenous peoples' environmental principles. Finally, the statement noted that the EMRIP report on access to justice for indigenous peoples was relevant to the implementation of principle 31 of the Guiding Principles in relation to barriers to access to justice and measures which are necessary to ensure equitability.

g. Interactive dialogue

The presentations were followed by an interactive dialogue during which indigenous representatives and their support organizations raised a range of issues. These included the content of, and process to develop guidance for, the ICMM's 2013 position statement on indigenous peoples and FPIC; the content and drafting of the UN Global Compact's Business Reference Guide on Indigenous Peoples; the contentious cases addressed by the Norwegian OECD National Contact Point and other NCPs in relation to indigenous peoples; and the work of the Special Rapporteur in the area of indigenous peoples and the extractive industry.

One organization questioned what it perceived as the promotion of an extractive industry based development model in indigenous territories by the Special Rapporteur in his 2013 report. The Special Rapporteur responded that this was a misinterpretation of what he proposed in his report. What the series of reports presented by the Rapporteur sought to do was to lay out the necessary pre-conditions which have to be met before extractive projects could proceed, and highlight that where indigenous rights were threatened by such projects good faith consultations are necessary in order to obtain their FPIC. The reports also noted that if, in accordance with their right to self-determination, an indigenous peoples did wish to pursue extractive projects that the preferred model for doing so was one in which the indigenous people themselves exercised control over the project.

A question was also raised in relation to a previously initiated process by the OECD in Norway to develop guidance on respect for indigenous peoples' rights. In response Mr Graver noted that such a process had been initiated but had evolved to have a broader remit than indigenous peoples. The development of such guidance was under the responsibility of the OECD head office in Paris and therefore further follow up with them in relation to the initiative could potentially be worthwhile. An indigenous person from Papua New Guinea noted the ineffectiveness of the Canadian OECD in response to violations of human rights in his territories in the context of the mining operations of Barrick Gold Corporation. A representative of AIPP proposed that the Norwegian OECD NCP should promote its findings from the Mindoro case to assist other NCPs in addressing difficult cases involving a lack of FPIC.

The representative of AIPP also challenged the ICMM with regard to the ambiguity of its policy language around FPIC and its suggestion that individual companies could decide whether or not to proceed with a project if FPIC was not forthcoming. Underpinning this objection was the fact that such a conception of, or approach to, FPIC is divorced from the rights FPIC aims to protect, and which the position statement claimed companies would respect. As a result it was felt that the ICMM position was inconsistent, and at odds with guaranteeing respect for indigenous peoples' rights. In response the ICMM representative explained that one part of the policy paper was a series of statements of fact, as opposed to principles, and should be read as such. He also stated that in certain contexts, where consent is not forthcoming, States may decide to proceed with a project, having balanced the national interest with the rights of indigenous peoples. In these contexts individual members would have to decide if proceeding with such a project was in keeping with their principles.

In his concluding comments, the session rapporteur, Luis Vittor, a representative of CAOI, reiterated the importance of recognizing the substantive and fundamental rights of indigenous peoples to

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lands, territories and resources and to self-determination which, as had been described by the indigenous representatives in their opening interventions, continued to be negatively impacted by extractive projects throughout the world. Recognizing these rights was the basis for the requirement to obtain and respect indigenous peoples FPIC. Mr Vittor noted that while advances had been made in policy coherence at the international level, the discussions illustrated that there was still significant challenges remaining if a coherent, indigenous rights based, interpretation of the Guiding Principles was to be realized and shared by all actors.

ii. Indigenous peoples' statement to the plenary session - Day 1

At the opening plenary session of the Forum, a statement summarizing of the conclusions emerging from the indigenous peoples' pre-Forum session was presented on behalf of the indigenous peoples' caucus. The statement, attached in Annex 3, highlighted the historical and on-going violations of indigenous peoples' rights to lands, territories and resources in the context of business activities, which were particularly profound in the context of extractive industry. In light of this, the statement emphasized the necessity for immediate State action, and full and effective indigenous participation in the preparation of National Action Plans.

The statement also addressed the imperative to obtain FPIC for business activities in order to guarantee respect for indigenous peoples' rights, including their right to self-determination. Noting the positive developments in relation to the policies of a range of actors at the international level, the statement nevertheless pointed to the practical challenges which remained to ensure that these developments were translated in practice. One of these challenges is the need to overcome the limited understanding which business actors have of indigenous peoples' rights, something which illustrates the importance of ensuring effective indigenous participation in the development of corporate policies. The statement concluded with a call to the Working Group to build on the initial work in its annual report in cooperation with indigenous peoples, and to conduct further research and facilitate discussions on issue of guaranteeing effective remedial mechanisms for corporate violations of indigenous peoples' rights.

iii. Panel discussion on indigenous peoples & business operations – Day 2

A panel discussion entitled "Indigenous peoples and business operations – taking steps towards implementing the guiding principles" was held on the 4th of December. The discussion was organized by the Working Group based on input provided by CAOI and AIPP, and was chaired by Pavel Sulyandziga. It consisted of presentations by James Anaya, the Special Rapporteur on the rights of indigenous peoples, Eduardo Vega Luna, the Peruvian Ombudsman, and Arantza Hernanz, a representative of Repsol and IPEICA (the global Oil and Gas industry association). Ivan Chernyakhovskiy, a representative of Sakhalin Energy and the Global Compact, and Joan Carling, the coordinator of AIPP, acted as respondents to the presentations.

In his presentation, the Rapporteur noted the importance of acknowledging that indigenous peoples have suffered negative, and even disastrous, effects as a result of extractive industry operations in their territories. The Rapporteur also outlined a series of necessary pre-conditions for FPIC to be sought and extractive projects to proceed. The Peruvian Ombudsman addressed the increased social conflict associated with extractive projects which proceed in the absence of adequate environmental impact assessments and good faith dialogue aimed at obtaining consent. The Ombudsman concluded that while economic development is important, it is not more important than the respect

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for rights, as the latter constitutes the basis for genuine and sustainable development. The Repsol / IPIECA representative noted that IPIECA, together with the Danish Institute for Human Rights, had produced a guide on Human Rights Due Diligence in 2012. The guide is aimed at avoiding past errors and seeking consensual agreements with indigenous peoples. IPIECA is currently conducting a project on FPIC and the oil and gas sector. In her capacity as a representative of Repsol she explained that the company had developed grievance mechanisms in conjunction with Peruvian indigenous peoples.

Speaking on behalf of EMRIP, Chief Littlechild raised the importance of respecting treaty rights and noted that FPIC must be applied fully and that it goes beyond the legal duty to consult, as it is a fundamental element of the right to self-development. He pointed out the need for corporations, such as Repsol, to be open to engaging with indigenous peoples' own grievance mechanisms and also suggested that attention should be given to business impacts on the situation of indigenous children. During the interactive dialogue one of the central issues raised by indigenous representatives was the need to recognize that indigenous peoples' worldviews are distinct from those of business enterprises, and that in some cases indigenous worldview may be incompatible with the pursuit of extractive operations in their territories. They emphasized that FPIC was about control over their territories, and that it was this control which was at stake in their discussions with companies seeking to access their lands and resources. A representative of StatOil, a member of IPIECA, stated that the company had recently started working on issues around FPIC, examining what the correct approaches to it might be, while bearing in mind that the responsibility to obtain FPIC rests with States.

The European Union express its view that corporate human rights due diligence was necessary in order to prevent violations of indigenous peoples' rights. It also highlighted the importance of indigenous peoples' participation in decision making in matters impacting their rights and the need for this to be achieved in accordance with indigenous peoples' own procedures and with reference to their FPIC. The European Union also highlighted the importance of ensuring that the perspectives of indigenous peoples are taken fully into account in any attempts to balance their way of life with the needs of companies. Prior and effective registration of indigenous peoples' land tenure was also described as a pragmatic matter by the European Union, noting that in its absence legal disputes over land ownership arise when corporations are granted leases. Canada pointed to the use of voluntary approaches by its corporations. It claimed that these approaches have led to Canadian companies gaining social licence to operate in countries such as Peru. Canada also noted that there was a need for better integration of indigenous peoples' processes in environmental impact assessments.

In his response on behalf of Sakhalin Energy and the Global Compact Mr Chernyakhovskiy expressed the hope that the Global Compact's Business Reference Guide on the UN Declaration on the Rights of Indigenous Peoples would prove useful to corporations. He outlined how Sakhalin Energy had, since 2010, engaged with indigenous peoples within the framework of FPIC as provided for in the Declaration in the context of the creation and on-going implementation of the Sakhalin indigenous peoples' development plan. Mr Chernyakhovskiy also pointed out that the grievance mechanism, which includes members of the indigenous peoples' council, had been developed specifically to address indigenous peoples' issues and operated in parallel to the generic grievance mechanism which indigenous peoples could also access.

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In her response, Ms Carling of AIPP focused on the importance of understanding the perspectives of indigenous peoples as well as developing an understanding of their rights. She stressed that this was essential if business and States are to appreciate how FPIC and grievance mechanism should be implemented. Ms Carling explained that FPIC is essentially about ensuring that the substance of indigenous peoples' rights are respected, and that in order to do so it is necessary to understand why indigenous peoples adopt certain positions. For example, in any decisions related to resource access and usage it was necessary to account for the cultural value of mountains or forests to the impacted indigenous peoples. Human rights due diligence therefore has to consider the wider socio-cultural dimensions when addressing how to mitigate and avoid impacts. Ms Carling emphasised that good faith engagement implies recognition of indigenous peoples as owners of the resources in their territories, and, to the extent possible, ensuring that indigenous peoples' customary laws prevailed within those territories.

The chairperson and working group member, Pavel Sulyandziga, commented on the fact that in a survey carried out by a major company and participant at the Forum, the predominant demand of indigenous peoples was for respect by business of their rights, their views, and for their status as peoples. He concluded that at the root of the problems which indigenous peoples faced in the context of corporate activities was the fact that this respect was still lacking.

iv. Indigenous participation at other sessions of the Forum

In addition to the aforementioned two sessions which were dedicated to indigenous peoples, indigenous representatives also participated as panellists in three other sessions/events and raised questions from the floor at a numerous other sessions. At the OHCHR organized pre-Forum "presentation of selected national cases, research and good practice" Lotty Cunningham, representing "Indigenous Women in the Americas – Plataforma contra la Impunidad", presented the issues faced by indigenous peoples in Nicaragua in relation to the implementation of the Guiding Principles and respect for their rights as affirmed under ILO Convention 169.

Likewise, as a participant in a multi-stakeholder Forum panel focusing on overcoming barriers to effective judicial remedies, Elida Cristina, of the Movement of Indigenous Women, Tz'ununija, outlined the obstacles to justice which indigenous peoples face in Guatemala. The "Indigenous Women in the Americas – Plataforma contra la Impunidad" also held an event on the impacts of corporate activities on indigenous women.¹⁹.

v. Focus on indigenous issues at closing session of the Forum

The importance of ensuring that indigenous peoples' rights continue to occupy a central role in future Forums and in the activities of the Working Group was touched on by Mary Robinson, the former High Commissioner on Human Rights and former President of Ireland. In her key note speech at the closing session of the Forum, Mrs Robinson welcomed the fact that the Working Group's annual report to the General Assembly acknowledged that the UN Declaration on the Rights of Indigenous Peoples should be the framework for implementation of the Guiding Principles and for the Working Group's activities. Mrs Robinson stressed that guaranteeing respect for indigenous peoples' rights and ensuring climate justice clearly fall within the scope of the UN Guiding Principles on Business and Human Rights, and called for concerted action by all actors in 2014 to address these critical issues.

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The on-going violations of indigenous peoples' rights, in particular the vulnerability of indigenous women's rights in the context of corporate activities, was also addressed in the closing speech of the Forum, which was delivered by Debbie Stothard of the International Federation for Human Rights and Altsean-Burma. Speaking from the floor, Elisa Canqui, an indigenous representative and member of IBIS, echoed Mary Robinson's views calling for the Working Group and its Forum continue to address the issue of indigenous peoples' rights in its future work and activities. She also expressed the hope that the recommendations in the Working Group's 2013 annual report would be used by corporations and States to ensure that indigenous peoples' rights and perspectives are understood and respected in the context of business activities in indigenous peoples' territories.

In a final intervention, Chief Littlechild thanked Mary Robinson for her focus on indigenous peoples' rights and her call for immediate action. In keeping with this call Chief Littlechild invited the Working Group to participate in the upcoming 2014 World Conference on Indigenous Peoples in order to ensure that indigenous peoples' rights are fully respected in the context of business activities in their territories. Finally, in her closing remarks, Working Group chairperson, Alexandra Guáqueta, welcomed the fact that indigenous peoples had been active participants throughout the 2013 Forum's proceeding.

6. Observations on the 2013 Forum and potential areas for future focus

Overall, in terms of opportunities for indigenous participation, the 2013 Forum represented a significant improvement on the 2012 Forum. The number of indigenous representatives attending, while still relatively small (only in the region of 40 individuals), was greater than the previous year, and the time allotted to discussion of indigenous issues, as well as the role of indigenous organizations in determining the agenda and participation, was also much improved. In addition, the indigenous peoples' caucus, which was held in advance of the Forum, facilitated the development of a shared understanding among indigenous representatives of both the potential and limitations of the Guiding Principles as they relate to the realization of indigenous peoples' rights. This enabled the identification of the themes and issues which were of common concern to indigenous peoples from across the global regions.

The official pre-Forum session, together with the Forum session dedicated to indigenous issues, provided an opportunity for these issues to be raised, and to some degree discussed, with the relevant UN mechanisms, industry bodies and other international actors. The fact that the Working Group currently includes an indigenous representative, Pavel Sulyandziga, among its members has also served as an important contributing factor in facilitating indigenous peoples' participation in the activities of the Working Group and in the Forum's proceedings. This aspect of the Working Group's composition, and the participatory avenues which it has opened, constitute an important precedent which future Working Groups composition and practice should seek to replicate.

The International Labour Organization (ILO) is a particularly significant international actor in the context of business and indigenous peoples' rights and its absence from the 2013 Forum was consequently unfortunate. Given the organization's tripartite structure involving States, employers and employees as well as its historical and on-going engagement with indigenous peoples' rights in the context of ILO Conventions 107 and 169, its participation at future Forums would be beneficial to the promotion of indigenous peoples' rights in the context of business activities and is to be

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encouraged. Participation may also assist the ILO supervisory bodies in their interpretation of ILO Conventions in a manner consistent with developments in the broader framework of indigenous peoples' rights, in particular in relation to the self-determination based requirement for FPIC. To this end the Working Group could consider placing a greater emphasis during Forum sessions on the potential role the ILO could play in furthering the implementation of the Guiding Principles and ensuring indigenous peoples' rights and labour rights are respected in the context of business activities.

The Working Group could also consider engaging with the UN Global Compact in relation to corporate policies on indigenous peoples' rights and reporting on respect for those rights in practice. The Global Compact has facilitated a series of discussions in relation to its Business Reference Guide on the UNDRIP.²⁰ By encouraging all businesses that are members of the UN Global Compact to address their indigenous peoples' rights policies and practices in their annual Communication on Progress reports, the Working Group could assist in breathing life into the recommendations of its own 2013 Annual Report and the 2013 UN Global Compact Business Reference Guiding on the UN Declaration on the Rights of Indigenous Peoples.

Numerous civil society sessions and interventions at the 2013 Forum focused on the need for a treaty addressing corporate human rights obligations. In their interventions many civil society representatives warned that the UN Guiding Principles and other voluntary guidelines have the potential to undermine the adoption of binding regulations in the area of human rights, with UNICEF's "Children's Rights and Business Principles" cited as an example of where this may have been the case. The call for a treaty addressing corporate responsibility in relation to human rights, as a means of building upon the Guiding Principles, was a central aspect of the closing speech of Debbie Stothard, the civil society representative. In response to this call a representative of business stated that focusing on a treaty addressing corporate obligations risked undermining the existing consensus which had been built around the Guiding Principles. This "anti-treaty" view had been supported by the Government of the United Kingdom in another Forum session. Ecuador on the other hand reiterated its support for such a treaty and proposed that intergovernmental negotiations in relation to it should be initiated in light of the fact that a significant number of States were in favour of such a process.²¹

In addition to Ecuador's proposal for a treaty addressing corporate human rights obligations, which is widely supported by civil society organizations, two recent developments within the HRC are illustrative a growing awareness among home and host States of the need for stronger enforcement mechanisms in relation to corporate human rights obligations and some form of legal instrument to facilitate this. The first was South Africa's recommendation to Norway at the 19th session of the Universal Periodic Review that it "ensure that the activities of transnational corporations and other business enterprises do not have a negative impact on the enjoyment of rights of indigenous peoples, and other ethnic groups".²² The second is the draft resolution on *Human rights and transnational corporations and other business enterprises*, presented by Norway, Ghana, India, Russia and Argentina, at the 26th session of the HRC which acknowledges the potential role for legally binding instruments to ensure effective access to remedies. The draft resolution states:

Recognizing the benefit of clarifying issues regarding legal and practical barriers to remedies, requests the High Commissioner for Human Rights to launch an inclusive and transparent

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consultative process with States and all relevant stakeholders to explore and facilitate the sharing of legal and practical measures to improve access to remedy, judicial and non-judicial, for victims of business related abuses, (*including by organizing a dedicated discussion regarding benefits and limitations of legally binding instruments to improve access*)²³ and present a report to the 32th session of the Human Rights Council, taking into account the work done so far.

The demand for an instrument, such as a treaty which would impose legally enforceable human rights obligations on corporations, has been supported by indigenous organizations and was discussed at the indigenous peoples' caucus. The value and importance of such a treaty was stressed by a number of representatives. This was seen as being particularly relevant in a context where corporate rights are afforded binding protection in bilateral investment agreements and investor-State contracts, while indigenous peoples' inherent and pre-existing rights are effectively ignored and overwritten by such agreements, with no effective remedies or legal avenues available to address violations of their rights. At the same time it was also noted that in light of the timeframe involved in realizing such a treaty, due to a lack of political consensus among States, practical and immediate steps also needed to be taken at the international, national (in both home and host States) and local levels to implement and enforce the Guiding Principles in accordance with indigenous peoples' rights and with the active participation of indigenous peoples.

The view emerging from the indigenous caucus was therefore that the implementation and enforcement of the Guiding Principles should not preclude consideration of the development of a treaty in relation to the human rights obligations of corporations. It was felt that the Framework and the Guiding Principles could afford indigenous peoples with an additional tool when seeking to assert their rights in the context of existing or proposed corporate activities. For this to happen the Framework and Principles have to be contextualized within the broader international human rights framework. This implies that the Guiding Principles have to be interpreted in light of human rights standards and jurisprudence, and not visa-versa, and that the Guiding Principles must not act as an obstacle to further normative or legal developments which are necessary for human rights to be fully realized and respected. In this regard it was noted that the philosophy underpinning the Guiding Principles was that they should not preclude further developments in international law.

In light of the historical and on-going violations of their rights and the imminent threats of further violations, interventions by indigenous peoples' representatives generally focused on the importance of taking immediate steps to guarantee respect for their inherent rights and their distinct perspectives on development and to ensure the availability, and effective enforcement, of remedies for corporate violations of those rights. This requires, at a minimum, that States comply with their existing legally binding obligations under international human rights law to protect against human rights violations by corporate actors, and that corporate actors conduct adequate due diligence in order to avoid human rights abuses or complicity in such abuses and that both States and corporations ensure effective remedies where such abuses or harms arise. Indigenous peoples' primary focus during the Forum therefore tended to be on the implementation and effective enforcement of the Framework and Guiding Principles, in accordance with their rights, at national levels, in both home and host states of corporations, rather than on the legal underpinnings and nature of the corporate responsibility to respect their rights.

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In a number of the Forum's sessions it was evident that a degree of confusion exists among corporate actors around the relationship between Corporate Social Responsibility (CSR) and the corporate obligation to respect human rights. A plain reading of the Framework and Guiding Principles, which are premised on the fact that all corporations have a responsibility to respect all human rights, sheds light on this relationship. As explained by their author, Professor Ruggie, they are reflective of the fact that "the era of declaratory CSR is over".²⁴ In light of this, corporations have to come to terms with the fact that the parameters of CSR have changed and that it has now evolved to embody two distinct streams of responsibility.

The first is the voluntary philanthropic type activities which traditionally formed part of CSR policies. The second, and the one which is relevant in the context of business and human rights, is the rights respecting conduct which is now demanded of all corporations across all of their business activities and relationships. The guidelines make clear that philanthropic measures can in no way compensate for failure to respect human rights. Therefore, while the former continues to be a voluntary primarily corporate determined and managed practice, the latter is an imperative, premised on an accepted international normative human rights framework, to which all corporations must now comply. A "pick and choose" approach consequently cannot apply to the responsibility to respect human rights.

This rights respecting aspect of CSR, which mandates that human right due diligence be conducted and the necessary steps taken to prevent and mitigate potential violations and impacts, applies irrespective of whether national legislation or State practice adequately addresses human rights impacts of corporations. The pursuit of activities in such contexts without due regard for indigenous peoples rights is a breach of the corporate responsibility to respect human rights and opens up the possibility of corporate complicity in human rights violations. As such a neat distinction between legal and voluntary corporate responsibilities which was generally assumed to apply to CSR activities is no longer valid. Many corporations have yet to grasp that the contemporary rights-consistent concept of CSR is comprised of both of these distinct dimensions. In the context of respecting indigenous peoples' rights this implies that corporations need to hold broad based dialogues with indigenous peoples in order to understand the content of their rights and indigenous perspectives on corporate activities. A failure to reconceive CSR in this manner would render the concept redundant in this new era which mandates human rights compliant corporate activities.

Civil society organizations and academics have pointed to the shortcomings in the UN Framework and Guiding Principles on Business and Human Rights in terms of, *inter alia*, the conceptual underpinnings for the corporate responsibility to respect; the extent to which they reflect international law around corporate accountability; and the manner in which they address the issue of extraterritorial responsibility.²⁵ They have also noted that voluntary commitments to CSR, absent legal requirements to realize the associated responsibilities, tend to be inadequate in terms of addressing social and environmental issues associated with corporate activities, while legal measures mandating CSR activities have provided significant incentives towards their realization.²⁶

However, despite these shortcomings in the current framework, insisting on this new conception of CSR, which necessitates corporate respect for all human rights, has potential benefits for indigenous peoples in terms of influencing existing corporate policies and actions on the ground. Prior manifestations of CSR, under which corporations unilaterally decided which, if any, human rights they would respect, and how they would do so, led to the CSR concept being regarded by many

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impacted rights holders, in particular indigenous rights holders, as little more than corporate public relations and a communications tool, serving to detract from the risks posed to fundamental human rights as a result of corporate activities. Such conceptions of CSR continue to be regarded as a means for “green-washing” environmental wrongs, or “blue-washing” human rights abuses, while effectively continuing with business as usual.

The responsibility to respect human rights, as framed under the international normative framework, shifts the terrain of CSR away from corporate control and definition and into the realm of international law and policy. This new reality is reflected in the description of the Guiding Principles as “an expression of a policy consensus within the international community about the responsibilities of business”.²⁷ By affirming the corporate responsibility to respect international human rights, while not placing any limitations on future developments in international law pertaining to corporate obligations, the Guiding Principles have the potential to contribute towards the establishment of “a firmer normative fabric for global governance” in the context of corporate activities, and open the prospect for a new “paradigm of normativity and responsibility”.²⁸ In other words, the substantive dimension of the guiding principles should not be completely dismissed. In addition to the acknowledgement by States of their duty to protect against corporate violations of human rights, the affirmation by States, through the Human Rights Council, of a corporate responsibility to respect human rights could lead to the emergence of a body of practice around this obligation and contribute to the evolution of new legal duties for corporations. In this regard the Guiding Principles are, to a certain extent, what civil society and indigenous peoples make of them. For this new normative paradigm of corporate responsibility to be realized the core question of how to guarantee corporate compliance with the responsibility to respect human rights will have to be tackled in earnest. Fundamental to this is ensuring that the Framework and Guiding Principles are understood as mechanisms for the furthering the implementation of international human rights law as it pertains to corporations and their activities, and not as a means for reinterpreting or limiting the contours and content of human rights and associated State and corporate obligations pertaining to them.

The annual Forum on Business and Human Rights has a potential role to play in this regard. If structured with that end in mind, it can provide a space facilitative of open and constructive dialogue between indigenous, industry and State representatives with regard to the operationalization of the Guiding Principles in accordance with indigenous peoples’ rights. The agenda and structure of the 2013 Forum was somewhat wanting in this regard. For example, the indigenous peoples’ three hour long pre-Forum session was held in parallel with the industry, State and civil society pre-Forum sessions, with the result that, apart from the ICM and Global Compact representatives who had been invited to present, industry ad State participation was minimal. Meanwhile, the official Forum session addressing indigenous issues was only one and a half hours in duration, and was held in parallel with other two other sessions. While this official session was well attended by industry representatives, the short timeslot allocated to it meant that once the panellists had spoken there was very little opportunity for subsequent dialogue or for panellists to respond to issues which were raised from the floor. As a result the opportunity to use the Forum as a space for constructive discussion and debate between rights and duty holders was not maximised.

To address such shortcomings in the future, the Working Group could, in conjunction with indigenous peoples, consider facilitating, or creating the space for, a session which enables direct

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engagement between indigenous and corporate representatives involving, where appropriate, international organizations and State representatives. The objective of such a session could be to further business understanding of indigenous peoples' rights and perspectives around issues such as due diligence in relation to indigenous peoples rights, FPIC implementation, and the establishment of culturally appropriate grievance and remedial mechanisms with a particular emphasis on the role of indigenous legal systems.

Concerns raised in the 2013 Forum around the role of corporate non-judicial grievance mechanisms in guaranteeing access to justice and the absence of effective remedies are indicative of the importance of such direct engagement. One example is that, in certain contexts, such as in the cases of victims of rape by police and security forces at Barrick Gold Corporation's mine in Papua New Guinea, corporate defined non-judicial mechanisms were being used as a means to foreclose and obstruct rights holders' access to other legally binding avenues of recourse.²⁹ Civil society and indigenous representatives emphasised that under no circumstances should non-judicial grievance mechanisms be used as a means to prevent violations of human rights from being addressed through judicial avenues. In light of such issues and the absence of effective remedies, the Forum could, for example, be used to facilitate a constructive dialogue between indigenous peoples, corporations and States in relation to access to remedy for violations of indigenous peoples rights. In keeping with the recognition afforded to customary judicial bodies in its 2013 annual report attention could be directed to the role of indigenous peoples' customary institutions and indigenous grievance mechanisms in realizing a right to effective remedies in the context of corporate activities in their territories. Furthermore, the potential for contractually binding, mutually acceptable, rights based grievance mechanisms could be investigated and good practice in this area identified.

Structuring a forum, or pre-Forum, session in a manner facilitative of direct engagement between indigenous and industry representatives, as well as private and public financial institutions involved in funding extractive industry projects, would contribute towards a more meaningful incorporation of indigenous peoples' rights into corporate policy and practice. It could also help to move the activities of the Working Group's activities beyond the necessary restatement of applicable human rights standards in the context of indigenous peoples, as reflected in its 2013 report, towards a collaborative focus on operational steps necessary for their translation into practice. This would constitute an important contribution towards realizing the Working Group's recommendation in its 2013 annual report that business actors "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".³⁰ Encouraging States to report on the incorporation of these instruments into their National Action Plans and the process for their elaboration would also be a constructive step toward the implementation of the Guiding Principles in a manner consistent with indigenous peoples' rights.

In 2012 the objective of Forum consisted primarily of familiarizing participants with the Guiding Principles, with little attention placed on how they were being realized in practice. The 2013 Forum represented welcome progress in this regard, as greater attention was directed towards the relevance of the Guiding Principles in concrete situations. Optimistic perspectives were aired by some during the Forum, that this shift in focus was reflective of a broader trend whereby corporate actors are moving beyond their initial efforts to understand the contents of the Guiding Principles, towards a meaningful consideration of steps necessary for their implementation. While this

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perspective may have some basis in fact, any such progress in implementation of standards has to be continually contextualized and evaluated in light of actual evidence of improvements in the situation of those rights holders most affected by corporate activities. Beyond the ambit of the Forum the Working Group also has a role to play in this regard through the transparent consideration of information received in relation to allegations of corporate related abuses of indigenous peoples' rights and the issuance of appropriate recommendations to State and corporate actors in relation to the necessary remedial measures.³¹ As the Working Group builds its capacity in the area of indigenous peoples' rights, the formulation of such recommendations may necessitate dialogue with representatives of indigenous peoples and cooperation with relevant human rights mechanisms, such as the UN Special Rapporteur on the rights of indigenous peoples or the Expert Mechanism on Indigenous Peoples Rights.³²

Two events, which occurred far from Geneva on the closing day of the Forum, underline the pressing need for immediate action on the ground if indigenous peoples' rights are to be protected and respected in the context of corporate activities. The first was the closure by the Ecuadorian Government of Fundación Pachamama, an organization which since 1997 has worked to defend the rights of Amazonian peoples impacted by extractive projects. This action by Ecuador reflects significant limitations in the State's compliance with the legally binding duty to respect the rights of its own indigenous peoples and could lead to a degree of scepticism in relation to its promotion of an international treaty in relation to corporate human rights obligations. Such obstacles to the functioning of indigenous rights organizations run contrary to the State duty to protect reaffirmed under the Guiding Principles. It is also at odds with the guidance delivered by the UN Special Rapporteur on human rights defenders, Margaret Sekaggya, to the Forum during its plenary session. The Guiding Principles themselves do not elaborate on the broad array of human rights duties which States hold in the context of business activities. It is therefore imperative that States act on guidance provided by UN Charter bodies, such as the Special Rapporteurs, in relation to these responsibilities. The same is true of the guidance and recommendations in relation to business and human rights that is provided by UN human rights treaty monitoring mechanisms such as the Committee on the Elimination of Racial Discrimination (CERD), Human Rights Committee and the Committee on Economic Social and Cultural Rights (CESCR), all of which have repeatedly recommended that home states hold their corporations to account for violations of human rights, including indigenous peoples rights, overseas.³³

The second disturbing event which occurred the day the Forum closed, and which illustrates the importance of immediate and tangible action, was a clash between local community members and police in Papua New Guinea at Barrick Gold Corporation's troubled Porgera silver and gold mine. The violent clash resulted in the killing of a number of locals whose only "crime" appeared to involve "scavenging" mine tailings - located in their traditional territories - for gold-bearing rocks.³⁴

The interventions made by indigenous peoples at the Forum sessions illustrate that these two events are representative of the daily on-going experience of many indigenous peoples and their organizations throughout the world in the context of extractive industry and other development activities in their territories. They serve as a reminder that despite welcome movements towards policy reforms by corporate and other actors, in practice little has yet changed for indigenous rights holders since the very first report of the Special Representative of the Secretary-General on the issue

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of human rights and transnational corporations and other business enterprises. That 2006 report painted a stark reality in which:

[t]he extractive sector - oil, gas and mining - utterly dominates this sample of reported abuses with two thirds of the total...The extractive industries also account for most allegations of the worst abuses, up to and including complicity in crimes against humanity. These are typically for acts committed by public and private security forces protecting company assets and property; large-scale corruption; violations of labour rights; and a broad array of abuses in relation to local communities, especially indigenous people.³⁵

This on-going reality serves as a poignant reminder of the need for rapid, tangible and demonstrable improvement in State and corporate practices in relation to preventing human rights impacts of business activities on indigenous peoples.

The production of its first annual report and the improved facilitation of indigenous participation in the Forum point to the Working Group's potential to play a role in driving this change. As noted by the indigenous caucus this potential can be realized in parallel with efforts in other fora aimed at the development of a treaty or other legally binding instruments addressing corporate human rights related obligations. By maintaining a strong focus on indigenous peoples' rights and operating in close collaboration with the broader UN Human Rights regime and indigenous peoples' organizations, the Working Group, and its Forum, have the potential to continue to play a constructive role in the creation of an environment which is conducive to the respect, protection, and fulfilment of indigenous peoples' collective and individual human rights. Operationalization of the Working Group's mandate in relation to indigenous peoples impacted by business activities demands nothing less.

**Annex 1: Recommendations by the indigenous peoples' caucus to the 2nd annual UN
Forum on Business and Human Rights
(Draft list of recommendations)**

Geneva, December 2013

Recommendations to States, business and other actors:

- Respect the collective rights of Indigenous Peoples to their lands, territories and resources.
- Business shall respect national judicial processes and court decisions with regard to violations of indigenous peoples' human rights.
- Respect indigenous peoples' institutions and processes including the principle of self selection and collective decision making in the context of FPIC processes.
- The OECD should revitalize its former process to develop guidance on respect for Indigenous Peoples' rights with the full and effective participation of indigenous peoples.
- Address deficiencies at the international level in access to remedies by ensuring greater enforcement powers of existing international mechanisms such as the OECD NCP's or by establishing alternative independent enforcement mechanisms.
- Ensure that independent environmental, social and cultural impact assessments are conducted with the consent and participation of indigenous peoples, or by the impacted indigenous peoples themselves, prior to any activities with potential human rights impacts.
- Ensure that the requirement for human rights due diligence includes respect for indigenous peoples' rights
- Guarantee that international human rights standards are not weakened through interpretations or the implementation of the Guiding Principles
- Reiterate that respect for indigenous peoples' collective rights constitutes the basis for the requirement to obtain indigenous peoples' FPIC and is necessary for its realization
- Ensure the immediate implementation of the recommendations in the Working Group report
- Guarantee that all National Action Plans afford adequate consideration to indigenous peoples' rights at home and overseas, and are consistent with the jurisprudence of the human rights regime and the rights and standards affirmed in UNDRIP and ILO Convention169.

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- States should hold the corporations registered in their jurisdictions to account for violations of indigenous peoples' rights overseas and ensure that those impacted by their operations have access to justice and remedy.
- Acknowledge that the implementation and enforcement of the Guiding Principles does not preclude consideration of future work on the development of a legally binding instrument in relation to the human rights obligations of corporations.

Recommendations to the Working Group:

The Working Group should, in cooperation with indigenous peoples, design and develop a joint project to further the implementation of the guiding principles in the area of access to remedy across a range of industry sectors. The project should be a case study and multi-stakeholder workshop based and launched in 2014.

In order to implement the third pillar and guarantee the right to remedy the Working Group needs to go beyond its current focus on best practices, and should anchor its work in concrete cases, including violations of indigenous peoples' rights.

Increase support for the full and effective participation of indigenous peoples in the activities of the Working Group and its Forum. This requires:

- a) guaranteeing funding for indigenous participation at the forum sessions
- b) ensuring that there is always an indigenous representative as a member of the working group
- c) holding a specific dialogue between the Working Group and the indigenous peoples in the 3rd Forum
- d) include Indigenous Peoples' rights as a standing agenda item in all their meetings;
- e) Indigenous Peoples rights should be mainstreamed in the activities of the Working Group and addressed as a cross-cutting issue in its future reports and recommendations, in particular in the context of bilateral investment agreements, extraterritorial jurisdiction and conflict zones.

The Working Group should recommend that Business and Human Rights be part of the Agenda of the World Conference on Indigenous Peoples in September 2014.

The Working Group should conduct missions to the territories of indigenous peoples whose human rights have been impacted by business operations.

**Annex 2: Statement by the Asia indigenous peoples' caucus at the indigenous peoples
pre-Forum session**

**Stakeholder pre Forum session: Indigenous Peoples
Forum on Business and Human Rights
Second session December 2-4, 2013, UN Headquarters, Geneva**

**Statement by the Asia Indigenous Peoples Caucus and the Asia Indigenous Peoples Pact (AIPP) and
Asia Indigenous Peoples' Network on Extractive Industries and Energy (AIPNEE)**

KEY ISSUES AND CHALLENGES

Indigenous peoples in Asia comprise around 300 million. The majority belongs to the poorest of the poor, and are systematically excluded, discriminated and exploited. The recognition and respect for indigenous peoples' rights in many countries in Asia is very weak. On the other hand, the demand for massive exploitation of the remaining resources of land, timber, water and minerals in indigenous territories for business and so-called development targets is intensifying. In particular, the rapid expansion of the economic growth in China and India in recent years has intensified the pressures on the lands and territories of indigenous peoples in Asia. Mining activities have increased in the Philippines, India and Indonesia causing so many conflicts and even political killings to protect mining interest. Likewise, the ambitious Investment Plan of ASEAN and SAARC include the construction of more than hundred large dams, hydro projects in major riverine systems of which millions of indigenous peoples depend on for their livelihoods, culture and ways of life.

As a result of business operations, along with the top-down development plans of states, indigenous peoples continue to suffer from forced displacements from their lands, territories and resources, the destruction of subsistence economies and sustainable livelihoods, cultural heritage, weakening of social cohesion and the occurrence of conflicts among others. These are clearly violations of the collective rights of indigenous peoples, particularly to their lands, territories and resources, as well as to their right to self-determined development.

Indigenous peoples in Asia are thus confronted with multilayered violations of their collective rights by development actors especially by states, companies, corporations and other business interest-groups. With the Guiding principles for Business and Human Rights, it is urgent and critical for states and business groups to reflect on their legacy in relation to indigenous peoples. Further, there is also a need for policy-cohesion at the international level and institutional level on the recognition and respect of indigenous peoples rights as human rights. Unless there is a political will to respect human rights, and implement a fundamental shift from the "business as usual" approach to a human rights based approach to business and development that is people-driven and based on their needs and aspirations, the Guiding Principles on Business and Human Rights will not make much

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difference in reversing the marginalized and exploited conditions of indigenous peoples across Asia and elsewhere.

In the spirit of constructive engagement in moving forward with the Guiding Principles, the indigenous peoples' representatives from Asia welcome the report of the Working Group on Business and Human Rights relating to indigenous peoples. The report clearly adds more guidance on the particular context of indigenous peoples' human rights as embodied in the UN Declaration of the Rights of Indigenous Peoples and the ILO Convention 169 on Indigenous and Tribal Peoples. While the requirement for the Free Prior and Informed Consent

(FPIC) is included in the report, it should also be understood that this is not merely a procedural or mechanical matter but rather as a form to operationalize the collective rights of indigenous peoples to their lands, territories and resources and to self-determination. The requirement for consent shall thereby be implemented and respected by all actors especially by states and business groups with proposed activities that have impacts to the full exercise and enjoyment of indigenous peoples' collective rights.

Further, the need for effective remedy mechanisms, especially at the national and regional levels in Asia is very urgent and critical. The thousands of victims of human rights violations by business groups amongst indigenous peoples across Asia are waiting for justice. The bad legacy of business enterprises needs to be addressed with a sense of fairness and humility in order to rebuild the trust of indigenous peoples' communities as partners for development based on the respect of their rights. Effective redress mechanisms shall thereby be explored by state and business groups including customary judicial forms of indigenous peoples that are appropriate and effective on dispute and conflict resolution involving business groups.

Finally, in addition to the above, the indigenous peoples representatives of Asia wish to put forward the following recommendations to the Working Group

1. For the Working Group on Business and Human Rights to include a dedicated agenda and a plenary session on indigenous peoples, Business and Human Rights: Moving forward with the implementation of the Guiding Principles on Business and Human rights during its 3rd Forum Meeting 2014.
2. For the Working Group to conduct a special session/workshop with indigenous peoples representatives to exchange views and recommendations on their report relating to indigenous peoples and for the implementation of the Guiding principles in general. In particular, this shall be done with the active participation of representatives of business groups and indigenous peoples.
3. For the working group to conduct a multi-stakeholder workshop on exploring remedies including the use of customary laws as appropriate to address the violations to the rights of indigenous peoples.
4. For the working group to conduct specific study on human rights abuses against indigenous peoples from business sectors.

**Annex 3: Indigenous peoples' statement at the opening session of the 2nd annual UN
Forum on Business and Human Rights**

Geneva, 3rd of December 2013

Conclusions and recommendations from the *Indigenous Peoples' Pre-Forum Stakeholder Session*

Luis Vittor (Coordinadora Andina de Organizaciones Indígenas), Rapporteur of the Indigenous Peoples' Pre-Forum Stakeholder Session

Mr. Chair,

Members of the Working Group,

Ladies and Gentlemen,

Indigenous delegates from six regions of the world met on the 1st and 2nd of December with the objective of assessing the political coherence between the Guiding Principles and the Rights of Indigenous Peoples. In light of the Indigenous Caucus' deliberations, we would like to submit the following conclusions and recommendations:

1 – Indigenous peoples are victims of violations of our rights to lands, territories and resources in the context of business activities. This is particularly the case in the context of mining and energy operations. This affects our livelihoods and therefore our subsistence. Given this reality we call on States to effectively protect our rights to our territories and resources in the context of business activities in our territories, in full compliance with international human rights law. National Action Plans should also guarantee indigenous peoples' participation and be consistent with the standards enshrined in the United Nations Declaration on the Rights of Indigenous Peoples and the ILO Convention 169.

2 – Consultation and Free, Prior and Informed Consent are imperative when business activities may have an impact on indigenous peoples' territories. We must recall that conducting consultations in order to obtain consent is a non-transferable duty of States. Therefore, consultations should ensure the protection and effective enjoyment of our fundamental rights, such as our right to our lands, territories and resources and our right to life, among others. Consistent with our right to self-determination, business activities can only take place in our lands where our consent has been obtained.

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3- With regard to political coherence at the international level, in our debates we identified some positive developments in the UN System (such as the recommendations of the Special Rapporteur on the Rights of Indigenous Peoples, the Expert Mechanism on the Rights of Indigenous Peoples, and the Permanent Forum on Indigenous Issues), as well as initiatives related to the private sector (such as those developed by the OECD, the ICMM and the Global Compact). Having said that, coherence across these initiatives remains a challenge. The greatest challenge is, however, the practical implementation of these advances and recommendations on the ground remains, a fact evidenced by the testimonies of indigenous representatives from all of the global regions who participated in our session. Therefore, we call on business to make a genuine effort to fully understand the rights of Indigenous Peoples before developing their policies and guidance in relation to the implementation of the Guiding Principles. All such initiatives should be realized with the full and effective participation of Indigenous Peoples.

4 – Finally, we recommend that, in their future work and activities related to the implementation of their mandate to promote the Guiding Principles, the Working Group and its Forum continue to address the issue of Indigenous Peoples' Rights, building on its 2013 annual report (A/68/279) which addressed the issue of indigenous peoples' rights in relation to its mandate. We particularly request that the Working Group, in cooperation with indigenous peoples, conduct further research and hold discussions on issue of guarantying effective remedial mechanisms.

Endnotes

¹ See T. Sagafi-Nejad & J H Dunning *The UN and Transnational Corporations: From Code of Conduct to Global Compact* (Bloomington: Indiana University Press, 2008) for a history of the UN engagement with the issue of business and human rights.

² UN Docs. E/CN.4/RES/2005/69 (2005) and A/HRC/RES/8/7 (2008).

³ HRC Resolution 17/4 Human rights and transnational corporations and other business enterprises UN Doc. A/HRC/RES/17/4 para. 6.

⁴ *Ibid.* para. 6 i & j.

⁵ *Ibid.* para. 12.

⁶ *Ibid.* para. 6 h.

⁷ Documentation and video footage of the sessions of the first annual United Nations Forum on Business and Human Rights, 3-5 December 2012 forum are available at

<http://www.ohchr.org/EN/Issues/Business/Forum/Pages/2012ForumonBusinessandHumanRights.aspx>.

⁸ UN Doc. A/68/279.

⁹ In this regard the 2013 Working Group thematic report cited C. Doyle & J. Carino *Making Free Prior and Informed Consent a Reality: Indigenous Peoples and the Extractive Sector* (London: ECCR, Middlesex University, PIPLinks, 2013) as a source for further elaboration on the bases and content of the requirement for FPIC.

¹⁰ J. Ruggie *Just Business* (New York: Amnesty International, 2013) at 45.

¹¹ HRC Resolution 17/4 (2011) para. 6 e & g.

¹² The initiative of AIPP to translate the Guiding Principles and the Report of the Working Group into national languages of Asian countries is a commendable step in this regard.

¹³ The agenda which included training sessions on the Guiding Principles, regional and sectorial focus on implementation challenges and initiatives around the implementation of the Guiding Principles is available at <http://www.ohchr.org/EN/Issues/Business/Forum/Pages/2013FBHRDocumentation.aspx>.

¹⁴ These 11 non-OECD States are Argentina, Brazil, Colombia, Costa Rica, Egypt, Latvia, Lithuania, Morocco, Peru, Romania, and Tunisia.

¹⁵ The Global Compact presentation is available at:

http://www.unglobalcompact.org/docs/issues_doc/human_rights/IndigenousPeoples/Presentation_GVA_Dec_13.pdf.

¹⁶ http://www.unglobalcompact.org/Issues/human_rights/indigenous_peoples_rights.html.

¹⁷ *Ibid.*

¹⁸ See UN Docs: A/HRC/24/41, 2013; A/HRC/21/47, 2012; A/HRC/18/35, 2011; and A/HRC/15/37, 2010.

¹⁹ The Plataforma contra la Impunidad event involved the participation of Bettina Cruz (México), Hermelinda Simón (Guatemala), Miriam Miranda (Honduras) and Patricia Gualinga (Ecuador).

²⁰ http://www.unglobalcompact.org/Issues/human_rights/indigenous_peoples_rights.html.

²¹ The initial proposal by Ecuador for such a treaty to the Human Rights Council was supported by the African Group, the Arab Group, Pakistan, Sri Lanka, Kirgizstan, Cuba, Nicaragua, Bolivia, Venezuela, and Peru available at <http://cancilleria.gob.ec/wp-content/uploads/2013/09/DECLARACION.pdf>.

²² UN Doc. A/HRC/WG.6/19/L.1 para. 131.186

²³ Emphasis added. The draft resolution includes a note referring to Ecuador's proposed resolution calling for a Treaty in relation to Business and Human Rights, stating that "The text in this parenthesis will be included provided that we have one resolution on Business and HR in this session". see Human Rights Council 26th Session Draft Resolution Version 100614 'Human rights and transnational corporations and other business enterprises' para 6, available at <http://www.business-humanrights.org/UNWorkingGroupPortal/Submissionsinterventions/UNHRC>

²⁴ J. Ruggie *Just Business* (London: Amnesty International, 2013) at 112.

²⁵ S. Deva & D. Bilchitz (eds) 'Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect' (Cambridge University Press, 2013).

²⁶ IMPACT Project Executive Summary Headline findings, insights & recommendations for policy makers, business & stakeholders (September 2013, CSR Impact).

²⁷ C. Lopez 'The 'Ruggie Process': from legal obligations to corporate social responsibility?' in S. Deva & D. Bilchitz (eds) *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (Cambridge University Press, 2013) at 60.

²⁸ A. Voiculescu 'Human Rights and the Normative Ordering of Global Capital' in A. Voiculescu & H. Yanacopulos (eds) *The Business of Human Rights* (London: Zed Books, 2011) at 10.

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²⁹ See for example <http://www.miningwatch.ca/news/barrick-ignores-un-high-commissioner-human-rights-recommendation-regarding-papua-new-guinea-rap>. Similar issues around confidential compensation agreements for rape victims also arose at African Barrick Gold Corporation's Tanzania Mine.

³⁰ UN Doc. A/68/279 para. 56b.

³¹ This is provided for under the Working Group's mandate which tasks it to 'to seek and receive information from all relevant sources, including Governments, transnational corporations and other business enterprises, national human rights institutions, civil society and rights-holders' UN Doc. A/HRC/RES/17/4 para. 6 b.

³² Such cooperation is envisaged under the Working Group's mandate UN Doc. A/HRC/RES/17/4 para. 6 h.

³³ See for example CERD recommendations to Canada (2006) UN Doc. CERD/C/CAN/CO/18 para. 17 & (2012) UN Doc. CERD/C/CAN/CO/19-20 para. 16; Australia (2010) UN Doc. CERD/C/AUS/CO/15-17 para. 13, United States (2008) CERD/C/USA/CO/6 para. 30; United Kingdom (2011) CERD.C.GBR.CO.18-20 para. 29; and Norway (2011) UN Doc. CERD/C/NOR/CO/19-20 para. 17; and CESCR recommendations to Austria (2013) UN Doc. E/C.12/AUT/CO/4 para. 12, Norway (2013) UN Doc. E/C.12/NOR/CO/5 para. 6; and China (2014) UN Doc. E/C.12/CHN/CO/2 para. 12, Human Rights Committee recommendations Germany (2012) UN Doc. CCPR/C/DEU/CO/6 para. 16; United States (2014) UN Doc. CCPR/C/USA/CO/4 para. 4.

³⁴ <http://www.minesandcommunities.org/article.php?a=12512>.

³⁵ UN Doc. E/CN.4/2006/97 para. 25.



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