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AND TRANSNATIONAL CORPORATIONS AND OTHER
BUSINESS ENTERPRISES

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Mr. Chairperson,
Distinguished delegates,
Ladies and gentlemen,

The Working Group on the issue of human rights and transnational corporations and other business enterprises, which I represent today, and whose report you have before you, was tasked by the Human Rights Council in 2011 to take the UN Guiding Principles on Business and Human Rights forward, support their dissemination, and encourage and provide guidance to States and business enterprises on their implementation.

The Guiding Principles have gained the support of UN member States from all regions of the world, as well as the support of the business community and civil society. The unanimous endorsement by the Human Rights Council in 2011 established the Guiding Principles as a global authoritative standard for the actions which both States and business must take to prevent and address negative impacts on human rights linked to business activity, and ensure effective access to remedies for individuals and communities when adverse impacts occur. The Guiding Principles affirm the existing duty of States to protect human rights in the context of business activities and elaborate on the legal and policy implications of this duty; and set out clearly the corporate responsibility to respect human rights.

Within its specific mandate to “give special attention to persons living in vulnerable situations”, the Working Group decided to highlight, in its report to the General Assembly, the impact of business operations on the rights of indigenous peoples, and to demonstrate the value of using the Guiding Principles in this context. The Guiding Principles themselves state that particular attention should be paid throughout to the rights, needs and challenges faced by those at heightened risk of becoming vulnerable or marginalized, such as indigenous peoples. Indeed, the Working Group noted the overall social and economic marginalization of indigenous peoples, which limits their ability to successfully assert their rights; excludes them from agreement processes and other consultations that irrevocably influence their lives; and leaves them at risk of increased vulnerability.

Excellencies,

The Working Group was alerted to numerous business-related impacts on the rights of indigenous peoples, which highlighted the specific features of indigenous cultures - namely, their deeply rooted spiritual and cultural special relationship to lands, territories and resources which indigenous peoples traditionally occupy or use. As has been documented by other expert groups, including UN experts, indigenous peoples are among the groups most severely affected by the activities of the extractive sector, the agro-industrial and the energy sectors. Reported adverse impacts range from impacts on indigenous peoples’ right to maintain their chosen traditional way of life, with their distinct cultural identity; to discrimination in employment and accessing goods and services (including financial services); access to land and security of land tenure; to displacement through forced or economic resettlement and associated serious abuses of civil and political rights, including impacts on human rights defenders, right to life and bodily integrity.

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

Excellencies,

I would like to take this opportunity to highlight six specific areas.

First, the report clarifies that while States are not per se responsible for abuse of indigenous peoples’ rights by private actors, States may breach the duty to protect where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors’ abuse. The duty to protect is derived from existing human obligations or commitments that States have undertaken and which are widely recognized by the international community. The most significant international instruments in the field of indigenous peoples’ rights are the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which clearly identifies indigenous peoples as collective subjects of international law, endowed with the right to self-determination; and International Labour Organization (ILO) Convention 169.

Second, the report recognizes that free, prior and informed consent (FPIC) is a fundamental element of indigenous peoples’ rights, on which the ability to exercise and enjoy a number of other rights rest. States have an obligation to consult and cooperate in good faith in order to obtain FPIC before the adoption of legislation or administrative policies that affect indigenous peoples; and the undertaking of projects that affect indigenous peoples’ rights to land, territory and resources, including mining and other utilization or exploitation of resources.

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

With regard to the corporate responsibility to respect, and in line with FPIC, the Working Group highlights that good faith consultation and participation is crucial particularly in respect of business decisions that will have a substantial impact on indigenous peoples’ rights, including projects with large “community footprints”, such as mining, agri-business and infrastructure. In practice, to avoid adverse impacts as well as business risks, businesses need to ensure that the State-led FPIC process is adequate. In the absence of an adequate State-led FPIC process, a business enterprise needs to consider carefully whether it can proceed with the project without the risk of causing or contributing to adverse impacts on the rights of indigenous peoples: the failure to inform, engage and consult with indigenous peoples, both men and women, not only undermines the ability of a business enterprise to respect rights (as it may not be aware of its potential or actual impacts), but it also fosters mistrust between communities and business enterprises and can lead to disruptions of operations.

Third, I would like to highlight that free trade agreements and bilateral investment agreements entered into by States, with the aim of promoting trade and investment, have a significant impact on indigenous peoples, and are reported to have been entered into on many occasions without proper consultation. Further, laws enacted and policies implemented further to these agreements can weaken the protection of indigenous lands and resources. In some cases, States have criminalized indigenous
protests against such agreements by prosecuting indigenous leadership, or by repressing communities that have demonstrated against them.

While the aim of these agreements includes increasing economic growth by promoting and protecting international trade and investment, they can weaken States’ abilities to regulate domestically, and as a consequence, restrict the ability of States to implement international human rights obligations, or to adhere to new obligations or evolving standards. In this regard, the Guiding Principles provides that States should maintain adequate domestic policy space to meet their human rights obligations when pursuing investment treaties and contracts. In doing so, States should take into account the specific needs and vulnerabilities of indigenous peoples, which are gender sensitive, to avoid restricting their ability to meet their obligations towards them.

Fourth, the report addresses the State duty and corporate responsibility to provide access to effective remedy for adverse human rights impacts. The report highlights that additional measures may be required to ensure non-discrimination against indigenous peoples in the judicial sphere, through the identification and removal of obstacles to equal access, including in the use of indigenous languages. States should ensure that legal systems recognize indigenous peoples as subjects of international law and take into account the social realities of their specific status. This may require States to allow and require courts to recognize indigenous peoples’ customary laws, traditions and practices, and customary ownership over their lands and natural resources in judicial proceedings.

At the same time, such an approach puts a very substantial responsibility on indigenous communities, including to ensure that the mechanisms are in conformity with the effectiveness criteria laid out in Guiding Principle 31 (namely that they be legitimate, accessible, predictable, equitable, transparent, rights-compatible (in process and outcome) and a source of continuous learning).

Fifth, many business-related impacts on the rights of indigenous peoples relate to activities of transnational corporations. States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. However, strong policy reasons exist for them to do so, as affirmed by the Guiding Principles. These reasons include, in addition to preserving the State’s own reputation and exercising the State’s regulatory power to advance human rights, ensuring predictability for business enterprises by providing coherent and consistent messages, through a range of approaches.

Sixth, the report highlights the specific vulnerabilities faced by indigenous women, who are often subjected to multiple forms of discrimination based on gender and ethnicity. While economic development may offer opportunities for indigenous women, it can deprive them of their existing livelihood, increase their vulnerability to abuse and violence and undermine their social status. By way of example, the report recommends that States integrate and apply gender-sensitive human rights considerations into relevant national laws, policies, regulations and contracts; and that business enterprises consult and engage regularly and directly with men and women in the communities in which operations are conducted. The report also highlights that indigenous peoples should ensure that decision-making protocols with regard to any free, prior and informed consent processes are developed, described and strengthened through their own representative institutions and in accordance with their own procedures. It further recommends that indigenous peoples pay extra attention to ensuring that women and other potentially disenfranchised groups are included in those processes, which should be fully in conformity with international human rights law.

Excellencies,
Mister/Madam Chairperson,

The recommendations in our report require the active support of Member States for their implementation. This support is needed to close the implementation gaps and challenges with regard
to the State duty to protect indigenous peoples against business-related human rights abuses, the corporate responsibility to respect human rights, and the corresponding obligations relating to access to effective remedy. In particular, the Working Group urges relevant stakeholders to conduct further studies into the effectiveness of existing remedy mechanisms available to indigenous peoples, including judicial and non-judicial mechanisms, extraterritorial remedies, as well as indigenous dispute resolution modes, with the goal of developing fact-based comprehensive guidance for States, international institutions, business enterprises and indigenous peoples.

The Working Group welcomes the decision to hold a high-level plenary session on indigenous peoples in September 2014, and looks forward to engaging during this and other events with all stakeholders on how the Guiding Principles can be further utilized to ensure that the rights of indigenous peoples, and of all affected persons and communities, are protected against adverse business-related human rights abuses.