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Fanny Pulver

The Implementation of Free, Prior and Informed Consent and Indigenous Peoples' Rights under the OECD Guidelines for Multinational Enterprises

An Analysis of the Regulatory Framework and
OECD National Contact Point Cases

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Multinational Enterprises**

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and
OECD National Contact Point Cases**

Dissertation
der Rechtswissenschaftlichen Fakultät
der Universität Zürich
zur Erlangung der Würde einer Doktorin der Rechtswissenschaft

vorgelegt von

Fanny Pulver
von Aarberg BE

betreut durch
Prof. Dr. Christine Kaufmann
Zweitgutachter
Prof. Dr. Bas Rombouts



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For my parents, Uschi and Matthias

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List of Abbreviations

ACHR	American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No. 36, 1144 UNTS 123
ADHR	American Declaration of the Rights and Duties of Man (adopted 2 May 1948) OEA/Serv.L./V/11.71
ADRIP	American Declaration on the Rights of Indigenous Peoples (adopted 15 June 2016) AG/RES.2888(SLVI-O/16)
AIPP	Asia Indigenous Peoples Pact
Art(s)	Article(s)
BHR	Business and Human Rights
BHRRC	Business & Human Rights Resource Centre
BHR YRS	Business and Human Rights Young Researchers Summit
BIAC	(OECD) Business and Industry Advisory Committee
CAO	Compliance Advisor Ombudsman
CAS	Committee on the Application of Standards
CBD	Convention on Biological Diversity
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CFM	Community Feedback Mechanism
COs	Concluding Observations
CRC	Committee on the Rights of the Child
CSR	Corporate Social Responsibility
CUP	Cambridge University Press
DD	Due Diligence
EAFORD	International Organization for the Elimination of All Forms of Racial Discrimination
EC	European Commission
ECCR	Ecumenical Council for Corporate Responsibility
ECOSOC	Economic and Social Council
ed(s)	Editor(s)
edn	Edition

EEPCo	Ethiopian Electric Power Corporation
eg	Exempli gratia
EIA	Environmental Impact Assessment
EMRIP	(UN) Expert Mechanism on the Rights of Indigenous Peoples
ENIP	European Network on Indigenous Peoples
EPFIs	Equator Principles Financial Institutions
ESIA	Environmental and Social Impact Assessment
et al	Et alteri
EU	European Union
EY	Ernst&Young
FAO	Food and Agriculture Organization of the United Nations
FAQ	Frequently Asked Questions
FDFA	Federal Department of Foreign Affairs
FIDH	International Federation for Human Rights
Fn	Footnote(s)
FPIC	Free, Prior, and Informed Consent
GC	General Comment
GR	General Recommendation
HRC	(UN) Human Rights Council
HR Committee	(UN) Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IAHRS	Inter-American Human Rights System
ibid	Ibidem
ICAR	International Corporate Accountability Roundtable
ICCPR	International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195
ICESCR	International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3
ICJ	International Court of Justice
ICMM	International Council on Mining & Metals
XX	

ICP	Informed Consultation and Participation
ie	Id est
IFC	International Finance Corporation
ILO	International Labour Organization
ILO C	International Labour Organization Convention
ILO R	International Labour Organization Recommendation
INFOE	Institute for Ecology and Action Anthropology
IOE	International Organization of Employers
IPRA	Republic Act No. 8731, the Indigenous Peoples' Rights Act of 1997
IPU	Inter-Parliamentary Union
IWGIA	International Work Group for Indigenous Affairs
MDGs	Millennium Development Goals
MIGA	Multilateral Investment Guarantee Agency
MNE(s)	Multinational Enterprise(s)
NAPs	National Action Plans
NBIM	Norwegian Bank Investment Management
NCP(s)	National Contact Point(s)
NGO	Nongovernmental Organization
No	Number
NPO	Nonprofit Organization
OAS	Organization of American States
OCDE	Organisation de Coopération et de Développement
OECD	Organisation for Economic Co-operation and Development
OEIGWG	Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights
OHCHR	Office of the High Commissioner for Human Rights
OUP	Oxford University Press
para(s)	Paragraph(s)
POSCO	South Korean Pohang Iron and Steel Enterprise
RBC	Responsible Business Conduct
RDS	Royal Dutch Shell
REDESCA	Relatoría Especial sobre los Derechos Económicos, Sociales, Culturales y Ambientales (Special Rapporteurship on Economic, Social, Cultural, and Environmental Rights)

Res	Resolution
SCBD	Secretariat of the Convention on Biological Diversity
SCHR	Swiss Centre of Expertise in Human Rights
SDG(s)	Sustainable Development Goal(s)
SEACC	Southeast Alaska Conservation Council
SICL	Swiss Institute of Comparative Law
SPDC	Shell Petroleum and Development Company
SR	Special Rapporteur
SRRIP	(UN) Special Rapporteur on the Rights of Indigenous Peoples
SRSR	Special Representative of the UN Secretary-General
TUAC	(OECD) Trade Union Advisory Committee
UK	United Kingdom
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNCTC	United Nations Centre on Transnational Corporations
UN Doc	United Nations Document
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
UNGP(s)	United Nations Guiding Principle(s)
UNPFII	United Nations Permanent Forum on Indigenous Issues
UNSDG	United Nations Sustainable Development Group
UNTS	United Nations Treaty Series
v	Versus
VCLT	Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331
VN	Vereinten Nationen
WGBHR	(UN) Working Group on Business and Human Rights
WGIP	(UN) Working Group on Indigenous Populations
WPRBC	(OECD) Working Party for Responsible Business Conduct
WWF	World Wide Fund for Nature International

Bibliography

Books, Chapters of Books, PhD Theses

- Åhrén M, *Indigenous Peoples' Status in the International Legal System* (OUP 2016)
- Anaya J, *Indigenous Peoples in International Law* (2nd edn, OUP 2004) (Indigenous Peoples)
- Anaya J and Rodríguez-Piñero L, 'Chapter 2 – The Making of the UNDRIP' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018) 38
- Avery CL, *Business and Human Rights in a Time of Change* (Amnesty International UK 2000)
- Backer LC, 'The Arc of Triumph and Transformation of the OECD Guidelines: Quo Vadis Triumph? Into a Era of Transformation! Triumphi Quo Vadis? Temporibus Transmutatio Parere' in OECD (ed), *OECD Guidelines for Multinational Enterprises – A Glass Half Full: A Liber Amicorum for Dr. Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct 2013-2018* (OECD 2018) 43
- Bağlayan B, 'Corporations and Human Rights: Searching for International Norms for Corporate Conduct in Domestic Case Law' (PhD Thesis, Université du Luxembourg 2017) (Corporations)
- Baleva MKA, *Regaining Paradise Lost – Indigenous Land Rights and Tourism: Using the UNGPs on Business and Human Rights in Mainstreaming Indigenous Land Rights in the Tourism Industry* (Brill Nijhoff 2019)
- Bantekas I and Oette L, *International Human Rights: Law and Practice* (3rd edn, CUP 2020)
- Barelli M, 'Chapter 9 – Free, Prior, and Informed Consent in the UNDRIP: Articles 10, 19, 29(2), and 32(2)' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018) 247 (FPIC in UN-DRIP)
- Baumann-Pauly D and Nolan J, 'Regulatory Framework and Guiding Principles' in Dorothee Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016) 31
- Bhatt KI, *Concessionaires, Financiers and Communities: Implementing Indigenous Peoples' Rights to Land in Transnational Development Projects* (CUP 2020)
- Blaser M, Feit HA and McRae G (eds), *In the Way of Development: Indigenous Peoples, Life Projects, and Globalization* (Zed Books 2004)
- Bodley JH, *The Power of Scale: A Global History Approach* (M.E. Sharpe 2003)

- Buhmann K, 'Future Perspectives – Doing Good but Avoiding SDG-Washing: Creating Relevant Societal Value without Causing Harm' in OECD (ed), *OECD Guidelines for Multinational Enterprises – A Glass Half Full: A Liber Amicorum for Dr. Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct 2013-2018* (OECD 2018) 127
- 'Meaningful Stakeholder Engagement as an Aspect of Risk-Based Due Diligence Between the Economy, Politics and Law: The Constitutive Role of the Business and Human Rights Regime' in Rachael L Johnstone and Anne Merrild Hansen (eds), *Regulation of Extractive Industries: Community Engagement in the Arctic* (Routledge 2020) 78 (Stakeholder Engagement)
- Cabrera Ormazá MV, *The Requirement of Consultation with Indigenous Peoples in the ILO: Between Normative Flexibility and Institutional Rigidity* (Brill Nijhoff 2017)
- Castellino J and Doyle CM, 'Chapter 1 – Who Are “Indigenous Peoples”?' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018) 7
- Charters C, 'Chapter 14 – Indigenous Peoples' Rights to Lands, Territories, and Resources in the UNDRIP: Articles 10, 25, 26, and 27' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018) 395
- Cryer R and others, *Research Methodologies in EU and International Law* (Hart Publishing 2011)
- Doyle CM, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free, Prior and Informed Consent* (Routledge 2015) (FPIC)
- Errico S, 'The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights' in Alexandra Xanthaki and Steve Allen (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011) 329
- 'Chapter 15 – Control over Natural Resources and Protection of the Environment of Indigenous Territories: Articles 29, 30, and 32' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018) 425 (Natural Resources and Environment)
- Fajardo T, *Soft Law* (Oxford Bibliographies, OUP 2014)
- Fitzmaurice M, 'Dynamic (Evolutive) Interpretation of Treaties, Part I' in Johan G Lamers (ed), *Hague Yearbook of International Law/Annuaire de la Haye de Droit International: Volume 21* (2008) (Martinus Nijhoff Publishers 2009) 101
- Francioni F, 'The Right of Access to Justice under Customary International Law' in Francesco Francioni (ed), *Access to Justice as a Human Right* (OUP 2007) 1

- Gilbert J, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (2nd edn, Brill Nijhoff 2016) (Land Rights)
- *Natural Resources and Human Rights: An Appraisal* (OUP 2018)
- Hartley J, 'Constructing a Contextual Model of Indigenous Participation in Decision-Making: A Comparative Analysis' (PhD Thesis, University of New South Wales 2016)
- Kaufmann C, *Globalisation and Labour Rights: The Conflict between Core Labour Rights and International Economic Law* (Hart Publishing 2007)
- 'Eine neue Architektur für Menschenrechte und Unternehmen: Gedanken zu einem Perspektivenwechsel und seinen Folgen' in Roberto Andorno and Markus Thier (eds), *Menschenwürde und Selbstbestimmung: Analysen und Perspektiven von Assistierenden des Rechtswissenschaftlichen Instituts der Universität Zürich* (Dike 2014) 73 (Neue Architektur)
- 'Respecting Human Rights in Investment Banking: A Change in Paradigm' in Karen Wendt (ed), *Responsible Investment Banking: Risk Management Frameworks, Sustainable Financial Innovation and Softlaw Standards* (Springer 2015) 509 (Respecting Human Rights)
- 'National Contact Points and Access to Remedy under the UNGP: Why Two Can Make a Dream so Real' in Nicola Bonucci and Catherine Kessedjian (eds), *40 Ans des Lignes Directrices de l'OCDE pour les Entreprises Multinationales/40 Years of the OECD Guidelines for Multinational Enterprises* (Editions A. Pedone 2018) 175 (NCPs)
- 'OECD MNE Guidelines Quo Vadis?: Making Responsible Business Conduct Work for Better Lives' in OECD (ed), *OECD Guidelines for Multinational Enterprises – A Glass Half Full: A Liber Amicorum for Dr. Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct 2013–2018* (OECD 2018) 29 (Quo Vadis)
- Kaufmann C and Grosz M, 'Poverty, Hunger and International Trade: What's Law Got to Do with It? Current Mechanisms and the Doha Development Agenda' in Jost Delbrück, Thomas Giegerich and Andreas Zimmermann (eds), *German Yearbook of International Law/Jahrbuch für Internationales Recht: Volume 51* (2008) (Duncker & Humblot 2009) 75
- Kornfeld IE, *Mega-Dams and Indigenous Human Rights* (Edward Elgar 2020)
- Lagoutte S, 'The UN Guiding Principles on Business and Human Rights: A Confusing "Smart Mix" of Soft and Hard International Human Rights Law' in Stéphanie Lagoutte and others (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016) 235
- Langford M and others, 'Introduction: An Emerging Field' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (CUP 2013) 3

- Lewis C, 'Indigenous Peoples and the Corporate Responsibility to Respect Human Rights' in Corinne Lennox and Damien Short (eds), *Handbook of Indigenous Peoples' Rights* (Routledge 2016) 201
- Mander J and Tauli-Corpus V, *Paradigm Wars: Indigenous Peoples' Resistance to Globalization* (Sierra Club Books 2006)
- Manson NC and O'Neill O, *Rethinking Informed Consent in Bioethics* (CUP 2007)
- Meijknecht A and Rombouts SJ, 'Protection of Indigenous and Tribal Peoples' Cultural and Environmental Rights in Suriname: Challenges in the Implementation of the Judgement of the Inter-American Court of Human Rights in the Saramaka Case and Subsequent Decisions' in Manuel May Castillo and Amy Strecker (eds), *Heritage and Rights of Indigenous Peoples: Patrimonio y Derechos de Los Pueblos Indígenas* (Leiden University Press 2017) 41
- Melish TJ and Meidinger E, 'Protect, Respect, Remedy and Participate: "New Governance" Lessons for the Ruggie Framework' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff Publishers 2012) 303
- Mestad O, 'The Voice of Affected Persons in the OECD Guidelines and Guidance Documents' in OECD (ed), *OECD Guidelines for Multinational Enterprises – A Glass Half Full: A Liber Amicorum for Dr. Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct 2013-2018* (OECD 2018) 77
- Michalowski S, 'Due Diligence and Complicity: A Relationship in Need of Clarification' in David Bilchitz and Surya Deva (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013) 218-242
- Morrison J, *The Social License: How to Keep Your Organization Legitimate* (Palgrave Macmillan 2014)
- 'The Social Licence: One Way of Thinking about Business and Human Rights' in Dorothee Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016) 101 (One Way)
- Muchlinski P, 'Corporations in International Law', in *Max Planck Encyclopedia of Public International Law* (Online) (OUP 2014)
- Mulder H and Scheltema M, 'Synthesis and Further Perspectives' in OECD (ed), *OECD Guidelines for Multinational Enterprises – A Glass Half Full: A Liber Amicorum for Dr. Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct 2013-2018* (OECD 2018) 13
- Nolan J, 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?' in David Bilchitz and Surya Deva (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013) 138 (Soft Law or Not Law)
- 'Business and Human Rights in Context' in Dorothee Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016) 2 (Context)

- ‘Mapping the Movement: The Business and Human Rights Regulatory Framework’ in Dorothée Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016) 32 (Movement)
- Oette L, ‘The UN Human Rights Treaty Bodies: Impact and Future’ in Gerd Oberleitner (ed), *International Human Rights Institutions, Tribunals, and Courts* (Springer 2018) 95
- Pascual-Vives F, *Consensus-Based Interpretation of Regional Human Rights Treaties* (Brill Nijhoff 2019)
- Pentassuglia G, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective* (Brill Nijhoff 2009)
- Pitts C, ‘The United Nations “Protect, Respect, Remedy” Framework and Guiding Principles’ in Dorothée Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016) 51
- Rodríguez-Piñero L, ‘The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples: Mutual Reinforcement’ in Alexandra Xanthaki and Steve Allen (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011) 457
- Rombouts SJ, *Having a Say: Indigenous Peoples, International Law and Free, Prior and Informed Consent* (Wolf Legal Publishers 2014) (Having a Say)
- Ruggie J, *Just Business: Multinational Corporations and Human Rights* (W.W. Norton & Company 2013) (Just Business)
- Saul B, *Indigenous Peoples and Human Rights: International and Regional Jurisprudence* (Hart Publishing 2016)
- Scherer AG and Palazzo G, ‘Globalization and Corporate Social Responsibility’ in Andrew Crane and others (eds), *The Oxford Handbook of Corporate Social Responsibility* (OUP 2008) 413–431
- Schrijver N, *Sovereignty over Natural Resources: Balancing Rights and Duties* (CUP 1997)
- Shelton D, ‘Introduction: Law, Non-Law and the Problem of “Soft Law”’ in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (OUP 2000) 1
- *Remedies in International Human Rights Law* (3rd edn, OUP 2015)
- Smits JM, *The Mind and Method of the Legal Academic* (Edward Elgar 2012)
- Summers J, *Peoples and International Law* (2nd edn, Brill Nijhoff 2014)

- Thornberry P, *Indigenous Peoples and Human Rights* (Manchester University Press 2002) (Indigenous Peoples)
- ‘Integrating the UN Declaration on the Rights of Indigenous Peoples into CERD Practice’ in Alexandra Xanthaki and Steve Allen (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011) 61 (CERD Practice)
- Thürer D, ‘Soft Law’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law: Volume IX* (OUP 2012) 269
- van Putten M, ‘The NCP Work: Dancing on a Cord’ in OECD (ed), *OECD Guidelines for Multinational Enterprises – A Glass Half Full: A Liber Amicorum for Dr. Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct 2013-2018* (OECD 2018) 51
- van Tulder R, ‘Bottoms Up?: OECD Guidelines and the Race to the Bottom or the Top’ in OECD (ed), *OECD Guidelines for Multinational Enterprises – A Glass Half Full: A Liber Amicorum for Dr. Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct 2013-2018* (OECD 2018) 135
- van’t Foort S and Lambooy T, ‘Effective or Not?: The Crucial Role of Effectiveness in Specific Instances’ in OECD (ed), *OECD Guidelines for Multinational Enterprises – A Glass Half Full: A Liber Amicorum for Dr. Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct 2013-2018* (OECD 2018) 67
- Weber RH, ‘Development of Coherent Procedural Rules for OECD Guidelines Mediation’ in Nicola Bonucci and Catherine Kessedjian (eds), *40 Ans des Lignes Directrices de l’OCDE pour les Entreprises Multinationales/40 Years of the OECD Guidelines for Multinational Enterprises* (Editions A. Pedone 2018) 101
- Weller M, ‘Chapter 5 – Self-Determination of Indigenous Peoples: Articles 3, 4, 5, 18, 23, and 46(1)’ in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018) 115
- Wilde-Ramsing J, ‘The Road to Remedy under the OECD Guidelines’ in OECD (ed), *OECD Guidelines for Multinational Enterprises – A Glass Half Full: A Liber Amicorum for Dr. Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct 2013-2018* (OECD 2018) 83 (Remedy)

Articles

- Aizawa M and Tripathi S, ‘Beyond Rana Plaza: Next Steps for the Global Garment Industry and Bangladeshi Manufacturers’ (2015) 1(1) *Business and Human Rights Journal* 145
- Anaya J, ‘Indigenous Rights Norms in Contemporary International Law’ (1991) 8(2) *Arizona Journal of International and Comparative Law* 1 (Contemporary)

- Babic M, Fichtner J and Heemskerk EM, 'States versus Corporations: Rethinking the Power of Business in International Politics' (2017) 52(4) *The International Spectator* 20
- Bağlayan B, 'Searching for Human Rights Norms for Corporate Conduct in Domestic Jurisprudence: A Bottom-Up Approach to International Law' (2018) 36(4) *Nordic Journal of Human Rights* 371 (Bottom-Up Approach)
- Baird IG, 'Indigeneity in Asia: An Emerging but Contested Concept' (2016) 17(4) *Asian Ethnicity* 501
- Baker SH, 'Why the IFC's Free, Prior, and Informed Consent Policy Does Not Matter (Yet) to Indigenous Communities Affected by Development Projects' (2012) 30(3) *Wisconsin International Law Journal* 668
- Barelli M, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58(4) *International and Comparative Law Quarterly* 957
- 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead' (2012) 16(1) *The International Journal of Human Rights* 1 (Developments)
- Barsh RL, 'Revision of ILO Convention No. 107' (1987) 81(3) *The American Journal of International Law* 756 (Revision ILO C 107)
- 'An Advocate's Guide to the Convention on Indigenous and Tribal Peoples' (1990) 15(1) *Oklahoma City University Law Review* 209
- Berman HR, 'The International Labour Organization and Indigenous Peoples: Revision of ILO Convention No. 107 at the 75th Session of the International Labour Conference, 1988' (1988) 41 *International Commission of Jurists Review* 48
- Bilchitz D, 'Do Corporations Have Positive Fundamental Rights Obligations?' (2010) 57(125) *Theoria* 1
- 'The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?' (2010) 7(12) *SUR International Journal on Human Rights* 199
- Boyle AE, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48(4) *International and Comparative Law Quarterly* 901
- Buhmann K, 'Public Regulators and CSR: The "Social Licence to Operate" in Recent United Nations Instruments on Business and Human Rights and the Juridification of CSR' (2016) 136(4) *Journal of Business Ethics* 699 (Social Licence)
- 'Analysing OECD National Contact Point Statements for Guidance on Human Rights Due Diligence: Method, Findings and Outlook' (2018) 36(4) *Nordic Journal of Human Rights* 390 (NCP Statements)
- Chinkin CM, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38(4) *International and Comparative Law Quarterly* 850
- Dare M, Schirmer J and Vancly F, 'Community Engagement and Social Licence to Operate' (2014) 32(3) *Impact Assessment and Project Appraisal* 188

- Davarnejad L, 'In the Shadow of Soft Law: The Handling of Corporate Social Responsibility Disputes under the OECD Guidelines for Multinational Enterprises' [2011] *Journal of Dispute Resolution* 351
- Davis M, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19(3) *Australian International Law Journal* 17
- Errico S, 'The American Declaration on the Rights of Indigenous Peoples' (2017) 21(7) *American Society of International Law Insights* <<https://www.asil.org/insights/volume/21/issue/7/american-declaration-rights-indigenous-peoples>> accessed 22 April 2022
- Gonza A, 'Integrating Business and Human Rights in the Inter-American Human Rights System' (2016) 1(2) *Business and Human Rights Journal* 357
- Götzmann N, 'Human Rights Impact Assessment of Business Activities: Key Criteria for Establishing a Meaningful Practice' (2017) 2(1) *Business and Human Rights Journal* 87
- Gunningham N, Kagan RA and Thornton D, 'Social License and Environmental Protection: Why Businesses Go Beyond Compliance' (2004) 29(2) *Law & Social Inquiry* 307
- Hall MA and Wright RF, 'Systematic Content Analysis of Judicial Opinions' (2008) 96(1) *California Law Review* 63
- Hanna P and Vanclay F, 'Human Rights, Indigenous Peoples and the Concept of Free, Prior and Informed Consent' (2013) 31(2) *Impact Assessment and Project Appraisal* 146
- Hannum H, 'New Developments in Indigenous Rights' (1987-1988) 28 *Virginia Journal of International Law* 649
- Henisz WJ, Dorobantu S and Nartey LJ, 'Spinning Gold: The Financial Returns to Stakeholder Engagement' (2014) 35(12) *Strategic Management Journal* 1727
- Hutchinson T and Duncan N, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83
- Kaufmann C, 'Wirtschaft und Menschenrechte: Anatomie einer Beziehung' (2013) 22(5) *Aktuelle Juristische Praxis* 744 (*Wirtschaft und Menschenrechte*)
- 'Menschen- und umweltrechtliche Sorgfaltsprüfung im internationalen Vergleich: Wie sinnvoll ist ein "Swiss Finish"?' (2017) 26(8) *Aktuelle Juristische Praxis* 967 (*Swiss Finish*)
- 'Global agieren, lokal profitieren – und keine Verantwortung?' [2018] *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht* 329 (*Verantwortung*)
- Kawashima S, 'The Right to Effective Participation and the Ainu People' (2004) 11(1-2) *International Journal on Minority and Group Rights* 21
- Khoury S and Whyte D, 'Sidelineing Corporate Human Rights Violations: The Failure of the OECD's Regulatory Consensus' (2019) 18(4) *Journal of Human Rights* 363

- Larsen PB, 'Contextualising Ratification and Implementation: A Critical Appraisal of ILO Convention 169 from a Social Justice Perspective' (2020) 24(2-3) *The International Journal of Human Rights* 94
- Larsen PB and Gilbert J, 'Indigenous Rights and ILO Convention 169: Learning from the Past and Challenging the Future' (2020) 24(2-3) *The International Journal of Human Rights* 83
- MacInnes A, Colchester M and Whitmore A, 'Free, Prior and Informed Consent: How to Rectify the Devastating Consequences of Harmful Mining for Indigenous Peoples' (2017) 15(3) *Perspectives in Ecology and Conservation* 152
- Maher R and Buhmann K, 'Meaningful Stakeholder Engagement: Bottom-Up Initiatives within Global Governance Frameworks' (2019) 107 *Geoforum* 231
- Marchegiani P, Morgera E and Parks L, 'Indigenous Peoples' Rights to Natural Resources in Argentina: The Challenges of Impact Assessment, Consent and Fair and Equitable Benefit-Sharing in Cases of Lithium Mining' (2020) 24(2-3) *The International Journal of Human Rights* 224
- McLachlan C, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54(2) *International and Comparative Law Quarterly* 279
- Muchlinski P, 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22(1) *Business Ethics Quarterly* 145 (Framework)
- Onwuegbuzie AJ and Leech NL, 'On Becoming a Pragmatic Researcher: The Importance of Combining Quantitative and Qualitative Research Methodologies' (2005) 8(5) *International Journal of Social Research Methodology* 375
- Oshionebo E, 'The OECD Guidelines for Multinational Enterprises as Mechanisms for Sustainable Development of Natural Resources: Real Solutions or Window Dressing?' (2013) 17(2) *Lewis & Clark Law Review* 545
- Owen JR and Kemp D, '"Free Prior and Informed Consent", Social Complexity and the Mining Industry: Establishing a Knowledge Base' (2014) 41 *Resources Policy* 91
- Pegg S and Zabbey N, 'Oil and Water: The Bodo Spills and the Destruction of Traditional Livelihood Structures in the Niger Delta' (2013) 48(3) *Community Development Journal* 391
- Rachovitsa A, 'The Principle of Systemic Integration in Human Rights Law' (2017) 66(3) *International and Comparative Law Quarterly* 557
- Robinson S, 'International Obligations, State Responsibility and Judicial Review under the OECD Guidelines for Multinational Enterprises Regime' (2014) 30(78) *Utrecht Journal of International and European Law* 68
- Rombouts SJ, 'The Evolution of Indigenous Peoples' Consultation Rights under the ILO and U.N. Regimes' (2017) 53(2) *Stanford Journal of International Law* 169 (Evolution)
- Ruggie J, 'Business and Human Rights: The Evolving International Agenda' (2007) 101(4) *The American Journal of International Law* 819

- ‘The Social Construction of the UN Guiding Principles on Business & Human Rights’ [2017] Corporate Social Responsibility Initiative Working Paper 67 <<https://www.hks.harvard.edu/publications/social-construction-un-guiding-principles-business-human-rights>> accessed 19 April 2022 (Social Construction)
- Ruggie J and Nelson T, ‘Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges’ [2015] Corporate Social Responsibility Initiative Working Paper 66 <<https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper.66.oecd.pdf>> accessed 21 April 2022
- Sanchez JCO, ‘The Roles and Powers of the OECD National Contact Points Regarding Complaints on an Alleged Breach of the OECD Guidelines for Multinational Enterprises by a Transnational Corporation’ (2015) 84(1) *Nordic Journal of International Law* 89
- Sapignoli M and Hitchcock RK, ‘Indigenous Peoples in Southern Africa’ (2013) 102(4) *The Round Table* 355
- Schliemann C, ‘Procedural Rules for the Implementation of the OECD Guidelines for Multinational Enterprises: A Public International Law Perspective’ (2012) 13(1) *German Law Journal* 51
- Seck SL, ‘Indigenous Rights, Environmental Rights, or Stakeholder Engagement: Comparing IFC and OECD Approaches to Implementation of the Business Responsibility to Respect Human Rights’ (2016) 12(1) *McGill Journal of Sustainable Development Law and Policy* 53
- Shany Y, ‘International Human Rights Bodies and the Little-Realized Threat of Fragmentation’ [2016] Hebrew University of Jerusalem Legal Studies Research Paper 16/06 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2722663> accessed 22 April 2022
- Shelton D, ‘Normative Hierarchy in International Law’ (2006) 100(2) *The American Journal of International Law* 291 (Hierarchy)
- Simons P and Collins L, ‘Participatory Rights in the Ontario Mining Sector: An International Human Rights Perspective’ (2010) 6(2) *McGill Journal of Sustainable Development Law and Policy* 177
- Suárez Santos R, ‘Three Decades since the ILO’s Convention 169: Reflections in Light of the Experience of the Private Sector with Prior Consultation’ (2020) 24(2-3) *The International Journal of Human Rights* 272
- Swepton L, ‘A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989’ (1990) 15(3) *Oklahoma City University Law Review* 677 (ILO C 169)
- ‘Progress through Supervision of Convention No. 169’ (2020) 24(2-3) *The International Journal of Human Rights* 112 (Supervision ILO C 169)
- Syn J, ‘The Social License: Empowering Communities and a Better Way Forward’ (2014) 28(3-4) *Social Epistemology* 318

- Tigre MA, 'Inter-American Court of Human Rights Recognizes the Right to a Healthy Environment' (2020) 24(14) American Society of International Law Insights <<https://www.asil.org/insights/volume/24/issue/14/inter-american-court-human-rights-recognizes-right-healthy-environment>> accessed 21 April 2022
- Tomaselli A, 'Political Participation, the International Labour Organization, and Indigenous Peoples: Convention 169 "Participatory" Rights' (2020) 24(2-3) The International Journal of Human Rights 127
- van der Ploeg L and Vanclay F, 'A Human Rights Based Approach to Project Induced Displacement and Resettlement' (2017) 35(1) Impact Assessment and Project Appraisal 34
- van't Foort S, 'The History of National Contact Points and the OECD Guidelines for Multinational Enterprises' (2017) 25 Rechtsgeschiede 195 (History)
- 'Due Diligence and Supply Chain Responsibilities in Specific Instances' (2019) 4 Erasmus Law Review 61 (Due Diligence)
- van't Foort S, Lambooy T and Argyrou Aikaterini, 'The Effectiveness of the Dutch National Contact Point's Specific Instance Procedure in the Context of the OECD Guidelines for Multinational Enterprises' (2020) 16(2) McGill Journal of Sustainable Development Law 191
- Venne S, 'The New Language of Assimilation: A Brief Analysis of ILO Convention 169' (1989) 2(2) Without Prejudice: The EAFORD International Review of Racial Discrimination 53
- Wettstein F, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide' (2012) 22(4) Business Ethics Quarterly 739
- Wielga M and Harrison J, 'Assessing the Effectiveness of Non-State-Based Grievance Mechanisms in Providing Access to Remedy for Rightsholders: A Case Study of the Roundtable on Sustainable Palm Oil' (2021) 6(1) Business and Human Rights Journal 67
- Yupsanis A, 'The International Labour Organization and Its Contribution to the Protection of the Rights of Indigenous Peoples' (2012) 49 Canadian Yearbook of International Law 117

Studies and Reports

- Bağlayan B and others, 'Good Business: The Economic Case for Protecting Human Rights' (BHR YRS/Frank Bold/ICAR, 2018) <<https://www.alexandria.unisg.ch/261854/>> accessed 22 April 2022
- Balaton-Chrimes S, 'POSCO's Odisha Project: OECD National Contact Point Complaints and a Decade of Resistance' (Non-Judicial Redress Mechanisms Report Series 5, Corporate Accountability Research, 2015) <<https://corporateaccountabilityresearch.net/njm-report-v-posco-odisha>> accessed 22 April 2022

- Candelaria SM, 'Comparative Analysis on the ILO Indigenous and Tribal Peoples Convention No. 169, UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and Indigenous Peoples' Rights Act (IPRA) of the Philippines' (ILO, 2012) <https://www.ilo.org/manila/publications/WCMS_171406/lang-en/index.htm> accessed 23 April 2022
- Davis R and Franks D, 'Costs of Company-Community Conflict in the Extractive Sector' (Corporate Social Responsibility Initiative Report 66, 2014) <<https://shiftproject.org/resource/costs-of-company-community-conflict-in-the-extractive-sector/>> accessed 23 April 2022
- Doyle CM, 'Indigenous Peoples' Issues & Participation at the UN Forum on Business and Human Rights: Progress to Date and Potential for the Future' (ENIP, 2014) <http://www.piplinks.org/system/files/C_Doyle_Indigenous_Peoples_at_the_UNBHR_Forum_2014.pdf?msckid=76458983c4c811ec86e721a96236570a> accessed 23 April 2022
- Doyle CM and others, 'Business and Human Rights: Indigenous Peoples' Experiences with Access to Remedy – Case Studies from Africa, Asia and Latin America' (AIPP/Almáciga/IWGIA, 2015) <<https://enip.eu/wp-content/uploads/2015/03/Business-and-Human-Rights-Indigenous-Peoples-Experience-with-Access-to-Remedy.pdf>> accessed 23 April 2022
- Doyle CM and others, 'Free Prior Informed Consent Protocols as Instruments of Autonomy: Laying Foundations for Rights Based Engagement' (INFOE/ENIP, 2019) <<https://enip.eu/FPIC/FPIC.pdf>> accessed 22 April 2022 (FPIC Protocols)
- Doyle CM and Cariño J, 'Making Free Prior & Informed Consent a Reality: Indigenous Peoples and the Extractive Sector' (PiPLinks/Middlesex University/ECCR, 2013) <<https://www.ecoesuit.com/wp-content/uploads/2014/09/Making-FPIC-a-Reality-Report.pdf>> accessed 21 April 2022
- Doyle CM and Whitmore A, 'Indigenous Peoples and the Extractive Sector: Towards a Rights-Respecting Engagement' (Tebtebba/PiPLinks/Middlesex University, 2014) <https://www.mdx.ac.uk/_data/assets/pdf_file/0021/138630/Indigenous-Peoples-and-the-Extractive-Sector.pdf> accessed 23 April 2022
- Greenspan E and others, 'Community Consent Index 2015: Oil, Gas, and Mining Company Public Positions on Free, Prior, and Informed Consent' (Oxfam, 2015) <https://www-cdn.oxfam.org/s3fs-public/file_attachments/bp207-community-consent-index-230715-en_0.pdf> accessed 22 April 2022
- Henriksen JB, 'Research on Best Practices for the Implementation of the Principles of ILO Convention No. 169: Case Study 7 – Key Principles in Implementing ILO Convention No. 169' (ILO, 2008) <https://www.ilo.org/wcmsp5/groups/public/-ed_norm/-normes/documents/publication/wcms_118120.pdf?msckid=ea324efec4c811ecba0407b8dd23018c> accessed 23 April 2022
- Herz S, La Vina A and Sohn J, 'Development without Conflict: The Business Case for Community Consent' (World Resources Institute, 2007) <http://pdf.wri.org/development_without_conflict_fpic.pdf> accessed 23 April 2022

Ingrams M, 'State of Remedy 2020: Understanding Community- and Civil Society-Led Complaints Concluded in 2020 through the Lens of Remedy' (OECD Watch Briefing Paper, 2021) <<https://www.oecdwatch.org/state-of-remedy-2020/>> accessed 2 April 2022

Ingrams M and Wilde-Ramsing J, 'The State of Remedy under the OECD Guidelines: Understanding NCP Cases Concluded in 2018 through the Lens of Remedy' (OECD Watch Briefing Paper, 2019) <<https://www.oecdwatch.org/wp-content/uploads/sites/8/2019/06/State-of-Remedy-2018-2019-06-08.pdf>> accessed 23 April 2022 (2018 State of Remedy)

— 'The State of Remedy under the OECD Guidelines: Understanding NCP Cases Concluded in 2019 through the Lens of Remedy' (OECD Watch Briefing Paper, 2020) <<https://www.oecdwatch.org/wp-content/uploads/sites/8/2020/06/State-of-Remedy-2020.pdf>> accessed 23 April 2022 (2019 State of Remedy)

Ingrams M and Zbona A, 'Use with Caution: The Role of the OECD National Contact Points in Protecting Human Rights Defenders' (OECD Watch/BHRRRC, 2019) <<https://www.oecdwatch.org/wp-content/uploads/sites/8/2019/06/Reprisals-NCP-system.pdf>> accessed 22 April 2022

Kaufmann C and others, 'Human Rights Implementation in Switzerland: A Baseline Study on the Business and Human Rights Situation in Switzerland' (SCHR, 2014) <<https://www.ohchr.org/Documents/Issues/Business/NationalPlans/HRAndBusinessBaselineSwitzerland.pdf>> accessed 22 April 2022 (Baseline Study)

Kaufmann C and others, 'Extraterritorialität im Bereich Wirtschaft und Menschenrechte: Extraterritoriale Rechtsanwendung und Gerichtsbarkeit in der Schweiz bei Menschenrechtsverletzungen durch transnationale Unternehmen' (SCHR, 2016) <https://www.skmr.ch/cms/upload/pdf/160815_SKMR_Studie_Extraterritorialitaet.pdf> accessed 22 April 2022

Kaufmann C and others, 'Access to Remedy: Study Commissioned by the FDFA with a View to Fulfilling Postulate 14.3663' (SCHR/SICL, 2017) <https://www.skmr.ch/cms/upload/pdf/180919_Access_to_Remedy.pdf> accessed 23 April 2022

Kaufmann C and Schuerch R, 'Neue Regeln für Schweizer Unternehmen – Berichterstattung und themenspezifische Sorgfaltspflicht: Der indirekte Gegenvorschlag zur Konzernverantwortungsinitiative' (2020) <https://www.skmr.ch/cms/upload/pdf/2020/201216_KVI_Gegenvorschlag.pdf> accessed 23 April 2022

Linder B, Lukas K and Steinkellner A, 'The Right to Remedy: Extrajudicial Complaint Mechanisms for Resolving Conflicts of Interest between Business Actors and Those Affected by their Operations' (Ludwig Boltzmann Institute of Human Rights, 2013) <http://humanrightsinbusiness.eu/wp-content/uploads/2014/07/Right-to-Remedy_Extrajudicial-Complaint-Mechanisms_study.pdf> accessed 24 April 2022

Mamo D and others, 'The Indigenous World 2020: 34th Edition' (IWGIA, 2020) <https://iwgia.org/images/yearbook/2020/IWGIA_The_Indigenous_World_2020.pdf> accessed 23 April 2022

- Marshall S, 'OECD National Contact Points: Better Navigating Conflict to Provide Remedy to Vulnerable Communities' (Non-Judicial Redress Mechanisms Report Series 16, Corporate Accountability Research, 2016) <<https://corporateaccountabilityresearch.net/njm-report-xvi-oecd-ncp>> accessed 22 April 2022
- Marshall S and Balaton-Chrimes S, 'Tribal Claims against the Vedanta Bauxite Mine in Niyamgiri, India: What Role Did the UK OECD National Contact Point Play in Instigating Free, Prior and Informed Consent?' (Non-Judicial Redress Mechanisms Report Series 9, Corporate Accountability Research, 2016) <<https://corporateaccountabilityresearch.net/njm-report-ix-vedanta>> accessed 22 April 2022
- Quijano Vallejos P and others, 'Undermining Rights: Indigenous Lands and Mining in the Amazon' (World Resources Institute, 2020) <https://files.wri.org/d8/s3fs-public/Report_Indigenous_Lands_and_Mining_in_the_Amazon_web_1.pdf> accessed 22 April 2022
- Salcito K, 'FPIC at the IFC: How Performance Standard 7 Could Better Protect Indigenous Peoples and Uphold Human Rights' (NomoGaia, 2020) <<http://nomogaia.org/wp-content/uploads/2020/11/PS7-at-the-IFC-Part-1-FPIC.pdf>> accessed 23 April 2022
- Sherpa L and others, 'Implementing the UN Declaration on the Rights of Indigenous Peoples: Handbook for Parliamentarians No. 23' (IPU, 2014) <<https://www.ipu.org/es/node/599>> accessed 23 April 2022
- Tomei M and Swepston L, 'Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169' (ILO, 1996) <https://www.ilo.org/public/libdoc/ilo/1996/96B09_253_engl.pdf> accessed 23 April 2022 (Guide ILO C 169)

Other Documents and Materials

Varia

- Anaya J, 'Update of OECD Guidelines for Multinational Enterprises: Informal Expert Meeting on Human Rights Issues' (2011) <<https://media.business-humanrights.org/media/documents/fdc31589438324b77398a39465f4f9d139427dce.pdf>> accessed 14 April 2022 (Update)
- Anaya J and Wiessner S, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-Empowerment' (*Jurist*, 3 October 2007) <<https://www.jurist.org/commentary/2007/10/un-declaration-on-rights-of-indigenous-2/>> accessed 23 April 2022
- Auswärtiges Amt, 'Nationaler Aktionsplan: Umsetzung der VN-Leitprinzipien für Wirtschaft und Menschenrechte 2016-2020' (2017) <<https://www.auswaertigesamt.de/blob/297434/8d6ab29982767d5a31d2e85464461565/nap-wirtschaft-menschenrechte-data.pdf>> accessed 27 April 2022

- CAO, 'Policy' (2021) <<https://documents1.worldbank.org/curated/en/889191625065397617/pdf/IFC-MIGA-Independent-Accountability-Mechanism-CAO-Policy.pdf>> accessed 25 April 2022
- Danish Government, 'Executive Order on a Mediation and Complaints-Handling Institution for Responsible Business Conduct' (Unofficial English Version, 2012) <<https://businessconduct.dk/file/298160/executive-order-on-mediation.pdf>> accessed 23 April 2022
- EPFIs, 'The Equator Principles' (2020) <<https://equator-principles.com/wp-content/uploads/2020/05/The-Equator-Principles-July-2020-v2.pdf>> accessed 18 April 2022
- EU, ILO and OECD, 'Responsible Business: Key Messages from International Instruments' (2019) <https://www.ilo.org/asia/info/public/background/WCMS_724747/lang-en/index.htm> accessed 23 April 2022
- EY, 'Business Risks Facing Mining and Metals 2013-2014' (EYGM Limited, 2013) <http://www.ceecthefuture.org/wp-content/uploads/2013/12/Business_risks_facing_mining_and_metals_2013%e2%80%932014_ER0069-1.pdf?msclkid=647e3d4dc4cb1ec983f6fb69b43ae> accessed 23 April 2022
- 'Global Mining and Metals Top 10 Business Risks and Opportunities – 2021' (EYGM Limited, 2020) <https://assets.ey.com/content/dam/ey-sites/ey-com/fr_fr/topics/mining-metals/ey-mm-business-risks-and-opportunities-2021.pdf> accessed 23 April 2022
- FIDH and others, 'Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights' (2011) <https://www.fidh.org/IMG/pdf/Joint_CSO_Statement_on_GPs.pdf> accessed 10 April 2022
- Human Rights Watch, 'UN Human Rights Council: Weak Stance on Business Standards – Global Rules Needed, Not Just Guidance' (16 June 2011) <<https://www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards>> accessed 26 April 2022
- ICMM, 'Position Statement: Indigenous Peoples and Mining' (2013) <https://www.icmm.com/website/publications/pdfs/mining-principles/position-statements_indigenous-peoples.pdf> accessed 24 April 2022 (Position Statement)
- 'Mining with Principles: Annual Report 2020' (2021) <https://www.icmm.com/website/publications/pdfs/annual-review/2020_icmm_annual-report.pdf> accessed 24 April 2022
- ILO, 'Comments Submitted by the ILO' (13 July 2018) <https://www.ilo.org/wcmsp5/groups/public/-ed_protect/-protrav/-ilo_aids/documents/genericdocument/wcms_634380.pdf> accessed 6 April 2022
- International Indian Treaty Council, 'The Geneva Conference: International NGO Conference on Discrimination against Indigenous Populations' (Special Issue Treaty Council News, Vol. 1 No. 7, 1977) <https://ipdpowwow.org/%201977_conference%20ITTC%20Report%20copy.pdf> accessed 12 April 2022

- International Law Association, 'Sofia Conference (2012) Final Report: Rights of Indigenous Peoples' (2012) <<https://www.ila-hq.org/index.php/committees>> accessed 24 April 2022
- Kaufmann C and Nieuwenkamp R, 'Human Rights is an Integral Part of Responsible Business Conduct' (OECD *on the Level*, 10 December 2018) <<https://oecdonthellevel.com/2018/12/10/human-rights-is-an-integral-part-of-responsible-business-conduct/>> accessed 24 April 2022
- NCP Norway, 'Procedural Guidelines for Handling Specific Instances: NCP Norway' (2014) <https://files.nettsteder.regjeringen.no/wpuploads01/blogs.dir/263/files/2014/01/FINAL_KPprosedyreregler_eng_godkj.pdf> accessed 23 April 2022
- Nieuwenkamp R, 'CSR is Dead! What's Next?' (OECD *Insights*, 22 January 2016) <<https://friendsoftheoecdguidelines.wordpress.com/2016/01/22/2016-csr-is-dead-whats-next/?msclkid=b4183387c4c911eca3cda461eb25b12a>> accessed 22 April 2022 (CSR is Dead)
- 'Outcomes from OECD National Contact Point Cases: More Remedy than You May Think!' (Friends of the OECD Guidelines for Multinational Enterprises, 27 November 2017) <<https://friendsoftheoecdguidelines.wordpress.com/>> accessed 25 April 2022
 - 'Staying Ahead of the Curve on Corporate Responsibility: Indigenous Peoples' Rights, Taxation and Disclosure' (OECD *on the Level*, 29 July 2018) <<https://oecdonthellevel.com/2018/07/29/staying-ahead-of-the-curve-on-corporate-responsibility-indigenous-peoples-rights-taxation-and-disclosure/>> accessed 25 April 2022 (Staying Ahead)
- Norwegian Ministry of Foreign Affairs, 'Terms of Reference for Norway's National Contact Point for Responsible Business Conduct' (2018) <<https://files.nettsteder.regjeringen.no/wpuploads01/blogs.dir/263/files/2019/01/EN-Mandat-Kontaktpunktet-2018.pdf>> accessed 27 April 2022
- Norwegian National Human Rights Institution and NCP Norway, 'Natural Resource Development, Business and the Rights of Indigenous Peoples' (2019) <<https://www.nhri.no/en/2019/seminar-report-2019-natural-resource-development-business-and-the-rights-of-indigenous-peoples/>> accessed 23 April 2022
- RSPO, 'Principles and Criteria: For the Production of Sustainable Palm Oil' (2018) <<https://rspo.org/resources/certification/rspo-principles-criteria-certification/rspo-principle-criteria-for-the-production-of-sustainable-palm-oil-2018>> accessed 11 April 2022
- Ryder G, 'Statement by Guy Ryder, Director-General of the ILO' (ILO, 19 September 2018) <https://www.ilo.org/wcmsp5/groups/public/-ed_protect/-protrav/-ilo_aids/documents/genericdocument/wcms_645652.pdf> accessed 6 April 2022

Shah R and Bloomer P, 'Respecting the Rights of Indigenous Peoples as Renewable Energy Grows' (*Stanford Social Innovation Review*, 23 April 2018) <https://ssir.org/articles/entry/respecting_the_rights_of_indigenous_peoples_as_renewable_energy_grows> accessed 27 April 2022

UK Department for International Trade, 'UK National Contact Point Procedures for Dealing with Complaints Brought under the OECD Guidelines for Multinational Enterprises' (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/851589/uk-ncp-specific-instance-procedures.pdf> accessed 23 April 2022

UN Global Compact, 'A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples' (2013) <<https://www.unglobalcompact.org/library/541>> accessed 4 April 2022

Documents of the European Union

European Commission, A Renewed EU Strategy 2011-2014 for Corporate Social Responsibility COM(2011) 681 final (EC, Renewed EU Strategy COM(2011))

- Proposal for a Directive of the European Parliament and Council of 23 February 2022 on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM(2022) 71 final (EC, Corporate Sustainability Due Diligence COM(2022))

Directive 2014/95/EU of the European Parliament and Council of 22 October 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, OJ L 330/1 (15 November 2014) (EU, Directive 2014/95/EU)

Regulation (EU) 2017/821 of the European Parliament and Council of 17 May 2017 Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas, OJ L 130/1 (19 May 2017) (EU, Regulation 2017/821)

Documents of the International Finance Corporation

IFC, 'ILO Convention 169 and the Private Sector: Questions and Answers for IFC Clients' (2007) <https://de.scribd.com/fullscreen/16905434?access_key=key-2bcwe3uie9jldwflgjzr> accessed 27 April 2022

- 'Guidance Notes: Performance Standards on Environmental and Social Sustainability' (2012) <https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/publications_policy_gn-2012> accessed 27 April 2022 (Guidance Notes)
- 'Performance Standards on Environmental and Social Sustainability' (2012) <https://www.ifc.org/wps/wcm/connect/24e6bfc3-5de3-444d-be9b-226188c95454/PS_English_2012_Full-Document.pdf?MOD=AJPERES&CVID=jkV-X6h> accessed 27 April 2022 (Performance Standards)

- ‘Policy on Environmental and Social Sustainability’ (2012) <https://www.ifc.org/wps/wcm/connect/7141585d-c6fa-490b-a812-2ba87245115b/SP_English_2012.pdf?MOD=AJPERES&CVID=kiIrw0g> accessed 27 April 2022 (Policy)

Documents of the International Labour Organization

Comments of the CEACR

CEACR, ‘Report III (Part 1A): General Report and Observations Concerning Particular Countries’ (presented at the 93rd Session of the International Labour Conference, 2005) <<https://www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/rep-iii-1a.pdf>> accessed 24 April 2022

- ‘Report III (Part 1A): General Report and Observations Concerning Particular Countries’ (presented at the 98th Session of the International Labour Conference, 2009) <[https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2009-98-1A\).pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2009-98-1A).pdf)> accessed 2 April 2022 (2009 General Observation)
- ‘Report III (Part 1A): General Report and Observations Concerning Particular Countries’ (presented at the 99th Session of the International Labour Conference, 2010) <[https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2010-99-1A\).pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2010-99-1A).pdf)> accessed 2 April 2022
- ‘Report III (Part 1A): General Report and Observations Concerning Particular Countries’ (presented at the 100th Session of the International Labour Conference, 2011) ILC.100/III/1A <[https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2011-100-1A\).pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2011-100-1A).pdf)> accessed 2 April 2022 (2011 General Observation)
- ‘Report III (Part 1A): General Report and Observations Concerning Particular Countries’ (presented at the 102nd Session of the International Labour Conference, 2013) ILC.102/III(1A) <[https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2013-102-1A\).pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2013-102-1A).pdf)> accessed 2 April 2022 (2013 Report)
- ‘Report III (Part A): General Report and Observations Concerning Particular Countries’ (presented at the 108th Session of the International Labour Conference, 2019) ILC.108/III(A) <https://www.ilo.org/ilc/ILCSessions/108/reports/reports-to-the-conference/WCMS_670146/lang-en/index.htm> accessed 2 April 2022 (2019 General Observation)

Conclusions Adopted by the Governing Body in the Procedures of Representation

Conclusions adopted by the Governing Body on a representation concerning Colombia alleging violation of ILO C 169 (November 2001) GB.282/14/3 <http://www.ilo.org/dyn/normlex/en/f?p=1000:50012:0:NO:50012:P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507143,en:NO> accessed 28 April 2022 (Conclusions Governing Body Colombia (GB.282/14/3))

Conclusions adopted by the Governing Body on a representation concerning Guatemala alleging violation of ILO C 169 (June 2007) GB.299/6/1 <http://www.ilo.org/dyn/normlex/en/f?p=1000:50012:0:NO:50012:P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507321,en:NO> accessed 23 April 2022

Constitution, Conventions, Declaration and Recommendation

ILO, 'Constitution of the International Labour Organization' (adopted 1 January 1919, entered into force 28 June 1919) 15 UNTS 40 (Constitution)

- 'Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries' (adopted 26 June 1957, entered into force 2 June 1959) 328 UNTS 247 (C 107)
- 'Recommendation No. 104 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries' (adopted 26 June 1957) (R 104)
- 'Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries' (adopted 7 June 1989, entered into force 5 September 1991) 1650 UNTS 383 (C 169)
- 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy' (5th edn as amended at the 329th Session in March 2017) (MNE Declaration)

Documents Prepared by the International Labour Office

International Labour Office, 'Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent Countries' (1953) <https://www.ilo.org/public/libdoc/ilo/ILO-SR/ILO-SR_NS35_engl.pdf> accessed 4 April 2022

- 'Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107): Report VI (1)' (1987) <https://www.ilo.org/public/libdoc/ilo/1987/87B09_172_engl.pdf> accessed 4 April 2022 (Partial Revision ILO C 107)
- 'Indigenous & Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169' (2009) <https://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_171810/lang-en/index.htm> accessed 4 April 2022 (2009 Guide ILO C 169)
- 'Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169): Handbook for ILO Tripartite Constituents' (2013) <https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/indigenous-and-tribal-peoples/WCMS_205225/lang-en/index.htm> accessed 4 April 2022 (Handbook ILO C 169)
- 'Applying the Indigenous and Tribal Peoples Convention, 1989 (No. 169): Excerpts from Reports and Comments of the ILO Supervisory Bodies' (2019) <https://www.ilo.org/global/topics/indigenous-tribal/publications/WCMS_714341/lang-en/index.htm> accessed 4 April 2022 (Applying ILO C 169)
- 'Implementing the ILO Indigenous and Tribal Peoples Convention No. 169: Towards an Inclusive, Sustainable and Just Future' (2019) <https://www.ilo.org/global/publications/books/WCMS_735607/lang-en/index.htm> accessed 4 April 2022 (Implementing ILO C 169)

- ‘Monitoring Compliance with International Labour Standards: The Key Role of the ILO Committee of Experts on the Application of Conventions and Recommendations’ (2019) <https://www.ilo.org/global/standards/WCMS_730866/lang-en/index.htm> accessed 4 April 2022 (Monitoring Compliance CEACR)
- ‘Rules of the Game: An Introduction to the Standards-Related Work of the International Labour Organization’ (4th edn, 2019) <https://www.ilo.org/global/standards/information-resources-and-publications/publications/WCMS_672549/lang-en/index.htm> accessed 4 April 2022 (Rules of the Game)
- ‘Social Dialogue, Collective Bargaining and Responsible Business Conduct: Promoting the Strategic Use of International Instruments for Trade Unions’ Action’ (2020) <https://www.ilo.org/actrav/pubs/WCMS_722744/lang-en/index.htm> accessed 4 April 2022 (RBC)

Minutes and Decisions of the ILO Governing Body

ILO Governing Body, ‘Minutes Policy Development Section: Strategic Plan for Engagement with United Nations System Bodies and Relevant Regional Organizations Regarding the Indigenous and Tribal Peoples Convention, 1989 (No. 169)’ (335th Session, 2019) GB.335/POL/PV(Rev.) <https://www.ilo.org/wcmsp5/groups/public/-ed_norm/-relconf/documents/meetingdocument/wcms_686638.pdf> accessed 2 April 2022

- ‘Policy Development Section: Strategic Plan for Engagement with United Nations System Bodies and Relevant Regional Organizations Regarding the Indigenous and Tribal Peoples Convention, 1989 (No. 169)’ (335th Session, 2019) GB.335/POL/2 <https://www.ilo.org/wcmsp5/groups/public/-ed_norm/-relconf/documents/meetingdocument/wcms_672870.pdf> accessed 2 April 2022

Records of the Conference Committee on the Application of Standards

- CAS, ‘Report of the Committee on the Application of Standards: Extracts from the Record of Proceedings 16 (Part One)’ (99th Session of the International Labour Conference, 2010) <https://www.ilo.org/wcmsp5/groups/public/-ed_norm/-normes/documents/publication/wcms_145220.pdf> accessed 2 April 2022
- ‘Report of the Committee on the Application of Standards: Extracts from the Record of Proceedings 16 (Part Two)’ (99th Session of the International Labour Conference, 2010) <https://www.ilo.org/wcmsp5/groups/public/-ed_norm/-normes/documents/publication/wcms_145220.pdf> accessed 2 April 2022

Documents of the Organization of American States

IACHR and REDESCA, ‘Informe Sobre Empresas y Derechos Humanos: Estándares Interamericanos’ (2019) <<http://www.oas.org/es/cidh/informes/pdfs/EmpresasDDHH.pdf>> accessed 27 April 2022

OAS, ‘Charter of the Organization of American States’ (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3

Documents of the Organisation for Economic Co-operation and Development

Declaration, Guidelines and Guidance Documents

OECD, 'Declaration by the Governments of OECD Member Countries and Decisions of the OECD Council on Guidelines for Multinational Enterprises, National Treatment, International Investment Incentives and Disincentives, Consultation Procedures' (adopted 21 June 1976) <<https://www.oecd.org/corporate/mne/50024800.pdf>> accessed 27 April 2022 (Declaration 1976)

- 'OECD Guidelines for Multinational Enterprises' (OECD, 2000) (2000 Guidelines)
- 'OECD Guidelines for Multinational Enterprises' (OECD, 2011) (2011 Guidelines)
- 'OECD-FAO Guidance for Responsible Agricultural Supply Chains' (OECD, 2016) (OECD-FAO Guidance)
- 'OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector' (OECD, 2017) (Stakeholder Guidance)
- 'OECD Due Diligence Guidance for Responsible Business Conduct' (OECD, 2018) (DD Guidance)

Other OECD Documents

- 'OECD Guidelines for Multinational Enterprises: Report by the Chair of the 2011 Meeting of the National Contact Points' (OECD, 2011) <<http://www.oecd.org/investment/mne/49247209.pdf>> accessed 27 April 2022
- '2011 Update of the OECD Guidelines for Multinational Enterprises: Comparative Table of Changes Made to the 2000 Text' (OECD, 2012) <<http://www.oecd.org/daf/inv/mne/49744860.pdf>> accessed 21 April 2022 (2011 Update)
- 'Annual Meeting of the National Contact Points for the OECD Guidelines for Multinational Enterprises: 2013 Chair's Report on the Activities of National Contact Points' (OECD, 2013) <<https://www.cancilleria.gob.ar/userfiles/ut/2013-annual-report-mne-guidelines.pdf>> accessed 25 April 2022
- 'OECD Guidelines for Multinational Enterprises: Responsible Business Conduct Matters' (OECD, 2014) <http://mneguidelines.oecd.org/MNEguidelines_RBCMatters.pdf> accessed 27 April 2022
- 'Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015' (OECD, 2016) <<https://mneguidelines.oecd.org/OECD-report-15-years-National-Contact-Points.pdf>> accessed 27 April 2022 (NCPs 2000-2015)
- 'National Action Plans on Business and Human Rights to Enable Policy Coherence for Responsible Business Conduct' (OECD, 2017) <<https://mneguidelines.oecd.org/NAP-to-enable-policy-coherence-for-RBC.pdf>> accessed 27 April 2022
- 'Structures and Procedures of National Contact Points for the OECD Guidelines for Multinational Enterprises' (OECD, 2018) <<https://mneguidelines.oecd.org/Structures-and-procedures-of-NCPs-for-the-OECD-guidelines-for-multinational-enterprises.pdf>> accessed 27 April 2022 (Structures and Procedures)

- ‘Cases Handled by the National Contact Points for Responsible Business Conduct’ (OECD, 2019) <<https://mneguidelines.oecd.org/Flyer-OECD-National-Contact-Points.pdf>> accessed 27 April 2022 (NCP Cases 2000-2019)
- ‘Guide for National Contact Points on Confidentiality and Campaigning when Handling Specific Instances’ (OECD, 2019) <<https://mneguidelines.oecd.org/Guide-for-NCPs-on-Confidentiality-and-campaigning-when-handling-specific-instances.pdf>> accessed 28 April 2022
- ‘Guide for National Contact Points on Coordination when Handling Specific Instances’ (OECD, 2019) <<https://mneguidelines.oecd.org/Guide-for-NCPs-on-Coordination-when-handling-Specific-Instances.pdf>> accessed 28 April 2022 (Coordination)
- ‘Guide for National Contact Points on Follow Up to Specific Instances’ (OECD, 2019) <<https://mneguidelines.oecd.org/ncps/Guide-for-National-Contact-Points-on-Follow-Up-to-Specific-Instances.pdf>> accessed 27 April 2022
- ‘Guide for National Contact Points on Recommendations and Determinations’ (OECD, 2019) <<https://mneguidelines.oecd.org/Guide-for-National-Contact-Points-on-Recommendations-and-Determinations.pdf>> accessed 27 April 2022 (Recommendations and Determinations)
- ‘Guide for National Contact Points on Structures and Activities’ (OECD, 2019) <<https://mneguidelines.oecd.org/Guide-for-National-Contact-Points-on-Structures-and-Activities.pdf>> accessed 27 April 2022 (Structures and Activities)
- ‘Guide for National Contact Points on the Initial Assessment of Specific Instances’ (OECD, 2019) <<https://mneguidelines.oecd.org/Guide-for-National-Contact-Points-on-the-Initial-Assessment-of-Specific-Instances.pdf>> accessed 24 April 2022
- ‘Progress Report on National Contact Points for Responsible Business Conduct’ (OECD, 2019) <[https://www.oecd.org/mcm/documents/NCPs%20-%20CMIN\(2019\)7%20-%20EN.pdf](https://www.oecd.org/mcm/documents/NCPs%20-%20CMIN(2019)7%20-%20EN.pdf)> accessed 23 April 2022 (Progress Report)
- ‘Providing Access to Remedy: 20 Years and the Road Ahead’ (OECD, 2020) <<http://mneguidelines.oecd.org/ncps/ncps-at-20/>> accessed 21 April 2022 (Road Ahead)
- ‘Annual Report of the OECD Guidelines for Multinational Enterprises 2019’ (OECD, 2020) <<http://mneguidelines.oecd.org/2019-Annual-Report-MNE-Guidelines-EN.pdf>> accessed 27 April 2022
- ‘Annual Report of the OECD Guidelines for Multinational Enterprises 2020’ (OECD, 2021) <<http://mneguidelines.oecd.org/2020-Annual-Report-MNE-Guidelines-EN.pdf>> accessed 27 April 2022 (Annual Report 2020)
- ‘Guide for National Contact Points on the Rights of Indigenous Peoples when Handling Specific Instances’ (OECD, 2022) <<http://mneguidelines.oecd.org/ncps/how-do-ncps-handle-cases.htm>> accessed 26 April 2022

- ‘Stocktaking Report on the OECD Guidelines for Multinational Enterprises’ (OECD, 2022) <<https://mneguidelines.oecd.org/stocktaking-report-on-the-oecd-guidelines-for-multinational-enterprises.pdf>> accessed 26 April 2022 (Stocktaking Report)

National Contact Point Cases

NCP Australia

Amadiba Crisis Committee v MRC Ltd., NCP Australia (Final Statement, 8 March 2013) <https://ausncp.gov.au/sites/default/files/inline-files/SouthAfrica_Mining.pdf> accessed 7 April 2022

NCP Belgium

Sherpa et al v Socapalm/Bolloré SA/Financière du Champ de Mars/Socfin/Socfinaf SA, NCP Belgium (Final Statement, 15 June 2017) <<https://economie.fgov.be/sites/default/files/Files/Entreprises/Communique-pcn-belge-Socapalm-Socfin-Socfinaf-Groupe-Bolloré-fr-20170615.pdf>> accessed 7 April 2022

NCP Canada

Fredemi Coalition v Goldcorp Inc., NCP Canada (Final Statement, 3 May 2011) <https://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/final_stat-marlin-decl_finale.aspx?lang=eng> accessed 7 April 2022

FIDH et al v CRCC-Tongguan Investment (Canada) Co., Ltd., NCP Canada (Final Statement, 24 July 2014) <<https://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/initial-assessment-evaluation-initiale.aspx?lang=eng>> accessed 7 April 2022

Southeast Alaska Conservation Council v Seabridge Gold, NCP Canada (Final Statement, 13 November 2017) <https://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/final_stat-seabridge-comm_finale.aspx?lang=eng> accessed 7 April 2022

Southeast Alaska Conservation Council v Imperial Metals, NCP Canada (Final Statement, 8 May 2020) <<https://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/2020-05-07-ncp-pcn.aspx?lang=eng>> accessed 7 April 2022

NCP France

Sherpa et al v Socapalm/Bolloré SA/Financière du Champ de Mars/Socfin/Socfinaf SA, NCP France (Final Statement, 3 June 2013) <<https://www.tresor.economie.gouv.fr/Institutionnel/Niveau3/Pages/bd7a00fc-6949-450b-bc40-aa09ac044ab0/files/08d3f300-c97d-4b7b-9621-308e6d1cde5b>> accessed 7 April 2022

Sherpa et al v Socapalm/Bolloré SA/Financière du Champ de Mars/Socfin/ Socfinaf SA, NCP France (Follow-Up Statement, 18 May 2016) <<https://www.tresor.economie.gouv.fr/Institutionnel/Niveau3/Pages/bd7a00fc-6949-450b-bc40-aa09ac044ab0/files/48089985-a538-4117-8e67-443ff2783cd5>> accessed 7 April 2022

CCFD et al v Michelin, NCP France (Final Statement, 27 September 2013)

<<https://www.tresor.economie.gouv.fr/Institutionnel/Niveau3/Pages/8ef77cd0-f703-40c3-b02f-deb7a6d01cb6/files/a1f585e5-27f4-4401-84cc-8440325c65fe>> accessed 7 April 2022

CCFD et al v Michelin, NCP France (Follow-Up Statement I, 14 May 2014)

<<https://www.tresor.economie.gouv.fr/Institutionnel/Niveau3/Pages/8ef77cd0-f703-40c3-b02f-deb7a6d01cb6/files/4278244b-8210-4771-aacf-1b638af0e6e9>> accessed 7 April 2022

CCFD et al v Michelin, NCP France (Follow-Up Statement II, 29 February 2016)

<<https://www.tresor.economie.gouv.fr/Institutionnel/Niveau3/Pages/8ef77cd0-f703-40c3-b02f-deb7a6d01cb6/files/e9ae7ba6-861e-4bee-a0c7-7b22ed61015a>> accessed 7 April 2022

CCFD et al v Michelin, NCP France (Follow-Up Statement II Appendix, 29 February 2016)

<<https://www.tresor.economie.gouv.fr/Institutionnel/Niveau3/Pages/8ef77cd0-f703-40c3-b02f-deb7a6d01cb6/files/1f265e4d-12d1-4cbf-9041-5d1a8feae206>> accessed 7 April 2022

Unión Hidalgo v EDF Group, NCP France (Final Statement, 10 March 2020)

<<https://www.tresor.economie.gouv.fr/Institutionnel/Niveau3/Pages/8fd9ecb1-2cb5-4e35-95b7-587b6793f341/files/bd60d487-1d03-44b1-9bf2-13ea02ed7f01>> accessed 7 April 2022

NCP Italy

Survival International v Salini Impregilo S.p.A., NCP Italy (Initial Assessment, 19 January 2017)

<[https://pcnitalia.mise.gov.it/attachments/article/2035928/Initial_Assessment_Survival_v._Salini_EN%20\(8\).pdf](https://pcnitalia.mise.gov.it/attachments/article/2035928/Initial_Assessment_Survival_v._Salini_EN%20(8).pdf)> accessed 7 April 2022

Survival International v Salini Impregilo S.p.A., NCP Italy (Final Statement, 8 June 2017)

<[https://pcnitalia.mise.gov.it/attachments/article/2035928/Final_Statement_Survival_vs._Salini_EN%20\(8\).pdf](https://pcnitalia.mise.gov.it/attachments/article/2035928/Final_Statement_Survival_vs._Salini_EN%20(8).pdf)> accessed 7 April 2022

Survival International v Salini Impregilo S.p.A., NCP Italy (Dichiarazione Finale, 8 June 2017)

<[https://pcnitalia.mise.gov.it/attachments/article/2016847/DF_Survival_v._Salini_def_firmata%20\(21\).pdf](https://pcnitalia.mise.gov.it/attachments/article/2016847/DF_Survival_v._Salini_def_firmata%20(21).pdf)> accessed 7 April 2022

NCP the Netherlands

Lok Shakti Abhiyan et al v ABP/APG, NCP the Netherlands (Final Statement, September 2013)

<<https://www.oecdguidelines.nl/notifications/documents/publication/2015/1/6/final-statement-abp-apg-somo-bothends>> accessed 7 April 2022

Obelle Concern Citizens & FOCONE v Shell, NCP the Netherlands (Final Statement, 27 February 2020)

<<https://www.oecdguidelines.nl/documents/publication/2020/02/27/final-statement-obelle-concern-citizens-vs.-spdc-and-royal-dutch-shell>> accessed 7 April 2022

Friends of the Earth et al v Rabobank, NCP the Netherlands (Initial Assessment, 16 December 2014) <<https://www.oecdguidelines.nl/notifications/documents/publication/2015/1/6/ncp-initial-assessment-rabobank-milieudefensie>> accessed 7 April 2022

Friends of the Earth et al v Rabobank, NCP the Netherlands (Final Statement, 15 January 2016) <<https://www.oecdguidelines.nl/notifications/documents/publication/2016/1/15/fs-foe-milieudefensie-rabobank>> accessed 7 April 2022

Friends of the Earth et al v Rabobank, NCP the Netherlands (Evaluation, 23 July 2018) <<https://www.oecdguidelines.nl/notifications/documents/publication/2018/07/23/ncp-evaluation-final-statement-foe-eu-and-foe-nl-vs.-rabobank>> accessed 7 April 2022

NCP Norway

ForUM and Friends of the Earth Norway v Cermaq ASA, NCP Norway (Final Statement, 10 August 2011) <https://files.nettsteder.regjeringen.no/wpuploads01/blogs.dir/263/files/2013/12/cermaq_final_statement.pdf> accessed 7 April 2022

Future In Our Hands (FIOH) v Intex Resources ASA, NCP Norway (Final Statement, 30 November 2011) <https://files.nettsteder.regjeringen.no/wpuploads01/blogs.dir/263/files/2013/12/intex_fivh_final.pdf> accessed 7 April 2022

Lok Shakti Abhiyan et al v NBIM, NCP Norway (Final Statement, 27 May 2013) <https://files.nettsteder.regjeringen.no/wpuploads01/blogs.dir/263/files/2013/12/nbim_final.pdf> accessed 7 April 2022

Norwegian Support Committee for Western Sahara v Sjøvik AS, NCP Norway (Final Statement, 3 July 2013) <<https://files.nettsteder.regjeringen.no/wpuploads01/blogs.dir/263/files/2013/12/130702-NCP-Norway-Final-Statement-MEDIATION-NSCWS.pdf>> accessed 7 April 2022

Fivas v Norconsult AS, NCP Norway (Joint Statement, 2 June 2015) <https://files.nettsteder.regjeringen.no/wpuploads01/blogs.dir/263/files/2021/02/150622-Joint-Statement-by-Norconsult-AS-and-FIVAS_FINAL.pdf> accessed 7 April 2022

Jijnjevaerie Saami Village v Statkraft, NCPs Norway/Sweden (Final Statement, 9 February 2016) <https://files.nettsteder.regjeringen.no/wpuploads01/blogs.dir/263/files/2013/12/08022016_Final-statement_ENG.pdf> accessed 7 April 2022

NCP South Korea

KTNC Watch et al v Daewoo International et al, NCP South Korea (Initial Assessment, 7 July 2015) <http://www.ncp.or.kr/servlet/kcab_encp/info/4001?pageno=2&seq=11&SEARCHTYPE=TITLE&SEARCHTEXT=>> accessed 7 April 2022

KTNC Watch et al v POSCO/NPS/KEXIM, NCP South Korea (Initial Assessment, 9 September 2020) <http://www.ncp.or.kr/servlet/kcab_encp/info/4001?pageno=1&seq=39&SEARCHTYPE=TITLE&SEARCHTEXT=>> accessed 7 April 2022

NCP Spain

Alianza por la Solidaridad v Grupo ACS-COBRA, NCP Spain (Final Statement, 19 December 2019) <https://comercio.gob.es/InversionesExteriores/PNCLD/Casos_tratados_PNCs/Documents/Informe-Final-caso-E-00007.pdf> accessed 7 April 2022

NCP Switzerland

Survival International v WWF, NCP Switzerland (Final Statement, 21 November 2017) <https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/nachhaltigkeit_unternehmen/nkp/Statements_zu_konkreten_Faellen.html> accessed 7 April 2022

TuK Indonesia v Roundtable on Sustainable Palm Oil, NCP Switzerland (Initial Assessment, 31 May 2018) <https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/nachhaltigkeit_unternehmen/nkp/Statements_zu_konkreten_Faellen.html> accessed 7 April 2022

TuK Indonesia v Roundtable on Sustainable Palm Oil, NCP Switzerland (Final Statement, 5 June 2019) <https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/nachhaltigkeit_unternehmen/nkp/Statements_zu_konkreten_Faellen.html> accessed 7 April 2022

Society for Threatened Peoples v Credit Suisse, NCP Switzerland (Initial Assessment, 19 October 2017) <https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/nachhaltigkeit_unternehmen/nkp/Statements_zu_konkreten_Faellen.html> accessed 7 April 2022

Society for Threatened Peoples v Credit Suisse, NCP Switzerland (Final Statement, 16 October 2019) <https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/nachhaltigkeit_unternehmen/nkp/Statements_zu_konkreten_Faellen.html> accessed 7 April 2022

NCP UK

Survival International v Vedanta Resources Plc., NCP UK (Final Statement, 25 September 2009) <<https://webarchive.nationalarchives.gov.uk/ukgwa/20121204133419/http://www.bis.gov.uk/policies/business-sectors/green-economy/sustainable-development/corporate-responsibility/uk-ncp-oecd-guidelines/cases/final-statements>> accessed 7 April 2022

IAP and WDM v GCM Resources Plc., NCP UK (Initial Assessment, 14 June 2013) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/833609/bis-13-929-initial-assessment-uk-national-contact-point-gcm-resources-plc.pdf> accessed 7 April 2022

IAP and WDM v GCM Resources Plc., NCP UK (Final Statement, 20 November 2014) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/833613/bis-14-1217-uk-ncp-final-statement-inter-national-accountability-project-world-development-movement-and-gcm-re-sources-findings-and-recommendation.pdf> accessed 7 April 2022

Documents of the United Nations

UN Commission on Human Rights

- UNCHR, 'Final Report (Last Part) Submitted by the Special Rapporteur, José R. Martínez Cobo: Study of the Problem of Discrimination against Indigenous Populations' (30 September 1983) UN Doc E/CN.4/Sub.2/1983/21/Add.8 (1983 Report Martínez Cobo)
- 'Technical Review of the United Nations Draft Declaration on the Rights of Indigenous Peoples: Draft Declaration as Agreed Upon by the Members of the Working Group at Its Eleventh Session' (20 April 1994) UN Doc E/CN.4/Sub.2/1994/2/Add.1
 - 'Report of the Centre on Transnational Corporations Submitted Pursuant to Sub-Commission Resolution 1990/26: Transnational Investments and Operations on the Lands of Indigenous Peoples' (15 June 1994) UN Doc E/CN.4/Sub.2/1994/40
 - 'Human Rights and Indigenous Issues' (24 April 2001) UN Doc E/CN.4/RES/2001/57 (Indigenous Issues)
 - 'Final Working Paper Prepared by the Special Rapporteur Mrs. Erica-Irene A. Daes: Indigenous Peoples and their Relationship to Land' (11 June 2001) UN Doc E/CN.4/Sub.2/2001/21
 - 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Rodolfo Stavenhagen, Submitted in Accordance with Commission Resolution 2001/65' (21 January 2003) UN Doc E/CN.4/2003/90 (2003 Report Stavenhagen)
 - 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, Submitted in Accordance with Commission on Human Rights Resolution 2002/65: Mission to the Philippines' (5 March 2003) UN Doc E/CN.4/2003/90/Add.3 (2003 Report Philippines)
 - 'Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (26 August 2003) UN Doc E/CN.4/Sub.2/2003/38/Rev.2
 - 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (26 August 2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2
 - 'Final Report of the Special Rapporteur, Erica-Irene A. Daes: Indigenous Peoples' Permanent Sovereignty over Natural Resources' (13 July 2004) UN Doc E/CN.4/Sub.2/2004/30

- ‘Human Rights and Transnational Corporations and Other Business Enterprises: Human Rights Resolution 2005/69’ (20 April 2005) UN Doc E/CN.4/RES/2005/69
- ‘Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’ (22 February 2006) UN Doc E/CN.4/2006/97 (2006 Report SRSG)

UN General Assembly

UNGA, ‘United Nations Declaration on the Rights of Indigenous Peoples’ (adopted 13 September 2007) UN Doc A/RES/61/295 (UNDRIP)

- ‘Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’ (7 August 2013) UN Doc A/68/279 (2013 Report WGBHR)
- ‘Transforming Our World: The 2030 Agenda for Sustainable Development’ (21 October 2015) UN Doc A/RES/70/1
- ‘Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’ (18 July 2017) UN Doc A/72/162
- ‘Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples’ (21 July 2017) UN Doc A/72/186 (2017 Report SRRIP)

UN Human Rights Council

HRC, ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts’ (19 February 2007) UN Doc A/HRC/4/35 (Mapping)

- ‘Expert Mechanism on the Rights of Indigenous Peoples’ (14 December 2007) UN Doc A/HRC/RES/6/36 (Establishment EMRIP)
- ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Protect, Respect and Remedy: a Framework for Business and Human Rights’ (7 April 2008) UN Doc A/HRC/8/5 (Framework)
- ‘Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya’ (11 August 2008) UN Doc A/HRC/9/9 (2008 Report SRRIP)
- ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Business and Human Rights: Towards Operationalizing the “Protect, Respect and Remedy” Framework’ (22 April 2009) UN Doc A/HRC/11/13 (Operationalizing)
- ‘Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya’ (15 July 2009) UN Doc A/HRC/12/34 (2009 Report SRRIP)

- ‘Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya’ (19 July 2010) UN Doc A/HRC/15/37 (2010 Report SRRIP)
- ‘Report of the Expert Mechanism on the Rights of Indigenous Peoples: Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making’ (23 August 2010) UN Doc A/HRC/15/35 (2010 Progress Report EMRIP)
- ‘Report of the Special Representatives of the Secretary-General on the Issue of Human rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (21 March 2011) UN Doc A/HRC/17/31 (UNGPs)
- ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators’ (25 May 2011) UN Doc A/HRC/17/31/Add.3
- ‘Human Rights and Transnational Corporations and Other Business Enterprises’ (6 July 2011) UN Doc A/HRC/RES/17/4 (UNGP Endorsement)
- ‘Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive Industries Operating within or Near Indigenous Territories’ (11 July 2011) UN Doc A/HRC/18/35 (2011 Report SRRIP)
- ‘Report of the Expert Mechanisms on the Rights of Indigenous Peoples: Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making’ (17 August 2011) UN Doc A/HRC/18/42 (2011 Final Report EMRIP)
- ‘Follow-Up Report on Indigenous Peoples and the Right to Participate in Decision-Making, with a Focus on Extractive Industries’ (30 April 2012) UN Doc A/HRC/EMRIP/2012/2 (2012 Follow-Up Report EMRIP)
- ‘Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya’ (6 July 2012) UN Doc A/HRC/21/47 (2012 Report SRRIP)
- ‘Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive Industries and Indigenous Peoples’ (1 July 2013) UN Doc A/HRC/24/41 (2013 Report SRRIP)
- ‘Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Report from an Expert Workshop entitled “Business Impacts and Non-Judicial Access to Remedy: Emerging Global Experience” Held in Toronto in 2013’ (28 April 2014) UN Doc A/HRC/26/25/Add.3
- ‘Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights’ (14 July 2014) UN Doc A/HRC/RES/26/9

- ‘Report of the Special Rapporteur on the Rights of Indigenous Peoples’ (11 August 2016) UN Doc A/HRC/33/42
- ‘Report of the Expert Mechanism on the Rights of Indigenous Peoples: Ten Years of the Implementation of the United Nations Declaration on the Rights of Indigenous Peoples: Good Practices and Lessons Learned: 2007-2017’ (7 August 2017) UN Doc A/HRC/36/56
- ‘Report of the Special Rapporteur on the Rights of Indigenous Peoples’ (10 August 2018) UN Doc A/HRC/39/17
- ‘Study of the Expert Mechanism on the Rights of Indigenous Peoples: Free, Prior and Informed Consent: A Human Rights-Based Approach’ (10 August 2018) UN Doc A/HRC/39/62 (2018 FPIC Study EMRIP)
- ‘Report of the Special Rapporteur on the Rights of Indigenous Peoples’ (18 June 2020) UN Doc A/HRC/45/34 (2020 Report SRRIP)

UN Treaty Monitoring Bodies

Committee on the Elimination of Racial Discrimination

- CERD, ‘Concluding Observations on the 10th, 12th, 13th Reports Submitted by Panama’ (23 April 1997) UN Doc CERD/C/304/Add.32
- ‘General Recommendation No. 23 on the Rights of Indigenous Peoples’ (18 August 1997) UN Doc A/52/18 (Annex V) (GR No. 23)
 - ‘Concluding Observations on the 1st to 10th Reports Submitted by Suriname’ (28 April 2004) UN Doc CERD/C/64/CO/9 (COs Suriname 2004)
 - ‘Concluding Observations on the 17th to 19th Reports Submitted by Ecuador’ (22 September 2008) UN Doc CERD/C/ECU/CO/19 (COs Ecuador 2008)
 - ‘Concluding Observations on the 10th to 14th Reports Submitted by Colombia’ (28 August 2009) UN Doc CERD/C/COL/CO/14
 - ‘Concluding Observations on the 8th to 13th Reports Submitted by Cambodia’ (1 April 2010) UN Doc CERD/C/KHM/CO/8-13
 - ‘Concluding Observations on the 17th to 20th Reports Submitted by Bolivia’ (8 April 2011) UN Doc CERD/C/BOL/CO/17-20
 - ‘Concluding Observations on the 19th to 20th Reports Submitted by Canada’ (4 April 2012) UN Doc CERD/C/CAN/CO/19-20
 - ‘Concluding Observations on the 16th to 18th Reports Submitted by Lao People’s Democratic Republic’ (13 April 2012) UN Doc CERD/C/LAO/CO/16-18 (COs Lao People’s Democratic Republic 2012)
 - ‘Prevention of Racial Discrimination, Including Early Warning and Urgent Action Procedure: Canada’ (Advance Unedited Version, 13 December 2019) Decision 1 (100) (Decision 1 (100) Canada)

Committee on Economic, Social and Cultural Rights

CESCR, 'Concluding Observations on the 2nd Report Submitted by Ecuador' (7 June 2004) UN Doc E/C.12/1/Add.100

- 'General Comment No. 21 on the Right of Everyone to Take Part in Cultural Life (Art. 15, Para. 1(a) ICESCR)' (21 December 2009) UN Doc E/C.12/GC/21 (GC No. 21)
- 'Concluding Observations on the 5th Report Submitted by Russian Federation' (1 June 2011) UN Doc E/C.12/RUS/CO/5
- 'Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights' (12 July 2011) UN Doc E/C.12/2011/1
- 'Concluding Observations on the 3rd Report Submitted by Argentina' (14 December 2011) UN Doc E/C.12/ARG/CO/3 (COs Argentina 2011)
- 'Concluding Observations on the Initial Report Submitted by Indonesia' (19 June 2014) UN Doc E/C.12/IDN/CO/1
- 'Concluding Observations on the 4th and 5th Reports Submitted by Angola' (15 July 2016) UN Doc E/C.12/AGO/CO/4-5
- 'General Comment No. 24 on State Obligations under the ICESCR in the Context of Business Activities' (10 August 2017) UN Doc E/C.12/GC/24 (GC No. 24)
- 'Concluding Observations on the 4th Report Submitted by Cameroon' (25 March 2019) UN Doc E/C.12/CMR/CO/4 (COs Cameroon 2019)

Committee on the Rights of the Child

CRC, 'General Comment No. 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights' (17 April 2013) UN Doc CRC/C/GC/16

Human Rights Committee

HR Committee, 'General Comment No. 23 on the Rights of Minorities (Art. 27)' (26 April 1994) UN Doc CCPR/C/21/Rev.1/Add.5 (GC No. 23)

- *Ilmari Länsman et al v Finland*, Communication No. 511/1992 (8 November 1994) UN Doc CCPR/C/52/D/511/1992 (*Ilmari Länsman et al v Finland*)
- *Jouni E. Länsman et al v Finland*, Communication No. 671/1995 (22 November 1996) UN Doc CCPR/C/58/D/671/1995 (*Jouni E. Länsman et al v Finland*)
- 'General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 (GC No. 31)
- *Ángela Poma Poma v Peru*, Communication No. 1457/2006 (24 April 2009) UN Doc CCPR/C/95/D/1457/2006 (*Ángela Poma Poma v Peru*)
- 'Concluding Observations on the 6th Report Submitted by Canada' (13 August 2015) UN Doc CCPR/C/CAN/CO/6 (COs Canada 2015)

Other UN Documents

ECOSOC, 'Study of the Problem of Discrimination against Indigenous Populations' (7 May 1982) UN Doc E/RES/1982/34

- 'Establishment of a Permanent Forum on Indigenous Issues' (28 July 2000) UN Doc E/RES/2000/22 (Res 2000/22)
- 'Report on the Sixteenth Session (24 April – 5 May 2017): Permanent Forum on Indigenous Issues' (5 May 2017) UN Doc E/2017/43-E/C.19/2017/11

OEIGWG, 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises: Third Revised Draft 17. August 2021' (2021) <<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>> accessed 10 April 2022

OHCHR, 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide' (2012) UN Doc HR/PUB/12/02 (Interpretive Guide)

- 'Frequently Asked Questions About the Guiding Principles on Business and Human Rights' (2014) UN Doc HR/PUB/14/3 (UNGPs FAQ)

SCBD, 'Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment Regarding Developments Proposed to Take Place on, or which Are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities' (SCBD, 2004) <<https://www.cbd.int/doc/publications/akwe-brochure-en.pdf>> accessed 3 April 2022

UNPFII, 'Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples' (17 February 2005) UN Doc E/C.19/2005/3 (Workshop on FPIC)

- 'Indigenous Peoples and the Millennium Development Goals' (28 March 2005) UN Doc E/C.19/2005/4/Add.13 (MDGs)
- 'Analysis of the Duty of the State to Protect Indigenous Peoples Affected by Transnational Corporations and Other Business Enterprises' (23 February 2012) UN Doc E/C.19/2012/3
- 'International Expert Group Meeting on the Theme "Implementation of the United Nations Declaration on the Rights of Indigenous Peoples: the Role of the Permanent Forum on Indigenous Issues and Other Indigenous-Specific Mechanisms (article 42)"' (13 February 2017) UN Doc E/C.19/2017/10

UNSDG, 'The Human Rights Based Approach to Development Cooperation towards a Common Understanding among UN Agencies' (2003) <<https://unsdg.un.org/resources/human-rights-based-approach-development-cooperation-towards-common-understanding-among-un>> accessed 27 April 2022

Jurisprudence

Case of the Yanomami v Brazil (Case 7615, Resolution No. 12/85) Inter-American Commission on Human Rights (5 March 1985)

Case of the Maya Indigenous Communities of the Toledo District v Belize (Case 12.053, Report No. 40/04) Inter-American Commission on Human Rights (12 October 2004)

Case of the Yakye Axa Indigenous Community v Paraguay (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 125 (17 June 2005)

Case of the Saramaka People v Suriname (Preliminary Objections, Merits, Reparations, and Costs) Inter-American Court of Human Rights Series C No. 172 (28 November 2007) (Case of the Saramaka)

Case of the Saramaka People v Suriname (Interpretation of the Judgement on Preliminary Objections, Merits, Reparations, and Costs) Inter-American Court of Human Rights Series C No. 185 (12 August 2008) (Case of the Saramaka Interpretation)

Case of the Kichwa Indigenous People of Sarayaku v Ecuador (Merits and Reparations) Inter-American Court of Human Rights Series C No. 245 (27 June 2012) (Case of the Sarayaku)

Case of the Garífuna Community of Triunfo de la Cruz and Its Members v Honduras (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 305 (8 October 2015) (Case of the Garífuna Community)

Case of the Kaliña and Lokono Peoples v Suriname (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 309 (25 November 2015) (Case of the Kaliña and Lokono)

Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina (Merits, Reparations, and Costs) Inter-American Court of Human Rights Series C No. 400 (6 February 2020)

Chapter 1: Introduction

*Companies come to us wanting to consult with us about their operations. They often want to know how long it will take our community to respond. We tell them that sometimes it will take one night, sometimes one day, sometimes it might be a week, a month or even years. It depends on the question they ask.*¹

Indigenous Leader, El Estor, Izabal Guatemala (2013)

The encroachment on indigenous peoples' rights dates back to historical colonial injustices and more recently results from the ongoing process of economic globalization.² Growing demand for natural resources and rapidly advancing industrialization have led to an increase in development projects.³ Often massive in scale and involving several actors, such as indigenous peoples, states, corporations, and project financiers, development projects serve manifold purposes.⁴ Considering the special relationship that indigenous peoples have with their lands and the fact that they inhabit resource-rich territories worldwide, they are often affected by these projects.⁵ Land evictions, the degradation of cultural heritage and destruction of cultural sites, deforestation, and the pollution of water and soil are examples of impacts these projects have on

¹ Citing John Morrison, *The Social License: How to Keep Your Organization Legitimate* (Palgrave Macmillan 2014) 72.

² UNCHR, 'Final Working Paper Prepared by the Special Rapporteur Mrs. Erica-Irene A. Daes: Indigenous Peoples and their Relationship to Land' (11 June 2001) UN Doc E/CN.4/Sub.2/2001/21 para 66; HRC, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya' (6 July 2012) UN Doc A/HRC/21/47 para 74; Cathal M Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free, Prior and Informed Consent* (Routledge 2015) 1-6.

³ Cathal M Doyle and Andrew Whitmore, 'Indigenous Peoples and the Extractive Sector: Towards a Rights-Respecting Engagement' (Tebtebba/PiPLinks/Middlesex University, 2014) xxvii <https://www.mdx.ac.uk/_data/assets/pdf_file/0021/138630/Indigenous-Peoples-and-the-Extractive-Sector.pdf> accessed 23 April 2022.

⁴ UNCHR, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Rodolfo Stavenhagen, Submitted in Accordance with Commission Resolution 2001/65' (21 January 2003) UN Doc E/CN.4/2003/90 para 6.

⁵ UNGA, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (7 August 2013) UN Doc A/68/279 para 1.

the lives, environment and rights of indigenous peoples, ultimately threatening their survival as a people.⁶ This phenomenon has been termed by indigenous peoples 'development aggression'.⁷

Their marginalized status in society both socially and economically means that indigenous peoples have limited possibilities to counteract such processes of development and assert their rights.⁸ Often, they have little meaningful say in the decision-making processes affecting them,⁹ which runs counter to their right to determine their own pace and path of economic, cultural, and social development in their state of residence.¹⁰ To enjoy their right to self-determination and related rights, it is critical that indigenous peoples are consulted and can effectively participate in decision-making processes affecting their interests.¹¹ The important principle of free, prior, and informed consent (FPIC), deriving from indigenous peoples' right to self-determination, aims to address this challenge.¹² The FPIC principle formally emerged in the mid-1980s as a response to adverse impacts.¹³ It serves as a central safeguard for indigenous peoples' rights, aimed at protecting against rights-denying actions and limitations.¹⁴ As the main duty bearers in international human rights law, states

⁶ UNCHR, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, Submitted in Accordance with Commission on Human Rights Resolution 2002/65: Mission to the Philippines' (5 March 2003) UN Doc E/CN.4/2003/90/Add.3 para 63; HRC, '2012 Report SRRIP' para 50. See also <<https://ejatlas.org/>> accessed 24 April 2022.

⁷ UNPFII, 'Indigenous Peoples and the Millennium Development Goals' (28 March 2005) UN Doc E/C.19/2005/4/Add.13 paras 3-4.

⁸ UNGA, '2013 Report WGBHR' para 1.

⁹ See eg HRC, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples' (18 June 2020) UN Doc A/HRC/45/34.

¹⁰ Arts. 3-4 UNGA, 'United Nations Declaration on the Rights of Indigenous Peoples' (adopted 13 September 2007) UN Doc A/RES/61/295; Sebastiaan J Rombouts, 'The Evolution of Indigenous Peoples' Consultation Rights under the ILO and U.N. Regimes' (2017) 53(2) *Stanford Journal of International Law* 169, 175, 211. On the right to self-determination, see generally Marc Weller, 'Chapter 5 - Self-Determination of Indigenous Peoples: Articles 3, 4, 5, 18, 23, and 46(1)' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018).

¹¹ Weller 124-125, 143-146.

¹² HRC, 'Study of the Expert Mechanism on the Rights of Indigenous Peoples: Free, Prior and Informed Consent: A Human Rights-Based Approach' (10 August 2018) UN Doc A/HRC/39/62 para 6.

¹³ Philippe Hanna and Frank Vanclay, 'Human Rights, Indigenous Peoples and the Concept of Free, Prior and Informed Consent' (2013) 31(2) *Impact Assessment and Project Appraisal* 146, 150.

¹⁴ Doyle, FPIC 4, 130.

are required to consult indigenous peoples and seek or obtain – in specific circumstances – indigenous peoples' FPIC for projects and policies impacting their lives, environments and rights.¹⁵ Against this background, FPIC is conceptualized as a right to give or withhold consent and thus as a human rights norm vis-à-vis the state and as a requirement to be fulfilled by and thus as an obligation of states.¹⁶ However, the notion of FPIC as a right per se – predominantly used by indigenous peoples – is controversial.¹⁷

Increasingly, however, this state-centric view of indigenous peoples' rights and FPIC is challenged by new realities. Economic globalization and the liberalization of investment and trade are increasing the pace of development projects, but also putting a spotlight on corporations. Corporations have become powerful actors exerting increasing influence not only on economic and political processes but also on society and the living conditions of individuals worldwide, including indigenous peoples.¹⁸ Adverse impacts of corporate activity on indigenous peoples in the context of development projects are well documented in various studies and databases.¹⁹ The reality of development projects, where corporate actors play a significant role in public-private part-

¹⁵ Arts. 10-11, 15, 17, 19, 28-29, 30, 32, 36, 38 UNGA, 'UNDRIP'; Arts. 6-7, 15-17, 22, 27-28 ILO, 'Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries' (adopted 7 June 1989, entered into force 5 September 1991) 1650 UNTS 383.

¹⁶ HRC, 'Report of the Expert Mechanisms on the Rights of Indigenous Peoples: Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making' (17 August 2011) UN Doc A/HRC/18/42 27, para 23; Doyle, FPIC 132-134.

¹⁷ Penelope Simons and Lynda Collins, 'Participatory Rights in the Ontario Mining Sector: An International Human Rights Perspective' (2010) 6(2) McGill Journal of Sustainable Development Law and Policy 177, 194.

¹⁸ Malcom Langford and others, 'Introduction: An Emerging Field' in Malcolm Langford and others (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social, and Cultural Rights in International Law* (CUP 2013) 3-4; Andreas G Scherer and Guido Palazzo, 'Globalization and Corporate Social Responsibility' in Andrew Crane and others (eds), *The Oxford Handbook of Corporate Social Responsibility* (OUP 2008) 413-427; Christine Kaufmann and others, 'Human Rights Implementation in Switzerland: A Baseline Study on the Business and Human Rights Situation in Switzerland' (SCHR, 2014) 1 <<https://www.ohchr.org/Documents/Issues/Business/NationalPlans/HRAndBusiness-BaselineSwitzerland.pdf>> accessed 22 April 2022.

¹⁹ The Business & Human Rights Resource Centre is an independent NPO drawing global attention to the positive and negative human rights impacts of corporations worldwide. On corporate activity impacting indigenous peoples, see <<https://www.business-human-rights.org/en/latest-news/?&search=indigenous%20peoples&language=en>>; <<https://ejatlas.org/>> accessed 24 April 2022. See also Corinne Lewis, 'Indigenous Peoples and the Corporate Responsibility to Respect Human Rights' in Corinne Lennox and Damien Short (eds), *Handbook of Indigenous Peoples' Rights* (Routledge 2016).

nerships and/or are given licence to operate by the state, ultimately raises the question of what human rights responsibilities corporations bear when conducting business on indigenous land. The present thesis is concerned with these responsibilities.

I. Business and Indigenous Peoples: Setting the Scene

The intersection between business and human rights has been intensely debated in recent decades in different fora, resulting in the development of a number of instruments and initiatives seeking to address the human rights responsibilities of corporations.²⁰ A milestone in this regard was the unanimous endorsement of the UN Guiding Principles on Business and Human Rights (UNGPs) by the UN Human Rights Council and the adoption of the revised OECD Guidelines for Multinational Enterprises (OECD Guidelines) by the OECD Investment Committee in 2011.²¹ In 2017, the International Labour Organization (ILO) followed suit and, for the fifth time, revised its Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO MNE Declaration) of 1977.²² Constituting the key instruments on responsible business conduct (RBC)²³ on an international level, all three stand for a global consensus that corporations have a responsibility to respect human

²⁰ For an overview, see eg Justine Nolan, 'Mapping the Movement: The Business and Human Rights Regulatory Framework' in Dorothee Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016) 32-51.

²¹ HRC, 'Report of the Special Representatives of the Secretary-General on the Issue of Human rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (21 March 2011) UN Doc A/HRC/17/31; HRC, 'Human Rights and Transnational Corporations and Other Business Enterprises' (6 July 2011) UN Doc A/HRC/RES/17/4; OECD, 'OECD Guidelines for Multinational Enterprises' (OECD, 2011).

²² ILO, 'Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy' (5th edn as amended at the 329th Session in March 2017).

²³ [RBC] means that 'businesses should make a positive contribution to economic, environmental and social progress with a view to achieving sustainable development and that businesses have a responsibility to avoid and address the adverse impacts of their operations'. See Roel Nieuwenkamp, 'CSR is Dead! What's Next?' (OECD *Insights*, 22 January 2016) <<https://friendsoftheoecdguidelines.wordpress.com/2016/01/22/2016-csr-is-dead-whats-next/?msclkid=b4183387c4c911eca3cda461eb25b12a>> accessed 22 April 2022.

rights.²⁴ Corporations are expected to avoid infringing on peoples' human rights and to address adverse human rights impacts with which they are involved, including those in their supply chain.²⁵

However, as the terms 'expectation' and 'responsibility' imply, the corporate responsibility to respect human rights is not grounded in a legal basis; rather, it originates from a well-established social norm, namely, not infringing upon the human rights of others.²⁶ In contrast to states, corporations are not (yet) recognized as subjects of international law and thus do not have human rights obligations under international human rights law.²⁷ Consequently, the standards and principles for responsible business conduct embodied in the key instruments mentioned above are non-binding for corporations unless transposed into domestic law.²⁸ However, although 'distinct from issues of legal liability and enforcement, which remain defined largely by national law provisions in relevant jurisdictions',²⁹ the corporate responsibility to respect as set forth in the three key instruments is considered morally binding on corporations.³⁰ It is framed and understood as a basic and global expectation that society has of businesses existing 'independently of States' abilities and/or willingness to fulfil their own human rights obligations (...) [and] over and above compliance with national laws and regulations protecting human rights'.³¹ In other words, the corporate responsibility to respect human rights refers to

²⁴ EU, ILO and OECD, 'Responsible Business: Key Messages from International Instruments' (2019) <https://www.ilo.org/asia/info/public/background/WCMS_724747/lang--en/index.htm> accessed 23 April 2022.

²⁵ HRC, 'UNGPs' Principle 11; OECD, '2011 Guidelines' 31, para 1.

²⁶ HRC, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework' (22 April 2009) UN Doc A/HRC/11/13 para 46; HRC, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Protect, Respect and Remedy: a Framework for Business and Human Rights' (7 April 2008) UN Doc A/HRC/8/5 para 54.

²⁷ Karin Buhmann, 'Public Regulators and CSR: The "Social Licence to Operate" in Recent United Nations Instruments on Business and Human Rights and the Juridification of CSR' (2016) 136(4) *Journal of Business Ethics* 699, 703.

²⁸ HRC, 'UNGPs' Commentary Principle 11; OHCHR, 'Frequently Asked Questions About the Guiding Principles on Business and Human Rights' (2014) UN Doc HR/PUB/14/3 Question 7; OECD, '2011 Guidelines' 13, para 1; ILO, 'MNE Declaration' para 7.

²⁹ HRC, 'UNGPs' Commentary Principle 12.

³⁰ Sander van't Foort, 'The History of National Contact Points and the OECD Guidelines for Multinational Enterprises' (2017) 25 *Rechtsgeschichte* 195, 198.

³¹ HRC, 'UNGPs' Commentary Principle 11; OECD, '2011 Guidelines' 17, para 2; Buhmann, 'Social Licence' 701.

both, compliance with applicable domestic laws and regulations (legal licence to operate) and respect for human rights in terms of social expectations (social licence to operate), which may go beyond what is required legally.³²

Since businesses can impact virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights, including those relating to indigenous peoples.³³ From this, it follows that corporations have a responsibility to respect indigenous peoples' rights. This understanding, which is reflected in an evolving discussion on business and indigenous peoples' rights emerging out of the broader discussion on responsible business conduct and spurred by an increasing indigenous resistance in response to widespread encroachment on their rights, advocates for greater rights recognition and implementation by governments and corporations.³⁴ Indigenous peoples' rights and FPIC are incorporated in different standards and initiatives directly addressing corporations,³⁵ and corporations' engagement with indigenous peoples' rights has been addressed by different mechanisms and bodies and is increasingly scrutinized by judicial and non-judicial grievance mechanisms.³⁶ For instance, in the past few years, the implementation mechanism of the OECD Guidelines, the OECD National Contact

³² HRC, 'Operationalizing' para 46; HRC, 'Framework' para 54; EU, ILO and OECD 2. See also John Morrison, 'The Social Licence: One Way of Thinking about Business and Human Rights' in Dorothee Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016) 101-103; Buhmann, 'Social Licence' 707, 710-711.

³³ OECD, '2011 Guidelines' 32, paras 39-40; HRC, 'UNGPs' Principle 12, Commentary Principle 12; HRC, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya' (19 July 2010) UN Doc A/HRC/15/37 para 47. For further elaborations, see below text to [Fn 958-972](#).

³⁴ John R Owen and Deanna Kemp, 'Free Prior and Informed Consent', *Social Complexity and the Mining Industry: Establishing a Knowledge Base* (2014) 41 Resources Policy 91, 91-93; Doyle, FPIC 3-4. On the resistance movement, see generally Mario Blaser, Harvey A Feit and Glenn McRae (eds), *In the Way of Development: Indigenous Peoples, Life Projects, and Globalization* (Zed Books 2004); Jerry Mander and Victoria Tauli-Corpuz, *Paradigm Wars: Indigenous Peoples' Resistance to Globalization* (Sierra Club Books 2006).

³⁵ For an elaboration on such initiatives, see eg Sebastiaan J Rombouts, *Having a Say: Indigenous Peoples, International Law and Free, Prior and Informed Consent* (Wolf Legal Publishers 2014) 210-213, 322-369; Doyle, FPIC 224; Angus MacInnes, Marcus Colchester and Andrew Whitmore, 'Free, Prior and Informed Consent: How to Rectify the Devastating Consequences of Harmful Mining for Indigenous Peoples' (2017) 15(3) *Perspectives in Ecology and Conservation* 152.

³⁶ <https://www.business-humanrights.org/en/from-us/lawsuits-database/> accessed 24 April 2022.

Points (NCPs) – which handle complaints concerning alleged non-observance of the OECD Guidelines by corporations³⁷ – has increasingly had to deal with cases specifically addressing the rights of indigenous peoples.³⁸

Particular focuses in this discussion are the extractive, energy, and agribusiness sectors due to their large ‘community footprint’. Typically, these sectors have a substantial impact on the livelihoods and rights of indigenous peoples due to their often-invasive activities in terms of land and resources.³⁹ Making the extractive industries a thematic focus of his mandate, the UN Special Rapporteur on the Rights of Indigenous Peoples (SRRIP) noted that extractive corporations should have policies and practices in place ‘to ensure that all aspects of their operations are respectful of the rights of indigenous peoples, in accordance with international standards and not just domestic law, including with regard to requirements of consultation and consent’.⁴⁰ UN treaty bodies, the UN Expert Mechanism on the Rights of Indigenous People (EMRIP) and the UN Working Group on Business and Human Rights have made similar recommendations and statements.⁴¹ Last, a number of extractive corporations have pub-

³⁷ OECD, ‘2011 Guidelines’ 68 I, para 1-4.

³⁸ OECD, ‘Annual Report of the OECD Guidelines for Multinational Enterprises 2019’ (OECD, 2020) 21-22 <<http://mneguidelines.oecd.org/2019-Annual-Report-MNE-Guidelines-EN.pdf>> accessed 27 April 2022. See below [Figure 2](#).

³⁹ UNGA, ‘2013 Report WGBHR’ paras 1, 21; HRC, ‘Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive Industries Operating within or Near Indigenous Territories’ (11 July 2011) UN Doc A/HRC/18/35 paras 30-55. See also Doyle and Whitmore; Cathal M Doyle and Jill Cariño, ‘Making Free Prior & Informed Consent a Reality: Indigenous Peoples and the Extractive Sector’ (PiPLinks/Middlesex University/ECCR, 2013) <<https://www.ecoesuit.com/wp-content/uploads/2014/09/Making-FPIC-a-Reality-Report.pdf>> accessed 21 April 2022.

⁴⁰ HRC, ‘Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya: Extractive Industries and Indigenous Peoples’ (1 July 2013) UN Doc A/HRC/24/41 para 89.

⁴¹ CESCR, ‘General Comment No. 24 on State Obligations under the ICESCR in the Context of Business Activities’ (10 August 2017) UN Doc E/C.12/GC/24 paras 5, 12, 17; CERD, ‘Concluding Observations on the 8th to 13th Reports Submitted by Cambodia’ (1 April 2010) UN Doc CERD/C/KHM/CO/8-13 para 16; HRC, ‘Follow-Up Report on Indigenous Peoples and the Right to Participate in Decision-Making, with a Focus on Extractive Industries’ (30 April 2012) UN Doc A/HRC/EMRIP/2012/2 para 27(d); UNGA, ‘2013 Report WGBHR’.

licly committed to respecting indigenous peoples' rights and FPIC, with a few entering into contractual agreements committing them to obtaining FPIC.⁴²

It is also against this backdrop that FPIC is increasingly conceptualized as a principle or standard for corporations to comply with.⁴³ This conceptualization stands for a growing recognition by corporations as well as international organizations and policy makers of the importance of corporate indigenous community engagement and relations for the following reasons:⁴⁴ First, corporate engagement with indigenous communities helps ensure respect for indigenous peoples' rights, contributing to the understanding of their rights and the avoidance and mitigation of adverse impacts.⁴⁵ Second, community engagement also makes good business sense, as it is a means for obtaining and sustaining support from indigenous communities.⁴⁶ This support is often described as a corporation's 'social licence to operate', which is deemed granted 'when the [corporation's] operations and the organisational values and

⁴² See eg Doyle and Whitmore 27-29; Emily Greenspan and others, 'Community Consent Index 2015: Oil, Gas, and Mining Company Public Positions on Free, Prior, and Informed Consent' (Oxfam, 2015) <https://www-cdn.oxfam.org/s3fs-public/file_attachments/bp207-community-consent-index-230715-en_0.pdf> accessed 22 April 2022; Owen and Kemp 92-93; ICMM, 'Position Statement: Indigenous Peoples and Mining' (2013) 1, 4 <https://www.icmm.com/website/publications/pdfs/mining-principles/position-statements_indigenous-peoples.pdf> accessed 24 April 2022.

⁴³ HRC, '2018 FPIC Study EMRIP' para 49; UNGA, '2013 Report WGBHR' para 24; HRC, '2013 Report SRRIP' para 89. See also Doyle, FPIC 134; MacInnes, Colchester and Whitmore 152-158.

⁴⁴ UNGA, '2013 Report WGBHR' para 20; OECD, 'OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector' (OECD, 2017) 92-99; IFC, 'Performance Standards on Environmental and Social Sustainability' (2012) Standard 1, para 32 <https://www.ifc.org/wps/wcm/connect/24e6bfc3-5de3-444d-be9b-226188c95454/PS_English_2012_Full-Document.pdf?MOD=AJPERES&CVID=jkV-X6h> accessed 27 April 2022.

⁴⁵ Başak Bağlayan and others, 'Good Business: The Economic Case for Protecting Human Rights' (BHR YRS/Frank Bold/ICAR, 2018) 26 <<https://www.alexandria.unisg.ch/261854/>> accessed 22 April 2022; Lewis 213; OECD, 'Stakeholder Guidance' 14; Ola Mestad, 'The Voice of Affected Persons in the OECD Guidelines and Guidance Documents' in OECD (ed), *OECD Guidelines for Multinational Enterprises - A Glass Half Full: A Liber Amicorum for Dr. Roel Nieuwenkamp*, Chair of the OECD Working Party on Responsible Business Conduct 2013-2018 (OECD 2018) 78.

⁴⁶ See eg OECD, 'Stakeholder Guidance' 14; Lewis 213.

processes underpinning them meet stakeholder expectations and satisfy societal norms', such as that of corporate respect for human rights, as referenced earlier.⁴⁷

Studies show that a social licence, here understood in terms of a corporation's perceived broader legitimacy,⁴⁸ is as important as a legal licence for business success since the lack of a social licence may have serious negative consequences for businesses.⁴⁹ Conflict with communities may result in reputational damage, project delays, financial and personal loss, or a loss of opportunity in terms of expansion plans or future projects or even the termination of a project.⁵⁰ A prominent recent example in this respect is the mining giant Rio Tinto, whose mining blast for the expansion of an iron ore mine at Juukan Gorge in Western Australia destroyed a cave of significant cultural importance to indigenous communities. While done in accordance with law – permits for operations were granted – it caused a social outcry eventually leading to the dismissal of Rio Tinto's board of directors.⁵¹ Also illustrative in this respect are the annual surveys of industry analysts Ernst & Young. In the firm's recent sur-

⁴⁷ Melanie Dare, Jacki Schirmer and Frank Vanclay, 'Community Engagement and Social Licence to Operate' (2014) 32(3) *Impact Assessment and Project Appraisal* 188, 188. See also Neil Gunningham, Robert A Kagan and Dorothy Thornton, 'Social License and Environmental Protection: Why Businesses Go Beyond Compliance' (2004) 29(2) *Law & Social Inquiry* 307.

⁴⁸ Morrison, 'One Way' 101-102.

⁴⁹ HRC, 'Operationalizing' para 46.

⁵⁰ See eg Bağlayan and others 9-10, 25-28; Steven Herz, Antonio La Vina and Jonathan Sohn, 'Development without Conflict: The Business Case for Community Consent' (World Resources Institute, 2007) <http://pdf.wri.org/development_without_conflict_fpic.pdf> accessed 23 April 2022; Witold J Henisz, Sinziana Dorobantu and Lite J Nartey, 'Spinning Gold: The Financial Returns to Stakeholder Engagement' (2014) 35(12) *Strategic Management Journal* 1727; Rachel Davis and David Franks, 'Costs of Company-Community Conflict in the Extractive Sector' (Corporate Social Responsibility Initiative Report 66, 2014) <<https://shiftproject.org/resource/costs-of-company-community-conflict-in-the-extractive-sector/>> accessed 23 April 2022.

⁵¹ <<https://www.theguardian.com/business/2020/jun/05/rio-tinto-blames-misunderstanding-for-destruction-of-46000-year-old-aboriginal-site>>; <<https://www.business-humanrights.org/en/latest-news/rio-tinto-ceo-top-executives-resign-amid-cave-blast-crisis/>> accessed 24 April 2022.

veys, the challenge of obtaining and maintaining a (social) licence to operate and environmental and social issues have been ranked the highest of the top ten risks faced by metal and mining corporations.⁵²

Different views exist on how FPIC relates to the concept of a 'social licence to operate', centring on the debate on whether following FPIC processes helps businesses obtain and maintain a social licence but without requiring consent or whether FPIC is a stronger concept used as a condition for obtaining and maintaining a social licence to operate.⁵³ Recent academic literature and the view of pertinent UN bodies seem to advocate for the latter view.⁵⁴ Morrison notes, 'If a business enjoys social licence for any particular activity, it is because they have understood that legitimacy, trust and consent are built on real knowledge, real transparency and shared decision-making'.⁵⁵ Furthermore, the UN Global Compact Guide for businesses equates consent with 'a formal, documented social license to operate'.⁵⁶

A. Key Parties and Relations in Development Projects: The Larger Picture

By "major development project" should be understood a process of investment of public and/or private, national or international capital for the purpose of building or improving the physical infrastructure of a specified region, the transformation over the long run of productive activities involving changes in the use of and property rights to land, the large-scale exploitation of natural resources including subsoil resources, the building of urban centres, manufacturing and/or mining, power, extraction and refining

⁵² EY, 'Global Mining and Metals Top 10 Business Risks and Opportunities – 2021' (EYGM Limited, 2020) 3-7 <https://assets.ey.com/content/dam/ey-sites/ey-com/fr_fr/topics/mining-metals/ey-mm-business-risks-and-opportunities-2021.pdf> accessed 23 April 2022; EY, 'Business Risks Facing Mining and Metals 2013-2014' (EYGM Limited, 2013) 7, 27-30 <http://www.ceecthefuture.org/wp-content/uploads/2013/12/Business_risks_facing_mining_and_metals_2013-2014_ER0069-1.pdf?msclid=647e3d4dc4cb1ec983f6fb69b43aede> accessed 23 April 2022; <https://www.ey.com/en_gl/mining-metals/top-10-business-risks-and-opportunities-for-mining-and-metals-in-2022> accessed 23 April 2022.

⁵³ For an overview of perspectives, see Juliette Syn, 'The Social License: Empowering Communities and a Better Way Forward' (2014) 28(3-4) *Social Epistemology* 318, 329-330.

⁵⁴ Rombouts, *Having a Say* 415; HRC, '2013 Report SRRIP' para 29; HRC, '2018 FPIC Study EM-RIP' para 26.

⁵⁵ Morrison, 'One Way' 103; Morrison, *The Social License* 72-90.

⁵⁶ UN Global Compact, 'A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples' (2013) 28 <<https://www.unglobalcompact.org/library/541>> accessed 4 April 2022.

plants, tourist developments, port facilities, military bases and similar undertakings. The purpose of such projects may vary, from furthering economic growth to flood control, generating electrical and other energy resources, improving transportation networks, promoting exports to obtain foreign exchange, creating new settlements, ensuring national security, and generating employment and income opportunities for the local population.⁵⁷

As suggested by this definition, the purposes that development projects serve, are as manifold as the actors involved and their relations to one another in the realization of such projects. Development projects may be transnational in nature and thus concern several states. They may be financed and realized by multiple public and/or private actors from different locations around the world.⁵⁸ Bhatt speaks of a 'triangularity of players' involving communities, concessionaires and their financiers and the state.⁵⁹ The purpose of this section is not to dive into this 'jungle' but to give an overview of the actors involved, to introduce them and to show how states' and corporations' human rights duties and responsibilities are distinct yet interconnected using the UNGPs as the central framework of reference, laying out these duties and responsibilities in a coherent manner.

1. Indigenous Peoples

The estimated number of indigenous peoples living in the world amounts to approximately 476 million individuals, representing approximately 5000 different cultures in over ninety states. Although indigenous peoples constitute approximately five percent of the world's population, they make up fifteen percent of the world's extremely poor due to different root causes, such as colonialization, systemic discrimination and racism, and the non-recognition of their individual and collective rights.⁶⁰ Their traditional territories – com-

⁵⁷ UNCHR, '2003 Report Stavenhagen' para 6.

⁵⁸ For a detailed analysis, see Kinnari I Bhatt, *Concessionaires, Financiers and Communities: Implementing Indigenous Peoples' Rights to Land in Transnational Development Projects* (CUP 2020).

⁵⁹ *ibid* 2.

⁶⁰ <<https://www.un.org/en/observances/indigenous-day/background>> accessed 24 April 2022; UNPFII, 'MDGs' paras 9, 12. For detailed statistics on indigenous peoples worldwide, see International Labour Office, 'Implementing the ILO Indigenous and Tribal Peoples Convention No. 169: Towards an Inclusive, Sustainable and Just Future' (2019) 13-22 <https://www.ilo.org/global/publications/books/WCMS_735607/lang--en/index.htm> accessed 4 April 2022.

prising approximately twenty percent of the world's land surface – host up to eighty percent of the world's biodiversity.⁶¹

Who are 'indigenous peoples'? There is no universally agreed-upon answer to this question. 'Indigenous peoples' is only one term used to describe those groups that identify as or are considered indigenous peoples. Depending on the national context, other terms used include 'indigenous ethnic minorities', 'aboriginals', 'hill tribes', 'minority nationalities', 'First Nations', 'scheduled tribes' or 'tribal groups'.⁶² Despite the lack of a formal definition of indigenous peoples in international law, there at least seems to be an emerging consensus to refer to their self-identification and to a number of objective criteria, such as their special relation with their territories, lands, and resources – which is common to all indigenous peoples worldwide despite their diversity –⁶³ and their cultural distinction from the majority of the population.⁶⁴ These subjective and objective criteria therefore do not allow for a unilateral qualification by the state in which indigenous peoples reside.⁶⁵ Given that the concept of indigeneity is questioned in certain regions, such an approach is desirable in terms of indigenous peoples' rights recognition and protection.⁶⁶ For practical reasons, this thesis uses the term 'indigenous peoples'.

2. States and Human Rights Obligations

International human rights law establishes obligations that states are bound to respect as parties to international human rights treaties.⁶⁷ As the primary duty bearers, they must refrain from interfering with or curtailing the enjoyment of

⁶¹ <<https://www.unep.org/zh-hans/node/477>> accessed 24 April 2022.

⁶² IFC, 'Performance Standards' Standard 7, para 4.

⁶³ Jérémie Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (2nd edn, Brill Nijhoff 2016) 2.

⁶⁴ Art. 1 ILO, 'C 169'; UNCHR, 'Final Report (Last Part) Submitted by the Special Rapporteur, José R. Martínez Cobo: Study of the Problem of Discrimination against Indigenous Populations' (30 September 1983) UN Doc E/CN.4/Sub.2/1983/21/Add.8 paras 21-22, 379-381.

⁶⁵ HRC, '2010 Report SRRIP' para 49; HR Committee, 'General Comment No. 23 on the Rights of Minorities (Art. 27)' (26 April 1994) UN Doc CCPR/C/21/Rev.1/Add.5 para 5.2.

⁶⁶ Joshua Castellino and Cathal M Doyle, 'Chapter 1 – Who Are "Indigenous Peoples"?' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018) 30. See also Rombouts, 'Evolution' 171-172; Ian G Baird, 'Indigeneity in Asia: An Emerging but Contested Concept' (2016) 17(4) *Asian Ethnicity* 501; Maria Sapignoli and Robert K Hitchcock, 'Indigenous Peoples in Southern Africa' (2013) 102(4) *The Round Table* 355.

⁶⁷ Ilias Bantekas and Lutz Oette, *International Human Rights: Law and Practice* (3rd edn, CUP 2020) 79.

human rights (obligation to respect), they must protect the enjoyment of human rights against abuses by third-party actors, including corporations (obligation to protect), and they must take positive action to facilitate the enjoyment of human rights (obligation to fulfil) within their jurisdiction.⁶⁸

Certainly, all three obligations are crucial in the context of development projects. As indicated above, such projects serve manifold purposes that ideally lead to improved development of the respective state and ultimately to better living conditions for its people. While development projects offer benefits such as energy production, improved infrastructure, and economic growth – touching upon states' obligation to fulfil human rights – these projects do come, as indicated above, with conflicts of interest and socio-ecological impacts.⁶⁹ Such impacts should be avoided by states in their own actions and should be protected against in relation to third parties. In the context of the responsible business conduct debate, including on businesses and indigenous peoples' rights, the latter duty is the central focus.⁷⁰

As stated above, development projects are rarely realized by states on their own but rather often feature a state-business nexus. That is, these projects are realized via state-owned or controlled corporations, via public-private partnerships – often defined as 'a long-term contract between a private party and a government entity, for providing a public asset or service'⁷¹ – or corporations are given a licence to operate by the state, for instance, by mining or timber logging concessions. Last, there are also instances where state duties are delegated to corporations due to a lack of state capacity or will.⁷² As aptly stated

⁶⁸ HR Committee, 'General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 paras 3-10.

⁶⁹ An illustrative example is the issue of renewable energy causing conflicts of interest, see eg Radhika Shah and Phil Bloomer, 'Respecting the Rights of Indigenous Peoples as Renewable Energy Grows' (*Stanford Social Innovation Review*, 23 April 2018) <https://ssir.org/articles/entry/respecting_the_rights_of_indigenous_peoples_as_renewable_energy_grows> accessed 27 April 2022; Itzhak E Kornfeld, *Mega-Dams and Indigenous Human Rights* (Edward Elgar 2020) 226-233.

⁷⁰ CESCR, 'GC No. 24' para 10.

⁷¹ <<https://ppp.worldbank.org/public-private-partnership/overview/what-are-public-private-partnerships>> accessed 24 April 2022.

⁷² For a more narrow definition of state-business nexus, see UNGPs, HRC, 'UNGPs' Commentary Principle 4; OHCHR, 'UNGPs FAQ' Question 18. On the issue of delegation, see eg HRC, '2013 Report SRRIP' para 61; Doyle, FPIC 224.

by Bhatt, in the context of development projects, 'legal and social relations are reframed, [and] community expectations can shift from the state to the private sector'.⁷³

Within these relational networks, states have an obligation to actively prevent corporate-related activities from undermining the enjoyment of human rights. More precisely, as set forth in Pillar I of the UNGPs – covering the state duty to protect against corporate-related human rights abuses – in fulfilling their duty to protect, states must take 'appropriate steps to prevent, investigate, punish and redress (...) abuse [by corporations] through effective policies, legislation, regulations and adjudication'.⁷⁴ Accordingly, states must create an environment that fosters corporate respect for human rights by clarifying and setting out what is expected from corporations.⁷⁵

Rooted in the state's existing legal obligations to protect under international human rights law, Pillar I of the UNGPs does not create new obligations. Instead, it substantiates the obligation to protect in the context of corporate conduct and provides guidance on how to implement this obligation.⁷⁶ The choice of means to create such an environment is largely at the discretion of states, which should consider a 'smart mix of measures – national and international, mandatory and voluntary'.⁷⁷ However, states must ensure policy coherence both vertically as concerns the laws, policies and processes to implement their human rights obligations and horizontally among their different departments and governmental levels as well as between their business-oriented trade and commerce policies and human rights obligations.⁷⁸

⁷³ Bhatt 2.

⁷⁴ HRC, 'UNGPs' Principle 1.

⁷⁵ *ibid* Principles 2-3, Commentary Principles 2-3.

⁷⁶ *ibid* General Principles, Principles 1-10; OHCHR, 'UNGPs FAQ' Question 6; Christine Kaufmann, 'Eine neue Architektur für Menschenrechte und Unternehmen: Gedanken zu einem Perspektivenwechsel und seinen Folgen' in Roberto Andorno and Markus Thier (eds), *Menschenwürde und Selbstbestimmung: Analysen und Perspektiven von Assistierenden des Rechtswissenschaftlichen Instituts der Universität Zürich* (Dike 2014) 82.

⁷⁷ HRC, 'UNGPs' Principle 3, Commentary Principle 3; Christine Kaufmann, 'Menschen- und umweltrechtliche Sorgfaltsprüfung im internationalen Vergleich: Wie sinnvoll ist ein "Swiss Finish"?' (2017) 26(8) *Aktuelle Juristische Praxis* 967, 975.

⁷⁸ HRC, 'UNGPs' Principle 8, Commentary Principle 8; Chip Pitts, 'The United Nations "Protect, Respect, Remedy" Framework and Guiding Principles' in Dorothee Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016) 57-58; Christine Kaufmann, 'Wirtschaft und Menschenrechte: Anatomie einer Beziehung' (2013) 22(5) *Aktuelle Juristische Praxis* 744, 749.

3. Corporations and Human Rights Responsibilities

The above has shown that states are the main duty bearers under international human rights law but not the sole actors in the context of development projects affecting indigenous peoples. Corporations play central roles in the realization of such projects. They are both expected and where applicable legally required to respect human rights throughout their activities.⁷⁹ The corporate responsibility to respect human rights is covered in Pillar II of the UNGPs. To conceptualize and operationalize their responsibility to respect human rights – that is, to avoid infringing on the human rights of others and to address adverse human rights impacts with which they are involved – corporations should take different yet interrelated steps: publish a policy commitment; conduct human rights due diligence to identify, prevent, mitigate, and account for how they address adverse human rights impacts; and engage in remediation.⁸⁰ As the core of the corporate responsibility to respect human rights, there is no one-size-fits-all approach to conducting human rights due diligence; rather, the suitable approach depends on the corporation's size, the sector, and the circumstances in which the business operates.⁸¹

Grappling with the issue of businesses and human rights necessarily prompts the question of which entities qualify as 'corporations'. The answer to this question is rather broad, since in today's globalized economic world, there is no typical corporation.⁸² The three key RBC instruments acknowledge this, using terms such as 'business enterprise', 'multinational enterprise', 'enterprise', 'company' and 'corporation' interchangeably. The intention behind this variation in terms is to ensure the widest possible observance of the instruments by corporations.⁸³ According to the OECD Guidelines, multinational enterprises may operate in all sectors of the economy; ownership may be private, state, or mixed; and there is no difference in treatment between multinational and domestic enterprises. In addition, small- and medium-sized enterprises are encouraged to abide by the OECD Guidelines' recommendations 'to the fullest extent possible'.⁸⁴ Similarly, the UNGPs 'apply to all (...) business enterprises, both transnational and others, regardless of their size, sector, location, own-

⁷⁹ See above text to [Fn 26-32](#).

⁸⁰ HRC, 'UNGPs' Principle 15; OECD, '2011 Guidelines' 31, para 5.

⁸¹ HRC, 'UNGPs' Principle 17.

⁸² OECD, '2011 Guidelines' 13, para 2; Christine Kaufmann, *Globalisation and Labour Rights: The Conflict between Core Labour Rights and International Economic Law* (Hart Publishing 2007) 164.

⁸³ OECD, '2011 Guidelines' 18, para 6.

⁸⁴ *ibid* 17-18, paras 4-6.

ership and structure'.⁸⁵ Such a broad definition of corporations is also found in the ILO MNE Declaration.⁸⁶ This thesis uses the term 'corporation', which should be understood under the key instruments' broad definition. From a more technical legal point of view, a corporation is often defined as 'an entity that is legally separate from its members, which enjoys its own personality and can hold rights and obligations in its own name'.⁸⁷

B. Indigenous Peoples' Rights

Indigenous peoples are entitled to all of the human rights enshrined in the international human rights framework as individuals and to a number of collective rights essential for the protection of their interests and cultural survival as a collective.⁸⁸ Their individual and collective rights – as most comprehensively articulated in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) – 'should [thus] not be seen as "special rights" but are expressions of universal, indivisible, and inalienable human rights'.⁸⁹ Indigenous peoples' rights are recognized in several other sources, including ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries of 1989 (ILO C 169), the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁹⁰ While these four instruments are binding for adhering states, as a declaration of the UN General Assembly, the UNDRIP is not legally binding.⁹¹ Indigenous peoples' rights are further expressed in regional standards, such as the American Declaration on the Rights of Indigenous Peoples (ADRIP) as well as in domestic laws.⁹²

Even though indigenous peoples tend to refuse designation as 'minorities', fearing that the usage of this term would diminish their entitlement to claim

⁸⁵ HRC, 'UNGPs' General Principles.

⁸⁶ ILO, 'MNE Declaration' paras 5–6.

⁸⁷ Peter Muchlinski, 'Corporations in International Law', in *Max Planck Encyclopedia of Public International Law (Online)* (OUP 2014) para 1.

⁸⁸ Preamble UNGA, 'UNDRIP'; Rombouts, *Having a Say* 15.

⁸⁹ Rombouts, 'Evolution' 184; Preamble, Arts. 43, 46(2) UNGA, 'UNDRIP'.

⁹⁰ For an overview of relevant instruments and provisions, see eg Lucky Sherpa and others, 'Implementing the UN Declaration on the Rights of Indigenous Peoples: Handbook for Parliamentarians No. 23' (IPU, 2014) 13 at Fn 16 <<https://www.ipu.org/es/node/599>> accessed 23 April 2022; Hanna and Vanclay 147.

⁹¹ See below [Fn 382](#).

⁹² For an overview on national legislations on consultation and FPIC, see eg HRC, '2018 FPIC Study EMRIP' paras 58–59.

the status as 'indigenous peoples' and the rights enshrined in the international law framework directly relating to indigenous peoples, such as the UNDRIP and ILO C 169, there is nevertheless an overlap between the two concepts in terms of characteristics and rights protection.⁹³ Indigenous peoples resemble minorities in having a non-dominant status in the states in which they reside and in being culturally distinct from the majority of the states' populations. Given these overlapping characteristics, indigenous peoples are protected through both the minority rights and indigenous peoples' rights framework. This is reflected in claims brought by indigenous peoples for violations of their rights as individuals belonging to minorities.⁹⁴

Given the scale and the variety of purposes of development projects, the entire spectrum of human rights can potentially be impacted. In his comprehensive study of the impact of extractive industries on the rights of indigenous peoples, the former SRRIP Anaya concluded:

The primary substantive rights of indigenous peoples that may be implicated in natural resource development and extraction, as has been extensively documented include, in particular, rights to property, culture, religion, and non-discrimination in relation to lands, territories and natural resources, including sacred places and objects; rights to health and physical well-being in relation to a clean and healthy environment; and rights to set and pursue their own priorities for development, including development of natural resources, as part of their fundamental right to self-determination.⁹⁵

At the very core of the indigenous peoples' rights framework is indigenous peoples' right to self-determination.⁹⁶ The UNDRIP, expressly in Arts. 3 and 4 refers to their right to self-governance and autonomy in the states in which they live and thus to internal self-determination.⁹⁷ Art. 3 reflects the language of common Arts. 1 of the ICCPR and ICESCR and therefore does not create a new right.⁹⁸ Grounded in the right to self-determination and also being prerequisites for the assertion of that right are indigenous peoples' rights to lands

⁹³ Castellino and Doyle 14; James Summers, *Peoples and International Law* (2nd edn, Brill Nijhoff 2014) 11.

⁹⁴ Summers 11; Castellino and Doyle 13-14. For specific examples, see below text to [Fn 683](#)-691.

⁹⁵ HRC, '2012 Report SRRIP' para 50. See also UNCHR, '2003 Report Stavenhagen' paras 6-30; UNCHR, '2003 Report Philippines' para 63.

⁹⁶ See eg Rombouts, 'Evolution' 175, 200.

⁹⁷ Arts. 3-4 UNGA, 'UNDRIP'; Rombouts, 'Evolution' 200.

⁹⁸ Sherpa and others 14.

and resources and participatory rights.⁹⁹ Due to the basic and inextricable link between the lands that they traditionally occupy and use and their identity, customs, culture, and existence,¹⁰⁰ the right to self-determination as well as other substantive rights depend upon the realization of their rights to land: land is property (land rights as proprietary rights); land is life (land rights as subsistence rights); land is a way of life in terms of traditions, customs and spirituality; and land is cultural heritage (land rights as a right to cultural integrity).¹⁰¹

Together with participatory rights, land and resource rights constitute the cornerstone of the UNDRIP and ILO C 169. However, they also spark the greatest controversy in the indigenous peoples' rights discourse revolving around state sovereignty and territorial integrity and the meaning and scope of their participation in decision-making processes.¹⁰² Without meaningful participation in decision-making processes affecting their interests, the realization of indigenous peoples' collective rights will be illusive.¹⁰³ Invariably connected to rights to lands, territories and resources and other substantive rights, indigenous peoples' participatory rights are not stand-alone rights but rights of process that must be examined in conjunction with their substantive rights.¹⁰⁴ As illustrated in this thesis, the principle of FPIC is considered the most far-reaching of indigenous peoples' participatory rights.¹⁰⁵

The following sections lay out the research gap and this thesis's research scope and questions as well as the methodology adopted to answer them. It also describes the structure chosen to present the findings of this thesis.

⁹⁹ Claire Charters, 'Chapter 14 - Indigenous Peoples' Rights to Lands, Territories, and Resources in the UNDRIP: Articles 10, 25, 26, and 27' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018) 397; Weller 124, 147-149.

¹⁰⁰ UNCHR, '1983 Report Martínez Cobo' paras 196-197.

¹⁰¹ Gilbert, *Land Rights* VIII; Mattias Åhrén, *Indigenous Peoples' Status in the International Legal System* (OUP 2016) 225-226; Rombouts, 'Evolution' 175.

¹⁰² Rombouts, 'Evolution' 173, 186.

¹⁰³ *ibid* 175.

¹⁰⁴ HRC, '2012 Report SRRIP' paras 47-50; Åhrén 225.

¹⁰⁵ Rombouts, *Having a Say* 196.

II. Research Gap, Aim, Questions, and Scope

What appears clear at first glance – corporations are subject to growing expectations to respect indigenous peoples' rights and FPIC – becomes vaguer and more complex at second glance. Currently, it is rather unclear what the corporate responsibility to respect indigenous peoples' rights and FPIC entails from a legal perspective (here referring to both hard and soft law). This lack of clarity is reflected in surveys showing that corporations are struggling to grasp the meaning and implementation of indigenous peoples' rights, the principle of FPIC and its operationalization.¹⁰⁶

Reasons given for this uncertainty include the controversial status of FPIC, referring to the debate on the scope of indigenous peoples' participatory rights as well as a plethora of emerging standards, principles and guidelines developed by different actors with diverging interpretations of FPIC.¹⁰⁷ Furthermore, albeit firmly acknowledged, how the corporate responsibility to respect human rights translates to daily business and what is expected from corporations in specific situations and sectors is an ongoing knowledge process requiring further clarification.¹⁰⁸ A reason for this, it is argued, lies in the key RBC instruments as such. While the latter underscore respect for human rights as a baseline expectation (referring at a minimum to the International Bill of Human Rights and the principles concerning fundamental rights of the ILO) being operationalized by a human rights due diligence process,¹⁰⁹ they do not

¹⁰⁶ HRC, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya' (15 July 2009) UN Doc A/HRC/12/34 para 57; HRC, '2010 Report SRRIP' paras 31, 61, 81. See also Norwegian National Human Rights Institution and NCP Norway, 'Natural Resource Development, Business and the Rights of Indigenous Peoples' (2019) 4, 24-26 <<https://www.nhri.no/en/2019/seminar-report-2019-natural-resource-development-business-and-the-rights-of-indigenous-peoples/>> accessed 23 April 2022; HRC, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts' (19 February 2007) UN Doc A/HRC/4/35 para 49 at Fn 46.

¹⁰⁷ See eg Mauro Barelli, 'Chapter 9 - Free, Prior, and Informed Consent in the UNDRIP: Articles 10, 19, 29(2), and 32(2)' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018); HRC, '2011 Report SRRIP' paras 60, 66; Doyle, FPIC 186, 224; Rombouts, *Having a Say* 210-213, 322-369.

¹⁰⁸ To further clarify responsible business conduct, the OECD has adopted several RBC Guidance Documents, see <<https://mneguidelines.oecd.org/due-diligence-guidance-for-responsible-business-conduct.htm>> accessed 24 April 2022.

¹⁰⁹ OECD, '2011 Guidelines' 31, para 5, 32, para 39.

address the content of substantive human rights standards applicable to the conduct of businesses.¹¹⁰ References to indigenous peoples' (rights) in the latter instruments are vague and sparse, leaving corporations with little guidance on what the responsibility to respect indigenous peoples' rights and FPIC and its operationalization entail.¹¹¹ In the words of Lewis, 'While the principle of corporate responsibility for human rights appears to be evolving into a global standard of conduct for businesses, the rights of indigenous peoples have not been sufficiently articulated as part of this principle'.¹¹²

There is a rich body of scholarly work on indigenous peoples and their rights elaborating on state obligations,¹¹³ the meaning of FPIC,¹¹⁴ and (corporate-led) developments in different business sectors to protect indigenous peoples' rights.¹¹⁵ With a view to the current debate on what the corporate responsibility to respect human rights entails, a recently published doctoral thesis has brought further clarification by studying the content of substantive human

¹¹⁰ Başak Bağlayan, 'Searching for Human Rights Norms for Corporate Conduct in Domestic Jurisprudence: A Bottom-Up Approach to International Law' (2018) 36(4) *Nordic Journal of Human Rights* 371, 374; Başak Bağlayan, 'Corporations and Human Rights: Searching for International Norms for Corporate Conduct in Domestic Case Law' (PhD Thesis, Université du Luxembourg 2017) 164-171, 176-178.

¹¹¹ Roel Nieuwenkamp, 'Staying Ahead of the Curve on Corporate Responsibility: Indigenous Peoples' Rights, Taxation and Disclosure' (OECD *on the Level*, 29 July 2018) <<https://oecdonthelevel.com/2018/07/29/staying-ahead-of-the-curve-on-corporate-responsibility-indigenous-peoples-rights-taxation-and-disclosure/>> accessed 25 April 2022; Sara L Seck, 'Indigenous Rights, Environmental Rights, or Stakeholder Engagement: Comparing IFC and OECD Approaches to Implementation of the Business Responsibility to Respect Human Rights' (2016) 12(1) *McGill Journal of Sustainable Development Law and Policy* 53, 83; Cathal M Doyle, 'Indigenous Peoples' Issues & Participation at the UN Forum on Business and Human Rights: Progress to Date and Potential for the Future' (ENIP, 2014) 9 <http://www.piplinks.org/system/files/C_Doyle_Indigenous_Peoples_at_the_UNBHR_Forum_2014.pdf?msckid=76458983c4c811ec86e721a96236570a> accessed 23 April 2022.

¹¹² Lewis 215.

¹¹³ Ben Saul, *Indigenous Peoples and Human Rights: International and Regional Jurisprudence* (Hart Publishing 2016); María V Cabrera Ormaza, *The Requirement of Consultation with Indigenous Peoples in the ILO: Between Normative Flexibility and Institutional Rigidity* (Brill Nijhoff 2017); Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press 2002).

¹¹⁴ See eg Doyle, FPIC; Rombouts, *Having a Say*.

¹¹⁵ On the extractive sector, see eg Doyle and Whitmore; Doyle and Cariño. On the tourism sector, see Mary K A Baleva, *Regaining Paradise Lost - Indigenous Land Rights and Tourism: Using the UNGPs on Business and Human Rights in Mainstreaming Indigenous Land Rights in the Tourism Industry* (Brill Nijhoff 2019).

rights norms applicable to the conduct of business enterprises based on an analysis of domestic judicial decisions and decisions by the OECD's NCPs.¹¹⁶ However, currently missing from legal research is an in-depth analysis of the responsibilities of corporations with regard to indigenous peoples' rights and FPIC through the lens of the standards as well as the 'case law' directly applicable to corporations.¹¹⁷

Against this background, this thesis embarks on analysing corporate responsibility to respect indigenous peoples' rights and FPIC in the context of development projects in more detail. Considering certain characteristics of indigenous peoples, such as the rights associated with self-determination and such peoples' distinct relationship with the land they traditionally occupy and use, the focus is on indigenous peoples' land and resource rights and their participatory rights, particularly the right to be consulted and the principle of FPIC. This thesis aims to close the above research gap by analysing the regulatory framework pertaining to indigenous peoples and corporations as well as the 'jurisprudence'¹¹⁸ of the OECD National Contact Points, currently the only state-based non-judicial grievance mechanism that handles complaints concerning corporate activity. In doing so, it aims to further clarify the content and operationalization of corporations' responsibility to respect indigenous peoples' rights and FPIC from a legal perspective. Based on the results of the analysis, this thesis further aims to identify (normative) shortcomings in the OECD Guidelines and the NCPs' 'jurisprudence' concerning indigenous peoples and to explore pathways for possible recommendations and changes.

This leads to the following research questions and considerations on the scope of this thesis:

1) What are the precise rules governing corporate responsibility with regard to indigenous peoples' rights and FPIC?

¹¹⁶ Bağlayan, 'Corporations'; Bağlayan, 'Bottom-Up Approach' 384-389. See also Karin Buhmann, 'Analysing OECD National Contact Point Statements for Guidance on Human Rights Due Diligence: Method, Findings and Outlook' (2018) 36(4) *Nordic Journal of Human Rights* 390.

¹¹⁷ In her thesis, Bağlayan addresses indigenous peoples' rights, yet rather marginally, see Bağlayan, 'Corporations' 240-247.

¹¹⁸ The terms 'case law' and 'jurisprudence' are put in quotation marks to differentiate the NCP mechanism, being non-judicial, from judicial mechanisms.

As a first step in further clarifying the corporate responsibility to respect indigenous peoples' rights and FPIC, a closer look at the regulatory framework pertaining to indigenous peoples and corporations is warranted. This is accomplished via the following approach:

Considering that corporations are not (yet) bearers of human rights obligations under international law, every debate on norms relating to corporations and human rights starts with the state as the primary human rights duty bearer.¹¹⁹ Thus, in a first step, the legal context is set by elaborating on the international legal framework laying out states' obligations regarding indigenous peoples' rights to identify the current legal understanding of indigenous peoples' rights to self-determination, lands and resources and the concepts of consultation and FPIC. Anchored in social expectations – which for moral and practical reasons often correspond to state obligations under international human rights law – the corporate responsibility is connected to the international human rights regime.¹²⁰ As indicated earlier, this connection is most clearly established through states' duty to protect human rights, which entails the obligation to ensure the corporate responsibility to respect human rights.¹²¹

Second, having established the current legal understanding in terms of states' obligations regarding indigenous peoples' rights, the analysis turns to the regulatory framework directly addressing corporations. It examines whether and how indigenous peoples' rights and FPIC are referenced in pertinent instruments to determine how these instruments inform the corporate responsibility to respect indigenous peoples' rights and FPIC.

The undercurrent of this two-pronged approach is that respecting human rights as a corporation requires knowledge of the content of these rights.¹²² In the words of the Special Representative of the UN Secretary General (SRSG) Ruggie, 'businesses should look to current internationally recognized rights for an authoritative enumeration, not of human rights *laws* that might apply to them, but of human *rights* they should respect'.¹²³

¹¹⁹ Kaufmann and others, 'Baseline Study' 2.

¹²⁰ Buhmann, 'Social Licence' 707, 710. See also Morrison, 'One Way' 103.

¹²¹ Buhmann, 'Social Licence' 707, 710; CESCR, 'GC No. 24' para 10.

¹²² See below text to [Fn 473](#).

¹²³ John Ruggie, 'The Social Construction of the UN Guiding Principles on Business & Human Rights' [2017] Corporate Social Responsibility Initiative Working Paper 67, 14 <<https://www.hks.harvard.edu/publications/social-construction-un-guiding-principles-business-human-rights>> accessed 19 April 2022; HRC, 'Framework' para 58.

Scope: The legal framework of reference pertaining to indigenous peoples is delimited to ILO C 169, and the UNDRIP, ICCPR, ICESCR, and ICERD as the most relevant instruments on indigenous peoples' rights on an international level. On a regional level, brief attention is given to the American Convention on Human Rights (ACHR) due to the importance of the Inter-American Court of Human Rights' (IACtHR) jurisprudence on indigenous peoples' rights. This thesis does not elaborate on domestic law for reasons of delimitation.

Regarding the regulatory framework directly addressing corporations, again, for reasons of comparability and delimitation, this thesis will solely focus on instruments and standards that are developed by international organizations, including the UN – encompassing the ILO as the UN's first specialized agency – the OECD, and the International Finance Corporation (IFC) – forming part of the World Bank Group. Pertinent instruments and standards include the UNGPs, the ILO MNE Declaration, the OECD Guidelines and related relevant OECD RBC Guidance Documents, and the IFC's Environmental and Social Performance Standards (IFC Performance Standards). The common denominators of these instruments are the following: They have been established under the auspices of international organizations and operate on an international level; they are not corporate membership-based and not corporate-led; and they are not purely voluntary, that is, they are government-backed and/or are not only based on voluntary commitment by businesses but also refer to business compliance with public regulation and applicable law.¹²⁴

Due to the limitations of scope, pertinent corporate and multi-stakeholder-driven (voluntary) initiatives, certification schemes, and public-private initiatives referring to indigenous peoples' rights and FPIC, such as the Roundtables on Sustainable Palm Oil (RSPO), Responsible Soy (RTRS) and Sustainable Biomaterials; the Forest Stewardship Council (FSC); and the UN Global Compact are excluded from the analysis. Nevertheless, because these initiatives emerged out of growing recognition of the private sector's responsibilities in relation to human rights, the environment and sustainable development, they are important standards of reference for the corporate responsibility to respect indigenous peoples' rights and FPIC.¹²⁵ Reference to such initiatives will thus be made where relevant for the argumentation of this thesis and particularly, as illustrated in [Chapter 5](#), where they play a role in NCP cases.

Furthermore, although this thesis analyses the IFC Performance Standards and the ILO MNE Declaration, for reasons of delimitation and different mandates from those of NCPs, neither the accountability mechanism for the IFC and

¹²⁴ See eg Buhmann, 'Social Licence' 700, 705.

¹²⁵ Rombouts, *Having a Say* 319.

Multilateral Investment Guarantee Agency (MIGA) – the Compliance Advisory Ombudsman (CAO) established to overview IFC/MIGA compliance with their policies – nor the ILO National Focal Points established for the promotion of the ILO MNE Declaration will be examined.¹²⁶

2) How do NCPs interpret and apply these rules when resolving disputes pertaining to corporations and indigenous peoples? Do NCPs apply substantive indigenous peoples' rights norms to define corporate responsibility under the OECD Guidelines?

Having examined the applicable regulatory framework, this thesis proceeds with an analysis of a cohort of NCP cases that were selected according to specific keywords reflecting indigenous peoples' issues. It strives to develop a typology of the case cohort and distil currently applied features of indigenous peoples' rights and FPIC on corporate actors and to analyse the results with reference to the requirements on the corporate responsibility to respect human rights as enshrined in the OECD Guidelines and other pertinent instruments addressing corporate actors. The underlying assumption of this undertaking is that the work of NCPs – as responsible business authorities examining corporate conduct on a case-by-case basis – can be useful in further unpacking the corporate responsibility to respect indigenous peoples' rights and FPIC in terms of content and operationalization.¹²⁷

By analysing the NCP cases relating to indigenous peoples, the thesis contributes both to the ongoing (scholarly) discussion on business and indigenous peoples' rights and to the NCP mechanism. Considered a prominent non-judicial grievance mechanism for corporate-related human rights abuses, the mechanism has received increasing attention in scholarly work.¹²⁸ However,

¹²⁶ The CAO determines whether the IFC/MIGA has verified that its clients are complying with their commitments. The CAO does not determine or make findings regarding whether IFC clients involved in the financed projects have complied and effectively implemented IFC/MIGA's policies, see CAO, 'Policy' (2021) <<https://documents1.worldbank.org/curated/en/889191625065397617/pdf/IFC-MIGA-Independent-Accountability-Mechanism-CAO-Policy.pdf>> accessed 25 April 2022. See also Doyle, FPIC 208.

¹²⁷ See generally Baglayan, 'Bottom-Up Approach'; Buhmann, 'NCP Statements'; Sander van't Foort, 'Due Diligence and Supply Chain Responsibilities in Specific Instances' (2019) 4 Erasmus Law Review 61.

¹²⁸ See eg Sander van't Foort, Tineke Lambooy and Argyrou Aikaterini, 'The Effectiveness of the Dutch National Contact Point's Specific Instance Procedure in the Context of the OECD Guidelines for Multinational Enterprises' (2020) 16(2) McGill Journal of Sustainable Development Law 191.

in terms of the substantive work of NCPs, little research has been done thus far.¹²⁹ Furthermore, to date, there has been no research on the facts and figures concerning NCP cases relating to indigenous people.

Scope: Regarding NCP cases, 30 September 2020 was chosen as the final date for the collection of cases, and 1 March 2021 was chosen as the final date in terms of defining the status of cases. The cohort of cases encompasses thirty-eight cases in total. These thirty-eight cases were used to create a typology, and twenty-two were selected for in-depth substantive analysis. Importantly, this thesis does not aim to examine the corporate responsibility to respect indigenous peoples' rights and FPIC by analysing corporate practice but instead focuses on the 'jurisprudence' of NCPs examining corporate conduct through the lens of the applicable regulatory framework pertaining to indigenous peoples and corporations.

3) What, from an international human rights perspective, are the shortcomings of the OECD Guidelines and the 'jurisprudence' of NCPs, and what recommendations can be developed from these findings?

As a last step and based on the results of the NCP case studies and the findings of previous chapters, the thesis aims to pinpoint potential shortcomings and gaps in the OECD Guidelines and the 'jurisprudence' of NCPs. In this way, recommendations and suggestions can be made for potential supplements or changes to the OECD Guidelines or NCPs' current approach to cases involving indigenous peoples. This undertaking seems valuable both for the discussion on the broader context of businesses and indigenous peoples' rights and for the NCP mechanism, which will likely handle indigenous peoples' cases in the future.

III. Methodology and Sources

To address the research questions, different methodologies are employed throughout this thesis. To answer the first research question, an expository approach is applied, aiming to answer 'descriptive questions about the way the (legal) world is'.¹³⁰ Thus, in [Chapters 2](#) and [3](#) – in which the international regulatory framework is studied – the method used is doctrinal legal research to

¹²⁹ Buhmann, 'NCP Statements' 392; van't Foort, 'Due Diligence'.

¹³⁰ Robert Cryer and others, *Research Methodologies in EU and International Law* (Hart Publishing 2011) 9.

identify the content of the law and the legal reasoning behind it.¹³¹ Sources examined include the key instruments, the ILO C 169 and the UNDRIP, the work of the ILO supervisory bodies and the UN human rights bodies (treaty-based and charter-based). A particular focus is on the UN human rights bodies' general comments, concluding observations, reports, and resolutions, including the UNGPs. This thesis further benefits greatly from an examination of a sample of judgements of the IACtHR as well as of the work of the OECD and the IFC in terms of their respective RBC instruments. Finally, this thesis uses bibliographical research of academic literature, including mostly legal literature but also literature on issues such as ethnicity, ethics, sustainability, and development, and reports and studies of organizations engaging with indigenous peoples' rights issues.

To answer the second research question, both exploratory and expository approaches are applied. The methods used to analyse NCPs' 'jurisprudence' relating to indigenous peoples are empirical, consisting of a quantitative analysis of NCP cases to create a typology of cases and doctrinal legal research to systematically analyse the content of NCPs' statements and reasoning, as detailed further in [Chapter 5, Section I](#).

The approach taken to answer the third research question is both practical and normative. It explores what shortcomings and lacunae can be identified from previous chapters in terms of NCPs' 'jurisprudence' and the OECD Guidelines and what suggestions can be made to improve the implementation of indigenous peoples' rights under the OECD Guidelines.

IV. Structure of this Thesis

This thesis is structured into six chapters. In addition to this introductory chapter, it includes four analytical chapters and a concluding and outlook chapter. [Chapter 1](#) has put the topic into context and provided insight on the 'how' of this thesis.

[Chapter 2](#) examines the international legal framework pertaining to indigenous peoples laying out states' obligations regarding indigenous peoples' rights. It focuses on relevant provisions on indigenous peoples' land and resource rights and participatory rights as set out in the two key instruments, ILO C 169 and the UNDRIP, as well as on the findings of pertinent bodies and

¹³¹ Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83, 85, 106, 110-113, 116-118.

mechanisms interpreting these instruments. Chapter 2 aims to distil the content and current legal understanding of the above rights, answering the first research question.

Chapter 3 examines the regulatory framework pertaining to corporations and indigenous peoples. It introduces the concept of the corporate responsibility to respect human rights as set out in the key RBC instruments and conducts a search for pertinent provisions relating to indigenous peoples in the key RBC instruments, relevant OECD RBC Guidance Documents and the IFC Performance Standards. Chapter 3 answers the first research question.

Chapters 4 and **5** are dedicated to the OECD National Contact Points. Chapter 4 introduces the state-based non-judicial mechanism from institutional, mandate, and procedural viewpoints, creating the basis for Chapter 5. Chapter 5 includes a typology of NCP cases relating to indigenous peoples and a substantive analysis of selected cases to distil currently applied features of indigenous peoples' rights and FPIC in relation to corporate actors. Thus, Chapters 4 and 5 answer the second research question.

Chapter 6 concludes by summarizing the findings of this thesis and based on these findings addresses lacunae in the OECD Guidelines and shortcomings of the NCPs' 'jurisprudence', making suggestions to strengthen the implementation of indigenous peoples' rights under the OECD Guidelines.

Chapter 2: International Legal Framework on Indigenous Peoples' Rights and FPIC: State Obligations

As elaborated in the previous chapter, indigenous peoples' collective rights, including their rights to self-determination, lands, territories, and resources, as well as cultural rights, are of particular concern for indigenous peoples to ensure their existence and cultural identity. However, the realization and enjoyment of these rights are increasingly under threat due to an increased pace of development projects affecting indigenous peoples' distinct way of living. Their participatory rights – referring to indigenous peoples' rights to be consulted and to participate in decision-making affecting them – serve as a central guarantee and safeguard of indigenous peoples' collective rights. This is reflected in various international human rights treaties and instruments, in the work of human rights treaty bodies and other supervisory bodies, in special procedures of the UN Human Rights Council, and in the jurisprudence of regional courts, such as the IACtHR. By becoming a party to these treaties or by customary international law, states incur obligations regarding indigenous peoples' rights and human rights in general.¹³²

This chapter will explore indigenous peoples' collective rights in the broader context of development projects, particularly their rights to lands, territories and resources and participatory rights, and states' related obligations. It seeks to distil the current legal understanding of these rights, safeguards and obligations, which will serve as a basis for [Chapters 3](#) and [5](#), which focus on corporations' human rights responsibilities regarding indigenous peoples. The right to consultation and the principle of FPIC are the main areas of focus, given their central role in guaranteeing the realization of indigenous peoples' rights and the controversy they spark.

The chapter is divided into four main sections. [Section I](#) elaborates on the ILO's indigenous peoples' rights framework, with a particular focus on ILO C 169 and the related work of the ILO supervisory bodies. The ILO's unique tripartite structure warrants a closer look at the business perspective on indigenous peoples' participatory rights. [Section II](#) elaborates on the UN's indigenous peoples' rights framework. Light is shed on the UNDRIP's pertinent provisions and their interpretation by relevant UN bodies and mechanisms.

¹³² Bantekas and Oette 79.

[Section III](#) examines three landmark IACtHR cases concerning indigenous peoples' rights, namely, *Saramaka People v Suriname*, *Kichwa Indigenous People of Sarayaku v Ecuador* and *Kaliña and Lokono Peoples v Suriname*. The former two cases have significantly sharpened states' obligations in terms of consultation and FPIC referring to the UN and ILO regimes. Furthermore, *Kichwa Indigenous People of Sarayaku v Ecuador* and *Kaliña and Lokono Peoples v Suriname* shed light on the corporate responsibility to respect indigenous peoples' rights. The chapter concludes with [Section IV](#) summarizing the key aspects of the current legal debate. Throughout the chapter, the predominant focus is on the state duty to protect.

I. ILO Framework

The ILO's engagement with indigenous peoples matters dates to its creation in 1919. Different studies on indigenous peoples as workers were undertaken focusing on systemic problems of forced labour, exploitation, and discrimination culminating in several instruments and standards addressing indigenous workers – at the time referred to as 'native workers' from the populations of the colonies.¹³³ Regional ILO conferences held in the 1930s and 1940s expanded the organization's scope by including issues beyond labour matters, such as improving the living standards of indigenous peoples.¹³⁴ A 1953 study on the living and working conditions of indigenous peoples (at the time referred to as 'indigenous populations') formed the basis of the first international legally binding document dealing specifically with indigenous peoples, ILO Convention No. 107 of 1957 (ILO C 107).¹³⁵ A change in terminology from 'indigenous populations' to 'indigenous peoples' only took place with ILO C 169, the successor to ILO C 107. For clarity, the subsequent sections will use the term 'indigenous peoples' in general elaborations and 'indigenous populations' when referring to original text.

¹³³ See generally Lee Sweptson, 'A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989' (1990) 15(3) *Oklahoma City University Law Review* 677; Athanasios Yupsanis, 'The International Labour Organization and Its Contribution to the Protection of the Rights of Indigenous Peoples' (2012) 49 *Canadian Yearbook of International Law* 117, 118-128; Cabrera Ormaza 23-40; International Labour Office, 'Implementing ILO C 169' 32.

¹³⁴ Cabrera Ormaza 31.

¹³⁵ International Labour Office, 'Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent Countries' (1953) <https://www.ilo.org/public/libdoc/ilo/IILO-SR/IILO-SR_NS35_engl.pdf> accessed 4 April 2022; Yupsanis 120, 124.

A. ILO's Indigenous and Tribal Populations Convention, 1957 (No. 107)

In 1957, the International Labour Conference adopted ILO C 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries along with Recommendation 104 (ILO R 104) of the same name.¹³⁶ Before its replacement by ILO C 169, ILO C 107 counted twenty-seven state ratifications. Although it is not open for new ratifications, it is currently still in force for seventeen states that did not ratify its successor ILO C 169. This includes India, with approximately 104 million indigenous people, and Bangladesh, with 1.5 million people.¹³⁷

ILO C 107 covers mainly individual rights, including provisions on recruitment and conditions of employment (Art. 15), vocational training, handicrafts and rural industries (Arts. 16-18), social security and health (Arts. 19-20), and education and means of communication (Arts. 21-26).¹³⁸ Moreover, it refers to the right of members of indigenous and tribal populations to retain their customs (Art. 7(2)) and recognizes for the first time the ownership – collective or individual – of traditionally occupied lands (Art. 11), albeit with no reference to natural resources as part of the lands.¹³⁹ In this context, it introduces the concept of 'free consent' in Art. 12(1) as follows:

The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.

¹³⁶ ILO, 'Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries' (adopted 26 June 1957, entered into force 2 June 1959) 328 UNTS 247; ILO, 'Recommendation No. 104 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries' (adopted 26 June 1957).

¹³⁷ ILO, 'C 107' is still in force in Angola, Bangladesh, Belgium, Cuba, Dominican Republic, Egypt, El Salvador, Ghana, Guinea-Bissau, Haiti, India, Iraq, Malawi, Pakistan, Panama, Syria and Tunisia, see <https://www.ilo.org/dyn/normlex/en/?p=1000:1300:0:NO:1300:P1300_INSTRUMENT_ID:312252> accessed 24 April 2022; Peter B Larsen and Jérémie Gilbert, 'Indigenous Rights and ILO Convention 169: Learning from the Past and Challenging the Future' (2020) 24(2-3) The International Journal of Human Rights 83, 85. While ILO C 107 is listed as out-dated, ILO R 104 is listed in the ILO system as an up-to-date instrument, see <https://www.ilo.org/dyn/normlex/en/?p=NORMLEX-PUB:12100:0:NO:12100:P12100_INSTRUMENT_ID:312442:NO> accessed 24 April 2022.

¹³⁸ Yupsanis 120-121.

¹³⁹ ibid 124. But see Arts. 4, 36(b) ILO, 'R 104'.

As follows from the wording of Art. 12(1), their right to lands does not apply in an absolute manner but can be limited to achieve relevant objectives in society.¹⁴⁰ As a counterbalance to this state discretion, the Convention provides for compensation in the form of land of equal quality 'suitable to provide for their present needs and future development' or when preferred monetary compensation.¹⁴¹ However, for some, this cannot obscure the fact that Art. 12 grants states near total freedom to remove indigenous peoples.¹⁴² Similarly, the right to retain their customs (Art. 7(2)) can be overridden by the Convention's overall aim of their integration into the life of their respective states as indicated in the Convention's title and stipulated in Art. 2(1).¹⁴³

The Convention imposes a dual obligation on states. First, they should prevent discrimination against members of indigenous and tribal populations.¹⁴⁴ Second, deemed progressive at the time of the Convention's adoption,¹⁴⁵ it imposes on states a duty to adopt special measures 'for the protection of the institutions, persons, property and labour of these populations',¹⁴⁶ 'enabling the said populations to benefit on an equal footing from the rights and opportunities which national laws or regulations grant to the other elements of the population'.¹⁴⁷ This positive duty is of a temporary nature, however, required 'only so long as there is need for special protection and only to the extent that such protection is necessary'.¹⁴⁸

ILO C 107 was criticized heavily by indigenous organizations and scholars for being paternalistic, unilateral and destructive.¹⁴⁹ Indigenous peoples were not included in the drafting process of the Convention and are depicted as 'less

¹⁴⁰ Cabrera Ormaza 37.

¹⁴¹ Art. 12(2-3) ILO, 'C 107'; Yupsanis 125.

¹⁴² See eg Russel L Barsh, 'Revision of ILO Convention No. 107' (1987) 81(3) *The American Journal of International Law* 756, 761; Gilbert, *Land Rights* 149.

¹⁴³ Art. 2(1) ILO, 'C 107': 'Governments shall have the primary responsibility for developing coordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries'. See also Cabrera Ormaza 37.

¹⁴⁴ See eg Arts. 3(2), 15(2) ILO, 'C 107'; Yupsanis 123.

¹⁴⁵ Cabrera Ormaza 36-37; Yupsanis 123.

¹⁴⁶ Art. 3(1) ILO, 'C 107'.

¹⁴⁷ Art. 2(2) *ibid*; Cabrera Ormaza 36.

¹⁴⁸ Art. 3(2b) ILO, 'C 107'; Yupsanis 123.

¹⁴⁹ See eg International Indian Treaty Council, 'The Geneva Conference: International NGO Conference on Discrimination against Indigenous Populations' (Special Issue *Treaty Council News*, Vol. 1 No. 7, 1977) 22-24 <https://ipdpowwow.org/1977_conference/ITTC_Report_copy.pdf> accessed 12 April 2022; Swepston, 'ILO C 169' 682-683; Yupsanis 120-121.

advanced' groups that should be integrated into national societies.¹⁵⁰ Such an 'integrationist approach' – it was argued – would eventually lead to the extinction of indigenous peoples' cultural identity since it paved the way for governmental assimilation policies granting states wide discretion in implementing their obligations.¹⁵¹ The Convention deliberately referred to 'indigenous populations' rather than 'peoples' to avoid any link to and recognition of collective rights, particularly the right to self-determination.¹⁵² As Anaya contends, since most provisions grant rights to members of indigenous populations but not to indigenous populations as a collective and are thus framed in individual terms, it is questionable whether indigenous peoples – seen as a collective – are beneficiaries of the rights enshrined in ILO C 107 after all.¹⁵³

The aforementioned drawbacks and an emerging indigenous movement starting to voice indigenous peoples' concerns in the 1970s¹⁵⁴ prompted the ILO Governing Body to assemble a Meeting of Experts in 1986.¹⁵⁵ The experts agreed on the need to revise ILO C 107 due to its integrationist approach, which '[i]n practice (...) had become a concept which meant the extinction of ways of life which are different from that of the dominant society'.¹⁵⁶ Importantly, in making this statement, the experts referred to the UN Study on the Problem of Discrimination against Indigenous Peoples by Martínez Cobo.¹⁵⁷ Arguing that ILO C 107 had not proved effective in protecting and developing indigenous peoples' rights, Martínez Cobo recommended that the Convention

¹⁵⁰ Art. 1 ILO, 'C 107'; John H Bodley, *The Power of Scale: A Global History Approach* (M.E. Sharpe 2003) 260.

¹⁵¹ Although Art. 2(1) ILO C 107 distinguishes between integration and assimilation, the Convention lacks 'solid criteria for distinguishing satisfactorily between these concepts and the corresponding related policies'. See Yupsanis 122-123, 127. See also Swepston, 'ILO C 169' 682-683, 689; Barsh, 'Revision ILO C 107' 756-762; Howard R Berman, 'The International Labour Organization and Indigenous Peoples: Revision of ILO Convention No. 107 at the 75th Session of the International Labour Conference, 1988' (1988) 41 *International Commission of Jurists Review* 48, 49.

¹⁵² Yupsanis 126-127.

¹⁵³ James Anaya, *Indigenous Peoples in International Law* (2nd edn, OUP 2004) 55.

¹⁵⁴ Swepston, 'ILO C 169' 687; Cabrera Ormaza 38.

¹⁵⁵ Swepston, 'ILO C 169' 689; Cabrera Ormaza 38-39.

¹⁵⁶ International Labour Office, 'Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107): Report VI (1)' (1987) 107, para 46 <https://www.ilo.org/public/libdoc/ilo/1987/87B09_172_engl.pdf> accessed 4 April 2022.

¹⁵⁷ *ibid.* Martínez Cobo was the Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, whose study is perceived as a change-maker regarding indigenous peoples issues, see Hurst Hannum, 'New Developments in Indigenous Rights' (1987-1988) 28 *Virginia Journal of International Law* 649, 658.

be revised to focus on self-determination rather than integration and to take into account the demands of indigenous peoples.¹⁵⁸ In 1989, the International Labour Conference adopted ILO C 169, which amended ILO C 107.

B. ILO's Indigenous and Tribal Peoples Convention, 1989 (No. 169)

ILO C 169 entered into force in September 1991. Currently, ILO C 169 counts twenty-four state ratifications (of 187 member states) with a majority of fifteen ratifications by Latin American states.¹⁵⁹

Its adoption is said to have induced a paradigm shift in the understanding of indigenous peoples and their rights.¹⁶⁰ ILO C 169 did away with the heavily criticized integrationist approach¹⁶¹ and replaced the term 'populations' with 'peoples'.¹⁶² This paradigm shift was not smoothly achieved, however. During the preparatory process of ILO C 169, the term 'peoples' caused great controversy due to its linkage to the controversial right to self-determination as enshrined in the ICCPR and ICESCR.¹⁶³ States opposed the term since '[i]n every other instance in which the term is used in international law, it refers to an independent people, or one with the right to become so, free of foreign political domination'.¹⁶⁴ Since the introduction of the term 'peoples' in connection with the right to self-determination might imply the recognition of the right to secession from existing states, the controversy was resolved by including a caveat in Art. 1 of ILO C 169.¹⁶⁵ Art. 1(3) holds, '[t]he use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to term under international law'.

¹⁵⁸ UNCHR, '1983 Report Martínez Cobo' paras 335-337.

¹⁵⁹ States that have ratified ILO C 169 include Argentina, Bolivia, Brazil, the Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Germany (entry into force in 2022), Guatemala, Honduras, Luxembourg, Mexico, Nepal, the Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain, and Venezuela, see <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:PI1300_INSTRUMENT_ID:312314> accessed 24 April 2022.

¹⁶⁰ James Anaya, 'Indigenous Rights Norms in Contemporary International Law' (1991) 8(2) Arizona Journal of International and Comparative Law 1, 7-8; Cabrera Ormaza 39-40.

¹⁶¹ Preamble ILO, 'C 169'; Swepston, 'ILO C 169' 689.

¹⁶² Art. 1 ILO, 'C 169'; Cabrera Ormaza 39.

¹⁶³ Art. 1 ICCPR; Art. 1 ICESCR; Swepston, 'ILO C 169' 692.

¹⁶⁴ Swepston, 'ILO C 169' 692.

¹⁶⁵ *ibid* 693.

Additionally, the term ‘indigenous’ was and still is contentious. The stagnation of state ratification is somewhat attributed to the questioning of the concept of indigeneity, particularly by African and Asian states, based on the broad perception that ‘we are all indigenous’.¹⁶⁶ However, even state ratification does not necessarily mean the end of this controversy on indigeneity and peoples. As Larsen contends, the controversy reappears in the political process of recognition on different governmental levels and actions, such as redefining indigenous peoplehood, reassessing past categorizations, and framing the boundaries of decision-making and citizenship.¹⁶⁷ This in turn affects the process of consultation, raising questions such as who should be consulted, when and on what terms.¹⁶⁸

Although an explicit reference to indigenous peoples’ right to self-determination is lacking, the provisions in ILO C 169 are built on respect for indigenous peoples’ ways of life, culture and traditional institutions.¹⁶⁹ Indigenous peoples are depicted as distinct from the rest of the national community (Art. 1(1a)) and entitled to ‘decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development’ (Art. 7(1)). Art. 2 of ILO C 169 imposes on states the obligation to develop, with the participation of indigenous peoples, coordinated and systematic action that inter alia promotes ‘the full realisation of the social, economic and cultural rights of indigenous peoples, with respect for their social and cultural identity, their customs, traditions, and their institutions’. Against this background, the Convention is said

¹⁶⁶ To overcome this hurdle or at least diminish it, Larsen proposes raising greater awareness of the inclusive nature of Art. 1 ILO, ‘C 169’, covering both indigenous and tribal peoples, which ‘allows for the recognition of socio-cultural difference and associated rights in additional contexts’. However, Larsen also emphasizes the misunderstandings and the criterion of self-identification that are common to both indigenous and tribal peoples, see Peter B Larsen, ‘Contextualising Ratification and Implementation: A Critical Appraisal of ILO Convention 169 from a Social Justice Perspective’ (2020) 24(2-3) *The International Journal of Human Rights* 94, 95-96. See also Baird; Sapignoli and Hitchcock.

¹⁶⁷ Larsen 97.

¹⁶⁸ *ibid.*

¹⁶⁹ CEACR, ‘Report III (Part A): General Report and Observations Concerning Particular Countries’ (presented at the 108th Session of the International Labour Conference, 2019) ILC.108/III(A) 609 <https://www.ilo.org/ilc/ILCSessions/108/reports/reports-to-the-conference/WCMS_670146/lang--en/index.htm> accessed 2 April 2022; Swepston, ‘ILO C 169’ 690-691; Anaya, ‘Contemporary’ 7.

to include aspects of the right to internal self-determination referring to indigenous peoples' sovereignty and self-governance in the state in which they reside.¹⁷⁰

ILO C 169 recognizes indigenous peoples as legal subjects holding individual and collective rights.¹⁷¹ Structurally, ILO C 169 is similar to ILO C 107. It deals with matters of general policy (Arts. 1-12), rights to lands and natural resources (Arts. 13-19), recruitment and conditions of employment (Art. 20), vocational training, handicrafts and rural industries (Arts. 21-23), social security and health (Arts. 24-25), education and means of communication (Arts. 26-31), contacts and cooperation across borders (Art. 32), and administration (Art. 33). However, the most important novelty of the Convention lies in its framework of participation and consultation rights, spanning the different topics.¹⁷² This new focus on indigenous peoples' inclusion in matters affecting them is also reflected in their involvement in the preparatory process of ILO C 169. Not formally included due to the ILO's rules of procedure, indigenous voices and representatives were nevertheless consulted.¹⁷³ Martínez Cobo's recommendations to focus on indigenous peoples' demands and self-determination were thus taken into account in the drafting of ILO C 169 to the extent possible.¹⁷⁴

Before delving into the pertinent provisions on participation and consultation in relation to land and resource rights and the analysis thereof by the ILO supervisory bodies, for reasons of clarity, the ILO's supervisory system and the current related challenges are briefly outlined.

¹⁷⁰ Rombouts, 'Evolution' 182-183; Cabrera Ormaza 56-58; Anaya, *Indigenous Peoples* 60. See also CEACR, 'Report III (Part 1A): General Report and Observations Concerning Particular Countries' (presented at the 100th Session of the International Labour Conference, 2011) ILC.100/III/1A 784 <[https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2011-100-1A\).pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2011-100-1A).pdf)> accessed 2 April 2022.

¹⁷¹ Swepston, 'ILO C 169' 690-691; Cabrera Ormaza 40; Larsen and Gilbert 86.

¹⁷² CEACR, '2011 General Observation' 784.

¹⁷³ Swepston, 'ILO C 169' 684-687.

¹⁷⁴ See eg Anaya, *Indigenous Peoples* 58-61. For a more critical appraisal of ILO C 169, see eg Yupsanis 157-159.

1. ILO's Supervisory System and ILO C 169

(a) *Brief Outline*

The ILO's supervisory system is two-pronged, with a regular system of supervision and special procedures reflecting the ILO's unique tripartite system where employers' and workers' organizations together have powers equal to those of member states in ILO deliberations.¹⁷⁵

The regular supervision system consists of member states' periodical reporting obligations under Art. 22 of the ILO Constitution on measures that they have taken to implement the provisions of the ratified ILO Conventions.¹⁷⁶ Worker and employer organizations can comment on state reports and submit comments and further information to ILO supervisory bodies.

Reports and comments are examined by the Committee of Experts on the Application of Conventions and Recommendations (CEACR), which is tasked with providing impartial and technical evaluations of the application of ILO Conventions by member states.¹⁷⁷ In doing so, the CEACR – composed of twenty independent legal experts from different geographic regions, legal systems and cultures –¹⁷⁸ determines the legal scope, content and meaning of the provisions of ILO Conventions.¹⁷⁹ The CEACR comments on member state reports either in the form of 'observations', which point to fundamental questions on the Convention's application by the state under scrutiny, or 'direct requests', which are requests for further information or concerning technical matters.¹⁸⁰ In the context of ILO C 169, indigenous peoples' right to consultation and land rights have been addressed most frequently in the CEACR's observations.¹⁸¹ In

¹⁷⁵ International Labour Office, 'Rules of the Game: An Introduction to the Standards-Related Work of the International Labour Organization' (4th edn, 2019) 106-113 <https://www.ilo.org/global/standards/information-resources-and-publications/publications/WCMS_672549/lang--en/index.htm> accessed 4 April 2022; <<https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang--en/index.htm>> accessed 24 April 2022.

¹⁷⁶ ILO, 'Constitution of the International Labour Organization' (adopted 1 January 1919, entered into force 28 June 1919) 15 UNTS 40.

¹⁷⁷ International Labour Office, 'Rules of the Game' 106-107.

¹⁷⁸ *ibid* 106.

¹⁷⁹ International Labour Office, 'Monitoring Compliance with International Labour Standards: The Key Role of the ILO Committee of Experts on the Application of Conventions and Recommendations' (2019) 23-24 <https://www.ilo.org/global/standards/WCMS_730866/lang--en/index.htm> accessed 4 April 2022.

¹⁸⁰ International Labour Office, 'Rules of the Game' 106.

¹⁸¹ CEACR, '2011 General Observation' 783; Lee Sweptston, 'Progress through Supervision of Convention No. 169' (2020) 24(2-3) *The International Journal of Human Rights* 112, 116, 118.

addition to these more specific comments, the CEACR may publish 'general observations' on a specific issue or question that arises concerning a particular Convention.¹⁸² Regarding ILO C 169, the CEACR has adopted three general observations, of which two deal specifically with participation and consultation.¹⁸³ The CEACR's comments are legally non-binding but nevertheless are said to have authoritative status by virtue of the CEACR's more than ninety years of engagement in supervision, its composition and its independence.¹⁸⁴

The second supervisory body is the Conference Committee on the Application of Standards (CAS), reflecting the tripartite structure of the ILO. As a standing committee of the International Labour Conference, it is composed of government, employer, and worker representatives. It examines selected CEACR observations that are included in the latter's annual report submitted to the International Labour Conference. The member states referred to in these selected observations are invited to respond to the CAS, which – based on the information provided – may recommend specific steps. These steps may relate, for example, to amending existing legislation, adopting new legislation or making use of the ILO's technical assistance, which indeed is often employed by the states concerned.¹⁸⁵ Like the CEACR, the consultation requirement is a recurring issue within the CAS.¹⁸⁶

In parallel to this regular system, the ILO provides three special procedures, including the representation procedure enshrined in Art. 24 of the ILO Constitution.¹⁸⁷ Art. 24 provides for the right of national and international employer and worker organizations to make a representation to the ILO Governing Body against any member state that allegedly has failed to comply with its obligations under a Convention. When admissible, such representations are ex-

¹⁸² International Labour Office, 'Rules of the Game' 106.

¹⁸³ CEACR, 'Report III (Part 1A): General Report and Observations Concerning Particular Countries' (presented at the 98th Session of the International Labour Conference, 2009) 672-673 <[https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2009-98-1A\).pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2009-98-1A).pdf)> accessed 2 April 2022; CEACR, '2011 General Observation' 783-788; CEACR, '2019 General Observation' 609-611.

¹⁸⁴ International Labour Office, 'Monitoring Compliance CEACR' 24; CEACR, '2019 General Observation' 12, para 32. See also Cabrera Ormazá 19.

¹⁸⁵ International Labour Office, 'Rules of the Game' 107-108; Sweptson, 'Supervision ILO C 169' 113.

¹⁸⁶ Cabrera Ormazá 132.

¹⁸⁷ Under Art. 26 of the ILO, 'Constitution', member states may lodge a complaint against another member state for not complying with a Convention. Furthermore, since 1951, the Committee on Freedom of Association investigates complaints lodged by employers' and workers' organizations of violations of freedom of association by member states, see International Labour Office, 'Rules of the Game' 110-116.

amined by an ad hoc appointed Tripartite Committee that draws up recommendations in a report that needs to be approved by the ILO Governing Body before being presented to the member state concerned.¹⁸⁸ At the time of writing (May 2020), a total of nineteen representations concerning ILO C 169, filed by national and international trade unions, have culminated in recommendations; compared to other ILO Conventions, this is 'an unusually high number'.¹⁸⁹ In terms of substance, the majority of representations refer to member states' failure to involve indigenous peoples adequately in consultations as required by Art. 6 of ILO C 169 inter alia in connection to land and resource rights.¹⁹⁰ In contrast to the workings of the CEACR, conclusions and recommendations of the Tripartite Committees are not the outcome of pure legal analyses but rather reflect the approaches of the Tripartite Committee members, that is, the perspectives of governments, workers, and employers.¹⁹¹

(b) *Challenge of Accessibility*

The above outline shows that the current tripartite system of the ILO does not allow for indigenous peoples' direct engagement with the ILO supervisory bodies.¹⁹² To make their voices heard, indigenous peoples heavily depend on the solidarity of the tripartite constituents.¹⁹³ It is, for instance, common practice for workers' organizations to submit comments and representations on behalf of indigenous peoples' organizations.¹⁹⁴ In addition to this means of engagement, indigenous peoples may become members of workers' and employers' organizations, form alliances or engage in ILO meetings and activities as representatives of governments or employers' or workers' organizations.¹⁹⁵

¹⁸⁸ International Labour Office, 'Rules of the Game' 110-111.

¹⁸⁹ Representations have been filed against Argentina (2008), Bolivia (1999), Brazil (2009), Chile (2014), Colombia (2001), Denmark (2001), Ecuador (2001), Guatemala (2007), Mexico (seven times since 1998), Nepal (2018 still pending), and Peru (three times since 1998), see <https://www.ilo.org/dyn/normlex/en/f?p=1000:50010::NO:50010:P50010_ARTICLE_NO:24> accessed 5 August 2021. See also Swepston, 'Supervision ILO C 169' 112, 118.

¹⁹⁰ International Labour Office, 'Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169): Handbook for ILO Tripartite Constituents' (2013) 7 <https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/indigenous-and-tribal-peoples/WCMS_205225/lang--en/index.htm> accessed 4 April 2022; Swepston, 'Supervision ILO C 169' 118; Cabrera Ormaza 135. For concrete examples, see below text to [Fn 273-290](#).

¹⁹¹ Cabrera Ormaza 135.

¹⁹² International Labour Office, 'Handbook ILO C 169' 9.

¹⁹³ Rombouts, 'Evolution' 192.

¹⁹⁴ International Labour Office, 'Handbook ILO C 169' 8.

¹⁹⁵ *ibid* 7-9; Cabrera Ormaza 113-115; Yupsanis 162.

Moreover, indigenous peoples can send information directly to ILO bodies concerning national policies, laws or court decisions and can seek support offered by the Programme to Promote ILO C 169 in several states across Asia, Latin America and Africa.¹⁹⁶ This dependency and lack of formal and direct access to the supervisory system is criticized by indigenous peoples and scholars equally for being rather arbitrary and posing a risk of conflicts of interest between indigenous peoples and ILO constituents.¹⁹⁷ Attempts to change the current system in the near future remain unlikely, however, as they would require changes in the ILO Constitution.¹⁹⁸

2. Consultation and Participation in ILO C 169

References to participation and consultation are found in nearly every provision that stipulates the adoption of measures for the promotion and protection of indigenous peoples' rights.¹⁹⁹ Broadly speaking, these provisions can be divided into those of a more general nature and those of a more specific nature. Arts. 6 and 7 create the general basis, referring to indigenous peoples' participation and consultation in decision-making processes affecting them. Specific reference to participation and consultation predominantly relates to indigenous peoples' land and resource rights enshrined in Arts. 13-19. Additionally, indigenous peoples' participation is referenced in the context of sev-

¹⁹⁶ International Labour Office, 'Handbook ILO C 169' 9; Rombouts, 'Evolution' 192-193.

¹⁹⁷ John B Henriksen, 'Research on Best Practices for the Implementation of the Principles of ILO Convention No. 169: Case Study 7 - Key Principles in Implementing ILO Convention No. 169' (ILO, 2008) 83 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_118120.pdf?msclkid=ea324efec4c811ecba0407b8dd23018c> accessed 23 April 2022; Larsen 103-104.

¹⁹⁸ Henriksen 79-80; Larsen 104.

¹⁹⁹ Saeko Kawashima, 'The Right to Effective Participation and the Ainu People' (2004) 11(1-2) International Journal on Minority and Group Rights 21, 28-29.

eral other thematic fields.²⁰⁰ Common to all these provisions is that they apply to and regulate the relations between indigenous peoples and the state in which they reside.²⁰¹

The subsequent sections examine Arts. 6 and 7 and the specific consultation and participation provisions relating to the protection of indigenous peoples' rights to lands and resources in more detail given their relevance in the context of development projects. The examination aims to distil the current legal understanding of these provisions as interpreted by ILO supervisory bodies regarding state obligations, particularly the obligation to protect human rights. Given the special tripartite structure of the ILO, the employers' group representing the business perspective will be given due regard.

(a) Concept of Consultation and Participation

(i) Arts. 6 and 7 of ILO C 169

The general framework of ILO C 169 regarding indigenous peoples' consultation and participation is set forth in Arts. 6 and 7.²⁰² Art. 6(1a) lays down the central obligation of states to consult indigenous peoples whenever legislative or administrative measures may affect them directly. Pursuant to Art. 6(1b-

²⁰⁰ The concept of participation is referred to using other terms such as the obligation to co-operate or the obligation to not take measures that are contrary to the freely expressed wishes of indigenous peoples, see International Labour Office, 'Handbook ILO C 169' 18. Indigenous peoples' participation is foreseen in the context of the following measures of ILO C 169: the realization of actions to protect their rights and guarantee their integrity (Art. 2(1)); the establishing of policies that aim to mitigate difficulties that indigenous peoples face in relation to new conditions of life and work (Art. 5(c)); the adoption of special measures which aim to ensure effective protections concerning the recruitment and the conditions of employment of indigenous workers (Art. 20(1)); the organization of special vocational training programmes and facilities (Art. 22(2)) and the performance of studies relating to special training programmes (Art. 22(3)); the promotion and strengthening of indigenous peoples' handicrafts, rural and community-based industries, subsistence economies, and traditional activities such as hunting, fishing, trapping, and gathering (Art. 23(1)); the planning and administration of health services (Art. 25(2)); the development and implementation of education programmes and services (Art. 27(1)); and the planning, coordination, execution and evaluation of measures adopted under ILO C 169 and the proposal of legislative and other measures and their application and supervision (Art. 32(2)). Moreover, indigenous peoples shall be consulted in the context of their own educational institutions and facilities and in the context of measures affecting the teaching of their indigenous languages (Art. 27(3), 28(1)).

²⁰¹ Arts. 2(1), 6(1) ILO, 'C 169'; International Labour Office, 'Handbook ILO C 169' 12.

²⁰² International Labour Office, 'Handbook ILO C 169' 18; Rombouts, 'Evolution' 187.

c), states are to establish means to enable indigenous peoples' participation at all levels of decision-making and for the full development of their own institutions, thus distinguishing between external and internal participation.²⁰³ Art. 6(1a) reads as follows:

In applying the provisions of this Convention, governments shall:

(a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions whenever consideration is being given to legislative or administrative measures which may affect them directly.

The criteria for consultations carried out in applying ILO C 169 are set out in Art. 6(2), which holds that consultations 'shall be undertaken, in good faith and in a form appropriate to the circumstances'. In addition, consultations should be undertaken with the 'objective of achieving agreement or consent to the proposed measures'. Proposed legislative or administrative measures may, for instance, relate to the construction of a dam project on the lands of an indigenous community.²⁰⁴

As indicated earlier, Art. 7(1) refers to the right of indigenous peoples to decide on their own development priorities. In particular, it requires the participation of indigenous peoples 'in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly'. For instance, pursuant to Art. 7(3), states should – in cooperation with indigenous peoples – conduct social, cultural, and environmental impact assessments where development plans are being planned. Such impact assessments are particularly relevant – as illustrated below – in the context of indigenous peoples' natural resource rights.²⁰⁵

(ii) Controversy

Art. 6 sparked heated debate. In particular, the last provision 'with the objective of achieving agreement or consent to the proposed measures' was the result of great controversy over the inclusion of consultation and participation provisions in the Convention.²⁰⁶ The controversy related to the concept of consultation and consent, more precisely to the question of whether agree-

²⁰³ This distinction between internal and external participation is also made in the UNDRIP, see eg Rombouts, 'Evolution' 206-207.

²⁰⁴ International Labour Office, 'Handbook ILO C 169' 12.

²⁰⁵ See below text to [Fn 271](#)-287.

²⁰⁶ For an overview, see eg Cabrera Ormaza 47-52.

ment or consent must be obtained before a planned action can proceed.²⁰⁷ Opponents feared that the latter would grant indigenous peoples a veto right; proponents, on the other hand, viewed it as an existing human right set out in national constitutions. In their view, the mere concept of consultation was too weak to comply with the Convention's aspirations of meaningfully addressing indigenous peoples' demands.²⁰⁸ Art. 6 was eventually adopted, but the controversy regarding the scope and application of consultation still lingers today.²⁰⁹

(iii) *Duty Bearer*

Regarding the authority responsible for consultation, the CEACR noted that 'the obligation to ensure that consultations are held in a manner consistent with the requirements established in the Convention is an obligation to be discharged by governments, not by private persons or companies', as specified in Arts. 2 and 6.²¹⁰ This suggests that operationalization of the consultation process may be delegated to other entities such as corporations, yet the state retains the obligation to ensure that the operationalization of the consultation process conforms with the provisions of ILO C 169.²¹¹

The role of the state as the primary bearer of the duty to respect, protect and fulfil indigenous peoples' rights is also reflected in several findings by the ILO supervisory bodies emphasizing that the obligation to consult is not an isolated obligation in specific cases but must be seen in the broader context of consultation and participation, particularly within the framework of Arts. 2 and 33.²¹² Pursuant to Art. 6 read in conjunction with Arts. 2 and 33, adhering

²⁰⁷ Swepston, 'ILO C 169' 691.

²⁰⁸ For an overview of the different viewpoints, see *ibid* 690-691; International Labour Office, 'Partial Revision ILO C 107' 108.

²⁰⁹ Larsen and Gilbert 88. For further elaborations, see below text to [Fn 339-358](#).

²¹⁰ International Labour Office, 'Applying the Indigenous and Tribal Peoples Convention, 1989 (No. 169): Excerpts from Reports and Comments of the ILO Supervisory Bodies' (2019) 13 <https://www.ilo.org/global/topics/indigenous-tribal/publications/WCMS_714341/lang--en/index.htm> accessed 4 April 2022; CEACR, '2011 General Observation' 787.

²¹¹ International Labour Office, 'Handbook ILO C 169' 14.

²¹² *ibid* 6, 12: 'The requirement for undertaking consultations with indigenous peoples is both broad and specific. In operational terms, this will often imply establishing institutionalized mechanisms for regular and broad consultation along with specific mechanisms to be applied, whenever a specific community is affected'. See also Sedfrey M Candelaria, 'Comparative Analysis on the ILO Indigenous and Tribal Peoples Convention No. 169, UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and Indigenous Peoples' Rights Act (IPRA) of the Philippines' (ILO, 2012) 12 <https://www.ilo.org/manila/publications/WCMS_171406/lang--en/index.htm> accessed 23 April 2022.

states are obliged to develop, with the participation of indigenous peoples, co-ordinated and systematic action to protect their rights. This involves the establishment of appropriate consultation and participation mechanisms with the representative institutions of indigenous peoples as well as agencies that administer programmes 'covering all stages from planning to evaluation of measures proposed in the Convention' affecting indigenous peoples.²¹³ Governmental bodies and agencies responsible for indigenous matters must have staff with decision-making power and be vested with adequate financial and logistical resources to fulfil their functions.²¹⁴ Such systematic and coordinated action shall ensure consistency among the different governmental institutions dealing with indigenous matters.²¹⁵

(iv) *Rights Holders and the Issue of Representation*

Consultation processes necessarily raise the question of who is entitled to consultation and the question of representation. Regarding the identification of indigenous peoples, the ILO supervisory bodies have repeatedly reaffirmed self-identification as a fundamental criterion for defining groups of subjects to which ILO C 169 applies. Those who fulfil the criteria listed in Art. 1(1) enjoy the rights enshrined in the Convention 'independent of their legal recognition in national legislation'.²¹⁶ Art. 1(1) holds:

This Convention applies to:

- (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

²¹³ CEACR, '2009 General Observation' 672; CEACR, '2011 General Observation' 787; CEACR, '2019 General Observation' 610. See also Doyle, FPIC 88.

²¹⁴ CEACR, '2009 General Observation' 672; CEACR, '2019 General Observation' 609; International Labour Office, 'Applying ILO C 169' 14-15.

²¹⁵ CEACR, '2019 General Observation' 609, inter alia highlighting the advances and deficiencies as concerns systematic and coordinated action.

²¹⁶ *ibid*; International Labour Office, 'Applying ILO C 169' 7-9.

Consultation processes 'should take into account the opinions of the various peoples involved in order to facilitate an exchange of information and ensure that the procedures used is considered appropriate by all parties'.²¹⁷ In more specific consultation, the scope of consultation is to be determined based on impact assessments as enshrined in Art. 7(3).²¹⁸

Equally important is the principle of representativity, provided for in Art. 6(1a), requiring the consultation of indigenous peoples through their representative institutions. Representativity is considered an important element of consultation since the uncertainty of who truly represents indigenous peoples can hamper the implementation of consultation processes.²¹⁹ In this context, the Tripartite Committee, in its report approved by the Governing Body in 2011 concerning a representation filed against Ecuador, held:

The Committee is aware that it could be difficult in many circumstances to determine who represents any given community. However, if an appropriate consultation process is not developed with the indigenous and tribal institutions or organizations that are truly representative of the communities affected, the resulting consultations will not comply with the requirements of the Convention.²²⁰

In terms of the meaning of 'representative institutions', the Tripartite Committee, in its report approved by the Governing Body in 2004 concerning a representation against Mexico, stated:

In view of the diversity of the indigenous peoples, the Convention does not impose a model of what a representative institution should involve, the important thing is that they should be the result of a process carried out by the indigenous peoples themselves.²²¹

Whether an institution or organization is representative of the represented community is thus for the latter to decide and for the former to prove. When,

²¹⁷ International Labour Office, 'Applying ILO C 169' 18; International Labour Office, 'Handbook ILO C 169' 14. Cabrera Ormaza argues that the CEACR has been rather reluctant to elaborate on the content of the term 'appropriate procedure of consultation' leaving it indeterminate, see Cabrera Ormaza 125.

²¹⁸ International Labour Office, 'Handbook ILO C 169' 14.

²¹⁹ Cabrera Ormaza 139. See also below text to [Fn 324](#).

²²⁰ International Labour Office, 'Applying ILO C 169' 21.

²²¹ *ibid.*

for instance, women are excluded from the decision-making of the representative institutions and the latter therefore de facto are not fully representative, additional steps for full representation may be necessary.²²²

(v) *Good Faith Consultation with the Objective of Obtaining Consent*

In light of the controversy on Art. 6, particularly fuelled in recent years by the ILO's employers' group,²²³ the CEACR adopted three general observations dealing with the concepts of consultation and participation in 2008, 2010 and 2018.²²⁴ The CEACR noted that the provisions on consultation and participation 'form the cornerstone of the [Convention] on which all its provisions are based'.²²⁵ Consultation serves as a tool for ensuring indigenous peoples' full participation in matters affecting them.²²⁶ The consultation and participation of indigenous peoples are, in the view of the CEACR, essential for ensuring equity and guaranteeing social peace in light of the challenges faced by indigenous peoples, such as the regularization of land titles and increased exploitation of natural resources.²²⁷ Effective and meaningful consultation and participation are necessary to ensure indigenous peoples' right to decide on their own development priorities and are 'instrumental in the prevention and resolution of conflict' and in achieving the goals of sustainable development and promoting legal certainty.²²⁸ The CEACR particularly stressed the importance of consultation and participation of indigenous peoples when development priorities are discussed and decided.²²⁹ Disregard for consultation and participation affects the implementation and success of development projects and programmes since they will not reflect indigenous peoples' aspirations

²²² International Labour Office, 'Handbook ILO C 169' 14; Alexandra Tomaselli, 'Political Participation, the International Labour Organization, and Indigenous Peoples: Convention 169 "Participatory" Rights' (2020) 24(2-3) *The International Journal of Human Rights* 127, 132.

²²³ See below text to [Fn 313](#)-330.

²²⁴ CEACR, '2009 General Observation'; CEACR, '2011 General Observation'; CEACR, '2019 General Observation'.

²²⁵ CEACR, '2011 General Observation' 786; CEACR, '2009 General Observation' 672.

²²⁶ CEACR, '2019 General Observation' 609. On the link between participation and consultation, see International Labour Office, 'Handbook ILO C 169' 19.

²²⁷ CEACR, '2009 General Observation' 672.

²²⁸ *ibid*; CEACR, '2011 General Observation' 788; CEACR, '2019 General Observation' 610. On the human rights dimension of the requirement of consultation, see eg Cabrera Ormaza 55-66.

²²⁹ CEACR, '2009 General Observation' 672.

and needs.²³⁰ Last it noted, that the inclusion of the consultation and participation provisions was a necessary step to eliminate the integrationist approach of its predecessor.²³¹

Regarding the form and content of consultation procedures, the CEACR provided the following guidance in its first general observation:

The form and content of consultation procedures and mechanisms need to allow the full expression of the viewpoints of the peoples concerned, in a timely manner and based on their full understanding of the issues involved, so that they may be able to affect the outcome and a consensus could be achieved, and be undertaken in a manner that is acceptable to all parties.²³²

In response to calls for further clarification on the scope and meaning of consultation and some criticism by employer members, the CEACR provided for a more extensive interpretation of the concept in its second general observation, taking into account the preparatory work and the wording of the Convention.²³³ Its interpretation of the nature of consultation reads as follows:

- 1) consultations must be formal, full, and exercised in good faith; there must be a genuine dialogue between governments and indigenous and tribal peoples characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord;
- 2) appropriate procedural mechanisms have to be put in place at the national level and they have to be in a form appropriate to the circumstances;
- 3) consultations have to be undertaken through indigenous and tribal peoples' representative institutions as regards legislative and administrative measures;
- 4) consultations have to be undertaken with the *objective* for reaching agreement or consent to the proposed measures.

It is clear from the above that pro forma consultations of mere information would not meet the requirements of the Convention. At the same time, such consultations do not imply a right to veto, nor is the *result* of such consultations necessarily the reaching of agreement or consent.²³⁴

²³⁰ *ibid.*

²³¹ CEACR, '2011 General Observation' 784.

²³² CEACR, '2009 General Observation' 672.

²³³ CEACR, '2011 General Observation' 783.

²³⁴ *ibid* 787-788.

This interpretation reflects the CEACR's interpretative work over the years and is in line with the findings of the Tripartite Committees examining representations alleging states' non-compliance with the Convention.²³⁵

In other words, consultation and participation need to be meaningful and effective to give indigenous peoples a real opportunity to impact the outcome of decision-making affecting them.²³⁶ This requires early and genuine involvement of indigenous peoples in decision-making processes through appropriate mechanisms.²³⁷ The supervisory bodies have repeatedly held that consultation processes must be carried out prior to decisions being made and the adoption of legislative or administrative measures and in a way that 'creates favourable conditions for achieving agreement or consent to the proposed measures, independent of the result obtained'.²³⁸ In this process, indigenous peoples must have and fully understand all the relevant information.²³⁹ Furthermore, indigenous peoples 'must be given sufficient time to organize their own internal decision-making processes and to participate effectively in the decisions adopted'.²⁴⁰

Importantly, Art. 6 is not to be understood as vesting indigenous peoples with veto power, nor does it imply that consent or consensus must be obtained during the consultation process for the process to be valid.²⁴¹ Finding agreement or consent is the purpose of a consultation process but not an independent requirement.²⁴² Nevertheless, the ILO C 169 Handbook of 2013 seems to suggest that the greater the impact on indigenous peoples is, the more important obtaining consent becomes:

The more severe the potential consequences are for the concerned indigenous peoples, the greater is the importance of obtaining agreement or consent. If, for instance, the continued existence of an indigenous culture is at

²³⁵ *ibid* 788. For a comprehensive overview of relevant excerpts from reports and comments on ILO C 169 by ILO supervisory bodies, see International Labour Office, 'Applying ILO C 169' 13-25, 28-34; Swepston, 'Supervision ILO C 169' 121; Cabrera Ormaza 135-137.

²³⁶ International Labour Office, 'Applying ILO C 169' 15.

²³⁷ *ibid* 15-20.

²³⁸ *ibid* 16-17; CEACR, '2009 General Observation' 672; CEACR, '2019 General Observation' 610.

²³⁹ International Labour Office, 'Handbook ILO C 169' 15.

²⁴⁰ International Labour Office, 'Applying ILO C 169' 20.

²⁴¹ *ibid* 15-16; International Labour Office, 'Handbook ILO C 169' 16.

²⁴² International Labour Office, 'Handbook ILO C 169' 16; International Labour Office, 'Applying ILO C 169' 15.

stake, the need for consent to proposed measures is more important than in cases where decisions might result in minor inconveniences, without severe and lasting consequences.²⁴³

(b) *Consultation and Participation in Relation to Land and Natural Resources*

It is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture. For such people, the land is not merely a possession and a means of production. (...) Their land is not a commodity which can be acquired, but a material element to be enjoyed freely.²⁴⁴

(i) *Land Rights*

This centrality of land and natural resources in the lives of indigenous peoples is expressed in Part II of ILO C 169, which deals specifically with indigenous peoples' land and resource rights, including rights to consultation and participation. From the Convention's perspective, the recognition and protection of indigenous peoples' rights to lands and resources are crucial to realizing their aspirations to decide on and control their own development priorities and to ensure their integrity and enjoyment of the other rights set forth in ILO C 169.²⁴⁵

The key provision on land rights is Art. 14 of ILO C 169. Pursuant to Art. 14(1), states shall recognize '[indigenous peoples]' rights of ownership and possession (...) over the lands which they traditionally occupy'. The wording 'traditionally occupy' should not be read as requiring continued occupation; rather, 'there should be some connection with the present'.²⁴⁶ Thus, indigenous peoples have rights in relation to lands to which they already have title of ownership but also to lands they occupy in the present and to lands from which they have been relatively recently expelled or to which they have lost title.²⁴⁷ Consequently, indigenous peoples do not have rights to lands of which they

²⁴³ International Labour Office, 'Handbook ILO C 169' 16.

²⁴⁴ UNCHR, '1983 Report Martínez Cobo' paras 196-197.

²⁴⁵ Preamble ILO, 'C 169'; International Labour Office, 'Handbook ILO C 169' 20-21; International Labour Office, 'Applying ILO C 169' 28-29.

²⁴⁶ Manuela Tomei and Lee Swepston, 'Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169' (ILO, 1996) 18 <https://www.ilo.org/public/libdoc/ilo/1996/96B09_253_engl.pdf> accessed 23 April 2022; Gilbert, *Land Rights* 165.

²⁴⁷ Tomei and Swepston 18-19; International Labour Office, 'Applying ILO C 169' 33.

were dispossessed a long time ago.²⁴⁸ For such cases, Art. 14(3) applies, calling for the establishment of national mechanisms to resolve land claims without time limitations.²⁴⁹ Such mechanisms must be set up in way that allows for ‘a real possibility [for indigenous peoples] of obtaining the return of their lands or compensation for lost lands’.²⁵⁰

Furthermore, Art. 14(2) calls on states to ‘take steps as necessary to identify the lands which the peoples concerned traditionally occupy’ – for example via a land registry, processes of demarcation and titling, or the recognition of co-management regimes or self-governance arrangements –²⁵¹ ‘and to guarantee effective protection of their rights of ownership and possession’. These obligations must be read in light of Art. 2(1) on states’ general obligation to develop, with the participation of indigenous peoples, ‘coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity’.²⁵² This includes the obligation to ensure adequate consultation as set forth in Art. 6 prior to the proposed measures, such as the adoption of legislation and the establishment of institutional mechanisms or the implementation of development projects conducted by public and private corporations.²⁵³ Further protective measures are envisaged in Art. 17 dealing with the transmission of land rights and related restrictions. Moreover, pursuant to Art. 18, states

²⁴⁸ Gilbert, *Land Rights* 165. This approach seems to be a middle way between the two extremes of rights to lands presently occupied and occupied in the past, see Thornberry, *Indigenous Peoples* 296.

²⁴⁹ Tomei and Swepston 19. On the right to restitution for historical removal or relocation in connection with Art. 14(3) ILO, ‘C 169’, see Gilbert, *Land Rights* 168, pointing out that: ‘Overall, what is emerging from both the UN Declaration and the OAS declaration, as well as ILO 169, is a call on States to establish at the national level processes to address past dispossession, under the more generic term of redress rather than restitution’.

²⁵⁰ Tomei and Swepston 19. In an observation made to Peru in 2005, the CEACR requested the government of Peru ‘to take appropriate measures, in consultation with the community concerned, to identify and eliminate those obstacles, procedural or otherwise, encountered by the community (...) in asserting effectively its claim to the lands’. See International Labour Office, ‘Applying ILO C 169’ 33.

²⁵¹ International Labour Office, ‘Applying ILO C 169’ 32; International Labour Office, ‘Indigenous & Tribal Peoples’ Rights in Practice: A Guide to ILO Convention No. 169’ (2009) 95 <https://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_171810/lang-en/index.htm> accessed 4 April 2022.

²⁵² International Labour Office, ‘Applying ILO C 169’ 31; International Labour Office, ‘2009 Guide ILO C 169’ 95.

²⁵³ International Labour Office, ‘2009 Guide ILO C 169’ 95–96. In its 2006 observation against Colombia, the CEACR held that Arts. 13 and 14 of ILO C 169 ‘[i]n practice (...) must be implemented in parallel with those on consultation set forth in Article 6’. See International Labour Office, ‘Applying ILO C 169’ 31.

must establish '[a]dequate penalties (...) for unauthorised intrusion upon, or use of, the lands of the peoples concerned, and (...) take measures to prevent such offences'.

In addition to the concept of traditional occupation of lands, the Convention covers the concept of traditional use of lands, for instance, for fishing, hunting or cultural or religious rituals.²⁵⁴ Pursuant to the second sentence of Art. 14(1), 'measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities'. This provision specifically targets the way of life of nomadic peoples.²⁵⁵ The Convention thus distinguishes between land exclusively occupied by indigenous peoples and land that is shared with the majority population but that indigenous peoples have the right to use.²⁵⁶ The latter right is to be understood as an additional right, not as an alternative to the right of ownership.²⁵⁷

From Art. 14(1), it can therefore be inferred that the basis for indigenous peoples' entitlement to land rights lies in their traditional occupation and use of these lands (customary land tenure) and not in the formal registration and recognition of their ownership by the state in which they reside.²⁵⁸ Consequently, whenever there is traditional occupation or use according to the above criteria, states must recognize that indigenous peoples have rights to the lands in question 'even where these rights are not in the same form as those recognized by the national legal system'.²⁵⁹ In the view of Sweptston, ILO C 169 therefore allows for a 'separate land rights regime'.²⁶⁰

In its most recent general observation, the CEACR highlighted that recognition of indigenous peoples' ownership and possession rights remains a critical issue despite progressive developments among signatory states to secure legal recognition of indigenous peoples' land rights.²⁶¹

²⁵⁴ CEACR, '2019 General Observation' 610.

²⁵⁵ Art. 14(1) ILO, 'C 169'. On the meaning of the term 'measures in appropriate cases', see Sweptston, 'ILO C 169' 702; Tomei and Sweptston 19.

²⁵⁶ Åhrén 174-176; Gilbert, *Land Rights* 131.

²⁵⁷ Tomei and Sweptston 19.

²⁵⁸ CEACR, '2019 General Observation' 610; International Labour Office, 'Applying ILO C 169' 30; International Labour Office, 'Handbook ILO C 169' 21; <<https://www.land-links.org/is-sue-brief/the-future-of-customary-tenure/>> accessed 24 April 2022.

²⁵⁹ Sweptston, 'ILO C 169' 696; Tomei and Sweptston 19.

²⁶⁰ Sweptston, 'ILO C 169' 696. More critical, Yupsanis 153-154.

²⁶¹ CEACR, '2019 General Observation' 610.

(ii) *Resource Rights*

Intrinsically linked to indigenous peoples' land rights are their rights to natural resources pertaining to their lands pursuant to Art. 15 of ILO C 169. Art. 15(1) stipulates the general right 'to participate in the use, management and conservation of these resources'. Natural resources comprise both non-renewable and renewable resources.²⁶² Additionally, the understanding of 'lands' is broad. Pursuant to Art. 13(2), the term 'lands' used in Art. 15 'shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use', such as forests, mountains, and rivers.²⁶³ The 1996 Guide to the Convention acknowledges that Art. 15 of ILO C 169 'is an especially difficult provision, (...) drafted in terms which are not always specific because it has to apply to many different national situations'.²⁶⁴ It further explains that '[e]xactly what this right consists of will have to be defined within each national legal system, within the land rights that these peoples have, and within their capacity to exercise their rights'.²⁶⁵

A special case among natural resources – emblematic for the abovementioned ambiguity surrounding Art. 15 – are subsurface resources.²⁶⁶ Since many states claim exclusive ownership of subsurface resources – such as oil, gas and minerals or other natural resources – Art. 15 does not provide for indigenous peoples' ownership rights in this respect but instead imposes an obligation on states to establish certain safeguards, which are particularly relevant in the context of development projects.²⁶⁷

Where states lease or sell land to corporations for exploration and exploitation activities, conflict with indigenous peoples occupying these lands is often a reality.²⁶⁸ Against this background, Art. 15(2) was included into the Convention.²⁶⁹ Art. 15(2) establishes that when states retain ownership of mineral or subsurface resources or rights to other resources, consultation procedures must be

²⁶² International Labour Office, '2009 Guide ILO C 169' 107; Candelaria 41.

²⁶³ CEACR, '2019 General Observation' 610. This in turn means that ownership as defined in Art. 14 of ILO C 169 only concerns lands and not the concept of territories, see Gilbert, *Land Rights* 269.

²⁶⁴ Tomei and Swebston 19.

²⁶⁵ *ibid.*

²⁶⁶ International Labour Office, 'Handbook ILO C 169' 22; Candelaria 41.

²⁶⁷ Gilbert, *Land Rights* 267-270; International Labour Office, 'Handbook ILO C 169' 23.

²⁶⁸ International Labour Office, 'Handbook ILO C 169' 23; <<https://cjasatlas.org/>> accessed 24 April 2022. As aptly stated by Rombouts: 'Concerns over the scope of indigenous decisionmaking powers in relation to resource extraction remain at the center of attention in the present day'. See Rombouts, 'Evolution' 190.

²⁶⁹ Tomei and Swebston 20.

implemented 'with a view to ascertaining whether and to what degree [indigenous peoples'] interests would be prejudiced, before undertaking or permitting any programmes for the exploration of exploitation of such resources pertaining to their lands'. Furthermore, indigenous peoples must whenever 'possible participate in the benefits of [exploration and exploitation] activities [and] receive fair compensation for any damages [incurred by] such activities'.²⁷⁰

These obligations of states must be read in conjunction with Arts. 6 and 7. In particular, the obligation to consult must be read in conjunction with Art. 7(3) on impact assessments, referred to earlier in this chapter.²⁷¹ Pursuant to Art. 7(3), states are obliged to carry out studies in cooperation with indigenous peoples 'to assess the social, spiritual, cultural and environmental impact on them of planned development activities'. The results of such impact assessments, the provision provides, 'shall be considered as fundamental criteria for the implementation of these activities'. In practice, Arts. 7(3), 6 and 15(2) have been applied by ILO supervisory bodies in conjunction with Art. 7(4) stipulating states' obligation to 'take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit'.²⁷²

Illustrative of indigenous peoples' land rights, particularly the understanding of traditional occupation and its broader implications for the consultation requirement in terms of indigenous peoples' resource rights, are the conclusions of the Tripartite Committee in a representation concerning Colombia.²⁷³ In this particular representation, the committee examined the granting of an environmental licence to an oil corporation for petroleum exploration activities allegedly without prior consultation of the indigenous community in question.²⁷⁴ The oil well was located in the middle of land that the community had

²⁷⁰ On the criticism relating to Art. 15(2) ILO, 'C 169', see eg Yupsanis 151.

²⁷¹ International Labour Office, 'Handbook ILO C 169' 22; Cabrera Ormaza 144. See also above text to [Fn 205](#).

²⁷² Art. 4 ILO, 'C 169', calling for the adoption of special measures to this end. See eg the CEACR's observation on Colombia, International Labour Office, 'Applying ILO C 169' 24-25.

²⁷³ Conclusions adopted by the Governing Body on a representation concerning Colombia alleging violation of ILO C 169 (November 2001) GB.282/14/3. See also Conclusions adopted by the Governing Body on a representation concerning Guatemala alleging violation of ILO C 169 (June 2007) GB.299/6/1 paras 48, 51. In this particular representation, the Tripartite Committee held that 'prior to the delivery of any exploitation licence, consultation should be held with all the communities concerned, within the meaning of Article 13, paragraph 2, and Article 15, paragraph 2, whether or not they hold title of ownership'. See *ibid* para 51.

²⁷⁴ Conclusions Governing Body Colombia (GB.282/14/3) para 83.

traditionally occupied but nearly two kilometres outside of the legally recognized reserve.²⁷⁵ The Tripartite Committee noted that in line with Art. 7(1), 'the Convention does not cover merely the areas occupied by indigenous peoples, but also the *process of development as it affects their lives ... and the lands that they occupy or otherwise use*'.²⁷⁶ From this, it follows, the committee contended, that 'The existence of an exploratory or operational project immediately adjacent to land which has been officially recognized as a reserve of the peoples concerned clearly falls within the scope of the Convention'.²⁷⁷ Therefore, the requirement of consultation regarding the exploitation of natural resources as stipulated in Art. 15(2) applied.²⁷⁸ Since the exploratory project impacted the community, the state of Colombia was – according to the committee – required to consult the community pursuant to Art. 15(2) 'with a view to determining whether their interests would be harmed, before authorizing the exploratory operations'.²⁷⁹ Since consultation took place after the granting of the environmental licence and was only for informative purposes and not pursuing a 'sincere desire to reach a consensus', the requirements on consultation as enshrined in Art. 6 were not met. This led the committee to conclude that the state of Colombia had acted in violation of Arts. 6 and 15(2) of ILO C 169.²⁸⁰

Similar comments were made by the CEACR in an individual observation to Guatemala, where it pointed out that 'a project for exploration or exploitation in the immediate vicinity of lands occupied or otherwise used by indigenous peoples, or which directly affects the interests of such peoples, would fall within the scope of the Convention'.²⁸¹

In a representation concerning Ecuador, the Tripartite Committee acknowledged the difficulties in relation to exploration and exploitation rights of sub-surface resources, particularly referring to differing interests, 'such as the economic and development interests represented by the hydrocarbon deposits and the cultural, spiritual, social and economic interests of the indigenous peoples'.²⁸² In such situations, 'the spirit of consultation and participation (...) requires that the parties involved seek to establish a dialogue allowing

²⁷⁵ *ibid* paras 85, 87, 91.

²⁷⁶ *ibid* para 86 (emphasis added).

²⁷⁷ *ibid*.

²⁷⁸ *ibid* paras 86–87.

²⁷⁹ *ibid* para 87.

²⁸⁰ *ibid* para 90.

²⁸¹ International Labour Office, 'Applying ILO C 169' 23–24.

²⁸² *ibid* 23.

them to find appropriate solutions in an atmosphere of mutual respect and full participation'.²⁸³ Art. 15 should thus be read in conjunction with Art. 6, which establishes the minimum requirements to be met.²⁸⁴

Regarding impact assessments, the committee in the representation concerning Colombia – referred to above – added that since consultation must be performed in advance, the affected community is to be 'involved as early on as possible in the process, including in the environmental impact studies'.²⁸⁵

The requirement of consultation and impact assessments in the context of natural resources was dealt with by the ILO supervisory bodies on several other occasions. In a representation concerning Bolivia, the Tripartite Committee recommended establishing environmental, social, cultural and spiritual impact assessments before authorizing exploration and exploitation of natural resources, 'in each particular case, especially in the case of large-scale exploitations such as those affecting large tracts of land'.²⁸⁶ Moreover, ILO supervisory bodies pointed out that impact assessment studies conducted by corporations do not replace consultation.²⁸⁷ Furthermore, considering consultation in the context of natural resources a main challenge, in its 2008 general observation, the CEACR called on member states to include 'provisions in legislation requiring prior consultation as part of the process determining if concessions for the exploitation and exploration of natural resources are to be granted'.²⁸⁸

Noteworthy in this context is also the CEACR's observation concerning Peru adopted in 2009. There, the CEACR requested that the government of Peru not only 'take the necessary steps to bring national law and practice into line with Arts. 2, 6, 7 and 15 of the Convention' but also 'suspend the exploration and exploitation of natural resources which are affecting the peoples covered by the Convention until such time as the participation and consultation of the peoples concerned is ensured through their representative institutions in a climate of full respect and trust, in accordance with Articles 6, 7 and 15 of the

²⁸³ *ibid.*

²⁸⁴ See also Stefania Errico, 'Chapter 15 – Control over Natural Resources and Protection of the Environment of Indigenous Territories: Articles 29, 30, and 32' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018) 439.

²⁸⁵ Conclusions Governing Body Colombia (GB.282/14/3) para 90.

²⁸⁶ International Labour Office, 'Applying ILO C 169' 25.

²⁸⁷ *ibid* 23, 26.

²⁸⁸ CEACR, '2009 General Observation' 672; Tomaselli 130-131.

Convention'.²⁸⁹ Similar requests to suspend the implementation and activities of development projects were made to Colombia and Guatemala the same year and to Bolivia in 2004.²⁹⁰

It is safe to say that these are among the most far-reaching requests voiced within the ILO supervisory system, triggering reaction from the employers' group, as noted above and detailed further below.²⁹¹

(iii) *Indigenous Peoples' Relocation*

In addition to indigenous peoples' rights to land that they occupy and use and rights to natural resources, Art. 16 of ILO C 169 deals with an equally important topic, that is, the removal and relocation of indigenous peoples from lands that they occupy and the right to restitution. This is a key provision in the context of development projects given that these projects more often than not result in the removal and relocation of indigenous peoples from their lands.²⁹²

Generally, Art. 16(1) establishes that indigenous peoples 'shall not be removed from the lands which they occupy'. As in Art. 15, the term 'lands' is to be understood broadly to include the concept of territories.²⁹³ This general rule can be departed from only in exceptional cases and where certain procedural safeguards are observed.²⁹⁴ Pursuant to Art. 16(2), relocation – where considered necessary – is permitted as an exceptional measure, as long as it takes place with the free and informed consent of the people concerned. If consent cannot be obtained, Art. 16(2) establishes that the relocation 'shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned'. Art. 16(3-4)

²⁸⁹ CEACR, 'Report III (Part 1A): General Report and Observations Concerning Particular Countries' (presented at the 99th Session of the International Labour Conference, 2010) 784 <[https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2010-99-1A\).pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2010-99-1A).pdf)> accessed 2 April 2022.

²⁹⁰ *ibid* 762, 768; CEACR, 'Report III (Part 1A): General Report and Observations Concerning Particular Countries' (presented at the 93rd Session of the International Labour Conference, 2005) 473 <<https://www.ilo.org/public/english/standards/relm/ilc/ilc93/pdf/rep-iii-1a.pdf>> accessed 27 April 2022.

²⁹¹ Cabrera Ormazá 115-120. See also below text to [Fn 313](#)-328.

²⁹² UNGA, 'Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples' (21 July 2017) UN Doc A/72/186 para 53; HRC, '2020 Report SRRIP' para 29.

²⁹³ Art. 13(2) ILO, 'C 169'.

²⁹⁴ Gilbert, *Land Rights* 149.

covers restitution, albeit using different language.²⁹⁵ It provides that indigenous peoples have the right – whenever possible – to return to their traditional lands once the reasons for relocation cease to exist. Where such return is not possible, pursuant to Art. 16(4), they have the right to land that is equivalent to the land that they previously occupied – as in equal ‘in quality and legal status’ – or monetary compensation, should this be preferred.²⁹⁶ In addition, full compensation is to be given in cases of relocation-induced loss and injury, such as loss of property or adverse health impacts.²⁹⁷ Restitution of land pursuant to Art. 16(3-4) only applies to present and future relocation pursuant to Art. 16(2) and not retroactively to past relocation and removal.²⁹⁸

The CEACR has specified that Art. 16 is the only provision in the Convention with ‘a very precise formulation of consent’.²⁹⁹ According to the ILO C 169 Guide of 2009, FPIC ‘means that the indigenous peoples concerned understands fully the meaning and consequences of the displacement and that they accept and agree to it’.³⁰⁰ This necessitates in turn that ‘they have clear and accurate information on all the relevant facts and figures’.³⁰¹ While Art. 16 starts off strong by stipulating a general prohibition on removing indigenous peoples from their lands in paragraph one, it becomes weaker in the subsequent paragraphs, permitting relocation in exceptional circumstances.³⁰² Compared to Art. 12 of ILO C 107, where removal is possible on grounds of national security, the interests of national economic development or health, Art. 16(2) certainly appears more restrictive. However, the provision falls short of defining these exceptional circumstances.³⁰³ Even today, it is not uncommon for states to in-

²⁹⁵ *ibid* 156.

²⁹⁶ The Convention clearly favours the granting of alternative lands over compensation, which is indicated by Art. 16(4)’s phrasing ‘these peoples shall be provided in *all possible* cases with lands of quality and legal status at least equal to that of the lands previously occupied’ (emphasis added). See *ibid* 153-154, 156.

²⁹⁷ Arts. 16(5) ILO, ‘C 169’; International Labour Office, ‘2009 Guide ILO C 169’ 98.

²⁹⁸ See eg Åhrén 195, pointing out ‘the right to restitution the ILO Secretariat reads into ILO 169 is clearly marginal’ and if at all limited to situations where to ‘the present day indigenous society must maintain some form of connection to the land area in question’. See also Gilbert, *Land Rights* 162-166, *inter alia* referring to ILO supervisory bodies’ approach to taking into account the consequences and effects of past relocations in their assessment of current issues concerning indigenous peoples’ land rights.

²⁹⁹ CEACR, ‘2011 General Observation’ 785.

³⁰⁰ International Labour Office, ‘2009 Guide ILO C 169’ 98. See also Swepston, ‘ILO C 169’ 707.

³⁰¹ International Labour Office, ‘2009 Guide ILO C 169’ 98.

³⁰² Swepston, ‘ILO C 169’ 706; Gilbert, *Land Rights* 149.

³⁰³ Gilbert, *Land Rights* 150.

voke national economic development as grounds for removal or relocation.³⁰⁴ Furthermore, the obligation to obtain consent is not absolute since relocation can take place even in situations where consent has not been obtained provided that certain procedural safeguards are implemented.³⁰⁵

This is not the only concern surrounding Art. 16, however. For instance, in connection with the provisions on equivalent land and compensation, these provisions disregard special relationships to land of indigenous peoples.³⁰⁶ Accordingly, it is argued that indigenous peoples have a special relationship with specific lands, not land in general.³⁰⁷ Furthermore, land does not merely provide economic security but is central to indigenous peoples' religions and cultures.³⁰⁸ This ultimately leads to difficult considerations regarding the amount of compensation and the value of lost land, raising questions such as '[h]ow much compensation can be paid to a people for the loss of their way of life³⁰⁹ or the loss of a culture?³¹⁰

Positively viewed is the fact that ILO C 169, unlike its predecessor, uses the term 'relocation' instead of 'removal' (which is only used in the first paragraph). In Swepston's view, this change in language implies 'that in every case in which they lose their lands they must be given new lands'.³¹¹

In its most recent general observation, the CEACR noted that 'the need to adopt specific measures to prevent the removal of indigenous peoples of their land'.³¹²

³⁰⁴ *ibid.*

³⁰⁵ Cabrera Ormaza 119-120; Swepston, 'ILO C 169' 707.

³⁰⁶ See eg Gilbert, *Land Rights* 154.

³⁰⁷ Sharon Venne, 'The New Language of Assimilation: A Brief Analysis of ILO Convention 169' (1989) 2(2) *Without Prejudice: The EAFORD International Review of Racial Discrimination* 53, 63.

³⁰⁸ Gilbert, *Land Rights* 154.

³⁰⁹ Venne 63.

³¹⁰ Gilbert, *Land Rights* 152-153.

³¹¹ Swepston, 'ILO C 169' 706.

³¹² CEACR, '2019 General Observation' 610.

3. Business Perspective

Given the specific tripartite structure of the ILO, the business perspective is well represented in the ILO's over-all work,³¹³ including work on indigenous peoples' rights. In recent years, the employers' group³¹⁴ has shown growing engagement and interest in the interpretation of ILO C 169 by the CEACR and other bodies.

The CEACR's interpretation of the Convention has been addressed in comments by employer organizations individually or represented by the International Organization of Employers (IOE), the largest private sector network in the world, representing the interests of employers in social and labour matters internationally.³¹⁵ On several occasions, the employers' group highlighted – both critically and with the aim of seeking further clarification – the potential difficulties in the application of the consultation requirement at a national level and the CEACR's interpretation of it from a business perspective.³¹⁶

Arguably the greatest stir was caused by the CEACR's observations requesting the suspension of certain development projects until the concerned indigenous peoples' participation and consultation was ensured.³¹⁷ The employer members of the CAS objected to these requests and 'pointed out that such requests did not have a basis in the Convention and had to be eliminated as soon as possible. The Committee of Experts was not a court of law and could not, in effect, request economic activity to stop'.³¹⁸ They contended further that 'consultation did not equate to, or require the consent of the parties being consulted' but signified – in their view – 'dialogue at least'.³¹⁹ According to the employer members, 'injunctions of this nature held potentially serious consequences for a nation's economic activity, in particular its ability to at-

³¹³ Larsen 102-103, 106.

³¹⁴ The term 'employers' group' refers to employers' representatives and organizations within the ILO.

³¹⁵ Cabrera Ormaza 115; <https://www.ilo.org/jobspact/partners/WCMS_123616/lang--en/index.htm> accessed 24 April 2022.

³¹⁶ Rombouts, 'Evolution' 199; Swepston, 'Supervision ILO C 169' 119; Cabrera Ormaza 115.

³¹⁷ See above text to [Fn 289-291](#).

³¹⁸ CAS, 'Report of the Committee on the Application of Standards: Extracts from the Record of Proceedings 16 (Part One)' (99th Session of the International Labour Conference, 2010) 17, para 54 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_145220.pdf> accessed 2 April 2022.

³¹⁹ CAS, 'Report of the Committee on the Application of Standards: Extracts from the Record of Proceedings 16 (Part Two)' (99th Session of the International Labour Conference, 2010) 103. <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_145220.pdf> accessed 2 April 2022.

tract foreign direct investment'.³²⁰ Against this background, they concluded, the CEACR had 'interpreted the term [consultation] as to impose a more exacting requirement upon the Government [of Peru] beyond that envisaged by the Convention'.³²¹

The CEACR, for its part, reacted to this debate in its 2010 general observation stating 'that it is clearly not a court of law and as a result cannot issue injunctions or provisional measures'.³²² However, the CEACR seemed to justify its observations on suspensions, noting that the latter were issued after discussions with the states concerned over a period of several years urging them to take the necessary measures to consult indigenous peoples in compliance with ILO C 169.³²³

In several comments submitted in 2012 on a series of government reports, the IOE indicated difficulties with the consultation requirement from the business perspective, including 'the identification of representative institutions, the definition of indigenous territory and the lack of consensus of indigenous and tribal peoples'.³²⁴ The IOE's comments also referred to the negative consequences for business when the consultation requirement is applied and interpreted erroneously. In particular, the IOE referred 'to the difficulties, costs and negative impact that the failure by States to comply with the obligation of consultation can have on the projects undertaken by both public and private enterprises'.³²⁵ In this regard, it maintained that an 'erroneous application and interpretation of the [consultation requirement] can be a legal obstacle and lead to business difficulties, harm the reputation of enterprises and result in financial costs'.³²⁶ Against this background, it 'call[ed] on the supervisory bodies and in particular the [CEACR] to avoid broad interpretations of the provisions

³²⁰ *ibid.*

³²¹ *ibid.*

³²² CEACR, '2011 General Observation' 783. See also Cabrera Ormaza 106-109.

³²³ CEACR, '2011 General Observation' 788.

³²⁴ CEACR, 'Report III (Part 1A): General Report and Observations Concerning Particular Countries' (presented at the 102nd Session of the International Labour Conference, 2013) ILC.102/III(1A) 35, para 103 <[https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2013-102-1A\).pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2013-102-1A).pdf)> accessed 2 April 2022. See also HRC, '2011 Report SRRIP' para 45; Cabrera Ormaza 138-141; Rombouts, 'Evolution' 199.

³²⁵ CEACR, '2013 Report' 35, para 103.

³²⁶ *ibid.*

of the Convention' concerning the requirement of consultation, ie, Arts. 6, 7, 15 and 16 of ILO C 169.³²⁷ Finally, employer members also requested to be included in the state's design of consultation mechanisms with indigenous peoples.³²⁸

In the view of Cabrera Ormaza, having thoroughly analysed the practices of the CEACR before and after 2010, the comments made and concerns raised by the employer group had an impact on the CEACR's interpretative work. She notices a less progressive interpretation of the consultation requirement and maintains that CEACR's interpretative work has been affected 'in a way that it is becoming less supportive of expanding the norm's content beyond the intention of the drafters of ILO Convention No. 169'.³²⁹ Similarly, in referring to the emerging consensus among other human rights bodies that FPIC is required in the case of large-scale development projects, Rombouts points out that 'according to the [CEACR], this more progressive view does not follow from the letter and the spirit of the Convention'.³³⁰

From this, the following preliminary conclusions can be drawn. First, the IOE seems to fear a more progressive interpretation of the consultation requirement, as such interpretation would further complicate the application of the requirement given its already complex nature. Such progressive interpretation translates into negative consequences for business actors involved in development projects.³³¹ According to them, consultation means 'at least dialogue' but does not require consent. Second, the employers' group views the consultation requirement as a duty of states that, if not fulfilled, may have negative effects on corporations conducting the development project for which consultation is required.³³² Third, the IOE's engagement clearly shows the interest of corporations in having a say in the design of the regulatory framework for

³²⁷ *ibid.*

³²⁸ Cabrera Ormaza 115, 132-133.

³²⁹ *ibid* 106, 146, at 120: '[T]he CEACR has taken a more restrictive interpretation of the requirement of consultation. In doing so, the CEACR uses broader and less straightforward formulations in their requests for states. Comments adopted by the CEACR after 2010 are basically requests for information on how consultation is being implemented or ensured by legislation, the manner in which indigenous peoples' interests and concerns are taken into account; or requests for examples of consultation procedures that are in force'. Searching through the CEACR's observations from 2010 to 2019, to the author's knowledge no similar observations were issued by the CEACR after the debate within the CAS, see <<https://www.ilo.org/public/libdoc/ilo/P/09661/>> accessed 6 August 2021.

³³⁰ Rombouts, 'Evolution' 197; CEACR, '2011 General Observation' 788. See also Larsen 100.

³³¹ See eg Swepston, 'Supervision ILO C 169' 119.

³³² Roberto Suárez Santos, 'Three Decades since the ILO's Convention 169: Reflections in Light of the Experience of the Private Sector with Prior Consultation' (2020) 24(2-3) *The International Journal of Human Rights* 272, 275-276.

consultation.³³³ This dynamic is ascribed to increasing regulation of the private sector on national and international levels – both soft and hard in nature – due to an accelerated pace of development projects and the advancement of indigenous peoples' rights generally as well as in the business and human rights context.³³⁴ As Larsen notes, the debate is thus no longer primarily about the lack of consultation regulations in the context of development projects but more 'one of winning the process of determining the nature and quality of consultation'.³³⁵ Whilst the private sector's inclusion in designing a consultation process is viewed as crucial by some,³³⁶ others perceive it as a departure from 'a human rights-based perspective of the consultation requirement that puts indigenous peoples at the centre as the main beneficiaries of this obligation'.³³⁷ Ultimately, the employers' group's submissions point to the uncertainties and ambiguities concerning the consultation requirement and its relation to FPIC.³³⁸

4. Politics of Interpretation

The above course of action is arguably part of a broader development labelled by Larsen the 'politics of interpretation' concerning ILO C 169's provisions on consultation, participation and consent.³³⁹ It refers to the legal interpretation of these provisions by not only the ILO but also other bodies, which has become increasingly controversial within the ILO.³⁴⁰ Critical voices have been raised, mainly by the employers' group,³⁴¹ concerning the alleged meddling of UN human rights bodies, the IACtHR and NGOs with the ILO's norm-setting and provision interpretation, which, they argue, are spurring 'unpredictable and strange interpretations' that lead to 'counter-productive indigenous expectations'.³⁴² At the centre of attention is the principle of FPIC, which is allegedly read into ILO C 169's consultation provisions.³⁴³ More precisely, it re-

³³³ Cabrera Ormaza 115, 132-133; Suárez Santos 274.

³³⁴ Larsen 97-99, 105-106; CEACR, '2019 General Observation' 609-610; Tomaselli 130. See also the contribution of Suárez Santos 273-274, addressing the issue of a lack of appropriate regulation.

³³⁵ Larsen 99.

³³⁶ Suárez Santos 274.

³³⁷ Cabrera Ormaza 133, 146; Larsen 99.

³³⁸ Cabrera Ormaza 192.

³³⁹ Larsen 97.

³⁴⁰ *ibid.* See also Cabrera Ormaza 147-189.

³⁴¹ Larsen 100; Suárez Santos 274-277.

³⁴² For a concise overview of the statements, see Larsen 100-101.

³⁴³ *ibid.* 101.

lates to the view taken by the above bodies that the greater the impact on indigenous peoples is, the more stringent and mandatory the requirements on consultation become, amounting to an obligation to actually obtain FPIC.³⁴⁴

In connection with the 2018 study by the EMRIP examining this understanding of consultation and FPIC,³⁴⁵ Guy Ryder, Director-General of the ILO, pointed out: 'It is of great concern to the ILO that the study (...) reflects and calls for erroneous interpretations of the Convention'.³⁴⁶ He further noted: 'A call for the independent ILO supervisory bodies to align their "interpretation of the ILO Convention" with a suggested "emerging consensus of human rights bodies" would not only be inappropriate, but also unhelpful'.³⁴⁷ Similarly, at the ILO Governing Body meeting in March 2019, the employers' group noted: 'Calls to promote an interpretation of Convention No. 169 in line with a "new international consensus on the right to consent" constituted an unjustifiable interference in the ILO's mandate and indicated new and growing problems (...) for ratifying States to implementing the Convention'.³⁴⁸ In light of these perspectives, the ILO Governing Body adopted a strategic plan that aims to ensure an understanding of ILO C 169's scope and application according to ILO criteria among relevant regional organizations and the UN.³⁴⁹

Against this background, it can be argued that the 'politics of interpretation' boils down to a reluctance of the ILO to interpret ILO C 169 in a 'dynamic (evo-

³⁴⁴ See below in [Chapter 2, Section II, B](#), -D. and [Section III, B](#), -C.

³⁴⁵ HRC, '2018 FPIC Study EMRIP'. For detailed elaborations on this study, see below in [Chapter 2, Section II, B](#).

³⁴⁶ Guy Ryder, 'Statement by Guy Ryder, Director-General of the ILO' (ILO, 19 September 2018) <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/genericdocument/wcms_645652.pdf> accessed 6 April 2022.

³⁴⁷ *ibid.* See also ILO, 'Comments Submitted by the ILO' (13 July 2018) <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/genericdocument/wcms_634380.pdf> accessed 6 April 2022.

³⁴⁸ ILO Governing Body, 'Minutes Policy Development Section: Strategic Plan for Engagement with United Nations System Bodies and Relevant Regional Organizations Regarding the Indigenous and Tribal Peoples Convention, 1989 (No. 169)' (335th Session, 2019) GB.335/POL/PV(Rev.) 14, para 79 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_686638.pdf> accessed 2 April 2022.

³⁴⁹ ILO Governing Body, 'Policy Development Section: Strategic Plan for Engagement with United Nations System Bodies and Relevant Regional Organizations Regarding the Indigenous and Tribal Peoples Convention, 1989 (No. 169)' (335th Session, 2019) GB.335/POL/2 <https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_672870.pdf> accessed 2 April 2022. See also Larsen 101-102.

lutive)³⁵⁰ or 'systemic' way³⁵¹ as practised and advocated for by some human rights bodies when interpreting their own instruments.³⁵² Broadly speaking, such interpretive approaches would allow ILO supervisory bodies to consider other instruments on indigenous peoples adopted after ILO C 169 when interpreting the latter, such as the UNDRIP.³⁵³

Different authors have expressed concerns on this reluctance not least because Art. 35 of ILO C 169 stipulates that '[t]he application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements'. As argued by Doyle, the intent of ILO C 169 was thus 'not to be a hindrance to the development of indigenous rights', but 'a frozen interpretation of the substantive rights emerging from the Convention has precisely that effect'.³⁵⁴ Larsen views these recent developments as 'efforts to decouple the Convention from wider international human rights developments',³⁵⁵ while Cabrera Ormaza speaks of a 'static and ILO-centred'³⁵⁶ interpretation of the consulta-

³⁵⁰ See generally Francisco Pascual-Vives, *Consensus-Based Interpretation of Regional Human Rights Treaties* (Brill Nijhoff 2019) 72-94; Malgosia Fitzmaurice, 'Dynamic (Evolutive) Interpretation of Treaties, Part I' in Johan G Lammers (ed), *Hague Yearbook of International Law/Annuaire de la Haye de Droit International: Volume 21* (2008) (Martinus Nijhoff Publishers 2009).

³⁵¹ Art. 31(3c) VCLT. See generally Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54(2) *International and Comparative Law Quarterly* 279; Adamantia Rachovitsa, 'The Principle of Systemic Integration in Human Rights Law' (2017) 66(3) *International and Comparative Law Quarterly* 557.

³⁵² On the reluctance, see Cabrera Ormaza 118; Barelli, 'FPIC in UNDRIP' 263-265; Doyle, FPIC 90. On the dynamic (evolutive) approach of the IACtHR in the context of indigenous peoples' rights, see eg Rombouts, *Having a Say* 230, 299, 314-315. See also below text to [Fn 702-707](#).

³⁵³ Cabrera Ormaza 118; Yuval Shany, 'International Human Rights Bodies and the Little-Realized Threat of Fragmentation' [2016] Hebrew University of Jerusalem Legal Studies Research Paper 16/06 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2722663> accessed 22 April 2022; Pascual-Vives 80-81.

³⁵⁴ Doyle, FPIC 96. Shortly after ILO C 169's adoption, Barsh advocated for a progressive interpretation to strengthen the Convention substantially, see Russel L Barsh, 'An Advocate's Guide to the Convention on Indigenous and Tribal Peoples' (1990) 15(1) *Oklahoma City University Law Review* 209, 211.

³⁵⁵ Larsen 100-101.

³⁵⁶ Cabrera Ormaza 146.

tion requirement based 'on the constraints of a historical and textual-based interpretation'.³⁵⁷ The SRRIP and the EMRIP express similar concerns.³⁵⁸

C. Interim Conclusion

Despite the relatively modest number of state ratifications, the reach and relevance of ILO C 169 should not be underestimated.³⁵⁹ Over the years, the ILO supervisory bodies have examined states' actions and developed legal interpretations as to when the provisions and requirements of ILO C 169 are met.³⁶⁰ Their guidance is an important source for understanding the international obligations of member states under ILO C 169 and is said to have brought about change on a national level, such as in legislation and policy.³⁶¹ Furthermore, as Larsen contends, ILO C 169 'is growing in significance as a soft-law framework for countries that have not yet ratified the Convention'.³⁶² Moreover, since its entry into force nearly thirty years ago, it has become an important point of reference for UN and regional human rights bodies.³⁶³ This development, however, is increasingly being challenged within the ILO.

From states' overarching obligation to develop – with the participation of indigenous peoples – coordinated and systematic action to protect indigenous peoples' rights, it follows that states are required to respect and protect the substantive rights of indigenous peoples, such as their land and resource rights.³⁶⁴ The cornerstone of the Convention is the framework of consultation and participation provisions spanning the Convention's different topics. The intertwined concepts of participation and consultation aim to ensure the inclusion of indigenous peoples in decision-making affecting their lives and thus serve as important safeguards in protecting their enjoyment of their rights, particularly those relating to lands and resources.

³⁵⁷ *ibid* 115, 213. See also Barelli, 'FPIC in UNDRIP' 263-265.

³⁵⁸ HRC, '2018 FPIC Study EMRIP' paras 46-48; UNGA, '2017 Report SRRIP' para 78. See also Cabrera Ormaza 205.

³⁵⁹ Larsen 105-106.

³⁶⁰ Swepston, 'Supervision ILO C 169' 112, 120.

³⁶¹ For an overview of state practice concerning the requirement of consultation with indigenous peoples, see Cabrera Ormaza 71-105, 129-132; International Labour Office, 'Applying ILO C 169' 5; Swepston, 'Supervision ILO C 169' 113, 116-118; Doyle, FPIC 89.

³⁶² Larsen 105.

³⁶³ *ibid* 95. For an in-depth analysis, see Cabrera Ormaza 147-189. See also below text to [Fn 674](#), [695](#), [720](#).

³⁶⁴ International Labour Office, 'Implementing ILO C 169' 16.

Given the controversy and complexity surrounding the consultation requirement, most of the ILO's supervision deals with the consultation requirement, particularly in connection with indigenous peoples' land and resource rights. They inter alia address the failure of member states to protect indigenous peoples' rights from violations caused by corporate-led development projects. Often, this refers to the state's failure to consult indigenous peoples as set forth in ILO C 169, or, when delegated to corporations, to make sure that the operationalization of consultation processes is in line with the Convention's requirements.³⁶⁵ In practical terms, this may mean that licences and concessions are granted to a corporation to start explorative operations without any consultation of the indigenous peoples affected or that consultation takes place after the concession has already been granted. Such pro forma consultation or consultation with the mere aim of providing information is – according to the ILO supervisory bodies – not in line with the understanding of Art. 6 of ILO C 169.

As stipulated in Art. 6 of ILO C 169, consultation must be undertaken in good faith and with the objective of obtaining agreement or consent. Consultation is thus understood as 'a qualitative process of good faith negotiations and dialogue, through which agreement and consent can be achieved if possible'.³⁶⁶ This requires involvement of indigenous peoples in the process of consultation and impact assessments as early as possible and 'a real effort to understand how indigenous peoples' cultures and traditional decision-making processes function, and adapting the form and timing of consultation to these'.³⁶⁷ Throughout their work, the ILO supervisory bodies have stressed that the right to consultation does not amount to a right to veto nor do consultation processes need to result in agreement or consent to be valid. Hence, within the ILO framework, the obligation to consult does not imply an obligation to obtain indigenous peoples' consent but does suggest an obligation to seek FPIC.³⁶⁸ Obtaining indigenous peoples' consent is thus not an independent requirement, except in the context of relocation. However, in the latter situation, the obligation to obtain consent is not absolute.

Against this background, it is argued that consultation within the ILO C 169 framework is an obligation of process rather than of result.³⁶⁹ This understanding differs from the more ambitious approach taken by pertinent human

³⁶⁵ Swepston, 'Supervision ILO C 169' 118; International Labour Office, 'Applying ILO C 169' 13, 23, 30.

³⁶⁶ International Labour Office, 'Handbook ILO C 169' 16.

³⁶⁷ *ibid* 15.

³⁶⁸ Cabrera Ormaza 120.

³⁶⁹ *ibid* 146, 202; Doyle, FPIC 86–90.

rights bodies that articulate FPIC as a requirement alongside the obligation to consult and thus consultation as an obligation of process and result in the case of activities having a severe impact on indigenous peoples.³⁷⁰ Although traces of this more stringent understanding of consultation where there are greater impacts on indigenous peoples can be found within the ILO framework,³⁷¹ recent developments concerning the 'politics of interpretation' surrounding ILO C 169 and the practices of the ILO supervisory bodies currently suggest no strong alignment between the ILO and other bodies regarding a more ambitious and progressive interpretation of the consultation requirement.³⁷²

II. UN Framework

The United Nations started to engage in indigenous peoples' issues in the 1970s.³⁷³ A milestone event marked the establishment in 1982 of the UN Working Group on Indigenous Populations (WGIP), inter alia triggered by a growing indigenous rights movement.³⁷⁴ The WGIP's mandate was to 'give special attention to the evolution of standards concerning the rights of indigenous populations'.³⁷⁵ This mandate and the issues raised in the Martínez Cobo study³⁷⁶ eventually resulted in the WGIP's drafting of international standards on indigenous peoples building the basis for the UNDRIP adopted more than two decades later.³⁷⁷

³⁷⁰ See below in [Chapter 2, Section II, B](#), -D. and [Section III, B](#), -C; Doyle, FPIC 144.

³⁷¹ Traces include, for instance, a clear expression of FPIC in the case of indigenous peoples' relocation (Art. 16(2) of ILO C 169), the recommendation to conduct impact assessments before authorizing exploration and exploitation of natural resources, particularly in the case of large-scale exploitations, recommendations to suspend activities, as well as the interpretation of FPIC within the International Labour Office, 'Handbook ILO C 169' at 16. See also Barelli, 'FPIC in UNDRIP' 264-265; Doyle, FPIC 83, 91-100, at 95 arguing that 'an implicit substantive requirement for consent [referring to consent as an essential principle and a required outcome] can be derived from a good faith interpretation of the Convention's terms in light of its objective and intent'.

³⁷² See eg Cabrera Ormazza 146, 205-206; Doyle, FPIC 99; Larsen 100-101.

³⁷³ James Anaya and Luis Rodríguez-Piñero, 'Chapter 2 - The Making of the UNDRIP' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (OUP 2018) 42.

³⁷⁴ *ibid* 43. On the indigenous movement, see also above [Fn 34, 154](#).

³⁷⁵ ECOSOC, 'Study of the Problem of Discrimination against Indigenous Populations' (7 May 1982) UN Doc E/RES/1982/34.

³⁷⁶ UNCHR, '1983 Report Martínez Cobo'.

³⁷⁷ Anaya and Rodríguez-Piñero 43.

Indigenous peoples' rights are further recognized in the ICCPR, ICESCR and ICERD with an established practice of the respective treaty bodies.³⁷⁸ Furthermore, other important UN bodies are dedicated to indigenous peoples' issues, including the SRRIP, the EMRIP and the UN Permanent Forum on Indigenous Issues (UNPFII).³⁷⁹

Similar to the previous section, the following elaborates on pertinent provisions of the UNDRIP detailing indigenous peoples' rights to lands, territories and resources and participatory rights and examines the understanding and interpretation thereof by the abovementioned bodies. It highlights relevant differences from the ILO framework and sheds light on states' duty to protect indigenous peoples' rights against business-related harm in the implementation of development projects.

A. UNDRIP

Adopted in 2007 by a resolution of the UN General Assembly with 143 member states in favour, four against, and eleven abstentions, the UNDRIP is the most widely supported instrument in the indigenous peoples' rights field.³⁸⁰ Its drafting process was much more inclusive than that of ILO C 169 as indigenous peoples and their representatives were included in each drafting stage.³⁸¹

As a Declaration, the UNDRIP is legally non-binding but carries normative weight.³⁸² The Declaration builds upon the normative basis of ILO C 169 and

³⁷⁸ See below text to [Fn 498](#)-542, [671](#)-700.

³⁷⁹ UNCHR, 'Human Rights and Indigenous Issues' (24 April 2001) UN Doc E/CN.4/RES/2001/57; HRC, 'Expert Mechanism on the Rights of Indigenous Peoples' (14 December 2007) UN Doc A/HRC/RES/6/36; ECOSOC, 'Establishment of a Permanent Forum on Indigenous Issues' (28 July 2000) UN Doc E/RES/2000/22.

³⁸⁰ <<https://www.un.org/press/en/2007/ga10612.doc.htm>> accessed 24 April 2022. The four dissenting states Australia, Canada, New Zealand and the United States have reversed their positions and endorsed the UNDRIP in 2009 and 2010, see Anaya and Rodríguez-Piñero 60. Samoa and Colombia, which have abstained from voting, also endorsed the UNDRIP, see <<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples/historical-overview.html>> accessed 24 April 2022. See also Rombouts, *Having a Say* 15.

³⁸¹ For a comprehensive description of the drafting process, see eg Anaya and Rodríguez-Piñero 48-60.

³⁸² *ibid* 60-62; Mauro Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58(4) *International and Comparative Law Quarterly* 957, 957-983.

other international human rights law documents.³⁸³ Its provisions, particularly those detailing indigenous peoples' rights to lands, territories and resources, draw on the practice of international human rights bodies, which have progressively applied generic human rights provisions such as the rights to property, culture, self-determination, and non-discrimination to indigenous peoples to protect their rights.³⁸⁴ The UNDRIP thus relates to already existing human rights obligations of states, and some of its provisions are perceived to reflect general principles of international law or even customary law.³⁸⁵ Today, the UNDRIP is considered the most comprehensive and progressive instrument in the field of indigenous peoples' rights.³⁸⁶ It is progressive in the sense that it not only builds upon already existing provisions but also expands their meaning and scope and provides for more clearly expressed and robust rights than the human rights instruments before it.³⁸⁷ Against this background, the Declaration itself is increasingly used as a point of reference and authority by human rights bodies in their interpretation of indigenous peoples' rights, especially those relating to lands, territories and resources.³⁸⁸

As a Declaration of the UN General Assembly, the UNDRIP does not have a built-in supervisory mechanism to monitor its implementation by states.³⁸⁹ Nevertheless, the UNDRIP is somewhat monitored and interpreted by the SR-

³⁸³ HRC, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya' (11 August 2008) UN Doc A/HRC/9/9 para 85; Anaya and Rodríguez-Piñero 45, 48-49.

³⁸⁴ Errico, 'Natural Resources and Environment' 426; Charters 397-398, 400; Barelli, 'FPIC in UNDRIP' 258. See also below text to [Fn 498](#)-502.

³⁸⁵ Anaya and Rodríguez-Piñero 60-62; James Anaya and Siegfried Wiessner, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-Empowerment' (*Jurist*, 3 October 2007) <<https://www.jurist.org/commentary/2007/10/un-declaration-on-rights-of-indigenous-2/>> accessed 23 April 2022; International Law Association, 'Sofia Conference (2012) Final Report: Rights of Indigenous Peoples' (2012) 28-29 <<https://www.ila-hq.org/index.php/committees>> accessed 24 April 2022; HRC, '2008 Report SRRIP' para 41. But see Megan Davis, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19(3) *Australian International Law Journal* 17.

³⁸⁶ <<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>> accessed 24 April 2022; Barelli, 'FPIC in UNDRIP' 263.

³⁸⁷ *ibid* 248, 263; Charters 397-398.

³⁸⁸ See eg Charters 400-401, 424; UNGA, '2017 Report SRRIP' para 35. See also below text to [Fn 696](#), [720](#).

³⁸⁹ Art. 42 UNGA, 'UNDRIP'.

RIP, EMRIP and UNPFII in their respective ways.³⁹⁰ As mentioned earlier, their contextual interpretative work of the UNDRIP when linked to ILO C 169 is increasingly viewed critically by the ILO, particularly the employers' group.³⁹¹

1. Rationale, Scope and Controversies

The UNDRIP is grounded in a similar rationale to ILO C 169, which is to remediate the consequences of historical injustices faced by indigenous peoples referring to their discrimination and marginalization and the denial of their rights.³⁹² The rights recognized in the UNDRIP are 'minimum standards for the survival, dignity and well-being of the indigenous peoples of the world'.³⁹³ Upon this premise, the UNDRIP's preamble confirms that indigenous peoples' control over developments that affect their lands, territories and resources will enable them to develop in line with their own aspirations and needs.³⁹⁴ Furthermore, unlike ILO C 169, Art. 3 of the UNDRIP enshrines the explicit right of indigenous peoples to self-determination, which, according to the prevailing opinion, relates to their autonomy, self-governance and right to 'freely pursue their economic, social and cultural development' within the sovereign state in which they reside.³⁹⁵ This necessitates effective participation and consultation of indigenous peoples.³⁹⁶ Against this background, the UNDRIP also enshrines several provisions that deal with indigenous peoples' consultation and participation in decision-making processes affecting them in different substantive contexts, including in the context of decision-making affecting their lands, territories and resources.³⁹⁷ Furthermore, the Declaration articulates rights to be enjoyed individually or collectively, ranging from rights to lands and resources to equality, nationality, freedom, and the right to life to provisions on language, education, media, labour rights, cultural heritage, and traditional knowledge.³⁹⁸

The UNDRIP does not include a formal definition of indigenous peoples, yet it recognizes their 'right (...) to be different, to consider themselves different, and to be respected as such'.³⁹⁹ Moreover, it refers to the range and diversity

³⁹⁰ See below text to [Fn 466](#)–497, [573](#)–670; Rombouts, 'Evolution' 202–203.

³⁹¹ See above text to [Fn 339](#)–358.

³⁹² Anaya and Rodríguez-Piñero 45, 61; Candelaria 4, 6.

³⁹³ Art. 43 UNGA, 'UNDRIP'.

³⁹⁴ Preamble *ibid*.

³⁹⁵ Art. 3 must be read in conjunction with Arts. 4 and 46(1) *ibid*; Rombouts, 'Evolution' 175.

³⁹⁶ Rombouts, 'Evolution' 175.

³⁹⁷ See below [Fn 405](#).

³⁹⁸ Arts. 2, 6, 7, 14, 16, 17, 31 UNGA, 'UNDRIP'.

³⁹⁹ Preamble *ibid*.

among indigenous peoples around the world.⁴⁰⁰ Like ILO C 169, the UNDRIP thus adopts an approach based on self-identification and other objective criteria.⁴⁰¹

Despite the UNDRIP's wide acceptance, issues that were already controversial in the context of ILO C 169 remain controversial in the realm of the UNDRIP. The debate mainly relates to state sovereignty over lands and natural resources as well as indigenous peoples' rights related thereto, including rights to property, compensation, and restitution; the issues of collective and individual rights and the nature and scope of the right to self-determination, ie, internal or external self-determination; and the reach of indigenous consultation and participation rights.⁴⁰² Not surprisingly, the requirement of consultation and, particularly, its coupling with FPIC sparked controversy in the drafting process and continues to be an issue of debate.⁴⁰³

2. Land and Resource Rights in the UNDRIP

The centrality of land, territories and resources in the lives of indigenous peoples is omnipresent in the Declaration.⁴⁰⁴ The Preamble to the Declaration recognizes 'the urgent need to respect and promote the inherent rights of indigenous peoples (...) especially their rights to their lands, territories and resources'. Several provisions enshrine positive obligations of states to comply with this plea, including the obligation to consult indigenous peoples; to ensure their participation; or to obtain their free, prior, and informed consent.⁴⁰⁵ The subsequent section gives a brief overview of the basic provisions on lands, territories and resources and highlights relevant differences from ILO C 169.

⁴⁰⁰ *ibid*; Candelaria 9, 11.

⁴⁰¹ See above text to [Fn 63](#)-65.

⁴⁰² Anaya and Rodríguez-Piñero 51; Rombouts, 'Evolution' 186; Errico, 'Natural Resources and Environment' 425-426. See also Art. 46(1) UNGA, 'UNDRIP'; Doyle, FPIC 117-125.

⁴⁰³ Anaya and Rodríguez-Piñero 51; Rombouts, 'Evolution' 186; Doyle, FPIC 161-164. See also above text to [Fn 339](#)-358.

⁴⁰⁴ On the importance and relevance of indigenous peoples' rights to lands, territories, and resources, see eg Charters 396-397.

⁴⁰⁵ Arts. 10, 27, 28, 29(2), 30(2), 32(2) UNGA, 'UNDRIP'.

(a) *Indigenous Peoples' Rights to Lands, Territories, and Resources*

The basic provisions are Arts. 25 and 26 of the UNDRIP. Art. 25 holds that:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Like Art. 13 of ILO C 169, the UNDRIP recognizes indigenous peoples' distinct relationship with their lands, territories, and resources. However, in contrast to Art. 13 of ILO C 169, Art. 25 of the UNDRIP frames this distinct relationship as a stand-alone right and not merely as a guiding principle for states when applying provisions relating to lands and territories.⁴⁰⁶ Furthermore, the term 'strengthen' implies to imposing on states a positive obligation to adopt active measures.⁴⁰⁷ The term 'spiritual relationship' is inclusive of a 'cultural relationship', although reference to a cultural relationship is omitted.⁴⁰⁸ From the past tense used, ie, 'traditionally owned or otherwise occupied and used', it can be inferred that the right to maintain and strengthen their relationship applies to lands, territories and resources that were owned, occupied or used by indigenous peoples in the past and are now no longer under their ownership, occupation or usage but rather owned, occupied or used by states or other actors.⁴⁰⁹ Maintaining and strengthening such a relationship necessarily includes the right to access such lands, territories, and resources.⁴¹⁰ Like Art. 13(2) of ILO C 169, Art. 25 of the UNDRIP adopts a broad notion of lands that extends to all resources, including surface and subsurface resources.⁴¹¹

Art. 26(1) of the UNDRIP enshrines the general right of indigenous peoples 'to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired'. Paragraph 2 specifically relates to their 'right to own, use, develop and control the lands, territories and resources that they possess' due to traditional ownership, occupation, or other acquisition.⁴¹²

⁴⁰⁶ Charters 410; Art. 13(1) ILO, 'C 169': 'In applying [the land provisions] of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories'.

⁴⁰⁷ Charters 412.

⁴⁰⁸ *ibid* 411.

⁴⁰⁹ *ibid*.

⁴¹⁰ *ibid* 412.

⁴¹¹ *ibid* 412-413.

⁴¹² Art. 26(2) UNGA, 'UNDRIP' (emphasis added).

Pursuant to Art. 26(3), states are obliged to 'give legal recognition and protection to these lands, territories and resources' – referring to Art. 26(1) –⁴¹³ which requires 'due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned'.

While the Declaration appears clear in terms of indigenous peoples' right to own, use, develop and control lands, territories, and resources that they possess,⁴¹⁴ uncertainty persists concerning the extent of their rights in connection with their traditional lands, territories, and resources now in third-party ownership, possession, or control. For instance, does it extend to their right to get land, territories and resources back to own, use, develop and control them?⁴¹⁵ In the view of Charters, the textual interpretation of Art. 26(1), its relation to other Articles in the Declaration (such as Art. 27) and ILO C 169, the provision's purpose and negotiating history, and international and regional jurisprudence suggest that Art. 26(1) does not express specific rights to lands, territories and resources 'lost' to third parties but rather a generic right to the latter, which is subject to limitations by third-party rights and interests.⁴¹⁶ At a minimum, it must include the right to access such lands, a reading that is consistent with Art. 25 of the UNDRIP.⁴¹⁷ Furthermore, and resonating with ILO C 169 and the practice of the IACtHR, the applicability of indigenous peoples' land and resource rights is not dependent on formal recognition by the state by means of titles to lands since these rights arise out of indigenous peoples' customs, ie, their traditional ownership, occupation, and use (customary land tenure).⁴¹⁸

Art. 27 of the UNDRIP calls on states to establish and implement, in conjunction with indigenous peoples, a process to recognize and adjudicate indigenous peoples' rights to their lands, territories and resources.⁴¹⁹ The obligation extends to rights relating to lands, territories and resources that they currently possess and to those they owned, occupied, or used in the past.⁴²⁰ Compared to the relevant provisions in ILO C 169, ie, 14(3), 16(2) and 16(4), the Declaration is broader and somewhat stronger in terms of the requirements that

⁴¹³ Charters 418.

⁴¹⁴ A high degree of intensity in using the lands and resources in their possession or consistent control of the latter is not required for indigenous peoples to have the benefit of the rights enshrined in Art. 26(2) UNGA, 'UNDRIP'. However, in some states, continuity of connection seems to be required, see *ibid* 414-415, 418-420.

⁴¹⁵ *ibid* 414-415.

⁴¹⁶ *ibid* 413-418, 424.

⁴¹⁷ *ibid* 412, 414-415.

⁴¹⁸ *ibid* 418; Candelaria 34; HRC, '2010 Report SRRIP' para 54. See also above text to [Fn 258](#).

⁴¹⁹ See also Arts. 8, 28 UNGA, 'UNDRIP'.

⁴²⁰ Art. 27 *ibid*; Charters 423.

such processes must fulfil. For instance, under Art. 27 of the UNDRIP, indigenous peoples have the right to participate in the processes, whereas Art. 16(2) of ILO C 169 on relocation provides for 'the opportunity for effective representation of the peoples concerned' in the procedures relating to relocation.⁴²¹

Art. 10 of the UNDRIP covers the issue of relocation.⁴²² It prohibits the forcible removal of indigenous peoples from their lands or territories and establishes that no relocation shall take place without indigenous peoples' FPIC and their agreement on just and fair compensation, which includes, where possible, the option of return. As in Art. 16(3-4) of ILO C 169, the present tense used in Art. 10 indicates its applicability in situations of present and future removals or relocations of indigenous peoples.⁴²³ For past removals and relocations, the Declaration foresees the possibility of redress as prescribed in Arts. 8, 27 and 28.⁴²⁴

In contrast to Art. 16(2) of ILO C 169, providing specific exceptions to the general prohibition of relocation, Art. 10 of the UNDRIP does not provide similar exceptions, which triggers the question of whether it stipulates an absolute prohibition of relocations or removals.⁴²⁵ An indication that supports no absolute prohibition is given by Arts. 8 and 46(2) of the UNDRIP. Art. 8 refers to mechanisms for the prevention of and redress for actions that aim at or result in indigenous peoples' dispossession of their lands, territories, and resources and thus to possible separations of indigenous peoples from their lands and territories.⁴²⁶ Furthermore, limitations on Art. 10 may apply given that they are justified under Art. 46(2).⁴²⁷ However, reading Art. 10 in light of the abovementioned provisions, it seems clear that 'any separation of Indigenous peoples from their lands is permissible only with Indigenous peoples free, prior and informed consent'.⁴²⁸ Furthermore, like Art. 16 of ILO C 169, the Declaration favours restitution of lands over compensation.⁴²⁹

⁴²¹ Charters 423.

⁴²² See also Art. 8 UNGA, 'UNDRIP'.

⁴²³ See eg Charters 408, arguing that there is no serious indication that Art. 10 UNGA, 'UNDRIP' applies retrospectively to past removals and relocations.

⁴²⁴ *ibid* 408, 410. '[S]tates had been reluctant to recognize a right to restitution and have pushed for the introduction of notions of redress and compensation'. See Gilbert, *Land Rights* 167-168. See also the above elaborations on Art. 14(3) ILO, 'C 169' at [Fn 249-250](#).

⁴²⁵ Charters 409.

⁴²⁶ *ibid* 409-410.

⁴²⁷ *ibid* 409.

⁴²⁸ *ibid* 410; Gilbert, *Land Rights* 158-159. See below text to [Fn 554-572](#).

⁴²⁹ Art. 28(1) UNGA, 'UNDRIP'; Gilbert, *Land Rights* 158-159. See also above [Fn 296](#).

(b) *Indigenous Peoples' Land and Resource Rights in the Context of Development Projects*

A central provision in the context of development projects is Art. 32 of the UNDRIP. Like ILO C 169, the Declaration specifically addresses in Art. 32(2) the tension between indigenous peoples' rights to resources and the states' sovereignty claims over resources, particularly subsurface resources.⁴³⁰ On the one hand, there are indigenous recognized rights to resources, as referred to in the subsection above.⁴³¹ On the other hand, there is national legislation that often reserves ownership and thus the power to dispose of these resources to the state.⁴³² To balance states' interests connected to resources for development purposes and indigenous peoples' interest in the enjoyment and protection of their land and resource rights, Art. 32(2) lists specific requirements that states must fulfil.⁴³³ Art. 32(2) of the UNDRIP reads as follows:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Art. 32(2) of the UNDRIP thus foresees the possibility of extractive or other development activities under the premise of indigenous peoples' inclusion in the decision-making in explorative or other development projects.⁴³⁴

⁴³⁰ See eg Charters 421; above text to [Fn 262-267](#).

⁴³¹ Arts. 25-26 UNGA, 'UNDRIP'. See also UNCHR, 'Final Report of the Special Rapporteur, Erica-Irene A. Daes: Indigenous Peoples' Permanent Sovereignty over Natural Resources' (13 July 2004) UN Doc E/CN.4/Sub.2/2004/30 para 39: '[T]he developments during the past two decades in international law and human rights norms in particular demonstrate that there now exists a developed legal principle that indigenous peoples have a collective right to the lands and territories they traditionally use and occupy and that this right includes the right to use, own, manage and control the natural resources found within their lands and territories'.

⁴³² See eg Errico, 'Natural Resources and Environment' 432, 434-436.

⁴³³ Charters 421; Errico, 'Natural Resources and Environment' 436. For a summary of the negotiation history of Art. 32(2) UNGA, 'UNDRIP' culminating in the compromise that it represents, see Errico, 'Natural Resources and Environment' 427-432, 435-436.

⁴³⁴ Errico, 'Natural Resources and Environment' 436.

The obligation to consult is not a stand-alone obligation but rather must be seen in connection with other human rights obligations.⁴³⁵ The duty to consult, using the words of the former SRRIP, is 'a procedural obligation associated with the duty to protect indigenous peoples' substantive rights'.⁴³⁶ In realizing development projects that, in practice, often impact indigenous peoples' resource rights and other rights closely linked thereto,⁴³⁷ states must consult indigenous peoples as part of their duty to respect and protect indigenous peoples' substantive rights.⁴³⁸ For instance, states must respect indigenous peoples' right to 'determine and develop priorities and strategies for the development or use of their lands or territories and other resources' provided

⁴³⁵ ibid 440-441. See generally Stefania Errico, 'The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights' in Alexandra Xanthaki and Steve Allen (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011); Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (CUP 1997). See also below text to [Fn 578](#)-582, [609](#)-610.

⁴³⁶ HRC, '2010 Report SRRIP' para 48; HRC, '2009 Report SRRIP' para 54. Similarly, the EMRIP points out: 'Indigenous peoples' rights to participate in decision-making in relation to extractive enterprises that affect them must not be understood as a trade-off for or exchangeable with indigenous peoples' substantive rights to their lands, territories and resources. Rather, the procedural aspects of the right (such as consultation) exist to promote the substantive right (such as self-determination and underlying rights relating to lands, territories and resources)'. See HRC, '2012 Follow-Up Report EMRIP' para 36.

⁴³⁷ The SRRIP has identified 'the implementation of natural resource extraction and other development projects on or near indigenous territories (...) possibly (...) [as] the most pervasive source of the challenges to the full exercise of their rights'. See HRC, '2011 Report SRRIP' para 57. See also CESCR, 'GC No. 24' paras 8, 12. For a more detailed elaboration on the link between indigenous peoples' land and resource rights and the rights to self-determination and culture as well as an overview of the approaches adopted by the UN treaty bodies, national courts and the IACtHR in connection with the latter, see eg Errico, 'Natural Resources and Environment' 433-435, 437-438, 447-448; Charters 397-401; *Case of the Saramaka People v Suriname* (Preliminary Objections, Merits, Reparations, and Costs) Inter-American Court of Human Rights Series C No. 172 (28 November 2007) para 122: '[T]he right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land'.

⁴³⁸ See below text to [Fn 587](#)-588.

for in Art. 32(1).⁴³⁹ Furthermore, Art. 32(3) of the UNDRIP enshrines the positive obligations of states to 'provide effective mechanisms for just and fair redress for any such activities, and appropriate measures (...) to mitigate adverse environmental, economic, social, cultural or spiritual impact'.

Although not explicitly referred to in the Declaration, the obligation to carry out impact assessments is read into Arts. 32(3) and 29 of the UNDRIP, with the latter referring to indigenous peoples' right to the conservation and protection of the environment.⁴⁴⁰ The same applies to benefit sharing agreements and mitigation and compensation measures.⁴⁴¹

Therefore, with Art. 32, particularly paragraphs 1-2, the power of states to dispose of resources and implement development projects is somewhat restricted.⁴⁴² The provision reflects 'the current shift from top-down approaches towards participatory forms of development', where respect for indigenous peoples' rights should guide processes of development.⁴⁴³ However, since indigenous peoples' rights to lands, territories and resources are not absolute and given the balancing character of Art. 32 of the UNDRIP, the latter rights may be subject to limitations.⁴⁴⁴

⁴³⁹ Regarding this connection, the SRRIP has stated: 'As part of the right to self-determination, "indigenous peoples have the right to determine priorities and strategies for the development or use of their lands and territories". This right necessarily implies a right of indigenous peoples to pursue their own initiatives for resource extraction within their territories if they so choose. In cases in which indigenous peoples retain ownership of all the resources, including mineral and other subsurface resources, within their lands, ownership of the resources naturally includes the right to extract and develop them. But even where the State claims ownership of subsurface or other resources under domestic law, indigenous peoples have the right to pursue their own initiatives for extraction and development of natural resources within their territories, at least under the terms generally permitted by the State for others'. See HRC, '2013 Report SRRIP' para 9.

⁴⁴⁰ Errico, 'Natural Resources and Environment' 448-449; HRC, '2010 Report SRRIP' paras 71-72, 74. ILO C 169 explicitly refers to impact assessments in Art. 7(3) ILO, 'C 169'.

⁴⁴¹ Errico, 'Natural Resources and Environment' 450; HRC, '2010 Report SRRIP' paras 71, 76-77. ILO C 169 explicitly refers to benefit sharing in Art. 15(2) ILO, 'C 169'.

⁴⁴² Errico, 'Natural Resources and Environment' 447. Arts. 7 and 15 ILO, 'C 169' contain similar provisions.

⁴⁴³ Errico, 'Natural Resources and Environment' 447. See also below text to [Fn 857-858](#).

⁴⁴⁴ Art. 46(2) UNGA, 'UNDRIP'; Rombouts, *Having a Say* 31, 73.

(c) *Implementation of Development Projects: Limitations on Rights and the State Duty to Protect Indigenous Peoples' Rights in International Practice*

The above elaborations on indigenous land and resource rights, particularly on Art. 32 of the UNDRIP, show that if states could implement development projects without taking indigenous peoples' rights into account, the very purpose of these rights would be undermined.⁴⁴⁵ This has been reiterated on several occasions by different human rights bodies, including the Inter-American Commission of Human Rights (IACHR), the IACtHR, the SRRIP and the UN treaty bodies.⁴⁴⁶

Without attempting to be comprehensive, the following section provides a broad overview of the practices of these human rights bodies addressing indigenous peoples' rights, particularly their rights to lands, territories, and resources, and the duty of states to protect these rights in the context of development projects featuring private actors. In this way, it is exemplified how the obligation to consult and the FPIC principle – examined in more depth below –⁴⁴⁷ fit into the broader context of development projects, serving as safeguards for indigenous peoples' substantive rights. Furthermore, in examining the duty to protect indigenous peoples' rights in the realm of development projects, a first glimpse can be given of related business human rights responsibilities in this connection.

(i) *Inter-American Human Rights System: IACHR and IACtHR*

The IACHR and the IACtHR are among the most authoritative bodies dealing with indigenous peoples' rights.⁴⁴⁸ Their practices have specifically dealt with the protection of indigenous peoples' rights in the context of development projects.⁴⁴⁹ In 1972, the IACHR held that 'for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states'.⁴⁵⁰ In the *Case of the Maya*

⁴⁴⁵ Barelli, 'FPIC in UNDRIP' 248-249.

⁴⁴⁶ In this regard, see also UNGA, '2013 Report WGBHR'; UNPFII, 'Analysis of the Duty of the State to Protect Indigenous Peoples Affected by Transnational Corporations and Other Business Enterprises' (23 February 2012) UN Doc E/C.19/2012/3.

⁴⁴⁷ See below [Chapter 2, Section II, A. 3.](#) and [B.-C., Section III.](#)

⁴⁴⁸ Barelli, 'FPIC in UNDRIP' 257.

⁴⁴⁹ *ibid*; Rombouts, 'Evolution' 211; Rombouts, *Having a Say* 206-208, 314.

⁴⁵⁰ Resolution on 'Special Protection for Indigenous Populations: Action to Combat Racism and Racial Discrimination', cited in the *Case of Yanomami v Brazil* (Case 7615, Resolution No. 12/85) Inter-American Commission on Human Rights (5 March 1985) para 8.

Indigenous Communities of the Toledo District v Belize, the IACHR stated ‘development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of (...) indigenous communities’.⁴⁵¹ An extensive analysis of such appropriate and effective measures is given by the IACtHR in the well-known case of the *Saramaka People v Suriname* (*Saramaka Case*).

Addressing Suriname's granting of logging and mining concessions to private corporations,⁴⁵² the IACtHR maintained that the collective right to property over ancestral lands extends to ‘those natural resources traditionally used and necessary for the very survival, development and continuation of [indigenous and tribal peoples'] way of life’.⁴⁵³ However, for the purpose of granting concessions for the exploration and extraction of natural resources, indigenous peoples' rights to lands and resources can be subject to limitations given that the right to property is not absolute.⁴⁵⁴ The Court held that for limitations to be lawful they must be: ‘a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society’.⁴⁵⁵ It added that in the case of indigenous peoples, ‘another crucial factor to be considered is whether the restriction amounts to a denial of their traditions and customs in a way that endangers the very survival of the group and its members’.⁴⁵⁶ To ensure that restrictions and limitations – in the

⁴⁵¹ *Case of the Maya Indigenous Communities of the Toledo District v Belize* (Case 12.053, Report No. 40/04) Inter-American Commission on Human Rights (12 October 2004) para 150.

⁴⁵² IACtHR, *Case of the Saramaka* para 124: ‘The State asserted that all land ownership, including all natural resources, vests in the State, and that, as such, the State may grant logging and mining concessions within alleged Saramaka territory, while respecting as much as possible Saramaka customs and traditions’. For more background information on the case, see eg Rombouts, ‘Evolution’ 213–214.

⁴⁵³ IACtHR, *Case of the Saramaka* para 122.

⁴⁵⁴ *ibid* paras 126–127.

⁴⁵⁵ *ibid* para 127.

⁴⁵⁶ *ibid* para 128; *Case of the Saramaka People v Suriname* (Interpretation of the Judgement on Preliminary Objections, Merits, Reparations, and Costs) Inter-American Court of Human Rights Series C No. 185 (12 August 2008) para 37: ‘The Court emphasized in the Judgment that the phrase “survival as a tribal people” must be understood as the ability of the Saramaka to “preserve, protect and guarantee the special relationship that [they] have with their territory”, so that “they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected [...]”. That is, the term “survival” in this context signifies much more than physical survival’.

Saramaka Case referring to the issuance of logging and mining concessions – do not amount to a denial of their survival, the state must comply with three additional safeguards.⁴⁵⁷

First, the State must ensure the *effective participation* of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan (...). Second, the State must guarantee that [indigenous peoples] receive a reasonable *benefit* from any such plan within their territory. [Third], the State must ensure that no concession will be issued (...) unless and until independent and technically capable entities, with the State's supervision, perform a prior *environmental and social impact assessment*.⁴⁵⁸

Importantly, the Court declared these safeguards, particularly that on effective participation and benefit sharing, to be aligned with international instruments and practice and state practice.⁴⁵⁹ It also referenced Art. 32 of the UNDRIP, which not only marked the first time that the Declaration was cited by a judicial international human rights body but further implied the conformity of the Court's safeguards with Art. 32 of the UNDRIP.⁴⁶⁰

The Court's findings suggest that the greater and more severe the impact of development activities on indigenous peoples is, the greater is the restriction on states' power to conduct them. It endorses a so-called sliding scale approach to indigenous peoples' participatory rights.⁴⁶¹ As illustrated further below, such an understanding has implications for the interpretation of the requirement of 'effective participation' referring to consultation and FPIC.⁴⁶² Against this background, the *Saramaka Case* is considered a landmark case for indigenous peoples inter alia, further shaping the contours of consultation

⁴⁵⁷ IACtHR, *Case of the Saramaka* paras 128-129. For a comprehensive analysis of the *Saramaka Case* and the safeguards put forward by the IACtHR, see Jacklyn Hartley, 'Constructing a Contextual Model of Indigenous Participation in Decision-Making: A Comparative Analysis' (PhD Thesis, University of New South Wales 2016).

⁴⁵⁸ IACtHR, *Case of the Saramaka* para 129 (emphasis added).

⁴⁵⁹ *ibid* para 130, inter alia referring to Art. 15 ILO, 'C 169' and the work of the HR Committee and the CERD. See also below text to [Fn 719-733](#); *Case of the Kichwa Indigenous People of Sarayaku v Ecuador* (Merits and Reparations) Inter-American Court of Human Rights Series C No. 245 (27 June 2012) para 157.

⁴⁶⁰ Rombouts, 'Evolution' 215; Barelli, 'FPIC in UNDRIP' 258.

⁴⁶¹ See below text to [Fn 614-631](#), [722](#).

⁴⁶² See below text to [Fn 614-631](#); Barelli, 'FPIC in UNDRIP' 251.

and FPIC, building the basis for subsequent judgements on indigenous peoples' rights and influencing developments outside the Inter-American human rights system.⁴⁶³

Another noteworthy development related to state obligations in the realm of development projects is a recent thematic report prepared by the Special Rapporteurship on Economic, Social, Cultural, and Environmental Rights (REDESCA, by its initials in Spanish) of the IACHR.⁴⁶⁴ The report constitutes the first comprehensive instrument in the Inter-American human rights system specifically dealing with and laying out states' obligations in the context of business and human rights under the system's standards and perspective. It also examines potential legal effects that states' obligations may generate for corporations. The report contains a series of recommendations for states and corporations to ensure compliance with the system's standards 'to ensure development with a human rights-based approach'. Importantly, the report lists FPIC as one of the twelve criteria considered fundamental and indispensable for the protection of human rights in the realm of business operations.⁴⁶⁵

(ii) UN SRRIP

Another body that deals extensively with indigenous peoples' rights in the context of development projects is the UN SRRIP. Former SRRIP Anaya, in particular, has addressed this theme in depth in his annual reports focusing especially on the extractive industry.⁴⁶⁶ A main reason for this thematic focus,

⁴⁶³ Hartley 4, 11-15; Rombouts, 'Evolution' 217. On the implementation challenges associated with the Saramaka Judgement, see Anna Meijknecht and Sebastian J Rombouts, 'Protection of Indigenous and Tribal Peoples' Cultural and Environmental Rights in Suriname: Challenges in the Implementation of the Judgement of the Inter-American Court of Human Rights in the Saramaka Case and Subsequent Decisions' in Manuel May Castillo and Amy Strecker (eds), *Heritage and Rights of Indigenous Peoples: Patrimonio y Derechos de Los Pueblos Indigenas* (Leiden University Press 2017). For further detail on the Saramaka Case and the jurisprudence of the IACtHR, see below [Chapter 2, Section III, B.1](#).

⁴⁶⁴ IACHR and REDESCA, 'Informe Sobre Empresas y Derechos Humanos: Estándares Inter-americanos' (2019) <<http://www.oas.org/es/cidh/informes/pdfs/EmpresasDDHH.pdf>> accessed 27 April 2022.

⁴⁶⁵ <https://www.oas.org/en/iachr/media_center/PReleases/2020/014.asp>; <<https://ijr-center.org/2020/02/06/new-inter-american-report-elaborates-on-business-human-rights-standards/>> accessed 24 April 2022.

⁴⁶⁶ HRC, '2011 Report SRRIP'; HRC, '2013 Report SRRIP' Annex para 21. Anaya's successor, SRRIP Victoria Tauli-Corpuz (2014-2020) focused on a thematic analysis of the impact of international investment agreements on the rights of indigenous peoples, which play a significant part in development projects, see HRC, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples' (11 August 2016) UN Doc A/HRC/33/42.

in addition to the sector's invasive nature, lies in 'the existence of conflicting points of view about the practical implications of international standards affirming the rights of [indigenous peoples], and about the kind of measures required to fulfil the responsibilities of States, corporate actors and indigenous peoples themselves'.⁴⁶⁷ This lack of a common understanding poses, according to Anaya, 'a significant barrier to the effective protection of indigenous peoples' rights in the context of natural resource extraction and development affecting them'.⁴⁶⁸ Particularly contentious among the stakeholders (states, indigenous peoples, corporations and NGOs) was the scope of states' duty to consult and the need to obtain FPIC.⁴⁶⁹

Based on several country visits and completed questionnaires, the SRRIP came to the main conclusion that the current model guiding development projects, particularly in the realm of resource extraction, appears inadequate in protecting and securing indigenous peoples' rights.⁴⁷⁰ More often than not, development projects, as promoted by states and corporations, are implemented in the name of the latter two but not the indigenous peoples affected:

It is a model in which the initial plans for exploration and extraction of natural resources are developed by the corporation, with perhaps some involvement by the State, but with little or no involvement of the affected indigenous community or people. The corporation controls the extractive operation and takes the resources and profits from it, with the State gaining royalties or taxes, and indigenous peoples at best being offered benefits in the form of jobs or community development projects that typically pale in economic value in comparison to the profits gained by the corporation. It is a model of colonial overtones, in which indigenous peoples see their territories again encroached upon by outsiders who control aspects of their habitats and take from them, even when done with the promise of corporate social responsibility.⁴⁷¹

Against this background, Anaya called for a new model that is 'fully conducive to the fulfilment of indigenous peoples' rights, particularly their self-determination, proprietary and cultural rights in relation to their affected lands and resources'.⁴⁷² Such a model not only necessitates a broad understanding of the content of indigenous peoples' rights but also compliance by states and cor-

⁴⁶⁷ HRC, '2012 Report SRRIP' paras 45-46; HRC, '2011 Report SRRIP' para 60.

⁴⁶⁸ HRC, '2012 Report SRRIP' paras 45-46; HRC, '2011 Report SRRIP' paras 66-68.

⁴⁶⁹ HRC, '2012 Report SRRIP' para 47.

⁴⁷⁰ HRC, '2011 Report SRRIP' para 82; HRC, '2012 Report SRRIP' para 38.

⁴⁷¹ HRC, '2012 Report SRRIP' para 74.

⁴⁷² HRC, '2013 Report SRRIP' para 4.

porations with their respective duties and responsibilities.⁴⁷³ Furthermore, it requires a model that is more inclusive of indigenous peoples promoting indigenous-controlled resource extraction via indigenous corporations or via partner agreements with non-indigenous corporations and enabling indigenous peoples' participation in the state's strategic planning for development and resource extraction.⁴⁷⁴

Referring to Art. 46(2) of the UNDRIP, the SRRIP reiterates that any limitation or restriction on indigenous peoples' rights – which is particularly likely to occur in the context of natural resource extraction due to its scale and invasive nature – must comply with specific criteria to be legitimate.⁴⁷⁵ In line with the jurisprudence of the IACtHR, the SRRIP points out that limitations must have a 'valid public purpose'. Such valid public purpose, he contends, 'is not found in mere commercial interests or revenue-raising objectives, and certainly not when benefits from the extractive activities are primarily for private gain'.⁴⁷⁶ In addition, limitations must be proportionate and necessary to that purpose. Whether these two criteria are met heavily depends on the rights at stake and their significance for indigenous peoples' survival.⁴⁷⁷

A particular focus, given its relevance in the context of development projects, is on the states' duty to protect against business-related human rights abuses. The SRRIP addressed the duty to protect from both a regulatory and a more substantive point of view. From a regulatory point of view, the SRRIP holds:

In the context of extractive industries, the State's obligation to protect human rights necessarily entails ensuring a regulatory framework that fully recognizes indigenous peoples' rights over lands and natural resources and other rights that may be affected by extractive operations; that mandates respect for those rights both in all relevant State administrative decision-making and in the behaviour of extractive companies; and that provides effective sanctions and remedies when those rights are infringed either by

⁴⁷³ *ibid* paras 5, 12, 52–57. In an earlier report, the SRRIP elaborated on corporations' responsibilities regarding indigenous peoples' rights, see HRC, '2010 Report SRRIP'.

⁴⁷⁴ HRC, '2013 Report SRRIP' paras 8, 10, 49–51. This necessarily requires state support and assistance in the form of programmes or other initiatives, see *ibid* paras 12, 14.

⁴⁷⁵ Art. 46(2) UNGA, 'UNDRIP': 'The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society'. HRC, '2013 Report SRRIP' paras 28, 32.

⁴⁷⁶ HRC, '2013 Report SRRIP' para 35.

⁴⁷⁷ *ibid* para 36.

government or corporate actors. Such a regulatory framework requires legislation or regulations that incorporate international standards of indigenous rights and that operationalize them through the various components of State administration that govern land tenure, mining, oil and gas, and other natural resource extraction or development.⁴⁷⁸

Such a regulatory framework should include regulatory measures with extraterritorial reach.⁴⁷⁹

The SRRIP further addresses certain aspects of the duty to protect from a more substantive point of view. In referencing the *Saramaka Case*, the SRRIP views consultation processes and FPIC, impact assessments, mitigation measures to avoid and minimize impacts, benefit sharing and compensation for impacts as the main safeguards necessary to protect and secure indigenous peoples' substantive rights in the context of development projects.⁴⁸⁰ All of these safeguards, he contends, are 'part of the State duty to protect indigenous peoples' rights in the context of extractive industries, which finds expression in article 32(2) of [the UNDRIP]'.⁴⁸¹ In determining the content and operationalization of these safeguards, the inclusion of indigenous peoples via consultation processes is imperative. Consultation processes serve as the 'channels through which indigenous peoples can actively contribute to the prior [impact assessments]',⁴⁸² the definition of mitigation measures and less harmful alternatives, and measures appropriate to compensate for negative impacts, or tangible benefit sharing agreements.⁴⁸³

Importantly, the SRRIP connects each of these safeguards with specific quality requirements.⁴⁸⁴ Consultation processes need to be fair and adequate.⁴⁸⁵ FPIC must be obtained on fair and equitable terms, 'including terms for compensation, mitigation measures and benefit-sharing in proportion to the impact on the affected indigenous party's rights'.⁴⁸⁶ Impact assessments must be prior

⁴⁷⁸ ibid para 44.

⁴⁷⁹ ibid paras 47-48, 90. See also below text to [Fn 534](#)-539.

⁴⁸⁰ HRC, '2012 Report SRRIP' paras 49, 52, 53; HRC, '2010 Report SRRIP' para 74.

⁴⁸¹ HRC, '2012 Report SRRIP' para 62. On the relationships among these safeguards, see eg Pia Marchegiani, Elisa Morgera and Louisa Parks, 'Indigenous Peoples' Rights to Natural Resources in Argentina: The Challenges of Impact Assessment, Consent and Fair and Equitable Benefit-Sharing in Cases of Lithium Mining' (2020) 24(2-3) *The International Journal of Human Rights* 224.

⁴⁸² HRC, '2013 Report SRRIP' para 59.

⁴⁸³ ibid paras 38, 59, 73; HRC, '2012 Report SRRIP' para 66.

⁴⁸⁴ For more detail regarding consultation and FPIC, see below text to [Fn 632](#)-670.

⁴⁸⁵ HRC, '2013 Report SRRIP' paras 58-60.

⁴⁸⁶ HRC, '2012 Report SRRIP' para 68.

and objective, ie, they must be subjected to independent review or conducted 'free from the control of the promoters of the extractive projects'.⁴⁸⁷ Impact mitigation and prevention measures should be adopted based on impact assessments and 'include mechanisms for participatory monitoring during the life of the project, as well as provide for measures to address project closure'.⁴⁸⁸ Benefit sharing is to be understood as a right arising from the recognition of indigenous peoples' land and resource rights and should therefore not be viewed as an act of (corporate) charity.⁴⁸⁹ Benefit sharing agreements, schemes and mechanisms should thus be fair and equitable.⁴⁹⁰ As illustrated later in this thesis, all these safeguards have implications for corporate responsibility to respect indigenous peoples' rights.⁴⁹¹ Particularly consultation and FPIC processes, benefit sharing and impact assessments have gained momentum as important means for corporations to prevent and minimize (adverse) impacts of their business actions.⁴⁹²

Ten years after the UNDRIP's adoption, former SRRIP Victoria Tauli-Corpuz draws the sobering conclusion that there has been limited progress in the Declaration's actual implementation, particularly concerning indigenous rights to self-determination and to lands, territories and resources.⁴⁹³ Indigenous peoples continue to be dispossessed of their traditional lands and resources and forcibly displaced due to development projects.⁴⁹⁴ She observes a lack of recognition of indigenous peoples and their rights and a lack of adequate implementation of legal instruments and measures aimed at protecting their individual and collective rights.⁴⁹⁵ Often, complaints received by the SRRIP relate to a lack of effective implementation of indigenous peoples' rights to consultation and consent in the context of development projects.⁴⁹⁶ Furthermore, the SRRIP notes with concern a drastic increase in recent years in attacks, acts of violence, and threats against and criminalization of indigenous peoples and their representatives defending their rights in the context of development projects. In these instances, states are the perpetrator or are inactive in pre-

⁴⁸⁷ HRC, '2013 Report SRRIP' para 65.

⁴⁸⁸ *ibid* para 73.

⁴⁸⁹ HRC, '2010 Report SRRIP' paras 76-77, 79; HRC, '2013 Report SRRIP' para 76.

⁴⁹⁰ HRC, '2010 Report SRRIP' para 78.

⁴⁹¹ See below text to [Fn 749-761](#); [Chapter 3, Section II](#) and [Chapter V, Section III](#).

⁴⁹² See eg Jérémie Gilbert, *Natural Resources and Human Rights: An Appraisal* (OUP 2018) 75; Marchegiani, Morgera and Parks; HRC, '2010 Report SRRIP' paras 76-80.

⁴⁹³ UNGA, '2017 Report SRRIP' paras 19, 52-56.

⁴⁹⁴ *ibid* para 53.

⁴⁹⁵ *ibid* paras 53, 56, 89.

⁴⁹⁶ *ibid* para 63.

venting and investigating human rights violations related to non-state actors and ensuring the latter's accountability, thus violating their duty to respect and protect human rights.⁴⁹⁷

(iii) *UN Treaty Bodies: HR Committee, CESC, and CERD*

The ICCPR, ICESCR and ICERD do not expressly refer to indigenous peoples' rights. Nevertheless, over the years since their respective entry into force, the bodies monitoring and promoting their implementation by state parties have interpreted the Covenants' generic provisions – using the UNDRIP *inter alia* as guidance – to ensure the protection of indigenous peoples' rights.⁴⁹⁸ The Human Rights Committee (HR Committee) for its part has addressed indigenous peoples' rights within the scope of Art. 27 of the ICCPR on the rights of minorities. The Committee on Economic, Social and Cultural Rights (CESC) has done so within the scope of Art. 15 of the ICESCR on cultural life and the Committee on the Elimination of Racial Discrimination (CERD) within the general framework of the provision of non-discrimination spanning throughout the ICERD.⁴⁹⁹ As scholarly work shows, indigenous issues have been addressed

⁴⁹⁷ *ibid* para 55. For a comprehensive study, see HRC, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples' (10 August 2018) UN Doc A/HRC/39/17.

⁴⁹⁸ Doyle and Whitmore 57–58; Barelli, 'FPIC in UNDRIP' 258.

⁴⁹⁹ For a comprehensive analysis of the treaty bodies' practices on indigenous peoples, see Dwayne Mamo and others, 'The Indigenous World 2020: 34th Edition' (IWGIA, 2020) 712–724 <https://iwgia.org/images/yearbook/2020/IWGIA_The_Indigenous_World_2020.pdf> accessed 23 April 2022; Saul 54–116; Patrick Thornberry, 'Integrating the UN Declaration on the Rights of Indigenous Peoples into CERD Practice' in Alexandra Xanthaki and Steve Allen (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011) 61–91.

in their decisions on individual communications,⁵⁰⁰ their concluding observations,⁵⁰¹ and their general comments.⁵⁰²

Particularly illustrative for the purposes of this thesis is a study conducted by Doyle and Whitmore on treaty bodies' jurisprudence, including the CERD, CE-SCR and HR Committee.⁵⁰³ Their analysis of the treaty bodies' recommendations under their concluding observations and complaint mechanism between 2007 and 2014 revealed 'a strong trend towards addressing indigenous peoples' rights in the context of subsoil extractive industry operations'.⁵⁰⁴ In this context, the study distilled main themes addressed by the UN treaty bodies.⁵⁰⁵ These themes range from impacts on water and sacred sites,⁵⁰⁶ displacement and forced evictions⁵⁰⁷ to violence, repression and conflict.⁵⁰⁸ Other themes refer to specific safeguards such as consultation and FPIC;⁵⁰⁹ the issue of im-

⁵⁰⁰ See below text to [Fn 683](#)-693.

⁵⁰¹ Consideration of regular reports submitted by state parties is a core function of most UN treaty bodies. At the heart of the review process are concluding observations, which serve as reference points on states' records of implementation. They do not impose any legal obligation on state parties but rather constitute authoritative statements. Additionally, the views and opinions adopted by the treaty bodies in individual complaint procedures are not formally binding but are taken into consideration by judicial bodies and thus have legal significance, see Lutz Oette, 'The UN Human Rights Treaty Bodies: Impact and Future' in Gerd Oberleitner (ed), *International Human Rights Institutions, Tribunals, and Courts* (Springer 2018) 100-101, 104-105.

⁵⁰² HR Committee, 'GC No. 23'; CERD, 'General Recommendation No. 23 on the Rights of Indigenous Peoples' (18 August 1997) UN Doc A/52/18 (Annex V); CESCR, 'General Comment No. 21 on the Right of Everyone to Take Part in Cultural Life (Art. 15, Para. 1(a) ICESCR' (21 December 2009) UN Doc E/C.12/GC/21; CESCR, 'GC No. 24'. The CESCR is currently developing a General Comment dedicated to land and the ICESCR, see <<https://www.ohchr.org/EN/HRBodies/CESCR/Pages/GeneralDiscussionLand.aspx>> accessed 7 April 2022. Legally speaking, General Comments and Recommendations are not binding on state parties nor are they vested with any formal legal status; rather, they represent authoritative interpretations of the provisions of the respective treaties by the treaty bodies, see Oette 103-104.

⁵⁰³ Doyle and Whitmore 57-77.

⁵⁰⁴ *ibid* 58.

⁵⁰⁵ *ibid* 60-61.

⁵⁰⁶ *ibid* 69-70.

⁵⁰⁷ *ibid* 71.

⁵⁰⁸ *ibid* 71-73.

⁵⁰⁹ *ibid* 61-63. See also below [Chapter 2, Section II, B](#).

pact assessments;⁵¹⁰ and restitution, compensation, benefits and redress, inter alia calling on states to ensure access to justice and effective remedies.⁵¹¹

The treaty bodies have continuously referred to the important role of impact assessments in determining the extent to which indigenous peoples' rights may be impacted by development projects, thus serving as important tools to enable indigenous peoples an informed decision-making.⁵¹² To fulfil this role, impact assessments should address environmental, spiritual, cultural, social and human rights impacts, including those relating to water, air and soil quality, health and livelihoods.⁵¹³ Importantly, they should be conducted independently and before any operating licences are issued.⁵¹⁴ Furthermore, states should ensure adequate and culturally appropriate compensation, redress and benefit sharing.⁵¹⁵ For instance, in its concluding observations on Russia in 2011, the CESCR inter alia recommended that the state 'ensure that licensing agreements with private entities provide for adequate compensation of the affected communities.'⁵¹⁶ With a view to benefit sharing, the CESCR, in its 2014 concluding observations on Indonesia, called on the state to:

⁵¹⁰ Doyle and Whitmore 64; CERD, 'Concluding Observations on the 1st to 10th Reports Submitted by Suriname' (28 April 2004) UN Doc CERD/C/64/CO/9 para 15. Taking into account the concerns voiced by indigenous and tribal peoples on natural resource exploitation, the CERD recommended that the state party 'set up an independent body to conduct environmental impact survey before any operating licenses are issued and to conduct health and safety checks on small-scale and industrial gold-mining'.

⁵¹¹ Doyle and Whitmore 64-67; CERD, 'Concluding Observations on the 17th to 20th Reports Submitted by Bolivia' (8 April 2011) UN Doc CERD/C/BOL/CO/17-20 para 20.

⁵¹² Doyle and Whitmore 64.

⁵¹³ *ibid.*

⁵¹⁴ *ibid.* For a recent example, see eg CESCR, 'Concluding Observations on the 4th Report Submitted by Cameroon' (25 March 2019) UN Doc E/C.12/CMR/CO/4 paras 16-18. For an example in 1997, see CERD, 'Concluding Observations on the 10th, 12th, 13th Reports Submitted by Panama' (23 April 1997) UN Doc CERD/C/304/Add.32 para 23, recommending the state party 'to investigate and monitor the impact of the work of mining companies, including foreign ones, (...) on the enjoyment of basic rights by indigenous peoples'.

⁵¹⁵ Doyle and Whitmore 64-65.

⁵¹⁶ CESCR, 'Concluding Observations on the 5th Report Submitted by Russian Federation' (1 June 2011) UN Doc E/C.12/RUS/CO/5 para 7. See also CESCR, 'Concluding Observations on the 3rd Report Submitted by Argentina' (14 December 2011) UN Doc E/C.12/ARG/CO/3 para 9.

Ensure that tangible benefits and their distribution are not left solely to the voluntary policy of corporate social responsibilities of companies, but are also defined in license agreements, in the form of employment creation and improvement of public services for local communities, among others.⁵¹⁷

With the adoption of the UNGPs, Doyle and Whitmore note 'increased treaty body engagement with the issue of extractive corporations' responsibility to respect indigenous peoples' rights' and the duty of states to ensure that this responsibility is met.⁵¹⁸ This engagement is best illustrated in CESCR's General Comment No. 24.⁵¹⁹ Adopted in 2017, General Comment No. 24 sets out states' obligations under the ICESCR in relation to business activities in reference to the UNGPs, particularly to Pillar I.⁵²⁰ It is the second General Comment of a UN treaty body specifically dealing with this theme in a consolidated and comprehensive manner.⁵²¹ Indigenous peoples' rights, particularly their protection in the context of development projects, are a recurring theme throughout the different parts of the General Comment. Indigenous peoples are recognized as part of 'the groups that are often disproportionately affected by the adverse impact of business activities (...) particularly in relation to the development, utilization or exploitation of lands and natural resources'.⁵²²

The General Comment focuses on the duty to protect, referring to it as the most relevant duty in the context of business activities.⁵²³ In this relation, the CESCR starts off reiterating the need for a regulatory framework:

The obligation to protect means that States parties must prevent effectively infringements of economic, social and cultural rights in the context of business activities. This requires that State parties adopt legislative, administrative, educational and other appropriate measures, to ensure effective pro-

⁵¹⁷ CESCR, 'Concluding Observations on the Initial Report Submitted by Indonesia' (19 June 2014) UN Doc E/C.12/IDN/CO/1 para 28.

⁵¹⁸ Doyle and Whitmore 75.

⁵¹⁹ Doyle and Whitmore inter alia refer to General Comment No. 24's predecessor document, the so-called 'Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights' adopted by the CESCR in 2009, see CESCR, 'Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights' (12 July 2011) UN Doc E/C.12/2011/1.

⁵²⁰ CESCR, 'GC No. 24' para 2.

⁵²¹ The first one was issued by the CRD, see CRC, 'General Comment No. 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights' (17 April 2013) UN Doc CRC/C/GC/16.

⁵²² CESCR, 'GC No. 24' paras 8, 9, 12, 17, 24, 38, 46, 48, 52, 56.

⁵²³ *ibid* para 10.

tection against Covenant rights violations linked to business activities, and that they provide victims of such corporate abuses with access to effective remedies.⁵²⁴

Already in 2004, in its concluding observation on Ecuador, the CESCR voiced its deep concern on natural resource extraction by international companies. It recommended 'that the State party implement legislative and administrative measures to avoid violations of environmental laws and rights by transnational companies'.⁵²⁵

Elaborating this rather broad regulatory obligation in more detail, the CESCR lists different sub- measures. Accordingly, states have 'a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence'⁵²⁶ and to impose 'criminal or administrative sanctions and penalties (...) where business activities result in abuses of the Covenant rights or where a failure to act with due diligence to mitigate risks allows such infringements to occur'.⁵²⁷ As part of this positive duty to require human rights due diligence, states should ensure that:

[W]here appropriate, the impacts of business activities on indigenous peoples specifically (in particular, actual, or potential adverse impacts on indigenous peoples' rights to land, resources, territories, cultural heritage, traditional knowledge and culture) are incorporated into human rights impact assessments.⁵²⁸

Moreover, acknowledging that different business contexts come with different human rights risks that may evolve and change over time, '[s]tates parties should regularly review the adequacy of laws and identify and address compliance and information gaps, as well as emerging problems'.⁵²⁹ In the context of development projects, this duty may, for example, entail regularly reviewing whether private companies – to which concessions and licences to operate are

⁵²⁴ ibid para 14.

⁵²⁵ CESCR, 'Concluding Observations on the 2nd Report Submitted by Ecuador' (7 June 2004) UN Doc E/C.12/1/Add.100 paras 12, 35. See also CERD, 'COs Suriname 2004' para 15.

⁵²⁶ CESCR, 'GC No. 24' para 16.

⁵²⁷ ibid para 15. See also CESCR, 'COs Argentina 2011' para 9.

⁵²⁸ CESCR, 'GC No. 24' para 17. See also CERD, 'Concluding Observations on the 17th to 19th Reports Submitted by Ecuador' (22 September 2008) UN Doc CERD/C/ECU/CO/19 para 16: 'The Committee also encourages the State party to ensure that oil companies carry out environmental impact studies in the areas where they plan to begin operations before obtaining licences in accordance with the 2002 Government decree'.

⁵²⁹ CESCR, 'GC No. 24' para 15. The CESCR *inter alia* refers to Principle 17(c) HRC, 'UNGPs'.

issued – are still complying with the related defined requirements. In this context, clearly referring to impact assessments as a safeguard, the CESCR maintains:

States would violate their duty to protect Covenant rights, for instance, by failing to prevent or to counter conduct by businesses that lead to such rights being abused, or that has the foreseeable effect of leading to such rights being abused, for instance (...) by granting exploration and exploitation permits for natural resources without giving due consideration to the potential adverse impacts of such activities on the individual and on communities' enjoyment of the Covenant rights (...).⁵³⁰

Other sub-aspects covered by General Comment No. 24 relate to the alignment of business incentives with human rights responsibilities. This could entail action to 'revoke business licences and subsidies (...) and revise (...) export credits and other forms of State support, privileges and advantages in case of human rights violations'.⁵³¹ Finally, a large part of the General Comment addresses the obligation of states to enable access to remedy, ie, 'by lowering the costs to victims and by allowing forms of collective redress'.⁵³² On several occasions, the CESCR highlights the barriers that indigenous peoples face when seeking remedy.⁵³³

Importantly, the CESCR notes that states' duty to protect arises not only in states' national territory but also outside it in situations over which states may exercise control.⁵³⁴ Applied to the business context, the so-called 'extraterritorial obligation to protect' requires states 'to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control', which is especially pertinent 'in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective'.⁵³⁵ This may involve regulating corporate conduct by imposing

⁵³⁰ CESCR, 'GC No. 24' para 18. See also CESCR, 'GC No. 21' para 50.

⁵³¹ CESCR, 'GC No. 24' para 15.

⁵³² *ibid.* See also HR Committee, 'Concluding Observations on the 6th Report Submitted by Canada' (13 August 2015) UN Doc CCPR/C/CAN/CO/6 para 6.

⁵³³ CESCR, 'GC No. 24' paras 8, 38, 46, 52, 56.

⁵³⁴ *ibid.* para 10.

⁵³⁵ *ibid.* para 30.

direct (due diligence) obligations on corporations domiciled in a state's territory and/or jurisdiction or using measures with indirect extraterritorial effects, such as incentives in public contracts.⁵³⁶

States' extraterritorial obligation to protect in the context of development projects has been addressed repeatedly by treaty bodies.⁵³⁷ The CERD is particularly proactive in this regard,⁵³⁸ calling on states 'to take appropriate legislative measures to prevent transnational corporations registered in [their jurisdictions] from carrying out activities that negatively impact on the enjoyment of rights of indigenous peoples in territories outside [of their jurisdictions], and hold them accountable'.⁵³⁹

The General Comment also directly addresses the corporate responsibility to respect human rights. Referencing the UNGPs, it recognizes the latter as an independent responsibility that 'exists regardless of whether domestic laws exist or are fully enforced in practice'.⁵⁴⁰ Importantly, with a view to indigenous peoples and referencing the UNDRIP, the CESCR calls on corporations to respect the principle of FPIC 'in relation to all matters that could affect their rights, including their lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired'.⁵⁴¹ It notes:

In exercising human rights due diligence, businesses should consult and co-operate in good faith with the indigenous peoples concerned through indigenous peoples' own representative institutions in order to obtain their free, prior and informed consent before the commencement of activities. Such consultations should allow for identification of the potentially negative impact of the activities and of the measures to mitigate and compensate for such impact. They should also lead to design mechanisms for sharing the benefits derived from the activities (...).⁵⁴²

⁵³⁶ ibid para 31. See generally Christine Kaufmann and others, 'Extraterritorialität im Bereich Wirtschaft und Menschenrechte: Extraterritoriale Rechtsanwendung und Gerichtsbarkeit in der Schweiz bei Menschenrechtsverletzungen durch transnationale Unternehmen' (SCHR, 2016) <https://www.skmr.ch/cms/upload/pdf/160815_SKMR_Studie_Extraterritorialitaet.pdf> accessed 22 April 2022.

⁵³⁷ For an overview, see Doyle and Whitmore 76-77.

⁵³⁸ ibid 76.

⁵³⁹ CERD, 'Concluding Observations on the 19th to 20th Reports Submitted by Canada' (4 April 2012) UN Doc CERD/C/CAN/CO/19-20 para 14. See also HR Committee, 'COs Canada 2015' para 6.

⁵⁴⁰ CESCR, 'GC No. 24' para 5.

⁵⁴¹ ibid para 12.

⁵⁴² ibid para 17.

(d) *Interim Conclusion*

The above section has shed light on both the content of the state duty to protect indigenous peoples' rights in the realm of development projects featuring private actors and on the procedures for implementing this duty. In conformity with Pillar I of the UNGPs, pertinent bodies and mechanisms addressing indigenous peoples' rights have emphasized the importance of adopting appropriate measures that mandate and ensure respect for indigenous peoples' rights by corporations, such as legislating mandatory human rights due diligence and redress and sanctions when indigenous peoples' rights are infringed by corporate conduct.⁵⁴³ Consultation and participation procedures, impact assessments, benefit sharing agreements and mitigation and compensation measures are considered essential elements of the duty to protect and are necessary to secure indigenous peoples' substantive rights. The latter safeguards must comply with specific qualitative requirements, and consultation and impact assessments should be conducted prior to the granting of licences and concessions and in consultation with indigenous peoples. Compliance with these safeguards serves as an indication as to whether states have complied with their duty to protect.⁵⁴⁴

The following section examines indigenous peoples' participatory rights as set forth in the UNDRIP in more detail.

3. Participation, Consultation, and FPIC in the UNDRIP

(a) *General Remarks*

Like ILO C 169, the consultation and participation framework of the UNDRIP includes general and more specific provisions.⁵⁴⁵ Art. 18 of the UNDRIP refers to indigenous peoples' general 'right to participate in decision-making in matters which would affect their rights through representatives chosen by themselves in accordance with their own procedures'.⁵⁴⁶ Read together with Arts. 4

⁵⁴³ HRC, 'UNGPs' Principles 1-3.

⁵⁴⁴ UNGA, '2013 Report WGBHR' paras 6-17.

⁵⁴⁵ Altogether, the UNDRIP contains over twenty provisions that relate to indigenous peoples' involvement in decision-making processes on issues of concern to them, see HRC, '2011 Final Report EMRIP' Advice No. 2 para 3. On the different terminology used in the provisions referring to participation, see Rombouts, 'Evolution' 201-202.

⁵⁴⁶ Rombouts, 'Evolution' 201.

and 5 of the UNDRIP,⁵⁴⁷ the provision refers to indigenous peoples' participation in internal and external (state-wide) decision-making processes.⁵⁴⁸ Participation, as exemplified by development projects, is a prerequisite to indigenous peoples' enjoyment of substantive rights and intrinsically linked to their right to self-determination and the crucial concepts of consultation and FPIC.⁵⁴⁹

States' general duty to consult with indigenous peoples is set out in Art. 19 of the UNDRIP, which reads as follows:⁵⁵⁰

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Partially reflecting the language of the corresponding provision Art. 6 of ILO C 169, the difference lies in the Declaration's actual articulation of the FPIC principle.⁵⁵¹ Overall, FPIC is set out in six provisions, five of which address issues of lands, territories, and resources.⁵⁵² This is much more than in ILO C 169, which contains only a precise formulation of FPIC in Art. 16, dealing with indigenous peoples' relocation. Borrowing the words of Barelli: 'It is precisely the explicit affirmation of FPIC, combined with the recognition of the right of Indigenous peoples to self-determination, that makes the Declaration's approach to participatory rights especially innovative' and 'more robust' than those in other instruments, such as ILO C 169.⁵⁵³ For the purposes of this thesis and to shed light on the contours of FPIC, the following section takes a closer

⁵⁴⁷ Arts. 4 and 5 UNGA, 'UNDRIP' referring to indigenous peoples' right to autonomy or self-government in matters concerning their internal and local affairs and to their right to participate in matters of the state, respectively.

⁵⁴⁸ HRC, 'Report of the Expert Mechanism on the Rights of Indigenous Peoples: Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making' (23 August 2010) UN Doc A/HRC/15/35 paras 3-6. Also ILO C 169 distinguishes between internal and external participation, see above text to [Fn 202-203](#).

⁵⁴⁹ HRC, '2009 Report SRRIP' para 37; HRC, '2011 Final Report EMRIP'; Rombouts, *Having a Say* 92-94.

⁵⁵⁰ HRC, '2009 Report SRRIP' para 38.

⁵⁵¹ Art. 6(1a) ILO, 'C 169': '[G]overnments shall consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly'. Art. 6(2) ILO, 'C 169': '[C]onsultations (...) shall be undertaken (...) with the objective of achieving agreement or consent to the proposed measures'.

⁵⁵² Arts. 10, 11(2), 19, 28(2), 29(2), 32(2) UNGA, 'UNDRIP'.

⁵⁵³ Barelli, 'FPIC in UNDRIP' 248. See also above text to [Fn 387](#).

look at Arts. 10, 19, 29(2) and 32(2) of the UNDRIP before referring to the pertinent practices of international and regional human rights bodies in relation to consultation and FPIC.

(b) FPIC in the UNDRIP: Arts. 10, 19, 29(2) and 32(2)

Whilst indigenous peoples view free, prior, and informed consent ‘as a requirement, prerequisite and manifestation of the exercise of their right to self-determination’,⁵⁵⁴ the scope and meaning of FPIC is rather nebulous. The most controversial issue pertains to the letter ‘C’ in FPIC and thus to the question of whether the term ‘consent’ confers on indigenous peoples a veto right concerning matters affecting them and on states a duty to obtain consent or whether it simply describes a method of consultation with indigenous peoples with the aim of finding agreement.⁵⁵⁵

Either way this question is answered, the implications are far reaching. As aptly stated by Barelli, ‘taking part in consultations knowing that one will hardly be able to oppose the outcome of the process in one thing; doing so with the awareness that the final decision might be successfully affected, or even rejected, is quite another’.⁵⁵⁶ Depending on its interpretation, FPIC may thus require – at a minimum – that states consult indigenous peoples in good faith and with the aim of reaching agreement.⁵⁵⁷

Currently, the obligation to consult is regarded as a general principle of international law and undisputed.⁵⁵⁸ The controversy starts where a more expanded interpretation of FPIC is advocated – mostly by indigenous peoples.⁵⁵⁹ This expanded interpretation requires that states obtain indigenous peoples’ consent before implementing or continuing with proposed measures and decisions. Accordingly, previously conducted consultation must lead to an agreement between states and the peoples concerned, and the former should not

⁵⁵⁴ HRC, ‘2010 Progress Report EMRIP’ para 34.

⁵⁵⁵ Barelli, ‘FPIC in UNDRIP’ 248–249, 251, 258.

⁵⁵⁶ *ibid* 251.

⁵⁵⁷ *ibid* 248.

⁵⁵⁸ IACtHR, *Case of the Sarayaku*, para 164; *Case of the Garífuna Community of Triunfo de la Cruz and Its Members v Honduras* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 305 (8 October 2015) para 158; HRC, ‘2009 Report SRRIP’ para 54.

⁵⁵⁹ See eg UNPFII, ‘Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples’ (17 February 2005) UN Doc E/C.19/2005/3 para 42.

act in the absence of such consent.⁵⁶⁰ Such interpretation seems undisputed in the cases of indigenous peoples' relocation (Art. 10 UNDRIP) and storage and disposal of hazardous materials on the lands and territories of indigenous peoples (Art. 29(2) UNDRIP).⁵⁶¹ These actions 'shall [not] take place without the free, prior, and informed consent of the indigenous peoples concerned'.⁵⁶² The two provisions did not cause great debate during the Declaration's negotiations. States generally supported the provisions' rationale to protect indigenous peoples' cultures and lives against these actions with detrimental effects.⁵⁶³

The crux lies with Arts. 19 and 32(2) of the UNDRIP. The two provisions call on states to consult with indigenous peoples 'in order to obtain their consent' 'before adopting and implementing legislative or administrative measures that may affect them' (Art. 19) and before 'the approval of any project affecting their lands or territories and other resources' (Art. 32(2)). Here, the pertinent question is whether the rather vague expression 'in order to obtain their consent' is to be interpreted as requiring actual consent or merely seeking consent of the peoples concerned for the actions foreseen in Arts. 19 and 32(2) of the UNDRIP.⁵⁶⁴ By placing the two provisions in the normative context of the UNDRIP and considering their drafting history, Barelli argues that the expression 'in order to obtain their consent' does not '[impose] upon States an absolute obligation to obtain the consent of Indigenous peoples before implementing a measure or project affecting them'⁵⁶⁵ or vest indigenous peoples with a general veto right.⁵⁶⁶ Furthermore, in light of Arts. 25, 26 and 31(1) of the UNDRIP, acknowledging the vital importance of lands, territories and resources in the lives and cultures of indigenous peoples and Art. 3 recognizing their right to freely pursue their economic, social and cultural development, 'in order to obtain consent' also cannot mean vesting indigenous peoples with a 'mere right to participation' and states with the power to 'indiscriminately implement measures or projects which may have serious negative consequences

⁵⁶⁰ Barelli, 'FPIC in UNDRIP' 248, 251, 268; Doyle, *FPIC* 146-147.

⁵⁶¹ Barelli, 'FPIC in UNDRIP' 254-256. See also below text to [Fn 614-631](#).

⁵⁶² Arts. 10, 29(2) UNGA, 'UNDRIP'.

⁵⁶³ Barelli, 'FPIC in UNDRIP' 255-256.

⁵⁶⁴ *ibid* 252; Doyle, *FPIC* 143-144.

⁵⁶⁵ Barelli, 'FPIC in UNDRIP' 253.

⁵⁶⁶ *ibid* 252-254. See also Errico, 'Natural Resources and Environment' 440. Compared to the final text of Arts. 19 and 32 of the UNDRIP, the 1994 draft Declaration referred to the obligation of states to obtain FPIC, see UNCHR, 'Technical Review of the United Nations Draft Declaration on the Rights of Indigenous Peoples: Draft Declaration as Agreed Upon by the Members of the Working Group at Its Eleventh Session' (20 April 1994) UN Doc E/CN.4/Sub.2/1994/2/Add.1 Arts. 20, 30.

on the lands, culture, and ultimately, lives of Indigenous peoples'.⁵⁶⁷ If this were possible, the indigenous rights framework would be deprived of its very purpose to protect against rights-denying measures.⁵⁶⁸

While there is no coherent uniform practice as further illustrated below,⁵⁶⁹ Barelli argues that within the realm of the UNDRIP's normative framework and the existing practices of judicial and quasi-judicial bodies, a 'flexible approach' towards FPIC has increasingly been adopted at the international level according to which the strength and importance of FPIC depends on the circumstances and the indigenous interests involved.⁵⁷⁰ Aiming to protect indigenous peoples' fundamental rights, the approach affirms that FPIC must be obtained where measures significantly affect indigenous peoples.⁵⁷¹

The following section engages with the legal contours of this flexible approach and examines the elements 'free, prior, and informed consent' in more detail since they inform the manner in which a consultation process should be employed.⁵⁷²

B. Consultation and FPIC in the Work of the UNPFII, SRRIP, and EMRIP

With the UN's engagement with indigenous peoples' issues came the establishment of three bodies: the UNPFII in 2000,⁵⁷³ the SRRIP in 2001,⁵⁷⁴ and the EMRIP in 2007.⁵⁷⁵ Briefly referenced earlier, they are all, given their respective mandates, involved in monitoring and reviewing the UNDRIP's implementa-

⁵⁶⁷ Barelli, 'FPIC in UNDRIP' 253-254, 268.

⁵⁶⁸ *ibid* 254. See also above text to [Fn 430](#)-446.

⁵⁶⁹ Barelli, 'FPIC in UNDRIP' 256, 260, 264; Doyle, FPIC 146-155. See below [Chapter 2, Section II, C](#).

⁵⁷⁰ HRC, '2009 Report SRRIP' para 47.

⁵⁷¹ Barelli, 'FPIC in UNDRIP' 249, 256, 263, 268-269; Mauro Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead' (2012) 16(1) *The International Journal of Human Rights* 1, 17. See also Doyle, FPIC 149-155; below text to [Fn 620](#).

⁵⁷² Barelli, 'FPIC in UNDRIP' 251.

⁵⁷³ ECOSOC, 'Res 2000/22'.

⁵⁷⁴ UNCHR, 'Indigenous Issues'. Since the establishment of the SRRIP in 2011, there have been four Special Rapporteurs: Rodolfo Stavenhagen (2001-2008), followed by James Anaya (2008-2014), Victoria Tauli-Corpuz (2014-2020), Francisco Calí Tzay (since 2020), see <https://www.ohchr.org/en/issues/ipeoples/srindigenouspeoples/pages/sripeo-plesindex.aspx> accessed 24 April 2022.

⁵⁷⁵ HRC, 'Establishment EMRIP'.

tion.⁵⁷⁶ This section will examine their work in relation to consultation and the principle of FPIC as continuing themes since their respective establishment in the past twenty years. Ten years after the adoption of the UNDRIP, the lack and denial of consultation and FPIC, particularly in relation to lands, territories and resources, remains an issue of serious concern according to all three bodies.⁵⁷⁷ The aim of the following section is not to fully describe their work but rather to highlight their pertinent contributions in shaping the contours of consultation and FPIC.

1. Rationale and Normative Grounding of Consultation and FPIC

Throughout their work, the bodies have viewed the duty to consult with indigenous peoples and the principle of FPIC as essential safeguards for the protection of indigenous peoples' substantive rights, including the rights to self-determination and participation; rights to property, religion, culture and non-discrimination in relation to lands, territories and natural resources; rights to health and physical well-being in relation to a clean and healthy environment; and right to set and pursue their own priorities for development.⁵⁷⁸ The rationale of consultation and FPIC, which the bodies consider to derive from indigenous peoples' right to self-determination and related principles of democracy, popular sovereignty and non-discrimination,⁵⁷⁹ is to '[reverse] the historical pattern of exclusion from decision-making, in order to avoid the future imposition of important decisions on indigenous peoples, and to allow them to flourish as distinct communities on lands to which their cultures remain attached'.⁵⁸⁰ Their purpose is to '[strive] for mutual understanding and consensual decision-making' and not to impose the will of one party onto the

⁵⁷⁶ For a brief overview of their respective mandates, see eg Rombouts, 'Evolution' 202-206. On the coordination between the three bodies and their complementary and sometimes overlapping mandates, see UNPFII, 'International Expert Group Meeting on the Theme "Implementation of the United Nations Declaration on the Rights of Indigenous Peoples: the Role of the Permanent Forum on Indigenous Issues and Other Indigenous-Specific Mechanisms (article 42)"' (13 February 2017) UN Doc E/C.19/2017/10.

⁵⁷⁷ ECOSOC, 'Report on the Sixteenth Session (24 April - 5 May 2017): Permanent Forum on Indigenous Issues' (5 May 2017) UN Doc E/2017/43-E/C.19/2017/11 para 9; UNGA, '2017 Report SRRIP' paras 62-64; HRC, 'Report of the Expert Mechanism on the Rights of Indigenous Peoples: Ten Years of the Implementation of the United Nations Declaration on the Rights of Indigenous Peoples: Good Practices and Lessons Learned: 2007-2017' (7 August 2017) UN Doc A/HRC/36/56 para 5.

⁵⁷⁸ See eg HRC, '2020 Report SRRIP' para 49; HRC, '2018 FPIC Study EMRIP' para 13.

⁵⁷⁹ HRC, '2009 Report SRRIP' para 41; HRC, '2018 FPIC Study EMRIP' paras 6-11.

⁵⁸⁰ HRC, '2009 Report SRRIP' para 41.

other.⁵⁸¹ They further serve as a means to redress the power imbalances between indigenous peoples and states.⁵⁸² Special consultation procedures with indigenous peoples in states' decision-making are deemed necessary and justified, since 'the normal democratic and representative processes usually do not work adequately to address the concerns that are particular to indigenous peoples, who are typically marginalized in the political sphere'.⁵⁸³

The bodies also highlight more pragmatic reasons in support of consultation and FPIC. The lack of consultation and FPIC, particularly in the context of development projects, may not only spur social conflict or even violence but also cause project oppositions that could result in the disruption of project operations.⁵⁸⁴ The support and consent of indigenous communities generates a so-called social licence to operate, creating a favourable environment for all parties involved, including corporations.⁵⁸⁵

2. Duty Bearer(s)

In light of the growing understanding that corporations also bear human rights responsibilities, a central question that arises, particularly in the context of development projects, is whose duty it is to consult with indigenous peoples. Is it a responsibility of states or of the corporations promoting and carrying out the project activities? Furthermore, if both actors bear responsibility, the necessary follow-up question is what relationship exists between a state's duty to consult and consultation carried out by corporations considering that the duty to consult is often delegated by states to private corporations.⁵⁸⁶ These questions have been addressed instructively by former SRRIP Anaya.

Throughout his mandate, the SRRIP emphasizes the role of states as the main duty bearers in protecting indigenous peoples' rights. Accordingly, the duty to consult with indigenous peoples is a human rights obligation incumbent primarily upon states.⁵⁸⁷ The main assumption is that as part of their duty to protect, states themselves must 'carry out or ensure adequate consultation' even though a third party, such as a private corporation, is promoting or realizing certain activities and projects.⁵⁸⁸ Importantly, even if the state delegates

⁵⁸¹ *ibid* para 49.

⁵⁸² HRC, '2018 FPIC Study EMRIP' para 11.

⁵⁸³ HRC, '2009 Report SRRIP' para 42.

⁵⁸⁴ HRC, '2011 Report SRRIP' paras 41-43.

⁵⁸⁵ HRC, '2018 FPIC Study EMRIP' para 26.

⁵⁸⁶ HRC, '2013 Report SRRIP' para 61.

⁵⁸⁷ HRC, '2010 Report SRRIP' para 61.

⁵⁸⁸ HRC, '2009 Report SRRIP' para 54. See also HRC, '2010 Report SRRIP' para 67.

operational aspects of its duty to consult and other procedural safeguards to corporations, which is a common practice, the state nevertheless retains what the SRRIP refers to as the 'ultimate responsibility' since such delegation does not absolve states from their duty to consult.⁵⁸⁹ If negotiations and consultation are carried out directly by corporations,⁵⁹⁰ the state remains ultimately responsible for any (operational) inadequacies. This entails the obligation to oversee and evaluate the procedures employed by corporations and the resulting outcomes and to mitigate against power imbalances.⁵⁹¹ As the EMRIP suggests, this could include legislation that requires the operationalization of FPIC and possible sanctions for failing to do so.⁵⁹² The delegation of a state's duty to consult is, according to the SRRIP, particularly problematic 'when there are insufficient or non-existent State regulatory frameworks regarding indigenous rights, including in relation to the protection of lands and resources, consultation and benefit-sharing schemes'.⁵⁹³

However, as indicated above, when carrying out consultation or negotiations, corporations assume responsibilities under their corporate responsibility to respect indigenous peoples' rights independent of states' obligation to consult.⁵⁹⁴ Importantly, in this respect, the SRRIP noted:

In accordance with the responsibility of business enterprises to respect human rights, direct negotiations between companies and indigenous peoples must meet essentially the same international standards governing State consultations with indigenous peoples, including – but not limited to – those having to do with timing, information gathering and sharing about impacts and potential benefits, and indigenous participation. (...) [C]ompanies must (...) exercise due diligence to ensure such compliance (...).⁵⁹⁵

Due diligence requires corporations to ensure that they do not contribute to any act or omission on the part of the states, such as a failure to comply with the safeguards. For instance, if a state fails to consult with indigenous peoples,

⁵⁸⁹ HRC, '2009 Report SRRIP' para 55. See also HRC, '2011 Report SRRIP' para 63; HRC, '2010 Report SRRIP' para 61; HRC, '2013 Report SRRIP' para 61.

⁵⁹⁰ 'By virtue of their right to self-determination, indigenous peoples are free to enter into negotiations directly with companies if they so wish'. See HRC, '2013 Report SRRIP' para 61.

⁵⁹¹ *ibid* para 62; HRC, '2018 FPIC Study EMRIP' para 56. See also below text to [Fn 743](#).

⁵⁹² HRC, '2018 FPIC Study EMRIP' Annex para 4.

⁵⁹³ HRC, '2011 Report SRRIP' para 63.

⁵⁹⁴ HRC, '2013 Report SRRIP' para 62. See also HRC, '2018 FPIC Study EMRIP' Annex para 4; Text to Fn 31.

⁵⁹⁵ HRC, '2013 Report SRRIP' para 62.

corporations should refrain from commencing activities. They also should not simply assume that consultation processes were conducted prior to the granting of a concession.⁵⁹⁶

Interestingly, the SRRIP appeared more critical of such direct corporate negotiations and consultation in its earlier reports than in his subsequent ones. In his first report, he noted that they may be undesirable and problematic because corporations are principally profit-oriented,⁵⁹⁷ and in his final report, he argued that they may even be ‘the most efficient and desirable way of arriving at agreed-upon arrangements (...) that are fully respectful of indigenous peoples’ rights, and they may provide indigenous peoples opportunities to pursue their own development priorities’.⁵⁹⁸

3. Consultation and FPIC: Substantive Dimension

(a) *Notions of FPIC*

As indicated earlier, FPIC is conceptualized by UN bodies as a safeguard that helps realize indigenous peoples’ substantive rights, particularly their right to self-determination.⁵⁹⁹ From this, the following notions of FPIC are derived: as a requirement to be met by states and thus as an obligation of states,⁶⁰⁰ as a right to give or withhold consent and thus as a human rights norm vis-à-vis the state;⁶⁰¹ and as a principle and a standard to be complied with by third parties, including corporations, and thus as a good business practice to help ensure respect for indigenous peoples’ rights.⁶⁰² Having touched upon the notion of FPIC as a duty of states in the previous sections and in more detail in the sections below, the following elaborations briefly focus on the notion of FPIC as a right. The notion of FPIC as a principle that corporations should observe as part of their responsibility to respect indigenous peoples’ rights will be covered in [Chapters 3](#) and [5](#) of this thesis.

One of the first recognitions of the right to FPIC can be found in a report of the first SRRIP Rodolfo Stavenhagen, who noted that indigenous peoples’ right to FPIC entails the ‘right to say no’ in relation to large-scale development pro-

⁵⁹⁶ HRC, ‘2010 Report SRRIP’ para 65.

⁵⁹⁷ HRC, ‘2009 Report SRRIP’ para 55.

⁵⁹⁸ HRC, ‘2013 Report SRRIP’ para 61.

⁵⁹⁹ See eg HRC, ‘2018 FPIC Study EMRIP’ paras 6-8.

⁶⁰⁰ HRC, ‘2011 Final Report EMRIP’ Advice No. 2 para 23; Doyle, FPIC 133-134.

⁶⁰¹ HRC, ‘2018 FPIC Study EMRIP’ paras 2-3; Doyle, FPIC 132-134.

⁶⁰² HRC, ‘2018 FPIC Study EMRIP’ paras 49-50; HRC, ‘2013 Report SRRIP’ para 89; CESCR, ‘GC No. 24’ para 17; Doyle, FPIC 134-135.

jects.⁶⁰³ Such an understanding has been affirmed by the UNPFII⁶⁰⁴ and the EMRIP, emphasizing the need for recognition that ‘the right to self-determination of indigenous peoples constitutes a duty for States to obtain indigenous people’s [FPIC], not merely to be involved in decision-making processes, but a right to determine their outcomes’.⁶⁰⁵ The EMRIP clarified that the right to determine and influence the outcome of a decision-making process includes the ‘right to give and withhold consent’ and the more proactive right to suggest alternative proposals and models in relation to the consultation process as such.⁶⁰⁶ Consent may be withheld in different situations for different reasons, including inadequacies in the process or distrust. However, FPIC should not be viewed as a right to veto since this would not be in line with the rationale of consultation and FPIC, which is the genuine integration of indigenous peoples in consensual decision-making.⁶⁰⁷ Rather, ‘[w]ithholding consent is expected to convince the other party not take the risk of proceeding with the proposal’.⁶⁰⁸ This finds further support in the former SRRIP’s statement ‘that neither consultation nor consent is an end in itself, nor are consultation and consent stand-alone rights’.⁶⁰⁹ Hence, consultation and FPIC cannot be abstracted from the rights that they aim to protect.⁶¹⁰

⁶⁰³ UNCHR, ‘2003 Report Stavenhagen’ paras 13, 66; Doyle, FPIC 132.

⁶⁰⁴ UNPFII, ‘Workshop on FPIC’ para 48.

⁶⁰⁵ HRC, ‘2011 Final Report EMRIP’ Advice No. 2 para 34. See also HRC, ‘2018 FPIC Study EMRIP’ para 15.

⁶⁰⁶ HRC, ‘2018 FPIC Study EMRIP’ paras 15, 25. See also HRC, ‘2011 Final Report EMRIP’ Advice No. 2 para 23; HRC, ‘2009 Report SRRIP’ para 46; HRC, ‘2012 Report SRRIP’ para 66; Doyle, FPIC 134. Doyle argues a right of indigenous peoples to FPIC is also affirmed by the CERD, CESCR, HR Committee and the IACtHR, see Doyle, FPIC 132.

⁶⁰⁷ HRC, ‘2018 FPIC Study EMRIP’ para 26; HRC, ‘2009 Report SRRIP’ paras 46, 48. See also Rombouts, *Having a Say* 87, at 171: ‘[P]erceiving FPIC as an “all or nothing” concept is not in line with the spirit of the UN Declaration and the international indigenous peoples’ movement in general, because their aim is to establish lasting and respectful relations between indigenous peoples and States. FPIC is about a genuine chance to influence the decision making process’.

⁶⁰⁸ HRC, ‘2018 FPIC Study EMRIP’ para 26.

⁶⁰⁹ HRC, ‘2012 Report SRRIP’ para 49.

⁶¹⁰ Doyle, FPIC 132–133, 144.

(b) Material Scope

(i) Obligation to Consult

The duty to consult with indigenous peoples applies ‘whenever a State decision may affect indigenous peoples in a way not felt by others in society’ and ‘whenever their particular interests are at stake’.⁶¹¹ Depending on the context, it may involve broader consultation or narrower consultation with indigenous groups that are particularly affected by a specific activity.⁶¹² Importantly, in relation to indigenous peoples’ land and resource rights (Arts. 25 and 26 UNDRIP), this means that the duty to consult applies irrespective of whether their rights are already recognized or they hold legal entitlement to these lands.⁶¹³

(ii) Obligation to Obtain FPIC: Sliding Scale Approach

As indicated earlier, the ‘consent’ element, particularly its scope, has sparked the greatest controversy. However, over the years, the ‘consent’ element has witnessed greater clarification by UN bodies. Former SRRIP Anaya argued that FPIC, as stipulated in the UNDRIP, is not to be interpreted as vesting indigenous peoples with a general veto power over decisions that may impact them; rather, consent should be the objective of a consultation process.⁶¹⁴ Importantly, the SRRIP did not just leave it at that; instead, he pointed out that ‘the strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved’.⁶¹⁵ He noted: ‘A significant, direct impact on indigenous peoples’ lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples’ consent’.⁶¹⁶ This presumption, he argued, turns into a prohibition in the cases of relocation (Art. 10 UNDRIP) and storage or disposal of hazardous waste (Art. 29 UNDRIP) and applies as a general rule in the case of extractive projects within indigenous territories in which the requirements of proportionality and necessity would hardly be met if such projects were to take place in indigenous territories without their consent.⁶¹⁷ Furthermore, depending on the nature of the potential impacts of a proposed activity on in-

⁶¹¹ HRC, ‘2009 Report SRRIP’ paras 43–44, 63.

⁶¹² *ibid* para 45.

⁶¹³ *ibid* para 44.

⁶¹⁴ *ibid* paras 46, 48.

⁶¹⁵ *ibid* para 47.

⁶¹⁶ *ibid*.

⁶¹⁷ *ibid*; HRC, ‘2013 Report SRRIP’ paras 27–30, 36.

indigenous peoples' rights, consent may also be required when extractive activities otherwise affect indigenous peoples, ie, outside their territories or in near proximity.⁶¹⁸ In the words of the SRRIP:

Where the rights implicated are essential to the survival of indigenous groups and foreseen impacts on the rights are significant, indigenous consent to those impacts is required, beyond simply being an objective of consultations. It is generally understood that indigenous peoples' rights over lands and resources in accordance with customary tenure are necessary to their survival. Accordingly, indigenous consent is presumptively a requirement for those aspects of any extractive project taking place within the officially recognized or customary land use areas of indigenous peoples, or that otherwise affect resources that are important to their survival.⁶¹⁹

The EMRIP, for its part, citing the work of the SRRIP and the jurisprudence of the IACtHR, adopts a similar understanding, noting that FPIC should 'be obtained in matters of fundamental importance for [indigenous peoples'] rights, survival, dignity and well-being'.⁶²⁰ Importantly, the EMRIP addresses the factors that need to be considered to assess whether a matter is fundamentally important. In this context, the EMRIP emphasizes the need to give priority to indigenous peoples' perspectives in determining whether there is an impact and in assessing its extent.⁶²¹ Other relevant factors that need to be considered relate to the nature, scale, duration, and long-term impact of the activity and considerations of the cumulative effects of previous activities or encroachments and historical injustices faced by the affected communities.⁶²² In this context, the EMRIP notes further: '[I]f a measure or project is likely to have a significant, direct impact on indigenous peoples' lives or land, territories or resource then consent is required'.⁶²³

The approach taken by the SRRIP and EMRIP is referred to as a 'sliding scale approach' to indigenous peoples' participatory rights.⁶²⁴ Most elaborately em-

⁶¹⁸ HRC, '2013 Report SRRIP' paras 27, 31, 45; HRC, '2018 FPIC Study EMRIP' para 32. See also Doyle, FPIC 140.

⁶¹⁹ HRC, '2012 Report SRRIP' para 85.

⁶²⁰ HRC, '2011 Final Report EMRIP' Advice No. 2 para 22. See also HRC, '2018 FPIC Study EMRIP' para 33.

⁶²¹ HRC, '2018 FPIC Study EMRIP' paras 33-34; HRC, '2012 Report SRRIP' para 66. See also Doyle, FPIC 94, 156-157.

⁶²² HRC, '2018 FPIC Study EMRIP' paras 33-35; HRC, '2011 Final Report EMRIP' para 22.

⁶²³ HRC, '2018 FPIC Study EMRIP' para 35. See also HRC, '2012 Follow-Up Report EMRIP' para 27.

⁶²⁴ HRC, '2018 FPIC Study EMRIP' para 35; HRC, '2009 Report SRRIP' para 47; Barelli, 'FPIC in UNDRIP' 262-263.

braced by the IACtHR,⁶²⁵ the approach is based on the assumption 'that the level of effective participation is essentially a function of the nature and content of the rights and activities in question'.⁶²⁶ In other words, the more significant the impact on indigenous peoples' cultures and lives is, the stronger the need for more rigorous protection of their participatory rights, namely, not just to seek but also to obtain indigenous peoples' FPIC.⁶²⁷ According to the sliding scale approach, the extent of a state's obligation concerning indigenous participatory rights is based on the degree of the impact of its action(s) on indigenous peoples.⁶²⁸ Therefore, depending on the degree of impact of a proposed action, the principle of FPIC may turn from an objective into a required outcome and the obligation of states from an obligation of process into one of result where the outcome of the process must be respected.⁶²⁹ Doyle therefore speaks of procedural and substantive aspects of FPIC.⁶³⁰

As referred to earlier, currently, the ILO does not support and employ such an approach to FPIC. In contrast, the EMRIP and SRRIP advocate for a sliding scale approach to FPIC and the alignment of the ILO's approach with their more progressive understanding in line with Art. 35 of ILO C 169.⁶³¹

⁶²⁵ IACtHR, *Case of the Saramaka* para 137. In examining consultation and FPIC, the EMRIP and SRRIP draw on the IACtHR's interpretation on effective participation in the *Saramaka Case*, see HRC, '2012 Report SRRIP' para 65; HRC, '2018 FPIC Study EMRIP' para 35. See also Hartley 12-14; Barelli, 'Developments' 17; Doyle, FPIC 146, 149-150.

⁶²⁶ Gaetano Pentassuglia, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective* (Brill Nijhoff 2009) 116.

⁶²⁷ Characterized by Barelli as a 'flexible approach' to FPIC, see Barelli, 'FPIC in UNDRIP' 256, 258, 260-261, 263, 269; Barelli, 'Developments' 14, 17. Hartley refers to an 'impact-based, contextual approach to FPIC', see Hartley 1-15. Similarly Doyle, FPIC 146, 149-159; Rombouts, *Having a Say* 159-160, 192.

⁶²⁸ Hartley 4, 11; Barelli, 'FPIC in UNDRIP' 260-261; Doyle, FPIC 149-155, at 149: '[T]he extent of the requirement to obtain consent is a function of the degree of impact of the proposed activity'.

⁶²⁹ Doyle, FPIC 144-146, at 144: 'Consultations which have the purpose of seeking consent only imply a procedural guarantee. Irrespective of their outcome, the purpose is satisfied by the act of seeking consent. By contrast, consultations with a purpose of obtaining consent embody both elements of an obligation of conduct and an obligation of result'. See also Cabrera Ormaza 146, 202; Barelli, 'Developments' 2.

⁶³⁰ Doyle, FPIC 131. See also HRC, '2018 FPIC Study EMRIP' paras 47-48.

⁶³¹ HRC, '2018 FPIC Study EMRIP' paras 46-48; UNGA, '2017 Report SRRIP' para 78. See also Cabrera Ormaza 205.

4. Consultation and FPIC: Procedural Dimension

(a) *Fair and Adequate Consultation*

Given varying contexts and national circumstances, the UNDRIP does not prescribe a specific way that consultation should be carried out. Nevertheless, as stipulated in Arts. 19 and 32(2) of the UNDRIP, good faith consultation through indigenous peoples' representative institutions is a prerequisite for any agreement with indigenous peoples. This has been reaffirmed and clarified further by the UN bodies, depicting good faith consultation and full and equitable participation of indigenous peoples 'as crucial components of a consent process'.⁶³² For consultation to be in good faith, consultation processes must comply with certain core elements.⁶³³

As a starting point, there needs to be consensus on the design and implementation of the consultation process as such.⁶³⁴ If indigenous peoples decline to enter into consultation, 'states should not insist, or allow companies to insist, that indigenous peoples engage in consultations'.⁶³⁵ Furthermore, consultations should not be confused with public hearings on certain issues.⁶³⁶ Consultation should be carried out with no time pressure and prior to the exploration phase and the authorization of any activity, throughout the project cycle.⁶³⁷ Consultation processes require a climate of confidence, trust and mutual respect.⁶³⁸ To create such a climate and ensure equal and meaningful debating opportunities, consultation should address existing power imbalances, including in financial and technical resources, access to information and relevant education, with states establishing mechanisms providing financial, technical and other assistance, such as negotiation capacity.⁶³⁹

⁶³² UNPFII, 'Workshop on FPIC' paras 47-48. See also HRC, '2013 Report SRRIP' para 58; HRC, '2018 FPIC Study EMRIP' para 16; HRC, '2020 Report SRRIP' para 48.

⁶³³ HRC, '2009 Report SRRIP' para 46.

⁶³⁴ *ibid* para 51.

⁶³⁵ HRC, '2013 Report SRRIP' para 25.

⁶³⁶ HRC, '2018 FPIC Study EMRIP' Annex para 6.

⁶³⁷ HRC, '2013 Report SRRIP' paras 67-69; HRC, '2018 FPIC Study EMRIP' para 15.

⁶³⁸ HRC, '2009 Report SRRIP' para 50.

⁶³⁹ *ibid* paras 50-51; HRC, '2012 Report SRRIP' para 67; UNPFII, 'Workshop on FPIC' para 48; HRC, '2013 Report SRRIP' paras 63-64, at 64: 'Practical measures to address power imbalances could include, inter alia, employing independent facilitators for consultations or negotiations, establishing funding mechanisms that would allow indigenous peoples to have access to independent technical assistance and advice, and developing standardized procedures for the flow of information to indigenous peoples regarding both the risks and potential benefits of extractive projects'.

Additionally and importantly, indigenous peoples should be consulted and able to 'participate through their own and freely chosen representatives and customary or other institutions'⁶⁴⁰ with due regard for their own decision-making processes as this 'is the best way of ensuring broad community support'.⁶⁴¹ Furthermore, indigenous communities for their part are urged to create, clarify, or even revise their own institutions and representative structures to be inclusive of all perspectives and to facilitate consultation processes.⁶⁴²

(b) 'Free', 'Prior', 'Informed', 'Consent'

In its first sessions, the UNPFII, in acknowledging that there is no formal official definition of the principle of FPIC, identified the application of the principle as a 'major methodological challenge', which ultimately led to a workshop taking place in 2005.⁶⁴³ Attended by representatives of states, the UN and other intergovernmental organizations as well as experts from indigenous organizations, the workshop resulted in a report presented the same year.⁶⁴⁴ The workshop's main purpose was to set out the current understanding of FPIC and provide methodologies for how FPIC should be respected.⁶⁴⁵

Most importantly, included remarks on the practical understanding of FPIC. In light of national and international policies, jurisprudence and practices, the report concluded that 'progress has been made towards a common understanding of the methodologies regarding [FPIC]'.⁶⁴⁶ This common understanding in relation to FPIC's elements was presented as follows:

Free should imply no coercion, intimidation or manipulation.

Prior should imply that consent has been sought sufficiently in advance of any authorization or commencement of activities and that respect is shown for time requirements of indigenous consultation/consensus processes.

Informed should imply that information is provided that covers (at least) the following aspects:

⁶⁴⁰ UNPFII, 'Workshop on FPIC' para 47.

⁶⁴¹ HRC, '2013 Report SRRIP' para 70.

⁶⁴² HRC, '2009 Report SRRIP' para 52. The inclusion of a gender perspective and the participation of women, children and persons with disabilities is deemed important, see UNPFII, 'Workshop on FPIC' para 47; HRC, '2018 FPIC Study EMRIP' Annex, paras 11, 14.

⁶⁴³ UNPFII, 'Workshop on FPIC' para 1.

⁶⁴⁴ *ibid* paras 2-4.

⁶⁴⁵ *ibid* paras 12-13.

⁶⁴⁶ *ibid* para 40.

The nature, size, pace, reversibility and scope of any proposed project or activity;

The reason(s) for or purpose(s) of the project and/or activity;

The duration of the above;

The locality of areas that will be affected;

A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle;

Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others);

Procedures that the project may entail.

Consent⁶⁴⁷

Giving consent to an agreement implies, according to the report that 'indigenous peoples have reasonably understood it'.⁶⁴⁸ This requires that the information provided is 'accurate and in a form that is accessible and understandable, including in a language that the indigenous peoples will fully understand'.⁶⁴⁹ Furthermore, '[t]he format in which information is distributed should take into account the oral traditions of indigenous peoples and their languages'.⁶⁵⁰

In dissecting FPIC, the report thus comprehensively indicates how FPIC processes should be conducted to be meaningful. As exemplified in development projects, an FPIC process is viewed as a continuous process beginning as early as possible and continuing throughout the project cycle and not simply as a onetime event.⁶⁵¹ This common understanding of FPIC presented by the report has not lost its relevance. Several other bodies have engaged with the different elements and phases of FPIC, adopting viewpoints in line with those adopted at the workshop.⁶⁵²

For instance, the EMRIP recently presented a study on the current understanding of FPIC in light of interpretations and practices developed after the adoption of the UNDRIP in 2007.⁶⁵³ The study's section on the elements of

⁶⁴⁷ *ibid* para 46.

⁶⁴⁸ *ibid* para 48.

⁶⁴⁹ *ibid*.

⁶⁵⁰ *ibid*.

⁶⁵¹ HRC, '2018 FPIC Study EMRIP' para 21.

⁶⁵² Rombouts, *Having a Say* 112. For a brief summary, see Barelli, 'FPIC in UNDRIP' 250-251.

⁶⁵³ HRC, '2018 FPIC Study EMRIP'.

FPIC reiterates the views in the UNPFII report but addresses certain aspects of FPIC's elements in more detail.⁶⁵⁴ For instance, in terms of a 'free' process, the study specifies that '[i]ndigenous peoples should have the freedom to guide and direct the process of consultation'.⁶⁵⁵ Practically, this encompasses their consultation on the consultation process itself and the possibility for them to develop and use their own protocols on consultation, which pave the way for a smooth consultation process.⁶⁵⁶ This speaks of an emerging trend where a growing number of indigenous peoples worldwide are formalizing their own engagement rules and procedures in the form of consultation and FPIC guidelines and protocols.⁶⁵⁷ Similarly, FPIC processes should be monitored and evaluated on a regular basis.⁶⁵⁸ In terms of an 'informed' process, the study clarifies that the information provided should be sufficient in terms of quality and quantity as well as clear, accurate and objective. Furthermore, indigenous peoples' representative institutions should be provided with adequate resources and capacity in a manner that does not interfere with their independence.⁶⁵⁹ Last, the steps of an FPIC process should be documented, and consent agreements, treaties or contracts should include detailed statements on the project.⁶⁶⁰

In addition to being incorporated into the practices of pertinent bodies and courts, the principle of FPIC has also received increased attention in scholarly works contributing to its demystification.⁶⁶¹ In light of the UNPFII's report, Rombouts engages in an extensive and detailed examination of the elements of FPIC.⁶⁶² He refers to the elements 'free' and 'informed' as the 'two key pillars of successful FPIC processes' that 'safeguard the validity of consent'.⁶⁶³ He argues that disrespect for these elements, such as coercive and threatening actions, misinforming indigenous peoples and disregarding their communication and information cultures, is often the reason for the failure of participation and consultation processes.⁶⁶⁴ In relation to the 'free' element, he concludes that

⁶⁵⁴ ibid paras 20-30.

⁶⁵⁵ ibid para 20.

⁶⁵⁶ ibid para 20, Annex para 9.

⁶⁵⁷ ibid para 57; Doyle, FPIC 157; Cathal M Doyle and others, 'Free Prior Informed Consent Protocols as Instruments of Autonomy: Laying Foundations for Rights Based Engagement' (INFOE/ENIP, 2019) <<https://enip.eu/FPIC/FPIC.pdf>> accessed 22 April 2022.

⁶⁵⁸ HRC, '2018 FPIC Study EMRIP' para 45.

⁶⁵⁹ ibid para 22.

⁶⁶⁰ ibid para 44.

⁶⁶¹ Doyle, FPIC; Rombouts, *Having a Say*; Doyle and Cariño.

⁶⁶² Rombouts, *Having a Say* 112-160.

⁶⁶³ ibid 141.

⁶⁶⁴ ibid 138, 141, 143.

respect for this element requires a process where the interaction between the parties is 'discourse friendly' and where indigenous peoples dispose of 'discursive control'.⁶⁶⁵ With regard to the 'informed' element, he contends that it 'entails more than informational disclosure about a certain proposition'.⁶⁶⁶ Respect for this element requires 'effective communication and commitments between the parties'.⁶⁶⁷ Accordingly, the focus is on not only the disclosure of information but also how this information is communicated.⁶⁶⁸ Parties must 'share a language', and the process of informing must be guided by 'accuracy and honesty'.⁶⁶⁹ He concludes that '[a] balanced, culturally appropriate model of adequate communication is vital for successful communicative transactions in FPIC processes'.⁶⁷⁰

C. Consultation and FPIC: The Practices of the CERD, HR Committee, and CESCR

1. CERD

As indicated earlier, consultation and FPIC are also recurring themes addressed by the three UN treaty bodies.⁶⁷¹ The CERD refers to indigenous peoples' equal rights in terms of effective participation and was the very first treaty body to affirm 'that no decisions directly relating to the rights and interest [of indigenous peoples] are taken without their informed consent'.⁶⁷² This strong position has been reiterated in various subsequent concluding observations by the CERD emphasizing states' obligation to consult with indigenous peoples at an early stage and throughout the different stages of extractive processes and to obtain FPIC in relation to extractive projects before their implementation.⁶⁷³ However, on other occasions, the CERD is more nuanced in its practices regarding FPIC, calling on states to 'endeavour to obtain' or 'seek'

⁶⁶⁵ ibid 138-141.

⁶⁶⁶ ibid 166. In his detailed examination of the 'informed' element, Rombouts draws on the work of, inter alia, Neil C Manson and Onora O'Neill, *Rethinking Informed Consent in Bioethics* (CUP 2007).

⁶⁶⁷ Rombouts, *Having a Say* 165 (emphasis omitted).

⁶⁶⁸ ibid 165.

⁶⁶⁹ ibid (emphasis omitted).

⁶⁷⁰ ibid.

⁶⁷¹ See eg Doyle, *FPIC* 126-127.

⁶⁷² CERD, 'GR No. 23' para 4; Doyle and Whitmore 61.

⁶⁷³ CERD, 'COs Ecuador 2008' para 16. For an overview, see eg Mamo and others 713-716; Barelli, 'FPIC in UNDRIP' 260; Doyle and Whitmore 61; Rombouts, *Having a Say* 200-202; Thornberry, 'CERD Practice'.

FPIC *inter alia* in line with ILO C 169 or to ensure respect for indigenous peoples' right to FPIC.⁶⁷⁴ The CERD also addresses indigenous peoples' 'capacity to effectively represent their interests in decision-making processes' and challenges the imposition of second voting processes where indigenous peoples have already voted against a specific measure.⁶⁷⁵

Particularly noteworthy is a decision issued by the CERD in December 2019 regarding three large-scale development projects in Canada under its Early Warning and Urgent Action Procedure.⁶⁷⁶ The pertinent projects are the 670-kilometre Coastal GasLink pipeline, the Trans Mountain Pipeline Expansion, and the Site C Dam, all currently under construction.⁶⁷⁷ All three projects are a source of conflict between the indigenous communities affected and the government of Canada allegedly culminating in forced removal, disproportionate use of force and harassment and intimidation against indigenous communities peacefully opposing these projects.⁶⁷⁸

In its two-page statement, the CERD expresses its deep concern 'by [Canada's] refusal to consider free, prior and informed consent as a requirement for any measure, such as large-scale development projects, that may cause irreparable harm to indigenous peoples' rights, culture, lands, territories and way of life'. In this context, the Committee urges Canada to immediately stop the construction of the projects and to cancel all related permits until FPIC is obtained from all the indigenous communities affected pursuant to 'the full and adequate discharge of the duty to consult'. Furthermore, Canada is urged to 'to freeze present and future approval of large-scale development projects (...) that do not enjoy [FPIC] from all indigenous peoples affected'. Last, the CERD recommends

⁶⁷⁴ See eg CERD, 'Concluding Observations on the 16th to 18th Reports Submitted by Lao People's Democratic Republic' (13 April 2012) UN Doc CERD/C/LAO/CO/16-18 para 17; CERD, 'Concluding Observations on the 10th to 14th Reports Submitted by Colombia' (28 August 2009) UN Doc CERD/C/COL/CO/14 para 20; Barelli, 'FPIC in UNDRIP' 260.

⁶⁷⁵ CERD, 'COs Lao People's Democratic Republic 2012' para 17; Doyle and Whitmore 63.

⁶⁷⁶ CERD, 'Prevention of Racial Discrimination, Including Early Warning and Urgent Action Procedure: Canada' (Advance Unedited Version, 13 December 2019) Decision 1 (100). In 1994, the CERD declared preventive measures, including early warning and urgent procedures as part of its regular agenda. The former is aimed at preventing existing problems and situations from escalating into conflict while urgent procedures are directed to responding to problems requiring immediate attention to prevent or limit the number or scale of serious violations of the ICERD, see <<https://www.ohchr.org/EN/HRBodies/CERD/Pages/EarlyWarningProcedure.aspx>> accessed 24 April 2022.

⁶⁷⁷ For a detailed description of the projects, see Mamo and others 570-574.

⁶⁷⁸ CERD, 'Decision 1 (100) Canada'.

that Canada 'establish, in consultation with indigenous peoples, a legal and institutional framework to ensure adequate consultation with the view to obtain [FPIC] regarding all legislation affecting indigenous peoples'.⁶⁷⁹

Despite the CERD's partially nuanced approach to FPIC,⁶⁸⁰ this example combined with the wording of General Comment No. 23 suggests a strong affirmation of FPIC as an essential requirement in the context of projects and measures that have a significant and direct impact on indigenous peoples' lives. In such situations, states should not proceed with their projects and measures absent indigenous peoples' consent, which suggests that the CERD employs a sliding scale approach to FPIC.⁶⁸¹ This approach is reinforced by the Committee's wording in relation to legislative measures affecting indigenous peoples (presumably having less significant impact), suggesting that FPIC need not necessarily be obtained for legislation to be adopted.⁶⁸²

2. HR Committee

The HR Committee for its part has addressed the issue of FPIC in light of the right to self-determination and cultural rights as enshrined in Arts. 1 and 27 of the ICCPR, arguing that the enjoyment of these rights may require measures that ensure the 'effective participation of members of minority communities in decisions which affect them'.⁶⁸³ It instructively elaborated on the meaning of 'effective participation' in the individual communications of *Länsman and Others v Finland* (*Länsman Case*) decided in 1994 and 1996 and *Ángela Poma Poma v Peru* (*Ángela Poma Poma Case*) in 2009.⁶⁸⁴ In the former case, the Committee reviewed the decision of the Finnish Central Forestry Board to allow stone quarrying in a reindeer-herding area that is home to a Saami community alleging a violation of their right to enjoy their own culture under Art. 27 of the ICCPR.⁶⁸⁵ Similarly, in the second case, the Committee addressed the Peruvian state's drilling of wells on and diversion of ground water from the land of an

⁶⁷⁹ *ibid.*

⁶⁸⁰ Barelli, 'FPIC in UNDRIP' 260-261.

⁶⁸¹ See also Barelli, 'Developments' 6-7.

⁶⁸² CERD, 'Decision 1 (100) Canada'. See also Doyle, *FPIC* 146, 148.

⁶⁸³ HR Committee, 'GC No. 23' para 7.

⁶⁸⁴ *Ilmari Länsman et al v Finland*, Communication No. 511/1992 (8 November 1994) UN Doc CCPR/C/52/D/511/1992; *Jouni E. Länsman et al v Finland*, Communication No. 671/1995 (22 November 1996) UN Doc CCPR/C/58/D/671/1995; *Ángela Poma Poma v Peru*, Communication No. 1457/2006 (24 April 2009) UN Doc CCPR/C/95/D/1457/2006.

⁶⁸⁵ *Ilmari Länsman et al v Finland* paras 3.1, 9.1; *Jouni E. Länsman et al v Finland* paras 2.1, 10.1.

indigenous community, which allegedly violated their right to enjoy their culture, as the water was essential for their traditional activities of grazing and raising alpacas and llamas.⁶⁸⁶

In determining whether such activities conformed with Art. 27 of the ICCPR, the Committee examined two interrelated criteria, namely, the 'severity' of the impacts on the way of life of the indigenous communities and the latter's 'effective participation' in the relevant decision-making processes. With regard to the first criterion, the Committee noted that measures amounting to a denial of the rights enshrined in Art. 27 would be incompatible with this article, while measures with only a limited impact would not necessarily amount to a denial.⁶⁸⁷ With a view to 'effective participation', the Committee affirmed the duty of states to consult with indigenous peoples.⁶⁸⁸ Furthermore, in the *Ángela Poma Poma Case*, the Committee affirmed the requirement of FPIC for measures with a substantive negative impact:

[T]he admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members.⁶⁸⁹

In the *Ángela Poma Poma Case*, the Committee found that Peru had violated Art. 27 of the ICCPR for four interrelated reasons: First, the indigenous community affected has never been consulted; second, the state had not ensured the undertaking of an impact assessment; third, the state had not taken measures to minimize and redress the harm; and fourth, the indigenous community was no longer able to benefit from their traditional economic activity. In the Committee's view, this substantively compromised the way of life and culture of the indigenous community.⁶⁹⁰

⁶⁸⁶ *Ángela Poma Poma v Peru* para 7.1.

⁶⁸⁷ *ibid* para 7.4; *Ilmari Länsman et al v Finland* para 9.4.

⁶⁸⁸ *Ilmari Länsman et al v Finland* para 9.6; *Jouni E. Länsman et al v Finland* para 10.5; *Ángela Poma Poma v Peru* paras 7.6-7.7. See also Rombouts, *Having a Say* 19, 80.

⁶⁸⁹ *Ángela Poma Poma v Peru* para 7.6.

⁶⁹⁰ *ibid* para 7.7.

In the *Länsman Case*, the Committee considered Finland's action in line with Art. 27 of the ICCPR since consultations with the Saami community had taken place, their interests were considered during the proceedings, and the amount of stone quarrying had only a limited impact on their way of life and culture.⁶⁹¹

Against this background, it is argued that the Committee's findings can be interpreted as implying that FPIC must be obtained prior to taking measures that will have a substantive impact on indigenous peoples' rights in line with a sliding scale approach to FPIC.⁶⁹² However, such understanding is less obvious when looking at the Committee's approach to FPIC in its concluding observations, where the Committee 'has thus far refrained from addressing the specific circumstances which would trigger the necessity to obtain consent'.⁶⁹³

3. CESCR

The CESCR has addressed the issue of FPIC in light of the right to culture as enshrined in Art. 15(1a) of the ICESCR.⁶⁹⁴ In its General Comment No. 21 on Art. 15(1a), the CESCR, while referring to Art. 6 of ILO C 169 and Art. 19 of the UNDRIP, calls on states to 'respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights'.⁶⁹⁵ This is reiterated by the CESCR in General Comment No. 24 on state obligations in the context of business activities.⁶⁹⁶ However, in listing the participation of indigenous peoples in the design and implementation of laws and policies affecting them as a core obligation of states to ensure enjoyment of the right to culture, the Committee uses more straightforward language, specifying: 'In particular, States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk'.⁶⁹⁷ The CESCR also addresses FPIC in its concluding observations, calling on states to 'effectively' consult with indigenous peoples and to 'seek FPIC' or to 'fulfil the obligation to obtain FPIC' before granting licences to corporations for eco-

⁶⁹¹ *Ilmari Länsman et al v Finland* para 9.6.

⁶⁹² Barelli, 'FPIC in UNDRIP' 259-261; HRC, '2018 FPIC Study EMRIP' para 35.

⁶⁹³ Barelli, 'FPIC in UNDRIP' 259. For an overview of the Committee's work on indigenous peoples, see eg Mamo and others 718-720; Rombouts, *Having a Say* 199 at footnote 789; Doyle, *FPIC* 153-155.

⁶⁹⁴ For a broad overview, see Mamo and others 716-718.

⁶⁹⁵ CESCR, 'GC No. 21' para 37.

⁶⁹⁶ CESCR, 'GC No. 24' para 12.

⁶⁹⁷ CESCR, 'GC No. 21' para 55(e).

conomic activities.⁶⁹⁸ On other occasions, the CESCR calls on states to ensure that indigenous peoples are 'consulted with a view to obtaining their FPIC' for any measures which may affect them.⁶⁹⁹

Despite the nuances in the Committee's language when referring to FPIC, it is argued that the CESCR's specification of FPIC in General Comment No. 21 can be taken to suggest that where preservation of indigenous peoples' cultural resources is threatened, obtaining FPIC is a necessity. This would be a similar understanding to that of the HR Committee and CERD.⁷⁰⁰

D. Interim Conclusion

The previous sections have analysed the two central safeguards of consultation and FPIC in more detail. Both are firmly recognized throughout the UNDRIP's provisions and distilled from pertinent provisions of international human rights covenants. Several bodies have examined the legal contours of consultation and FPIC, shedding light on the safeguards' scopes and substantive and procedural dimensions. FPIC is seen as the most far-reaching,⁷⁰¹ but also the most controversial principle enshrined in the UNDRIP. Over the years since the Declaration's adoption, the pertinent bodies referred to above have maintained that the principle of FPIC should not be interpreted as vesting indigenous peoples with a general veto right; rather, the scope of FPIC depends on the circumstances and the interests of the indigenous peoples involved. It is generally accepted that acquiring indigenous peoples' consent is the objective of a consultation process. However, as the above elaborations suggest, the more significant the impact on indigenous peoples' way of life is, the more the FPIC principle may turn from an objective into a required outcome – that is, certain proposed measures and projects should not move forward absent the FPIC of the indigenous peoples concerned. Such understanding has been labelled the 'sliding scale' or 'flexible approach' to FPIC, gaining increased acceptance at the international level.

The obligation to consult and seek or obtain FPIC in a manner that allows for genuine integration of indigenous peoples in consensual decision-making is an obligation of states, but operational aspects of the obligation may be delegated

⁶⁹⁸ See eg CESCR, 'Concluding Observations on the 4th and 5th Reports Submitted by Angola' (15 July 2016) UN Doc E/C.12/AGO/CO/4-5 para 20; CESCR, 'COs Argentina 2011' para 9. For an overview, see eg Barelli, 'FPIC in UNDRIP' 260; Doyle and Whitmore 61-63; Rombouts, *Having a Say* 203.

⁶⁹⁹ CESCR, 'COs Cameroon 2019' para 13.

⁷⁰⁰ Barelli, 'FPIC in UNDRIP' 260; Doyle, FPIC 146; HRC, '2018 FPIC Study EMRIP' para 35.

⁷⁰¹ Rombouts, *Having a Say* 73.

to third actors, including corporations. If operationalized by third actors, the state retains the ultimate responsibility to ensure that the process of consultation and FPIC is conducted in an adequate manner.

III. Consultation and FPIC in the Jurisprudence of the IACtHR

The most detailed elaboration of the FPIC principle was developed by the IACtHR in its landmark case the *Saramaka People v Suriname* in 2007 in connection to the safeguard of effective participation.⁷⁰² For many years, both the IACtHR and IACHR have applied and interpreted the pertinent regional standards that they oversee in an evolutive and dynamic way to respond to claims brought by indigenous peoples focusing predominantly on issues relating to their land and resource rights and related norms of participation, consultation and FPIC.⁷⁰³ Importantly, in doing so, the IACtHR has deemed it ‘useful and appropriate to resort to other international treaties, aside from the [ACHR], such as [ILO C 169]’ as the more specialized law.⁷⁰⁴ In particular, the application and interpretation of the right to property as enshrined in Art. 21 of the ACHR has proven to be one of the most important avenues through which the two human rights bodies have protected indigenous peoples.⁷⁰⁵ As Saul argues,

⁷⁰² Barelli, ‘FPIC in UNDRIP’ 257; Rombouts, *Having a Say* 206–208, 220.

⁷⁰³ For an overview of the case law of the IACHR and IACtHR, see <<https://www.oas.org/en/iachr/indigenous/decisions/iachr.asp>> accessed 24 April 2022. For a comprehensive analysis of the latter bodies’ practices in relation to indigenous peoples, see eg Saul 132–159; Rombouts, *Having a Say* 224–225, 230–296; Luis Rodríguez-Piñero, ‘The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples: Mutual Reinforcement’ in Alexandra Xanthaki and Steve Allen (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing 2011). On the evolutive and dynamic approach, particularly regarding the IACtHR, see eg Rombouts, *Having a Say* 224–230, 314–315, at 227: ‘The Court (...) perceives human rights treaties as “living instruments” and therefore an evolutionary approach towards interpretations is needed’.

⁷⁰⁴ *Case of the Yakye Axa Indigenous Community v Paraguay* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No. 125 (17 June 2005) para 127; IACtHR, *Case of the Saramaka* para 92; Saul 132.

⁷⁰⁵ Saul 134; above text to [Fn 453](#). For a progressive and evolutive interpretation of Art. 26 of the ACHR, see the recent judgement of the IACtHR in the *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v Argentina* (Merits, Reparations, and Costs) Inter-American Court of Human Rights Series C No. 400 (6 February 2020); Maria A Tigre, ‘Inter-American Court of Human Rights Recognizes the Right to a Healthy Environment’ (2020) 24(14) *American Society of International Law Insights* <<https://www.asil.org/insights/volume/24/issue/14/inter-american-court-human-rights-recognizes-right-healthy-environment>> accessed 21 April 2022.

their regional jurisprudence has brought greater clarification not only to the regional standards but also to the international standards to which they resorted.⁷⁰⁶ Against this background, the IACtHR and the IACHR are considered two of the most authoritative human rights bodies dealing with indigenous peoples' issues.⁷⁰⁷

The main objective of this section is to shed light on the IACtHR's understanding of the 'effective participation' safeguard, particularly the element of FPIC. Before delving into the Court's interpretation in more detail, its institutional setting, mandate, and interpretative approach will briefly be examined.

A. Institutional Setting and Mandate of the IACtHR

With the signing of the OAS Charter in 1948,⁷⁰⁸ the states of America created the Organization of American States (OAS), one of the oldest regional organizations.⁷⁰⁹ Currently, all thirty-five states of the Americas are members of the OAS and have ratified its Charter.⁷¹⁰ In addition to the Charter, the member states adopted the American Declaration of the Rights and Duties of Man (ADHR) the same year. This meant the formal establishment of the Inter-American Human Rights System (IAHRS), to which the ACHR, the other main instrument governing the IAHRS, as well as other protocols and conventions on specialized themes, were added.⁷¹¹ For instance, in June 2016, the OAS adopted the ADRIP, considered the regional counterpart to the UNDRIP.⁷¹² The Inter-American instruments are overseen by the IACHR⁷¹³ and the IACtHR, established in

⁷⁰⁶ Saul 132-133.

⁷⁰⁷ Rombouts, 'Evolution' 211; Rombouts, *Having a Say* 314.

⁷⁰⁸ OAS, 'Charter of the Organization of American States' (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3.

⁷⁰⁹ <http://www.oas.org/en/about/who_we_are.asp> accessed 24 April 2022.

⁷¹⁰ <http://www.oas.org/en/sla/dil/inter_american_treaties_A-41_charter_OAS_signatures.asp> accessed 24 April 2022.

⁷¹¹ <<https://www.oas.org/en/iachr/mandate/what.asp>> accessed 24 April 2022; <<https://www.oas.org/en/iachr/mandate/Basics/intro.asp>> accessed 24 April 2022.

⁷¹² Stefania Errico, 'The American Declaration on the Rights of Indigenous Peoples' (2017) 21(7) *American Society of International Law Insights* <<https://www.asil.org/insights/volume/21/issue/7/american-declaration-rights-indigenous-peoples>> accessed 22 April 2022; Rodríguez-Piñero 458.

⁷¹³ The IACHR serves as a consultative organ of the OAS. Its work rests on the following three pillars: an individual petition system, monitoring of the human rights situations in the member states, and attention devoted to priority thematic areas, see <<https://www.oas.org/en/iachr/mandate/what.asp>> accessed 24 April 2022; Saul 132-133.

1959 and 1979, respectively, the two principal bodies mandated to protect and promote human rights in the Americas.⁷¹⁴ In 1990, a Special Rapporteur on the Rights of Indigenous Peoples was created.⁷¹⁵

The IACtHR is the autonomous judicial organ of the IAHRs based in Costa Rica. The Court has contentious jurisdiction over any case concerning an alleged violation of the ACHR and any other protocols to which a state is party and may issue advisory opinions and order provisional measures. However, the Court can only decide cases concerning states that have accepted the Court's competence to hear contentious cases and only when these cases are submitted to the Court by the IACHR or state parties.⁷¹⁶ The Court's final decisions are binding on state parties. Currently, twenty states have recognized the Court's contentious jurisdiction.⁷¹⁷

B. Effective Participation: Consultation and FPIC

1. Saramaka People v Suriname

As referenced earlier, in the *Saramaka Case* concerning Suriname's granting of logging and mining concessions to private corporations within Saramaka territory, the IACtHR established three safeguards with which a state must comply to ensure that any proposed activity restricting indigenous peoples' enjoyment of their rights does not amount to a denial of their very survival.⁷¹⁸ One of these three safeguards is the obligation to ensure the 'effective participation of the members of the [indigenous community] in conformity with their customs and traditions regarding any development, investment, exploration or extraction plan (...) within [their] territory'.⁷¹⁹ The Court viewed the safeguard

⁷¹⁴ <https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en> accessed 24 April 2022.

⁷¹⁵ <<https://www.oas.org/en/iachr/indigenous/mandate/Functions.asp>> accessed 24 April 2022.

⁷¹⁶ <https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en> accessed 24 April 2022.

⁷¹⁷ This includes the following state parties: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, and Uruguay, see <https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en> accessed 3 July 2022.

⁷¹⁸ IACtHR, *Case of the Saramaka* paras 124, 129.

⁷¹⁹ *ibid* para 129.

of 'effective participation' to be in line with other international instruments, including Art. 15(2) of ILO C 169 and Art. 32 of the UNDRIP yet deemed it important to further clarify the scope and nature of consultation, noting that:⁷²⁰

[I]n ensuring the effective participation of members of the Saramaka people in development or investment plans within their territory, the State has a duty to actively consult with said community according to their customs and traditions. This duty requires the State to both accept and disseminate information, and entails constant communication between the parties. These consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement. Furthermore, the Saramakas must be consulted, in accordance with their own traditions, at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community, if such is the case. Early notice provides time for internal discussion within communities and for proper feedback to the State. The State must also ensure that members of the Saramaka people are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily. Finally, consultation should take account of the Saramaka people's traditional methods of decision-making.⁷²¹

The Court continued by examining the relation between consultation and FPIC, introducing its sliding scale approach to FPIC as follows:

[T]he Court considers that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions.⁷²²

In its subsequent interpretation of the judgement, the Court clarified that FPIC is also required in situations where the cumulative effects of small-scale projects resemble those of large-scale projects.⁷²³

With regard to Suriname's standpoint that neither consultation with the Saramakas nor their consent was necessary in relation to the concessions since the latter did not affect traditional sites, the Court argued that 'the question

⁷²⁰ *ibid* paras 130-132; Rombouts, 'Evolution' 215. This alignment has recently garnered further support with the adoption of the ADRIP, which, in Art. 29(4), uses the terminology of Art. 32(2) of the UNDRIP, see Barelli, 'FPIC in UNDRIP' 258.

⁷²¹ IACtHR, *Case of the Saramaka* para 133.

⁷²² *ibid* paras 134, 137.

⁷²³ IACtHR, *Case of the Saramaka* Interpretation paras 17, 41. See also Barelli, 'FPIC in UNDRIP' 258.

for the State is not whether to consult with the Saramaka people, but whether the State must also obtain their consent',⁷²⁴ that is, whether the state must recognize and ensure the right of indigenous peoples to give or withhold their FPIC.⁷²⁵

Upon Suriname's subsequent request to shed further light on whom a state must consult to ensure effective participation, the Court held that this is for the indigenous community to 'determine, in accordance with their customs and traditions, which tribe members are to be involved [or which person or group of persons will represent the people] in such consultations'.⁷²⁶ In terms of what must be the subject of consultation, the Court ordered Suriname at a minimum to consult with the Saramakas on the following issues:

(1) the process of delimiting, demarcating and granting collective title over the territory of the Saramaka people; (2) the process of granting the members of the Saramaka people legal recognition of their collective juridical capacity, pertaining to the community to which they belong; (3) the process of adopting legislative, administrative, and other measures as may be required to recognize, protect, guarantee, and give legal effect to the right of the members of the Saramaka people to the territory they have traditionally used and occupied; (4) the process of adopting legislative, administrative and other measures necessary to recognize and ensure the right of the Saramaka people to be effectively consulted, in accordance with their traditions and customs; (5) regarding the results of prior environmental and social impact assessments, and (6) regarding any proposed restrictions of the Saramaka people's property rights, particularly regarding proposed development or investment plans in or affecting Saramaka territory.⁷²⁷

On the relation between consultation and FPIC, the Court thus endorsed the view that consultation is always mandatory and that obtaining FPIC becomes mandatory with projects that will have a significant impact on indigenous peoples, such as large-scale development or investment projects, as well as where the cumulative effects of small-scale projects resemble those of large-scale projects.⁷²⁸ It also instructively demonstrated the interconnectedness and overlap of consultation processes and environmental and social impact assessments where the latter not only help ensure an informed consulta-

⁷²⁴ IACtHR, *Case of the Saramaka* paras 147.

⁷²⁵ *ibid* 194(d).

⁷²⁶ IACtHR, *Case of the Saramaka* Interpretation paras 15, 18.

⁷²⁷ *ibid* para 16.

⁷²⁸ *ibid* paras 17, 41; Barelli, 'FPIC in UNDRIP' 258; Doyle, FPIC 151, 155–156.

tion process but also play an important role in determining whether impacts amount to a threat to the survival of indigenous peoples triggering the requirement of FPIC.⁷²⁹

This latter point touches upon the main challenges inherent to a sliding scale approach to FPIC, namely, what projects are classified as large-scale or small-scale, when do (cumulative) activities and measures amount to a significant impact and who has a say in determining the latter.⁷³⁰ While further clarification with respect to these challenges is certainly needed, the Saramaka judgment suggests that in the context of large-scale development and investment projects, major impacts on indigenous peoples are assumed.⁷³¹ In turn, the FPIC requirement is not triggered in the context of small-scale projects where no major impact is assumed.⁷³² Regarding the assessment of what amounts to a major or significant impact, it is suggested that indigenous peoples' views have priority.⁷³³

2. Kichwa Indigenous People of Sarayaku v Ecuador

This understanding of effective participation was upheld by the Court in its 2012 decision in the *Case of the Kichwa Indigenous People of Sarayaku v Ecuador* (Sarayaku Case) concerning oil exploitation by private foreign corporations.⁷³⁴ In examining whether Ecuador had complied with the safeguard of effective participation when granting oil concessions, the Court elaborated further on the implementation of an adequate consultation process. Importantly, in doing so, the Court reiterated the practice of the ILO and UNDRIP supervisory bodies.⁷³⁵

Based on its previous decisions, the Court deemed the following requirements essential in consultation processes: Consultation must be conducted in advance and throughout the implementation of a project;⁷³⁶ consultation should be conducted in good faith, ie, without coercion and undue influence or ne-

⁷²⁹ IACtHR, *Case of the Saramaka* Interpretation para 41. On impact assessments and FPIC, see generally Hanna and Vanclay.

⁷³⁰ Doyle, FPIC 155-159; Barelli, 'Developments' 15; Hartley 5, 86-144.

⁷³¹ IACtHR, *Case of the Saramaka* Interpretation para 17; Doyle, FPIC 151; Barelli, 'Developments' 17.

⁷³² Doyle, FPIC 149; Barelli, 'Developments' 14, 17.

⁷³³ Doyle, FPIC 156-159. See also above text to [Fn 621](#).

⁷³⁴ IACtHR, *Case of the Sarayaku* paras 2, 177, 300. For a summary of the case, see eg Rom-bouts, 'Evolution' 217-218. IACtHR, *Case of the Garífuna Community* is a further example.

⁷³⁵ IACtHR, *Case of the Sarayaku* paras 180-187.

⁷³⁶ *ibid* paras 180-184.

gotiations with individual members and with the objective of reaching agreement,⁷³⁷ consultation must be adequate and accessible, ie, it must be in line with the indigenous peoples' own models, forms and traditions of decision-making as there is no one-size-fits-all procedure and there must be a procedure that takes into account national circumstances and those of the indigenous peoples.⁷³⁸ It reiterated that knowing potential project risks requires a continuous process of communication and the implementation of environmental and social impact assessments.⁷³⁹ Crucially, the Court held that the states' duty to consult must be regarded as a general principle of international law.⁷⁴⁰

The *Sarayaku Case* thus shed further light on the contours of consultation within the safeguard system established by the Court. This was not its sole contribution, however. The case also bore implications from a business and indigenous peoples' rights perspective, shedding some light on corporations' involvement in consultation processes. In assessing Ecuador's compliance with its duty to 'guarantee the Sarayaku People's right to consultation', the Court deemed it necessary to determine 'whether the actions of the concessionaire company (...) satisfy the minimum standards and essential requirements of a valid consultation process'.⁷⁴¹ Applying the established consultation requirements to the case at hand, the Court found that none had been complied with by the state of Ecuador or by the private corporation. Consultations with the indigenous community were not undertaken in advance, in good faith and with the aim of reaching agreement, or in an informed, appropriate, and accessible manner for the following reasons.⁷⁴²

The Court noted that Ecuador did not carry out any type of consultation at any stage of the project but instead inappropriately delegated the consultation process to the private oil corporation carrying out resource exploitation without observing, supervising, monitoring or participating in the process to safeguard the rights of the Sarayaku People.⁷⁴³ By promoting the execution of oil exploration, Ecuador contributed to a climate of 'conflict, division, and confrontation between the indigenous communities of the area',⁷⁴⁴ rather than one

⁷³⁷ *ibid* paras 185-200.

⁷³⁸ *ibid* paras 201-203.

⁷³⁹ *ibid* paras 204-207, 208-210.

⁷⁴⁰ *ibid* para 164.

⁷⁴¹ *ibid* para 178.

⁷⁴² *ibid* paras 178, 184, 199-200, 211, 232.

⁷⁴³ *ibid* paras 184, 187-189, 199, 203.

⁷⁴⁴ *ibid* para 198.

of respect conducive to reaching agreement.⁷⁴⁵ This climate was exacerbated by the oppressive presence of the corporation's private security and public security, including the Ecuadorian military and national police in the exploitation area, to ensure oil operations.⁷⁴⁶ Against this background, the Court conclude that 'by failing to consult the Sarayaku People on the execution of a project that would have a direct impact on their territory, [Ecuador] failed to comply with its obligations (...) to guarantee the participation of the Sarayaku People'⁷⁴⁷ in the decision-making affecting their rights to communal property and cultural identity, thus violating these rights and the right to consultation.⁷⁴⁸

A particular concern of the Court was that consultation was carried out by the same corporation performing oil explorations.⁷⁴⁹ In the Court's view, the oil corporation had used fraudulent methods to obtain signatures of support from members of the indigenous community by offering money and other economic benefits and failed to respect the community's political structure *inter alia* by negotiating directly with some members of the community.⁷⁵⁰ Against this background, the Court concluded that the corporation's actions could not be considered consultation in good faith or accessible and adequate consultation since they did not involve genuine dialogue and were not aimed at reaching agreement.⁷⁵¹

Given the close link between an informed consultation process and environmental impact assessments, the Court also assessed compliance with the latter safeguard. It concluded that the environmental impact plan was not implemented according to relevant international standards and the requirements established in its case law. The plan was prepared and implemented by a private corporation subcontracted by the oil corporation without state supervision and participation by the community, and without considering the potential social, spiritual and cultural impacts of the planned exploitation activities on the community.⁷⁵² As a result, the Court concluded that 'the company's actions did not form part of an informed consultation', since they did not provide

⁷⁴⁵ *ibid* paras 193, 197-199.

⁷⁴⁶ *ibid* paras 190-193, 210.

⁷⁴⁷ *ibid* para 232.

⁷⁴⁸ *ibid* paras 211, 232, 341.

⁷⁴⁹ *ibid* paras 187-188.

⁷⁵⁰ *ibid* paras 194, 196, 203.

⁷⁵¹ *ibid* paras 200, 203.

⁷⁵² *ibid* para 207.

the community with the necessary environmental impact information, allow them to discuss the process, or inform them of the advantages and disadvantages of the development project in relation to their way of life and culture.⁷⁵³

3. Kaliña and Lokono Peoples v Suriname

Also noteworthy from a business and indigenous peoples' rights perspective, particularly with a view to social and environmental impact assessments involving corporations, is the *Case of the Kaliña and Lokono Peoples v Suriname* (Kaliña and Lokono Case) decided by the IACtHR in November 2015.⁷⁵⁴ Similar to the *Sarayaku Case*, the IACtHR had to examine mining operations conducted by private companies adversely impacting the Kaliña and Lokono peoples.⁷⁵⁵ Since Suriname failed to ensure an independent social and environmental impact assessment prior to the start of bauxite mining and to supervise the subsequent assessment, which was conducted without the participation of the communities by a private entity subcontracted by the mining corporation, the Court found Suriname in violation of the latter safeguard and ultimately of its duty to protect the Kaliña and Lokono peoples' right to collective property (Art. 21 ACHR).⁷⁵⁶ It reiterated that supervising such assessments goes hand in hand with ensuring effective participation of indigenous peoples in the assessments, thus noting the interlinkage between the safeguards of effective participation and prior environmental and social impact assessments and the duty to provide for them.⁷⁵⁷

The case was significant in two respects. First, the Court's assessment marked the first time in its case law history when it made explicit reference to the UNGPs and their three pillars.⁷⁵⁸ Without elaborating further, the Court noted that the UNGPs 'establish that businesses must respect and protect human rights, as well as prevent, mitigate, and accept responsibility for the adverse human rights impacts directly linked to their activities.'⁷⁵⁹ Gonza argues that this statement indicates 'that there is room for the Court to go beyond the UNGPs and interpret the Convention as requiring corporations to respect and

⁷⁵³ *ibid* paras 209.

⁷⁵⁴ *Case of the Kaliña and Lokono Peoples v Suriname* (Merits, Reparations, Costs) Inter-American Court of Human Rights Series C No. 309 (25 November 2015).

⁷⁵⁵ *ibid* paras 222-223.

⁷⁵⁶ *ibid* paras 216, 226, 230, 290.

⁷⁵⁷ *ibid* para 215.

⁷⁵⁸ Alejandra Gonza, 'Integrating Business and Human Rights in the Inter-American Human Rights System' (2016) 1(2) *Business and Human Rights Journal* 357, 363.

⁷⁵⁹ IACtHR, *Case of the Kaliña and Lokono* paras 224-225.

protect' human rights.⁷⁶⁰ Second, and also constituting a novelty, the Court called on Suriname to establish 'the necessary mechanisms to monitor and supervise the execution of the rehabilitation by the company', thus placing the obligation to rehabilitate the affected territories on Suriname 'in conjunction with the company'.⁷⁶¹

C. Interim Conclusion

In a similar vein to the SRRIP and other pertinent UN bodies addressing indigenous peoples' rights, the IACtHR employs a sliding scale approach to indigenous peoples' participatory rights. Consultation is seen by the Court as a general principle of international law, with which a state must always comply. However, in the case of large-scale development or investment projects, which, in the Court's view, usually generate major impacts on indigenous peoples, consultation must result in obtaining the concerned indigenous peoples' consent. The same applies to small-scale projects, whose cumulative effects resemble those of large-scale projects.

Importantly, in concluding that neither the state nor the private corporation had satisfied the requirements of consultation with the Kichwa indigenous peoples, the Court's examination provided insight into not only the state duty to protect but also the corporate responsibility to respect indigenous peoples' rights. Similar to the SRRIP,⁷⁶² the Court maintained that where corporations are involved in the process of consultation and FPIC, the state has the obligation to oversee corporations' involvement and ensure the adequacy of the processes conducted. The same applies to the operationalization and implementation of social and environmental impact assessments. The Court's conclusions in the *Sarayaku Case* and the *Kaliña and Lokono Case* indicate that a state's failure to do so constitutes a state's non-compliance with the requirements of consultation and ultimately with its duty to protect against adverse corporate conduct. The Court's course of action to examine the private corporation's actions in light of the established consultation requirements addressed to states suggests that corporations should fulfil the latter requirements. In other words, and in line with the SRRIP,⁷⁶³ the Court does not apply a lower standard for consultation requirements where corporations are involved in such consultation.

⁷⁶⁰ Gonza 364 (emphasis added).

⁷⁶¹ IACtHR, *Case of the Kaliña and Lokono* para 290. See also Gonza 364.

⁷⁶² See above text to [Fn 587-591](#).

⁷⁶³ HRC, '2013 Report SRRIP' para 62.

IV. Conclusion

Indigenous peoples' individual and collective rights are recognized in several international human rights instruments and most comprehensively articulated in the two key instruments, ILO C 169 and the UNDRIP. This chapter has examined the legal contours and understanding of indigenous peoples' collective rights, including their right to self-determination; right to participation and consultation; and rights to lands, territories, and resources, as interpreted and put forward by pertinent bodies addressing indigenous peoples' rights. The chapter has shown that indigenous peoples' participatory rights as well as land and resource rights form the cornerstone of their recognized set of rights upon which the enjoyment of other rights is based.

Safeguards for Indigenous Peoples' Rights Due to the basic and inextricable link between indigenous peoples' identity, customs, culture, and existence to the lands that they traditionally occupy and use, land means more to indigenous peoples than a commodity, possession, or means of production. The key instruments recognize not only this strong bond but also the strong need to protect indigenous peoples' land and resource rights. They firmly acknowledge that the basis for indigenous peoples' land and resource rights lies in the traditional occupation and use of these lands (customary land tenure) and not in the formal recognition and registration of their ownership by the state in which they reside. This approach and understanding appears particularly important given the lacking or insufficient protection of these rights in national regulatory frameworks.⁷⁶⁴

Via participation, consultation, and FPIC processes, indigenous peoples can make their voices heard. These processes serve as important safeguards for the protection of their rights in decision-making and development plans affecting them. However, their participatory rights, particularly in relation to their lands and resources, spark the greatest controversy due to conflicting interests among states, corporations and indigenous peoples concerning the purpose and use of these lands and resources, the participatory rights' practical implications and the measures required by states to fulfil their obligations regarding these rights. Hand in hand with this controversy goes a lack of recognition, effective implementation and protection of indigenous peoples' rights.⁷⁶⁵

Contentiously debated is the scope of states' obligation to consult with indigenous peoples, ie when to obtain their FPIC in the context of development af-

⁷⁶⁴ Gilbert, *Land Rights* 247.

⁷⁶⁵ See above text to [Fn 466](#)–474, [493](#)–497.

fecting them. As illustrated by this chapter, the ILO appears to take a less progressive stance towards this thorny issue than the pertinent UN bodies as well as the IACtHR. While the latter institutions increasingly seem to advocate for a sliding scale approach to FPIC, requiring that FPIC be obtained, not merely sought, in the context of development projects having a significant and major impact on indigenous peoples, the ILO and its supervisory bodies seem to stick to a more cautious approach in this context. Within the ILO framework, consent or agreement is certainly the objective of a consultation process but not a required outcome. Accordingly, a consultation process is deemed valid even in the absence of indigenous peoples' consent provided that certain requirements are met. In terms of relocation, the two frameworks appear the most aligned on FPIC, with ILO C 169 stipulating the only precise formulation of FPIC. Although these diverging approaches buttress the longstanding controversy surrounding indigenous peoples' participatory rights, arguably exacerbating rather than decreasing uncertainty, the concepts of consultation and FPIC have been sharpened and further clarified over the years in the work and practices of both the ILO supervisory bodies and pertinent bodies in the UN and the OAS, particularly in terms of procedural aspects.

The concepts of consultation and FPIC are based on the premise of enabling genuine and meaningful inclusion of indigenous peoples in decision-making affecting them. As emphasized in both the ILO and the UN framework, such inclusion requires adequate processes and mechanisms that are adapted to and appropriate for the circumstances and the context at hand and characterized by mutual respect and good faith. While there is no predefined or one-size-fits-all consultation and FPIC model, certain core elements must be met for it to succeed. Accordingly, these processes should be free from any form of coercion, intimidation, or manipulation; conducted prior to the adoption of measures and the authorization or starting of activities; and provide indigenous peoples with sufficient time to organize themselves. This latter point relates to the important issue of representativity and to including indigenous peoples early in the design of these processes, which is increasingly occurring with indigenous peoples formulating their own consultation and FPIC protocols and guidelines. Indigenous peoples should participate via their own institutions and freely choose their representatives. The core element of representation is deemed particularly important but often challenging to implement.⁷⁶⁶

Furthermore, meaningful inclusion in decision-making necessitates a solid, good, and true information base upon which decisions and actions can be made. Consenting to a proposed agreement or measure implies that one has

⁷⁶⁶ See above text to [Fn 220, 324](#).

reasonably understood it. Therefore, the method of informing is deemed as important as the information itself, which should (at least) cover all the central aspects of a measure, project, or activity. Useful information tools are social and environmental impact assessments that allow indigenous communities and the actors promoting and implementing a development project to understand its expected impacts, ideally creating a knowledge base upon which preventative, mitigating or alternative measures can be suggested and taken. Furthermore, as emphasized by pertinent bodies, impact assessments play a central role in determining whether impacts are major and significant in nature, triggering the requirement of FPIC, and in determining the scope of consultation processes, as in who must be consulted, in general. Last, consultation and FPIC processes should not be viewed simply as a single event but rather as a continuous process throughout the lifecycle of a project.

Throughout this chapter it was shown that consultation and FPIC processes and impact assessment studies should be flanked by other safeguards, including benefit sharing agreements and mitigation and compensation measures.

Safeguard Compliance as an Indicator for States' Compliance with their Duty to Protect As shown in different parts of [Chapter 2](#), the above safeguards are considered central elements of the state duty to protect aimed at protecting indigenous peoples' rights against adverse impacts of corporate-related activities. Even when delegating aspects of these safeguards, states must ensure that they are operationalized in a manner consistent with the applicable core elements and quality requirements as established under the indigenous peoples' rights framework. This involves the obligation to oversee and evaluate the procedures employed by corporations and the outcomes generated. In this respect, pertinent bodies have emphasized the importance of adopting appropriate measures that ensure and mandate respect for indigenous peoples' rights by corporations, such as providing for redress and sanctions when indigenous peoples' rights are infringed upon by corporate conduct and developing clear regulatory frameworks that lay out laws and regulations addressing corporate conduct on indigenous ground. Pertinent bodies have suggested legislating mandatory corporate human rights due diligence and for the operationalization of impact assessments and FPIC as well as possible sanctions for failing to do so. Compliance with these safeguards is thus an indication of whether states have complied with their duty to protect indigenous peoples' rights.⁷⁶⁷

⁷⁶⁷ UNGA, '2013 Report WGBHR' para 10.

Compliance with these Safeguards as a Responsibility of Corporations? Although this chapter has focused on states' obligations, some first lessons can be drawn from it regarding business and indigenous peoples' rights, particularly when looking at pertinent bodies' elaborations on states' duty to protect these rights against corporate-related harm. Former SRRIP Anaya advocated for a new model in the realm of development projects that necessitates not only a broad and common understanding of indigenous peoples' rights but also the compliance of states and corporations with their respective duties and responsibilities. The SRRIP recognized the responsibility of corporations with regard to indigenous peoples existing independently of state compliance with their own obligations, such as compliance with the safeguards of consultation, impact assessments or benefit sharing agreements. Importantly, when corporations are involved in consultation processes, he contended that they should essentially meet the same criteria as laid down in international standards governing state consultation with indigenous peoples by conducting due diligence.⁷⁶⁸

This understanding – that is, that corporations should orient themselves with the indigenous peoples' rights framework with a view to their own responsibilities – is further supported by the practices of the IACtHR, as shown in the *Sarayaku Case* and the *Kaliña and Lokono Case*. In the former case, the Court essentially assessed the private corporation's actions against the same consultation requirements governing state consultation. In the latter case, the Court made explicit reference to the corporate responsibility to respect indigenous peoples' rights, for the first time referencing the UNGPs. Such an understanding further aligns with that of the SRSR referred to at the beginning of this thesis, who argued that corporations should look at internationally recognized human rights for an authoritative enumeration of human rights that they should respect.⁷⁶⁹

What Are the Precise Rules Governing Corporate Responsibility with Regard to Indigenous Peoples' Rights and FPIC? The answer of the present chapter is twofold. First, the precise rules governing this responsibility are those adopted by states as part of their duty to protect with which corporations must comply as a matter of binding domestic law. Second, the precise rules governing this responsibility also stem from the international regulatory framework pertaining to indigenous peoples, not as a matter of binding law but as rules that cor-

⁷⁶⁸ HRC, '2013 Report SRRIP' para 62.

⁷⁶⁹ See above text to [Fn 123](#).

porations are expected to respect and consider as sources of orientation and guidance in their own activities. Two important examples in this respect are the issues of indigeneity and customary land tenure.

As the present chapter has shown, neither the question of who is categorized as indigenous peoples and thus as rights holders under the regulatory framework nor the question of land and resource rights are for states to decide unilaterally – at least in theory. Under both the ILO and the UN framework, it is firmly established that the existence of indigenous peoples is to be established by objective and subjective criteria. Furthermore, the basis for indigenous peoples' land and resource rights lies in their customary land tenure, not in the formal recognition and registration of their ownership by the state in which they reside. Against this background and considering that corporations' responsibility to respect indigenous peoples' rights exists independently of states' compliance with their own obligations, corporations cannot and should not use the lack of formal recognition of indigenous peoples and their land and resource rights as an excuse not to recognize and respect indigenous peoples' rights in their own activities.⁷⁷⁰ In the words of the SRRIP:

[T]he mere existence of [indigenous peoples] in the areas where companies plan to carry out their activities must be considered by those companies as a strong indication that those groups have *some sort of rights* over the land and resource that they occupy or otherwise use. Furthermore, companies cannot, in the exercise of due diligence, assume that the absence of official recognition of indigenous communal ownership rights implies that such rights do not exist.⁷⁷¹

The following chapter focuses on the regulatory framework directly addressing corporations.

⁷⁷⁰ HRC, '2010 Report SRRIP' paras 49–50, 57.

⁷⁷¹ *ibid* para 57.

Chapter 3: Business and Indigenous Peoples' Rights: Regulatory Framework on the Corporate Responsibility to Respect Indigenous Peoples' Rights and FPIC

Chapter 3 continues to answer the first research question: What are the precise rules governing corporate responsibility with regard to indigenous peoples' rights and FPIC? As such, and in line with [Chapter 2](#), Chapter 3 continues to focus on relevant standards in the field of business and indigenous peoples' rights. While Chapter 2 examined the international legal framework laying out states' indigenous peoples' rights obligations, from which first lessons could be drawn regarding corporations' responsibility to respect indigenous peoples' rights and FPIC, Chapter 3 aims to examine the regulatory framework directly addressing corporations to further frame the contours of this responsibility.

The regulatory framework examined includes and is delimited to the three key RBC instruments, that is, the UNGPs, the ILO MNE Declaration, and the OECD Guidelines, as well as related OECD RBC Guidance Documents and the IFC Performance Standards. Given the broad scope of the OECD Guidelines, encompassing a comprehensive RBC framework, including due diligence recommendations in tune with the UNGPs and the ILO MNE Declaration, and the clarifying nature of the OECD RBC Guidance Documents that seek to guide the implementation of the OECD Guidelines and may help in implementing the UNGPs and the ILO MNE Declaration,⁷⁷² the focus will be on the OECD Guidelines and the related OECD Guidance Documents for the purposes of this chapter's undertaking. This focus is further indicated since the analysis of the NCPs' 'jurisprudence' in [Chapter 5](#) will draw on these OECD instruments.

Delving into these standards, examining in detail what they entail regarding indigenous peoples' rights and FPIC and how this translates to the corporate responsibility to respect indigenous peoples' rights and the process of human rights due diligence first requires introducing the key RBC standards in terms of their origin, general structure, content, and legal nature. The present chapter begins with a short historical outline of the origins of the business and hu-

⁷⁷² OECD, 'OECD Due Diligence Guidance for Responsible Business Conduct' (OECD, 2018) 3, 11, 93; Christine Kaufmann, 'Global agieren, lokal profitieren - und keine Verantwortung?' [2018] Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht 329, 333.

man rights debate followed by a general introduction of the key RBC instruments, the paradigm shift that they have heralded and the criticism that they have received. This is followed by elaborations on the corporate responsibility to respect human rights as such and the concept of human rights due diligence as set forth in the OECD Guidelines. The section on business and human rights concludes with a short overview of developments since the milestone of 2011, the year of the UNGPs' and the OECD Guidelines' endorsement and adoption. Second, the chapter turns to the business and indigenous peoples' rights context, identifying pertinent provisions on indigenous peoples' rights and FPIC in the regulatory framework addressing corporations.

I. Business and Human Rights

A. Background

As analysed in [Chapter 2](#), states, as parties of international human rights treaties, have binding obligations to respect, protect and fulfil human rights.⁷⁷³ However, in recent decades, this state-centric view of human rights has been challenged by new realities. Due to economic globalization and the liberalization of investment and trade, corporations have become powerful actors exerting increasing influence not only on economic and political processes but also on society and the living conditions of individuals worldwide without, in contrast to states, assuming human rights obligations under international human rights law.⁷⁷⁴ At the same time, a decrease in the power of many states as well as a lack of will and capacity to meet their human rights obligations can be observed – a phenomenon that holds also true regarding indigenous peoples' rights.⁷⁷⁵ While this worldwide expansion and influence of the private sector certainly comes with benefits such as economic growth, job creation, and poverty reduction,⁷⁷⁶ it also comes with corporate violations of human rights. Recurring examples of corporate-related human rights abuses and

⁷⁷³ HR Committee, 'GC No. 31' paras 3-10.

⁷⁷⁴ Justine Nolan, 'Business and Human Rights in Context' in Dorothee Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016) 2-3; Langford and others 3-4; Scherer and Palazzo 413-427; Kaufmann, 'Wirtschaft und Menschenrechte' 746-747, 752. On the comparison between the gross domestic products of states and the revenues of corporations, see eg Milan Babic, Jan Fichtner and Eelke M Heemskerk, 'States versus Corporations: Rethinking the Power of Business in International Politics' (2017) 52(4) *The International Spectator* 20.

⁷⁷⁵ Nolan, 'Context' 2-3; above text to [Fn 466](#)-497.

⁷⁷⁶ *ibid* 3; HRC, 'Framework' para 2.

the related vacuum of human rights protection have spurred an intense debate on the intersection between business and human rights and the role of international law and states in regulating corporate-related human rights abuses.⁷⁷⁷

Beginning in earnest in the 1990s,⁷⁷⁸ the debate was rather sluggish and characterized by conflicting positions among states, the private sector and civil society on the scope and nature of corporations' involvement with human rights.⁷⁷⁹ These positions ranged from purely voluntary aspirations to more far-reaching ones suggesting binding human rights obligations for corporations.⁷⁸⁰ The latter concept, in particular, has been on the agenda of the UN since the 1970s with the UN Centre on Transnational Corporations (UNCTC) coordinating the work on the Draft Code of Conduct on Transnational Corporations.⁷⁸¹ It resurfaced with the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (UN Draft Norms) in 2003; however, no consensus could be reached on them. The UN Draft Norms, which aimed at imposing the same range of

⁷⁷⁷ HRC, 'UNGPs' para 1, Commentary Principle 3; Dorothée Baumann-Pauly and Justine Nolan, 'Regulatory Framework and Guiding Principles' in Dorothée Baumann-Pauly and Justine Nolan (eds), *Business and Human Rights: From Principles to Practice* (Routledge 2016) 31-32; Bağlayan, 'Bottom-Up Approach' 373. Examples of corporate-related human rights abuses include: US-based Union Carbide Corporation and the Bhopal catastrophe in India in 1984, see Nolan, 'Context' 3-4. On the Netherlands-based Royal Dutch Shell and the oil spills in the Niger Delta in 2008, see Scott Pegg and Nenibarini Zabbey, 'Oil and Water: The Bodo Spills and the Destruction of Traditional Livelihood Structures in the Niger Delta' (2013) 48(3) *Community Development Journal* 391. On the EU and US-based fashion corporations and the Rana Plaza garment factory collapse in Bangladesh in 2013, see Motoko Aizawa and Salil Tripathi, 'Beyond Rana Plaza: Next Steps for the Global Garment Industry and Bangladeshi Manufacturers' (2015) 1(1) *Business and Human Rights Journal* 145. On the UK-based corporation Rio Tinto and the destruction of an ancient Aboriginal sacred site in Western Australia in 2020, see <<https://www.theguardian.com/business/2020/jun/05/rio-tinto-blames-misunderstanding-for-destruction-of-46000-year-old-aboriginal-site>>; <<https://www.business-humanrights.org/en/latest-news/australia-rio-tinto-mining-blast-destroys-ancient-aboriginal-sacred-site/>> accessed 24 April 2022.

⁷⁷⁸ Baumann-Pauly and Nolan 31. On the historical context of business and human rights, see eg Christopher L Avery, *Business and Human Rights in a Time of Change* (Amnesty International UK 2000). On the intersection of the business and human rights debate and corporate social responsibility debate, see eg Florian Wettstein, 'CSR and the Debate on Business and Human Rights: Bridging the Great Divide' (2012) 22(4) *Business Ethics Quarterly* 739.

⁷⁷⁹ Kaufmann, 'Neue Architektur' 74. See also below [Fn 782-783](#).

⁷⁸⁰ Nolan, 'Movement' 32-47.

⁷⁸¹ *ibid* 39; Kaufmann, 'Wirtschaft und Menschenrechte' 747.

human rights obligations on corporations that states have committed themselves to under international human rights treaties, was a particular thorn in the side of business associations and received little support from states.⁷⁸² In contrast, instruments of a voluntary and non-binding nature, such as the UN Global Compact established in 2000 or corporate and industry codes of conduct and stakeholder initiatives, met with great approval, at least by the private sector.⁷⁸³ For others, such corporate social responsibility efforts lacked legitimacy, robustness and effectiveness.⁷⁸⁴

B. End of the Beginning: Key Instruments and a Paradigm Shift

The non-adoption of the UN Draft Norms and the divide that it caused among different stakeholders as well as the continuation of corporate misconduct prompted the mandate of a Special Representative of the UN Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises,⁷⁸⁵ created by the UN Commission on Human Rights in 2005.⁷⁸⁶ After an extensive consultation process with states, the private sector, and civil society,⁷⁸⁷ the appointed SRSG Ruggie managed what had been impossible for several years, namely, to forge a broad consensus among these stakeholders.⁷⁸⁸

Instead of taking up the threads of the UN Draft Norms and creating new standards, the SRSG went with a more pragmatic approach emphasizing existing obligations of states and growing engagement of corporations with human rights issues.⁷⁸⁹ His approach, which he later labelled 'principled pragma-

⁷⁸² UNCHR, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (26 August 2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2 Art. 1. For a detailed account of the UN Draft Norms, see eg UNCHR, 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (22 February 2006) UN Doc E/CN.4/2006/97 paras 56-69; HRC, 'UNGPs' paras 2-3; Nolan, 'Movement' 41-42.

⁷⁸³ Kaufmann, 'Neue Architektur' 79-80. For an overview of such codes of conduct and stakeholder initiatives, see Nolan, 'Movement' 44-46; Nolan, 'Context' 4-6.

⁷⁸⁴ Nolan, 'Context' 4-5. See also below text to [Fn 872](#)-876.

⁷⁸⁵ Nolan, 'Movement' 42.

⁷⁸⁶ UNCHR, 'Human Rights and Transnational Corporations and Other Business Enterprises: Human Rights Resolution 2005/69' (20 April 2005) UN Doc E/CN.4/RES/2005/69.

⁷⁸⁷ John Ruggie, *Just Business: Multinational Corporations and Human Rights* (W.W. Norton & Company 2013) xii, 104-106, 119-124.

⁷⁸⁸ Nolan, 'Movement' 42; Kaufmann, 'Swiss Finish' 968.

⁷⁸⁹ Kaufmann, 'Neue Architektur' 81; Pitts 51.

tism,⁷⁹⁰ was not focused on the formal nature of responsibilities, ie, binding or non-binding, but on their substance and the result of improving and strengthening the promotion and protection of human rights in the realm of business operations.⁷⁹¹ In keeping with the motto 'what works best in creating change',⁷⁹² Ruggie proposed a framework that is operationalized by a 'smart mix' of different means under which each stakeholder assumes specific responsibilities to contribute to this change.⁷⁹³

1. UN Guiding Principles on Business and Human Rights

In 2008, the SRSG introduced the so-called Respect, Protect and Remedy Framework (Framework)⁷⁹⁴ to the UN Human Rights Council, which was extended by the UNGPs unanimously endorsed by the latter in 2011.⁷⁹⁵ The UNGPs contain thirty-one principles that provide guidance on operationalizing the Framework's three pillars, which are 'distinct, yet complementary'.⁷⁹⁶

(a) *The Three Pillars*

As already mentioned in [Chapters 1](#) and [2](#) of this thesis, the first pillar of the UNGPs relates to the state duty to protect human rights against corporate-related abuses, which is grounded in states' existing legal obligations to protect under international human rights law.⁷⁹⁷

The second pillar refers to the corporate responsibility to respect human rights, that is, the responsibility to avoid infringing on the human rights of others and to address adverse human rights impacts with which they are involved.⁷⁹⁸ To conceptualize and operationalize their responsibility to respect, corporations should put in place a policy commitment, carry out human rights due diligence, and create and cooperate in remedy mechanisms.⁷⁹⁹

In contrast to the first pillar, corporate responsibility to respect human rights is not grounded in a legal basis; rather, it originates from a well-established

⁷⁹⁰ UNCHR, '2006 Report SRSG' paras 70-81.

⁷⁹¹ *ibid* para 81; Ruggie, *Just Business* 55; Kaufmann, 'Neue Architektur' 81.

⁷⁹² UNCHR, '2006 Report SRSG' para 81.

⁷⁹³ HRC, 'UNGPs' Principle 3, Commentary Principle 3.

⁷⁹⁴ HRC, 'Framework'.

⁷⁹⁵ HRC, 'UNGP Endorsement'.

⁷⁹⁶ HRC, 'UNGPs' para 5; Ruggie, *Just Business* 125.

⁷⁹⁷ HRC, 'UNGPs' Principles 1-10.

⁷⁹⁸ *ibid* Principles 11-24.

⁷⁹⁹ *ibid* Principle 15.

social norm.⁸⁰⁰ Hence, the principles stipulated in the UNGPs referring to and operationalizing the corporate responsibility to respect are not legally binding on corporations unless transposed into domestic law or incorporated in binding contractual requirements between corporations and their business partners.⁸⁰¹ However, as a global expectation, corporations' human rights responsibility goes beyond compliance with domestic law and contractual requirements and exists 'independently of States' abilities and/or willingness to fulfil their on human rights obligations'.⁸⁰² Should states lack the political will or the capacity to enact and enforce domestic regulations against corporations, or where they act contrary to such laws or international obligations or national law conflicts with international human rights standards, corporations are nevertheless expected to respect human rights 'to the fullest extent'.⁸⁰³

The third pillar addresses states and corporations jointly to provide access to remedy for victims of corporate-related human rights abuses in the forms of both judicial and non-judicial mechanisms. The latter may be state-based, such as NCPs, or non-state based, referring to operational-level grievance mechanisms administered by corporations alone or in collaboration with others.⁸⁰⁴

The UNGPs are thus based on the complementary responsibility of states and corporations to implement human rights in the realm of business operations opting for a smart mix.⁸⁰⁵

(b) *Legal Nature and Normative Value*

The UNGPs' mixture of provisions, referring to existing binding obligations of states and stipulating social expectations rather than legal requirements addressed to corporations, ultimately raises the question of their legal nature. As a resolution of the UN Human Rights Council, the UNGPs are formally non-binding, which would indicate their status as a soft law instrument.⁸⁰⁶ However, considering that there is no one agreed-upon definition of the term

⁸⁰⁰ ibid Commentary Principle 11; HRC, 'Framework' para 54; OHCHR, 'UNGPs FAQ' Question 25; Ruggie, *Just Business* 90-102.

⁸⁰¹ OHCHR, 'UNGPs FAQ' Questions 6-7, 27, 31.

⁸⁰² HRC, 'UNGPs' Commentary Principle 11; OHCHR, 'UNGPs FAQ' Question 31.

⁸⁰³ HRC, 'UNGPs' Commentary Principle 23; OHCHR, 'UNGPs FAQ' Questions 8, 25.

⁸⁰⁴ HRC, 'UNGPs' Principles 25-31.

⁸⁰⁵ Christine Kaufmann, 'Respecting Human Rights in Investment Banking: A Change in Paradigm' in Karen Wendt (ed), *Responsible Investment Banking: Risk Management Frameworks, Sustainable Financial Innovation and Softlaw Standards* (Springer 2015) 511.

⁸⁰⁶ Kaufmann, 'Neue Architektur' 79.

'soft law' and thus diverse soft law instruments, thinking of soft law as simply formally non-binding and as not law would be too narrow and simplistic.⁸⁰⁷ Chinkin defines soft law broadly as including the following range of instruments:

Soft law instruments range from treaties, but which include only soft obligations ("legal soft law"), to non-binding or voluntary resolutions and codes of conduct formulated and accepted by international and regional organisations ("non-legal soft law"), to statements prepared by individuals or groups in a non-government capacity, but which purport to promote international principles.⁸⁰⁸

Taking into account the above definition and the long-standing academic debate on soft law, there seems to be consensus on certain aspects, however.⁸⁰⁹ First, soft law is legally non-binding and thus – in contrast to hard law – cannot be enforced through binding dispute resolution.⁸¹⁰ Second, soft law does not fall under the sources of international law enumerated in Art. 38(1) of the ICJ Statute.⁸¹¹ Third, despite the latter two points, soft law nonetheless may carry normative value and have legal effects such as guiding the behaviour of states and other actors and contributing to the development, interpretation and clarification of international law.⁸¹²

As aptly stated by Baleva, the UNGPs' mixture of provisions makes their clear categorization as Chinkin's soft law rather challenging,⁸¹³ but nor does it indicate their hard law character either. Nevertheless, nearly ten years after their endorsement, it is safe to argue that the UNGPs constitute a soft law

⁸⁰⁷ Christine M Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38(4) *International and Comparative Law Quarterly* 850, 850; Justine Nolan, 'The Corporate Responsibility to Respect Human Rights: Soft Law or Not Law?' in David Bilchitz and Surya Deva (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013) 144.

⁸⁰⁸ Chinkin 851.

⁸⁰⁹ See generally Teresa Fajardo, *Soft Law* (Oxford Bibliographies, OUP 2014); Dinah Shelton, 'Normative Hierarchy in International Law' (2006) 100(2) *The American Journal of International Law* 291.

⁸¹⁰ Alan E Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48(4) *International and Comparative Law Quarterly* 901, 901-902; Daniel Thürer, 'Soft Law' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law: Volume IX* (OUP 2012) 270-271.

⁸¹¹ Thürer 270; Fajardo.

⁸¹² Thürer 270-271, 277; Nolan, 'Soft Law or Not Law' 144; Shelton, 'Hierarchy' 291-293.

⁸¹³ Baleva 107.

instrument that is non-binding but carries normative force.⁸¹⁴ This argument is based on recognition of social expectations by states and other key actors, such as international organizations, and is demonstrated in their concretization on a national level through policy measures and legislation and their broad uptake on an international level in corporate responsibility instruments of other standard-setting bodies, including the OECD and ILO.⁸¹⁵ The *Kaliña and Lokono Case* before the IACtHR is an example of the UNGP's repercussion on a regional level.⁸¹⁶

Against this background, it is safe to say that the discussions on business and human rights and responsible business conduct generally are in full swing. The developments in the business and human rights field since 2011 and a tentative glance at the years to come show that this field has changed and is changing. As illustrated further below, there is a trend of binding regulations on corporate conduct and thus a transformation of soft law to hard law.⁸¹⁷

2. OECD Guidelines for Multinational Enterprises

As one of four constituent elements of the OECD Declaration of 1976,⁸¹⁸ the OECD Guidelines existed long before the UNGPs.⁸¹⁹ Since their inception in 1976, they have witnessed five revisions, most recently in 2011.⁸²⁰ It was not a coincidence that the fifth revision of the OECD Guidelines was adopted by the OECD Investment Committee the same year that the UN Human Rights Council endorsed the UNGPs. With the revision, the OECD Guidelines include

⁸¹⁴ Stéphanie Lagoutte, 'The UN Guiding Principles on Business and Human Rights: A Confusing "Smart Mix" of Soft and Hard International Human Rights Law' in Stéphanie Lagoutte and others (eds), *Tracing the Roles of Soft Law in Human Rights* (OUP 2016) 241-244, 252-253; Nolan, 'Soft Law or Not Law' 159; Baleva 107. See also Dinah Shelton, 'Introduction: Law, Non-Law and the Problem of "Soft Law"' in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (OUP 2000) 2: 'The term "soft law" itself seems to contain a normative element leading to expectations of compliance'.

⁸¹⁵ HRC, 'Mapping' para 45; OHCHR, 'UNGPs FAQ' Question 14; Nolan, 'Soft Law or Not Law' 144, 158. See also below text to [Fn 821](#), [834](#)-835.

⁸¹⁶ See above text to [Fn 758](#)-760.

⁸¹⁷ Kaufmann, 'Swiss Finish' 970-975. See also below text to [Fn 934](#)-955.

⁸¹⁸ OECD, 'Declaration by the Governments of OECD Member Countries and Decisions of the OECD Council on Guidelines for Multinational Enterprises, National Treatment, International Investment Incentives and Disincentives, Consultation Procedures' (adopted 21 June 1976) <<https://www.oecd.org/corporate/mne/50024800.pdf>> accessed 27 April 2022.

⁸¹⁹ On the OECD and the origins of the OECD Guidelines, see eg Bağlayan, 'Corporations' 154-158.

⁸²⁰ <<http://mneguidelines.oecd.org/about.htm>> accessed 24 April 2022.

a new human rights chapter designed to be fully aligned with the UNGPs by confirming the complementary responsibility of corporations and states for implementing human rights and adopting the human rights due diligence approach.⁸²¹ However, despite this alignment, the OECD Guidelines differ from the UNGPs in terms of structure, scope, and implementation due to the instruments' differing provenances and historical development.

The OECD Guidelines are structured in two parts. The first part contains a set of recommendations addressed by OECD member states and states adhering to the OECD Declaration of 1976 to multinational enterprises operating in or from these states.⁸²² The recommendations relate – in addition to human rights – to other substantive areas, including the environment, employment and industrial relations, disclosure, consumer interests, science and technology, anticorruption, competition, and taxation. Each substantive chapter features a commentary. Thus, from a substantive point of view, the OECD Guidelines are much broader than the UNGPs, delineating other relevant RBC issues in addition to human rights. The second part refers to the OECD Guidelines' implementation procedure and mechanism, more precisely to the NCPs. In contrast to the UNGPs, neither part of the OECD Guidelines comprises detailed provisions on remedy.⁸²³

The OECD Guidelines' broad scope and distinct implementation mechanism rightly earned them the distinction of 'the world's most comprehensive multilateral agreement on business ethics' and the only RBC instrument with a built-in state-based grievance mechanism.⁸²⁴ Due to the alignment of the OECD Guidelines' human rights chapter with the UNGPs, however, it is argued that the NCPs de facto also constitutes the grievance mechanism of the UNGPs.⁸²⁵ A similar narrative is used with the ILO MNE Declaration given the overlap between the OECD Guidelines' employment and industrial relations chapter and the ILO's core Conventions.⁸²⁶

⁸²¹ OECD, '2011 Guidelines' 3, 31, para 36; Buhmann, 'NCP Statements' 391; Kaufmann, 'Respecting Human Rights' 511.

⁸²² OECD, '2011 Guidelines' 3.

⁸²³ HRC, 'UNGPs' Principles 25-31.

⁸²⁴ Nieuwenkamp, 'CSR is Dead'; OECD, '2011 Guidelines' 3.

⁸²⁵ Buhmann, 'NCP Statements' 391.

⁸²⁶ OECD, 'Progress Report on National Contact Points for Responsible Business Conduct' (OECD, 2019) para 39 <[http://www.oecd.org/mcm/documents/NCPs - CMIN\(2019\)7 - EN.pdf](http://www.oecd.org/mcm/documents/NCPs_-_CMIN(2019)7_-_EN.pdf)> accessed 23 April 2022. On the operational tools of the ILO MNE Declaration, see below text to [Fn 839-843](#).

While the governmental recommendations in the OECD Guidelines' first part are non-binding for multinational enterprises, the second part on the OECD Guidelines' implementation procedures contains binding obligations for states adhering to the OECD Declaration of 1976. Under a binding OECD Council Decision, adhering states are obliged to promote the OECD Guidelines and establish an NCP.⁸²⁷ Additionally, like the UNGPs, the OECD Guidelines reaffirm states as the main duty bearers, referring to states' existing obligation to protect under international human rights law.⁸²⁸ Against this background, the legal nature of the OECD Guidelines is somewhat hybrid, containing both binding and non-binding provisions.⁸²⁹

3. ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy

In addition to the OECD, the UNGPs also had repercussions within the ILO, and vice versa, as the standards of reference for employment issues and labour rights, the ILO's labour standards and recommendations within the UNGPs and OECD Guidelines.⁸³⁰ Particularly relevant are the ILO's four fundamental principles and rights at work enshrined in the ILO Declaration on Fundamental Principles and Rights at Work of 1998 and in the eight ILO Conventions, commonly referred to as the ILO's core or fundamental Conventions.⁸³¹

Similar to UN human rights treaties, ILO Conventions such as the above or ILO C 169 legally bind states but not corporations. In an attempt to address corporations more directly, the ILO – near the time of the efforts of the UNCTC and the OECD in the 1970s – became active and in 1977 adopted the ILO MNE Declaration.⁸³² Presently, it is the only ILO instrument that directly addresses

⁸²⁷ OECD, '2011 Guidelines' 3, 13, para 1, 67-69.

⁸²⁸ *ibid* 31.

⁸²⁹ van't Foort, 'History' 195, 206-207. For a detailed elaboration on the OECD Guidelines' legal nature, see Baglayan, 'Corporations' 172-179; Christian Schliemann, 'Procedural Rules for the Implementation of the OECD Guidelines for Multinational Enterprises: A Public International Law Perspective' (2012) 13(1) German Law Journal 51.

⁸³⁰ HRC, 'UNGPs' Commentary Principle 12; OECD, '2011 Guidelines' 35-37, paras 1-8, 37-41, paras 48-59.

⁸³¹ The ILO's four fundamental principles and rights at work are: freedom of association and collective bargaining, elimination of discrimination, elimination of forced labour and elimination of child labour, see <<https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/in-dex.htm>> accessed 24 April 2022.

⁸³² ILO, 'MNE Declaration'.

corporations.⁸³³ In 2017, the ILO decided to further amend the Declaration to include new labour standards and policy outcomes and to take into account recent global developments since its last revision in 2006, such as the endorsement of the UNGPs, the revision of the OECD Guidelines, and the goals set out in the 2030 Agenda for Sustainable Development.⁸³⁴ Regarding the role of corporations in achieving the aim of the ILO MNE Declaration, the latter is aligned with the UNGPs, reflecting their language inter alia in terms of human rights due diligence.⁸³⁵

The ILO MNE Declaration seeks to provide guidance ‘to encourage the positive contribution which multinational enterprises can make to economic and social progress and the realization of decent work for all; and to minimize and resolve the difficulties to which their various operations may give rise.’⁸³⁶ Its principles on employment, training, conditions of work and life, and industrial relations are substantially rooted in principles contained in international labour standards and are addressed to states, employers’ and workers’ organizations, and MNEs, which observe them on a voluntary basis.⁸³⁷ Put differently, ‘the MNE Declaration is a non-binding instrument which contains recommendations on how enterprises should apply principles deriving from ILO Conventions and Recommendations’ – one of which is ILO C 169.⁸³⁸

With the 2017 revision, the ILO MNE Declaration also contains a number of operational tools, including a regional follow-up mechanism, tripartite appointed national focal points, company-union dialogue and an interpretation procedure of the principles of the ILO MNE Declaration to ensure the addressees’ commitment to the Declaration’s principles.⁸³⁹ Neither of these operational tools compares to the NCPs.⁸⁴⁰ Except for the tripartite national focal points

⁸³³ International Labour Office, ‘Social Dialogue, Collective Bargaining and Responsible Business Conduct: Promoting the Strategic Use of International Instruments for Trade Unions’ Action’ (2020) 7 <https://www.ilo.org/actrav/pubs/WCMS_722744/lang--en/index.htm> accessed 4 April 2022.

⁸³⁴ ILO, ‘MNE Declaration’ 1; EU, ILO and OECD 3; <https://www.ilo.org/empent/areas/mne-declaration/WCMS_570332/lang--en/index.htm> accessed 24 April 2022.

⁸³⁵ ILO, ‘MNE Declaration’ para 10(a-e).

⁸³⁶ *ibid* para 2.

⁸³⁷ *ibid* paras 7, 10, Annex I; <<https://www.ilo.org/empent/areas/mne-declaration/lang--en/index.htm>> accessed 24 April 2022.

⁸³⁸ <https://www.ilo.org/empent/areas/business-helpdesk/faqs/WCMS_475067/lang--en/index.htm> accessed 24 April 2022.

⁸³⁹ ILO, ‘MNE Declaration’ Annex II; International Labour Office, ‘RBC’ 31-34; <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_547615/lang--en/index.htm> accessed 24 April 2022.

⁸⁴⁰ ILO, ‘MNE Declaration’ Annex II.

set up at a national level, all of the operational tools are institutionalized and operationalized within the ILO.⁸⁴¹ Currently, seven member states of the ILO have appointed a national focal point that is tasked with promoting the ILO MNE Declaration on a national level.⁸⁴² By integrating the ILO MNE Declaration National Focal Point into its already existing NCP, Norway is an example that shows the possible synergies between the ILO MNE Declaration and the OECD Guidelines and their implementation.⁸⁴³

4. Paradigm Shift

In October 2019, the ILO, together with the European Union and the OECD, published a document titled 'Responsible Business: Key Messages from International Instruments'.⁸⁴⁴ What at first glance appears an inconspicuous eight-page document conveys a strong message at second glance, namely, that the key RBC instruments – the UNGPs, OECD Guidelines, and ILO MNE Declaration – are aligned and mutually enforcing. Although each has its specific focuses, it is notable that all three instruments stand for a consensus that corporations have a responsibility to respect human rights as part of the broader debate on responsible business conduct, which marks a paradigm shift from earlier developments.⁸⁴⁵ This paradigm shift has several facets and can be described as follows.

First, corporate responsibility to respect human rights is to be understood as a 'global standard of expected conduct for all business enterprises wherever they operate'⁸⁴⁶ as an integral part of their practices and operations and should be distinguished from corporate social responsibility (CSR), traditionally un-

⁸⁴¹ For more details on the operational tools, see *ibid* Annex II; <<https://www.ilo.org/empent/areas/mne-declaration/lang--en/index.htm>> accessed 24 April 2022.

⁸⁴² <https://www.ilo.org/empent/areas/mne-declaration/WCMS_570379/lang--en/index.htm> accessed 24 April 2022.

⁸⁴³ In 2019, Norway complied with the encouragement to appoint a National Focal Point by adopting a new mandate for its OECD National Contact Point. This new mandate establishes a formal complaint mechanism for the ILO MNE Declaration alongside the OECD Guidelines, see Norwegian Ministry of Foreign Affairs, 'Terms of Reference for Norway's National Contact Point for Responsible Business Conduct' (2018) <<https://files.nettsteder.regjeringen.no/wpuploads01/blogs.dir/263/files/2019/01/EN-Mandat-Kontakt-punktet-2018.pdf>> accessed 27 April 2022. See also OECD, 'Progress Report' para 39.

⁸⁴⁴ EU, ILO and OECD.

⁸⁴⁵ *ibid* 1-8; Kaufmann, 'Swiss Finish' 968.

⁸⁴⁶ HRC, 'UNGPs' Commentary Principle 11; OECD, '2011 Guidelines' 31-32, para 37.

derstood as corporations' voluntary and philanthropic engagement with social and environmental efforts.⁸⁴⁷ Thus, a first interim conclusion is that there has been a shift from voluntary to expected conduct.⁸⁴⁸

A second change lies in the expansion of perspectives, which is particularly apparent in the evolution of the OECD Guidelines. In 1976, the main aim of the OECD Declaration and the OECD Guidelines was to '[improve] the international investment climate (...) [and] to [encourage] the positive contributions of multinational enterprises to economic and social progress.'⁸⁴⁹ Because they focused on investors' and economic perspectives, themes such as human rights, consumer interests and the environment were not included in the earlier editions of the OECD Guidelines.⁸⁵⁰ It was not until their fourth revision in 2000 that respect for human rights was stipulated for the first time – but only marginally – and provisions on issues such as sustainable development, child labour and consumer protection were included.⁸⁵¹ However, a full-fledged human rights chapter and the concept of stakeholder engagement was only introduced in the OECD Guidelines another eleven years later with their fifth revision.⁸⁵²

With these changes, the previously economic and corporation-centred perspective has thus been expanded into a holistic perspective, taking into account society as a whole and thus people and the planet.⁸⁵³ The focus is no longer only on investors' and corporations' risks, such as financial, reputational or legal risks but is expanded to and inclusive of, for instance, environmental risks and the risks of rights holders potentially affected by corporate

⁸⁴⁷ OHCHR, 'UNGPs FAQ' Question 9; EU, ILO and OECD 3; Nieuwenkamp, 'CSR is Dead'; Kaufmann, 'Verantwortung' 331. The terminology used for responsible business conduct, such as RBC, business and human rights and CSR is used inconsistently and interchangeably, however.

⁸⁴⁸ Kaufmann, 'Verantwortung' 331.

⁸⁴⁹ OECD, 'Declaration 1976' 5.

⁸⁵⁰ van't Foort, 'History' 198, 203. The 1991 revision introduced a completely new chapter on the environment.

⁸⁵¹ *ibid* 203–204.

⁸⁵² OECD, '2011 Update of the OECD Guidelines for Multinational Enterprises: Comparative Table of Changes Made to the 2000 Text' (OECD, 2012) 15, 24, 33–38 <<http://www.oecd.org/daf/inv/mne/49744860.pdf>> accessed 21 April 2022; Mestad 81.

⁸⁵³ Kaufmann, 'Verantwortung' 331. This expansion of perspective was well illustrated in the EU Commission's new definition of CSR in 2011. Previously defined as 'a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis', CSR is now to be understood as 'the responsibility of enterprises for their impacts on society'. See EC, Renewed EU Strategy COM(2011) 3, 6.

conduct.⁸⁵⁴ Consequently, infringements of human rights in the business context are relevant for corporations regardless of whether they pose a business risk for them.⁸⁵⁵ This represents a change from the traditional business risk understanding in which human rights infringements, even when severe, were only relevant when amounting to a business risk.⁸⁵⁶

The expansion in perspective is equated with a human rights-based approach to corporate conduct.⁸⁵⁷ The objectives of this approach are first to further the realization of human rights, second to integrate human rights standards and principles into all activities, focusing on both process and outcome, and third to contribute to the development of capacities of duty bearers such as states and non-state actors to meet their obligations and responsibilities and of rights holders to empower them to claim and exercise their rights.⁸⁵⁸ Accordingly, the approach makes peoples affected by corporate conduct rights holders and not merely recipients of services provided by corporations on a voluntary basis.⁸⁵⁹ A telling example in this regard is the one of benefit sharing. As indicated earlier, benefit sharing is to be understood as a right arising from the recognition of indigenous peoples' land and resource rights and should therefore not be viewed as an act of (corporate) charity.⁸⁶⁰ As rights holders, they must be able to enjoy their rights, which requires that states protect these

⁸⁵⁴ OECD, '2011 Guidelines' 34, para 45; OECD, 'DD Guidance' 15; HRC, 'UNGPs' Commentary Principle 17. See also Christine Kaufmann, 'OECD MNE Guidelines Quo Vadis?: Making Responsible Business Conduct Work for Better Lives' in OECD (ed), *OECD Guidelines for Multinational Enterprises - A Glass Half Full: A Liber Amicorum for Dr. Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct 2013-2018* (OECD 2018) 30; Kaufmann, 'Neue Architektur' 88.

⁸⁵⁵ Kaufmann, 'Respecting Human Rights' 512.

⁸⁵⁶ *ibid*; Kaufmann, 'Neue Architektur' 82-84.

⁸⁵⁷ Kaufmann, 'Respecting Human Rights' 512.

⁸⁵⁸ UNSDG, 'The Human Rights Based Approach to Development Cooperation towards a Common Understanding among UN Agencies' (2003) <<https://unsdg.un.org/resources/human-rights-based-approach-development-cooperation-towards-common-understanding-among-un>> accessed 27 April 2022. For an analysis of a human rights-based approach to project-induced displacement and resettlement and the corporate responsibility to respect human rights, see Lidewij van der Ploeg and Frank Vanclay, 'A Human Rights Based Approach to Project Induced Displacement and Resettlement' (2017) 35(1) *Impact Assessment and Project Appraisal* 34.

⁸⁵⁹ Christine Kaufmann and Mirina Grosz, 'Poverty, Hunger and International Trade: What's Law Got to Do with It? Current Mechanisms and the Doha Development Agenda' in Jost Delbrück, Thomas Giegerich and Andreas Zimmermann (eds), *German Yearbook of International Law/Jahrbuch für Internationales Recht: Volume 51* (2008) (Duncker & Humblot 2009) 85-86.

⁸⁶⁰ See above text to [Fn 489, 517](#).

rights against violations by third parties, including corporations (Pillar I of the UNGPs), and that corporations respect them (Pillar II of the UNGPs).⁸⁶¹ The human rights-based approach is further reflected in the UNGPs' provisions on access to remedy for affected rights holders as a joint responsibility of corporations and states as part of their duty to protect (Pillar III of the UNGPs).⁸⁶²

Third, an expanded risk understanding necessarily comes with an expanded scope of the established business concept of corporate due diligence.⁸⁶³ This is reflected in the 2011 revision of the OECD Guidelines, which also introduced 'a new and comprehensive approach to due diligence'.⁸⁶⁴ In keeping with the spirit of the OECD Guidelines' comprehensive framework of responsible business conduct, the concept of corporate due diligence applies to nearly all the substantive areas outlined in the OECD Guidelines, including human rights, lending it the name human rights due diligence in line with the UNGPs.⁸⁶⁵ The scope of corporate due diligence has thus been expanded to covering peoples' and environmental risks.⁸⁶⁶ Importantly, hand in hand with this newly introduced comprehensive approach to due diligence comes comprehensive responsible supply chain management.⁸⁶⁷ As a result, 'the new concept of risk-driven corporate due diligence applies to the whole supply chain because all suppliers' actions may have adverse impacts'.⁸⁶⁸

Fourth, with the adoption of the UN Sustainable Development Goals (SDGs) in 2015, an additional change is developing.⁸⁶⁹ While the corporate responsibility to respect human rights is framed as a negative responsibility of 'do no harm',

⁸⁶¹ Kaufmann, 'Neue Architektur' 87; Kaufmann, 'Respecting Human Rights' 512-513.

⁸⁶² HRC, 'UNGPs' Principles 25-31; Kaufmann, 'Neue Architektur' 88-89.

⁸⁶³ Kaufmann, 'Neue Architektur' 88; Kaufmann, 'Respecting Human Rights' 519-520.

⁸⁶⁴ OECD, '2011 Guidelines' 4.

⁸⁶⁵ The concept of corporate due diligence does not apply to the OECD Guidelines' chapters on science and technology, competition, and taxation. See *ibid* 20, para 10, 23, para 14, 31, para 5.

⁸⁶⁶ Kaufmann, 'Neue Architektur' 88.

⁸⁶⁷ OECD, '2011 Guidelines' 4.

⁸⁶⁸ Kaufmann, 'Quo Vadis' 30; Kaufmann, 'Verantwortung' 331.

⁸⁶⁹ UNGA, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (21 October 2015) UN Doc A/RES/70/1.

increasingly it is suggested to expand this negative responsibility to include positive responsibilities of corporations to fulfil human rights and thus a 'do good approach' – that is, to contribute to the realization of human rights.⁸⁷⁰

What can be distilled from the above paradigm shift is that the business and human rights debate has largely moved from 'if' corporations should engage with human rights to 'how' they should engage.⁸⁷¹ The 'how' of the corporate responsibility to respect human rights will be covered in more detail in [Chapter 3, Section I, C.](#)

5. Criticism

The corporate responsibility to respect human rights as stipulated in the key instruments has faced criticism on different aspects. Much criticism is directed to the non-binding nature of corporate human rights responsibility, allegedly creating an accountability and remedy gap.⁸⁷² Other criticism relates to the responsibility's negative framing of 'do-no-harm'⁸⁷³ and to the lack of more robust guidance regarding specific groups such as women, children, hu-

⁸⁷⁰ See generally Karin Buhmann, 'Future Perspectives - Doing Good but Avoiding SDG-Washing: Creating Relevant Societal Value without Causing Harm' in OECD (ed), *OECD Guidelines for Multinational Enterprises - A Glass Half Full: A Liber Amicorum for Dr. Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct 2013-2018* (OECD 2018); Rob van Tulder, 'Bottoms Up?: OECD Guidelines and the Race to the Bottom or the Top' in OECD (ed), *OECD Guidelines for Multinational Enterprises - A Glass Half Full: A Liber Amicorum for Dr. Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct 2013-2018* (OECD 2018); David Bilchitz, 'Do Corporations Have Positive Fundamental Rights Obligations?' (2010) 57(125) *Theoria* 1. Target 67 of Goal 17 of the SDGs refers to the UNGPs, see <<https://sustainabledevelopment.un.org/post2015/transformingourworld>> accessed 24 April 2022.

⁸⁷¹ Nolan, 'Context' 2-3; Baumann-Pauly and Nolan 31.

⁸⁷² See eg Nolan, 'Soft Law or Not Law' 155-157, citing Shelton, 'Hierarchy' 320 at 157: '[S]oft law will be at its most effective when "it stands not in isolation" but "instead, [as] it is used most frequently either as a precursor to hard law or as a supplement to a hard law instrument", and from this it might obtain a certain element of bindingness. Soft law standing alone can lack legitimacy if not coupled with any binding law for either the source of the obligation or its enforcement mechanisms'. See also Human Rights Watch, 'UN Human Rights Council: Weak Stance on Business Standards - Global Rules Needed, Not Just Guidance' (16 June 2011) <<https://www.hrw.org/news/2011/06/16/un-human-rights-council-weak-stance-business-standards>> accessed 26 April 2022; Kaufmann, 'Neue Architektur' 89.

⁸⁷³ See eg David Bilchitz, 'The Ruggie Framework: An Adequate Rubric for Corporate Human Rights Obligations?' (2010) 7(12) *SUR International Journal on Human Rights* 199, 211.

man rights defenders, and indigenous peoples.⁸⁷⁴ Furthermore, as indicated at the beginning of this thesis, insofar as the content of substantive human rights standards applicable to corporations' conduct is concerned, the UNGPs and OECD Guidelines allegedly contain a degree of vagueness.⁸⁷⁵ As illustrated further below, this vagueness is apparent in the context of business and indigenous peoples' rights.⁸⁷⁶

C. Corporate Responsibility to Respect Human Rights: Conceptualization and Operationalization

The above shows the key RBC instruments frame corporations' responsibility broadly; that is, the responsibility to respect human rights applies not only to corporations' own operations but also to their supply chains and other business relationships. Furthermore, corporations' responsibility is framed in both negative and positive terms. Respect for human rights means avoiding infringing on them (negative) and addressing adverse human rights impacts with which corporations are involved (positive).⁸⁷⁷ Thus, corporations are expected to be proactive and put policies and processes in place to ensure their respect for human rights.

The following elaborations examine the 'how' of the corporate responsibility to respect human rights and the concept underpinning it in more detail using the OECD Guidelines and the OECD Due Diligence Guidance for Responsible Business Conduct of 2018 (OECD DD Guidance) as the standards of reference. Reference is made to both the general due diligence provisions enshrined in Chapter II of the OECD Guidelines and the human rights due diligence provisions as specifically set out in the OECD Guidelines' Chapter IV on human rights.⁸⁷⁸ This approach is useful given that Chapter II – in setting the tone and building the basis for the subsequent substantive RBC chapters – provides

⁸⁷⁴ See eg Peter Muchlinski, 'Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation' (2012) 22(1) *Business Ethics Quarterly* 145, 148; FIDH and others, 'Joint Civil Society Statement on the Draft Guiding Principles on Business and Human Rights' (2011) <https://www.fidh.org/IMG/pdf/Joint_CSJ_Statement_on_GPs.pdf> accessed 10 April 2022.

⁸⁷⁵ Bağlayan, 'Bottom-Up Approach' 374; Sabine Michalowski, 'Due Diligence and Complicity: A Relationship in Need of Clarification' in David Bilchitz and Surya Deva (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013) 222. See also above text to [Fn 108](#)–112.

⁸⁷⁶ See below [Chapter 3, Section II](#).

⁸⁷⁷ Baleva 92; OECD, '2011 Guidelines' 31, para 1.

⁸⁷⁸ There is a difference between risk-based due diligence and risk-based human rights due diligence in terms of risk prioritization, see OECD, 'DD Guidance' 17, 45.

recommendations on the concept of risk-based due diligence as such and by implication on human rights due diligence as well.⁸⁷⁹ Notably, although the conceptualization and operationalization of human rights due diligence are approached from a general human rights perspective, first references to the context of business and indigenous peoples are made.

1. Conceptualization: Type of Involvement in Adverse Human Rights Impacts

The OECD Guidelines expect corporations, regardless of size and type of operations, ‘to avoid infringing on the human rights of others and (...) address [actual and potential] adverse human rights impacts with which they are involved.’⁸⁸⁰ More precisely, corporations are expected to ‘avoid *causing* or *contributing* to adverse human rights impacts through their own activities, and address such impacts when they occur’ and to ‘seek to prevent or mitigate adverse human rights impacts that are *directly linked* to their operations, products or services by their business relationships, even if they have not contributed to those impacts.’⁸⁸¹ There are thus three distinct ways in which a corporation may be involved in adverse human rights impacts, which are generally understood as situations where an individual’s ability to enjoy his or her human rights is eliminated or reduced.⁸⁸² Given the broad substantive scope of the OECD Guidelines, impacts may also be related to workers, the environment, bribery, consumers, and corporate governance.⁸⁸³

The distinction in types of involvement is important since it triggers different expectations of corporate conduct in addressing actual and potential adverse impacts and determines whether there is also a responsibility to provide or cooperate in remediation.⁸⁸⁴ In this regard, the OECD Guidelines and OECD DD Guidance specify the following:

Where an enterprise *causes* or may *cause* an adverse human rights impact, it should take the necessary steps to cease or prevent the impact. Where an enterprise *contributes* or may *contribute* to such an impact, it should take the necessary steps to cease or prevent its contribution and use its leverage

⁸⁷⁹ OECD, ‘2011 Guidelines’ 21, paras 1 and 4, 23, para 4, 24, para 15.

⁸⁸⁰ *ibid* 19, para 2, 31, para 1, 33, para 41; OECD, ‘DD Guidance’ 15.

⁸⁸¹ OECD, ‘2011 Guidelines’ 31, paras 2-3 (emphasis added); HRC, ‘UNGPs’ Principle 13.

⁸⁸² OHCHR, ‘UNGPs FAQ’ Annex I.

⁸⁸³ OECD, ‘DD Guidance’ 3.

⁸⁸⁴ OECD, ‘2011 Guidelines’ 34, para 46; OECD, ‘DD Guidance’ 72.

to mitigate any remaining impact to the greatest extent possible. Leverage is considered to exist where the enterprise has the ability to effect change in the practices of an entity that cause adverse human rights impacts.⁸⁸⁵

Prevention refers to activities that are intended to avoid an adverse impact occurring in the first place (e.g. which reduce the risk of an adverse impact occurring); whereas mitigation refers to activities that reduce the impact when an adverse impact does occur. Prevention is the primary goal of due diligence.⁸⁸⁶

Should a corporation identify that it has caused or contributed to actual adverse impacts, it should address them by providing for or cooperating in their remediation.⁸⁸⁷

Furthermore, seeking ways to prevent or mitigate adverse impacts *directly linked* to a corporation's operations, products or services 'would entail an enterprise, acting alone or in co-operation with other entities, as appropriate, to use its leverage to influence the entity causing the adverse human rights impact to prevent or mitigate that impact'.⁸⁸⁸ What constitutes appropriate action in a specific situation is determined by different factors such as 'the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the impact, and whether terminating the relationship with the entity itself would have adverse human rights impacts'.⁸⁸⁹ Importantly, adverse impacts that occur within a business relationship caused by an entity cannot be attributed to the corporation with which it has a business relationship, ie, responsibility cannot be shifted.⁸⁹⁰ There is also no remediation responsibility in situations where a corporation is directly linked to adverse impacts.

Further defining what is meant by 'causing', 'contributing' and 'directly linked', the OECD DD Guidance provides:

An enterprise 'causes' an adverse impact if the enterprise's activities [including both actions and omissions] on their own are sufficient to result in the adverse impact.⁸⁹¹

An enterprise 'contributes to' an impact if its activities, in combination with the activities of other entities cause the impact, or if the activities of the en-

⁸⁸⁵ OECD, '2011 Guidelines' 33, para 42 (emphasis added).

⁸⁸⁶ OECD, 'DD Guidance' 74.

⁸⁸⁷ OECD, '2011 Guidelines' 31, para 6, 33, para 41; OECD, 'DD Guidance' 34, 88-91.

⁸⁸⁸ OECD, '2011 Guidelines' 33, para 43, 24, para 20.

⁸⁸⁹ *ibid* 33, para 43, 24-25, paras 21-22.

⁸⁹⁰ *ibid* 20, para 12, 33, para 43.

⁸⁹¹ OECD, 'DD Guidance' 70; OECD, '2011 Guidelines' 33, para 42.

terprise cause, facilitate or incentivise another entity to cause an adverse impact. Contribution must be substantial, meaning that it does not include minor or trivial contributions.⁸⁹²

Directly linked: 'Linkage' is defined by the relationship between the adverse impact and the enterprise's products, services or operations through another entity (i.e. business relationship). 'Directly linked' is not defined by direct contractual relationships, for example 'direct sourcing'.⁸⁹³ The OECD Guidelines clarify that business relationships include 'relationships with business partners, entities in the supply chain [such as suppliers, investors, contractors, joint ventures] and any other non-State or State entities directly linked to its business operations, products or services'.⁸⁹⁴

Generally, an enterprise is most likely to cause an adverse impact in the context of activities associated with its own operations and an enterprise is most likely to be directly linked to adverse impacts that are caused by business relationships. Contribution can occur in the context of activity related to an enterprise's own operations or through a business relationship.⁸⁹⁵

Applying this theoretical framework to the business and indigenous peoples' rights context, the following three fictitious scenarios can be distinguished:

Causing an adverse impact on indigenous peoples' rights: Extractive corporation (A) fails to identify and consult the indigenous community present in the territory in which mining operations are planned. Blasting activities of extractive corporation (A) destroy sites that are culturally significant to the indigenous community, adversely impacting their cultural rights.

Contributing to an adverse impact on indigenous peoples' rights: A private equity investor invests in a steel plant operating in territory inhabited by indigenous peoples. The investor, sitting on the board of the steel plant, regularly interacts with the management of the steel plant. The investor votes against installing run-off treatment, and as a result, the drinking water of the indigenous community is polluted by run-off from the steel plant, adversely impacting their right to health and water.⁸⁹⁶

Directly linked to an adverse impact on indigenous rights: Corporation (B) sources gold from mining entity (C), whose security forces are engaging in violent actions against indigenous peoples living near the mining plant. Corpo-

⁸⁹² OECD, 'DD Guidance' 70.

⁸⁹³ *ibid* 71.

⁸⁹⁴ OECD, '2011 Guidelines' 23, para 14; EU, ILO and OECD 4.

⁸⁹⁵ OECD, 'DD Guidance' 71.

⁸⁹⁶ *ibid*.

ration (B) did not cause or contribute to these violent acts, but nevertheless, there is a direct link between corporation (B)'s products and the adverse impact through its business relationship.⁸⁹⁷

2. Operationalization

Broadly speaking, the operationalization of the corporate responsibility to respect human rights is three-pronged. Corporations should have a policy commitment in place, carry out human rights due diligence, and provide for or cooperate in the remediation of actual adverse human rights impacts.⁸⁹⁸ The overarching aim of these building blocks, reflecting a human rights-based approach to business conduct, is to embed human rights into corporate practices internally and externally, that is, throughout the supply chain and other business relationships, to ensure respect for human rights.⁸⁹⁹

(a) *Human Rights Policy Commitment*

The OECD Guidelines recommend that corporations adopt a human rights policy statement that expresses their commitment to respect human rights. To embed the issue of human rights into policies and management systems,⁹⁰⁰ this statement should be:

(i) approved at the most senior level of the enterprise; (ii) informed by relevant internal and/or external expertise; (iii) stipulate the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services; (iv) publicly available and communicated internally and externally to all personnel, business partners and other relevant parties; (v) reflected in operational policies and procedures necessary to embed it throughout the enterprise.⁹⁰¹

Such integration of a human rights policy throughout a corporation is crucial to avoid or overcome conflicts and foster coherence between different business departments with different understandings and agendas.⁹⁰² It also serves

⁸⁹⁷ *ibid.*

⁸⁹⁸ OECD, '2011 Guidelines' 31, paras 4-6; OECD, 'DD Guidance' 15.

⁸⁹⁹ OECD, 'DD Guidance' 16; Pitts 55; HRC, 'Framework' para 62.

⁹⁰⁰ OECD, 'DD Guidance' 22-24, 56-60.

⁹⁰¹ OECD, '2011 Guidelines' 31, para 4, 33-34, para 44.

⁹⁰² OECD, 'DD Guidance' 22-24, 56-50; Pitts 55. '[P]roduct developers may not consider human rights implications; sales or procurement teams may not know the risks of entering into relationships with certain parties; and company lobbying may contradict commitments to human rights'. See HRC, 'Framework' para 62.

as a reference standard for corporations and other stakeholders to check and verify whether the corporation lives up to its human rights commitment(s). As described further below, several NCP procedures deal with allegations of a lack of or insufficient human rights policies.⁹⁰³

Several mining corporations are known to have adopted human rights policy statements with reference to indigenous peoples and FPIC.⁹⁰⁴ A prominent example in this regard is the 2013 Position Statement on Indigenous Peoples and Mining of the International Council on Mining and Metals (ICMM) – a mining industry body that brings together twenty-eight of the world's leading mining and metal corporations and thirty-six national and regional associations.⁹⁰⁵ Under the position statement, ICMM company members commit to '[w]ork to obtain consent of indigenous communities for (...) projects that are located on lands traditionally owned by or under customary use of Indigenous Peoples and are likely to have a significant adverse impacts on Indigenous Peoples'.⁹⁰⁶ Furthermore, the position statement indicates that '[indigenous peoples] can give or withhold their consent to a project, through a process that strives to be consistent with their traditional decision-making processes'.⁹⁰⁷

The UN Working Group on Business and Human Rights has examined the responsibility to adopt a policy commitment through an indigenous peoples' rights lens, noting that such a commitment must be made easily accessible to indigenous peoples, ie, taking into account language barriers, communication preferences and gender imbalances.⁹⁰⁸ From a substantive point of view, corporations may include specific provisions on the relationship with indigenous peoples and on respect for their rights, particularly their collective land and resource rights in accordance with customary land tenure and their participatory rights. Accordingly, the policy commitment should 'lay out principles for engagement with indigenous communities, including good faith consultations, and when and how the business enterprise will seek to ensure respect for the

⁹⁰³ See below [Chapter 5, Section III, C](#).

⁹⁰⁴ Greenspan and others 14-35; <<https://www.ungpreporting.org/database-analysis/>> accessed 24 April 2022.

⁹⁰⁵ ICMM, 'Mining with Principles: Annual Report 2020' (2021) <https://www.icmm.com/website/publications/pdfs/annual-review/2020_icmm_annual-report.pdf> accessed 24 April 2022.

⁹⁰⁶ ICMM, 'Position Statement' 4.

⁹⁰⁷ *ibid* 1. For a detailed interpretation of the position statement, see Doyle, FPIC 367-368.

⁹⁰⁸ UNGA, '2013 Report WGBHR' para 23.

principle of [FPIC].⁹⁰⁹ Importantly, the UN Working Group advocates for this provision to be developed in a participatory process that itself involves indigenous representatives.⁹¹⁰

(b) *Human Rights Due Diligence*

At the very core of discharging the corporate responsibility to respect human rights is the process of human rights due diligence, which serves as a tool to determine and show whether corporations are meeting their responsibility.⁹¹¹ First and foremost, the purpose of human rights due diligence is to avoid involvement in adverse impacts. If this is not achieved, due diligence 'should enable enterprises to mitigate them, prevent their recurrence and, where relevant, remediate them'.⁹¹² The OECD Guidelines describe human rights due diligence:

[A]s the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse [human rights] impacts [so called risks] [in their own operations, their supply chain and other business relationships] as an integral part of business decision-making and risk management systems.⁹¹³

Human rights due diligence includes different interrelated procedural steps:⁹¹⁴ It commences with identifying and assessing actual or potential adverse impacts,⁹¹⁵ followed by integrating and acting upon these findings to cease, prevent, or mitigate these impacts;⁹¹⁶ tracking the implementation and results of the due diligence activities to ensure that the right measures are taken and to incorporate lessons learned to improve future processes;⁹¹⁷ and communicating how impacts are addressed, that is, providing information about the due diligence conducted.⁹¹⁸ Finally, if a corporation identifies that it has caused or contributed to adverse impacts, it is expected to provide for or cooperate in

⁹⁰⁹ *ibid* paras 23-24, 29.

⁹¹⁰ *ibid* para 23.

⁹¹¹ HRC, 'UNGPs' Commentary Principle 15.

⁹¹² OECD, 'DD Guidance' 16.

⁹¹³ OECD, '2011 Guidelines' 23, para 14, 34, para 45; OECD, 'DD Guidance' 15.

⁹¹⁴ OECD, '2011 Guidelines' 34, para 45; OECD, 'DD Guidance' 16, 21.

⁹¹⁵ OECD, 'DD Guidance' 25-28.

⁹¹⁶ *ibid* 29-31.

⁹¹⁷ *ibid* 32.

⁹¹⁸ *ibid* 33.

remediation of those impacts.⁹¹⁹ Providing or cooperating in remediation of adverse impacts is not part of the due diligence process as such, but the due diligence process serves as a supporting measure regarding remediation.⁹²⁰

Of course, there is no one-size-fits-all model of human rights due diligence given the variety of human rights and rights holders that may be adversely impacted and of business activities. At the same time, in a globalized world where the number of business relationships is high and supply chains are often complex and opaque, corporations may face challenges in identifying and addressing all the adverse impacts associated with their operations.⁹²¹ The OECD Guidelines recognize these challenges and expect corporations to '[c]arry out human rights due diligence as appropriate to their size, the nature and content of operations and the severity of the risks of adverse human rights impact'.⁹²² In the words of the OECD DD Guidance, human rights due diligence is 'commensurate with risk' and may involve 'prioritization', lending it the name of risk-based human rights due diligence.⁹²³ Depending on the industry sector and operations, some rights are more relevant and at risk than others.⁹²⁴ For instance, the apparel sector's human rights risks (workers' rights) are different than those of the extractive sector (indigenous peoples' rights).⁹²⁵ Accordingly, where necessary, salient and severe human rights risks should be prioritized in the process of human rights due diligence.⁹²⁶ The severity of a potential human rights impact can be gauged against the possibility of remediating it. For instance, if a potential adverse impact may result in loss of life, even if it is unlikely, it may need to be prioritized.⁹²⁷ Importantly, prioritization does not mean that corporations are absolved from addressing all their adverse human rights impacts, more so since human rights risks may change over time.⁹²⁸

In sum, human rights due diligence is thus to be understood as an ongoing and dynamic process that may vary and need adaptation depending on the corpo-

⁹¹⁹ OECD, '2011 Guidelines' 34, para 46; OECD, 'DD Guidance' 34.

⁹²⁰ OECD, 'DD Guidance' 21, 88.

⁹²¹ *ibid* 17, 66.

⁹²² OECD, '2011 Guidelines' 15, para 24, 31, para 5, 34, para 45.

⁹²³ OECD, 'DD Guidance' 17; OECD, '2011 Guidelines' 24, para 16.

⁹²⁴ OECD, '2011 Guidelines' 32, para 40; OECD, 'DD Guidance' 17.

⁹²⁵ OECD, 'DD Guidance' 62.

⁹²⁶ OECD, '2011 Guidelines' 32, para 40; HRC, 'UNGPs' Principle 24.

⁹²⁷ This represents a difference between risk-based human rights due diligence and risk-based due diligence for other adverse impacts. In the case of prioritizing risks to human rights, severity is the determining factor over likelihood, see OECD, 'DD Guidance' 17, 45.

⁹²⁸ OECD, '2011 Guidelines' 32, para 40, 34, para 45; HRC, 'UNGPs' Commentary Principle 24; OECD, 'DD Guidance' 17, 45.

ration's circumstances, the nature and context of corporation's operation(s), and the risk and nature of human rights impacts.⁹²⁹ Consequently, for corporations whose risk profiles include potential adverse impacts on indigenous peoples, ensuring respect for indigenous peoples' rights will require a due diligence process that is tailored to their characteristics and their individual and collective rights, particularly their participatory rights and land and resource rights, upon which the enjoyment of other rights are based.⁹³⁰ The above elaborations show, conducting human rights due diligence is not a responsibility of result but of conduct.⁹³¹ Effective human rights due diligence is supported by a human rights policy statement embedding human rights into policies and management systems and aims to enable remediation where appropriate.⁹³²

(c) *Remediation*

Where corporations identify that they have caused or contributed to an adverse human rights impact, the OECD Guidelines foresee corporations' provision or cooperation in remediating these adverse impacts, which may range from judicial to state-based non-judicial and non-state-based non-judicial remedy mechanisms, including operational-level grievance mechanisms.⁹³³

D. Recent Developments: 2011 until the Beginning of 2022

Since 2011, things have changed on different levels and via diverse means. The following does not aim to give an exhaustive overview of all the developments in the business and human rights field since 2011 but refers to some of the more recent developments on the international, regional, national, and corporate levels to introduce some instruments relevant for the purposes of this thesis and to round off this general section on business and human rights.

On a regional level, the adoption of EU Directive 2014/95 has been heralded as an important step towards more transparency by requiring corporations of a certain size to report non-financial information such as matters relating to the environment, social issues, and employees, respect for human rights, anticorruption, and bribery.⁹³⁴ Furthermore, EU Regulation 2017/821 lays out the supply chain due diligence obligations of Union importers of conflict minerals

⁹²⁹ OECD, '2011 Guidelines' 20, para 10, para 5; OECD, 'DD Guidance' 16-19.

⁹³⁰ See below [Chapter 3, Section II](#), [Chapter 5, Section III, A](#), and [D](#); OECD, 'DD Guidance' 17.

⁹³¹ Buhmann, 'NCP Statements' 393.

⁹³² OECD, 'DD Guidance' 15.

⁹³³ OECD, '2011 Guidelines' 31, para 6, 34, para 46. For further details, see OECD, 'DD Guidance' 34, 88-91; HRC, 'UNGPs' Principles 22, 25-31.

⁹³⁴ EU, Directive 2014/95/EU.

(tin, tantalum tungsten, their ores, and gold)⁹³⁵ – minerals that are often found in territories inhabited by indigenous peoples.⁹³⁶ Last, in February 2022 the EU Commission adopted a proposal for an EU-wide mandatory corporate sustainability due diligence directive.⁹³⁷

On an international level, the following developments are noteworthy: In 2012, the IFC, supporting investment in developing countries by providing loans, presented its renewed Policy on Environmental and Social Sustainability in which it recognizes the corporate responsibility to respect human rights.⁹³⁸ This policy is further specified in the IFC Performance Standards on Environmental and Social Sustainability, which were adopted contemporaneously and include a specific section on indigenous peoples.⁹³⁹

To further clarify responsible business conduct, particularly the concept of corporate due diligence and the requirements it entails,⁹⁴⁰ the OECD has put effort into developing specific (sector) guidance documents, such as the OECD-FAO Guidance for Responsible Agricultural Supply Chains of 2016 (OECD-FAO Guidance),⁹⁴¹ the OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector of 2017 (OECD Stakeholder Guidance),⁹⁴² and the OECD DD Guidance of 2018.⁹⁴³ As illustrated further below, all three OECD RBC Guidance Documents are relevant to the business and indigenous peoples' rights context.

Within the UN, the claim for directly binding human rights obligations for corporations has been reinvigorated. In June 2014, the UN Human Rights Council mandated an open-ended intergovernmental working group 'to elaborate an international legally binding instrument to regulate, in international human

⁹³⁵ EU, Regulation 2017/821.

⁹³⁶ For gold mining, see eg Patricia Quijano Vallejos and others, 'Undermining Rights: Indigenous Lands and Mining in the Amazon' (World Resources Institute, 2020) <https://files.wri.org/d8/s3fs-public/Report_Indigenous_Lands_and_Mining_in_the_Amazon_web_1.pdf> accessed 22 April 2022.

⁹³⁷ EC, Corporate Sustainability Due Diligence COM(2022).

⁹³⁸ IFC, 'Policy on Environmental and Social Sustainability' (2012) para 12 <https://www.ifc.org/wps/wcm/connect/7141585d-c6fa-490b-a812-2ba87245115b/SP_English_2012.pdf?MOD=AJPERES&CVID=kiIrwOg> accessed 27 April 2022.

⁹³⁹ IFC, 'Performance Standards' Standard 7.

⁹⁴⁰ Kaufmann, 'Verantwortung' 332.

⁹⁴¹ OECD, 'OECD-FAO Guidance for Responsible Agricultural Supply Chains' (OECD, 2016).

⁹⁴² OECD, 'Stakeholder Guidance'.

⁹⁴³ OECD, 'DD Guidance'. For a comprehensive overview of all the OECD RBC Guidance Documents, see <<http://mneguidelines.oecd.org/duediligence/>> accessed 24 April 2022.

rights law, the activities of transnational corporations and other business enterprises'.⁹⁴⁴ A third revised draft treaty was published in August 2021, which foresees specific provisions on indigenous peoples, consultation and FPIC.⁹⁴⁵

A parallel shift towards binding regulations has already taken place, however. On a national level, there is growing legislative momentum among states towards mandatory disclosure and reporting as well as human rights due diligence.⁹⁴⁶ In 2015, the UK government adopted the UK Modern Slavery Act, which establishes a framework against modern slavery and human trafficking. The Act's Clause 54 on Transparency in Supply Chains requires corporations to publish an annual statement – signed off by the top level – on actions such as policies enacted, due diligence processes and training to combat slavery and human trafficking. Failure to comply with Clause 54 may result in legal and financial consequences.⁹⁴⁷ The Australian government followed by adopting a Modern Slavery Act in 2018.⁹⁴⁸ In terms of mandatory human rights due diligence, France, the Netherlands and Germany adopted mandatory due diligence laws in 2017, 2019 and 2021.⁹⁴⁹ In Switzerland, a similar initiative was nar-

⁹⁴⁴ HRC, 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (14 July 2014) UN Doc A/HRC/RES/26/9 para 1.

⁹⁴⁵ OEIGWG, 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises: Third Revised Draft 17. August 2021' (2021) Art. 6(4d) <<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>> accessed 10 April 2022.

⁹⁴⁶ See eg Kaufmann, 'Swiss Finish' 970-975.

⁹⁴⁷ UK Modern Slavery Act 2015 (Chapter 30) 2015, available at <<https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>> accessed 24 April 2022.

⁹⁴⁸ Australian Modern Slavery Act 2018 (No. 153) 2018, available at <<https://www.legislation.gov.au/Details/C2018A00153>> accessed 24 April 2022.

⁹⁴⁹ Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, available at <<https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/>> accessed 24 April 2022; Dutch Child Labour Due Diligence Law (Wet Zorgplicht Kinderarbeid) 2019 (Unofficial Translation), available at <<https://www.ropesgray.com/en/newsroom/alerts/2019/06/Dutch-Child-Labor-Due-Diligence-Act-Approved-by-Senate-Implications-for-Global-Companies>> accessed 24 April 2022; Gesetz über die unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in Lieferketten (Lieferkettensorgfaltspflichtengesetz (LkSG)) vom 16. Juli 2021, available at <http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl121s2959.pdf> accessed 24 April 2022.

rowly rejected at ballot boxes in November 2020.⁹⁵⁰ On a policy level, several states have adopted so-called national action plans (NAPs) as a means to operationalize the UNGPs. NAPs lay out states' respective strategies on business and human rights and responsible business conduct generally, with some referring to indigenous peoples.⁹⁵¹ Last, there is an increase in lawsuits against corporations in different jurisdictions alleging corporate-related human rights abuses.⁹⁵² Noteworthy in this context is the recently launched lawsuits database of the Business and Human Rights Resource Centre – a well-known NPO in the field of business and human rights – showing that a majority of cases were filed by workers or affected communities, including indigenous peoples, against mining or oil and gas corporations.⁹⁵³

On the corporate level, there are a plethora of different corporate- and multi-stakeholder-driven initiatives and standards referring to human rights.⁹⁵⁴ Furthermore, several corporations regularly report on and disclose issues related to human rights on a voluntary basis.⁹⁵⁵

II. Business and Indigenous Peoples' Rights

The previous section has shown that the UNGPs, OECD Guidelines, and ILO MNE Declaration stand for a broad consensus that corporations bear responsibilities as actors in society in addition to their primary obligation to obey domestic laws in the jurisdiction in which they operate and/or where they are domiciled and independent of states' ability and/or willingness to fulfil

⁹⁵⁰ <<https://www.bk.admin.ch/ch/d/pore/vi/vis462t.html>> accessed 24 April 2022. On the counter-proposal, see Christine Kaufmann and Res Schuerch, 'Neue Regeln für Schweizer Unternehmen - Berichterstattung und themenspezifische Sorgfaltspflicht: Der indirekte Gegenvorschlag zur Konzernverantwortungsinitiative' (2020) <https://www.skmr.ch/cms/upload/pdf/2020/201216_KVI_Gegenvorschlag.pdf>; <<https://www.ejpd.admin.ch/bj/de/home/aktuell/mm.msg-id-86226.html>> accessed 23 April 2022.

⁹⁵¹ For an overview, see <<https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>> accessed 24 April 2022. States referring to indigenous peoples in der NAPs as of April 2020 include: Chile, Colombia, Finland, France, Germany, Kenya, Spain, Sweden (most elaborated), Thailand, the UK, and the United States.

⁹⁵² <<https://www.business-humanrights.org/en/from-us/lawsuits-database/>> accessed 24 April 2022.

⁹⁵³ *ibid.*

⁹⁵⁴ See eg <<https://msi-database.org/database>> accessed 24 April 2022.

⁹⁵⁵ <<https://www.ungpreporting.org/database-analysis/explore-disclosures/>> accessed 24 April 2022.

their own human rights obligations.⁹⁵⁶ The three core instruments firmly acknowledge the corporate responsibility to respect human rights as an integral part of responsible business conduct via a set of authoritative yet non-binding principles and recommendations consistent with applicable laws and internationally recognized standards.⁹⁵⁷ That the corporate responsibility to respect human rights includes the responsibility to respect indigenous peoples' rights has been acknowledged and is reflected in an evolving discussion on business and indigenous peoples with increased recognition of their rights and the principle of FPIC in different standards and initiatives, including the key RBC instruments.⁹⁵⁸

Under the UNGPs, corporations are – at a minimum – expected to respect internationally recognized human rights expressed in the International Bill of Human Rights, encompassing the Universal Declaration of Human Rights, IC-CPR, ICESCR and principles concerning fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work of 1998.⁹⁵⁹ While to some this points to a delimitation to human rights enshrined in these instruments,⁹⁶⁰ SRSR Ruggie takes the view that the corporate responsibility to respect applies to all internationally recognized human rights.⁹⁶¹ This view, as shown in [Chapter 2](#), is also shared by others, including former SRRIP Anaya and the CESCR, which firmly recognize corporations' responsibility to respect indigenous peoples' rights.⁹⁶²

⁹⁵⁶ OECD, '2011 Guidelines' 17, para 2, 31-32, paras 37-38; ILO, 'MNE Declaration' para 8; HRC, 'UNGPs' Principle 23; OHCHR, 'UNGPs FAQ' Question 31.

⁹⁵⁷ OECD, '2011 Guidelines' 3; Christine Kaufmann and Roel Nieuwenkamp, 'Human Rights is an Integral Part of Responsible Business Conduct' (OECD *on the Level*, 10 December 2018) <<https://oecdonthellevel.com/2018/12/10/human-rights-is-an-integral-part-of-responsible-business-conduct/>> accessed 24 April 2022.

⁹⁵⁸ Greenspan and others; Doyle and Whitmore 26-29; Doyle, FPIC 240-245. See also below [Chapter 3, Section II, A-C](#).

⁹⁵⁹ HRC, 'UNGPs' Principle 12, Commentary Principle 12.

⁹⁶⁰ Muchlinski, 'Framework' 148.

⁹⁶¹ Ruggie, 'Social Construction' 14.

⁹⁶² HRC, '2012 Report SRRIP' para 55; James Anaya, 'Update of OECD Guidelines for Multinational Enterprises: Informal Expert Meeting on Human Rights Issues' (2011) <<https://media.business-humanrights.org/media/documents/fdc31589438324b77398a39465f4f9d139427dce.pdf>> accessed 14 April 2022; CESCR, 'GC No. 24'; Seck 83.

This view is further buttressed by the UNGPs' Commentary itself, making clear that depending on the circumstances, corporations are also expected to consider additional standards such as those referring to individuals of specific groups or populations.⁹⁶³ More precisely:

[E]nterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples (...).⁹⁶⁴

Such additional standards include the UNDRIP and ILO C 169 as specified by the UN Working Group on Business and Human Rights –⁹⁶⁵ the UN body mandated to promote the effective implementation of the UNGPs.⁹⁶⁶ The same provision on additional standards can be found verbatim in the OECD Guidelines.⁹⁶⁷ The ILO MNE Declaration does not include a similar provision. However, given its alignment with the UNGPs referring to the baseline expectation of the International Bill of Human Rights, it is safe to argue that such an understanding of the scope of corporations' responsibility is in line with the ILO MNE Declaration, especially since the Declaration refers to ILO C 169 as a Convention that corporations may wish to consider.⁹⁶⁸

Against this backdrop, the rights and standards affirmed in the UNDRIP and ILO C 169 clearly also fall within the scope of the corporate responsibility to respect human rights in addition to those rights and standards enshrined in the International Bill of Human Rights,⁹⁶⁹ which are already interpreted in a way to ensure the protection of indigenous peoples.⁹⁷⁰ As such, the corporate responsibility to respect human rights includes a responsibility to respect indigenous peoples' rights and by implication the principle of FPIC given its

⁹⁶³ HRC, 'UNGPs' Commentary Principle 12, General Principles.

⁹⁶⁴ *ibid* Commentary Principle 12.

⁹⁶⁵ UNGA, '2013 Report WGBHR' paras 19, 21, 24. See also Doyle, FPIC 227-228.

⁹⁶⁶ HRC, 'UNGP Endorsement' para 6.

⁹⁶⁷ OECD, '2011 Guidelines' 32, para 40.

⁹⁶⁸ ILO, 'MNE Declaration' para 10(d), Annex I. See also <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_549433/lang-en/index.htm> accessed 24 April 2022.

⁹⁶⁹ HRC, '2012 Report SRRIP' para 59; Doyle, FPIC 225-226. See also HRC, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations: Guidance for Negotiators' (25 May 2011) UN Doc A/HRC/17/31/Add.3 18, Principle 7.

⁹⁷⁰ For an overview, see above text to [Fn 671](#)-700.

recognition in the two key indigenous peoples' rights instruments.⁹⁷¹ Accordingly, the duties and responsibilities outlined in the UNGPs, OECD Guidelines, and ILO MNE Declaration need to be interpreted by corporations and states in a manner that is consistent with the UNDRIP, ILO C 169 and the International Bill of Human Rights.⁹⁷²

In keeping with the first research question – what are the precise rules governing corporate responsibility with regard to indigenous peoples' rights and FPIC? – the above elaborations beg the question of precisely what the key RBC instruments, OECD RBC Guidance Documents and IFC Performance Standards entail in terms of indigenous peoples' rights and FPIC? Can one find the rights of indigenous peoples and the principle of FPIC reflected in the standards directly addressing corporations? Putting an indigenous peoples' rights lens to these instruments, the following sections identify pertinent provisions seeking to frame the corporate responsibility with a view to indigenous peoples' rights.

A. Indigenous Peoples' Rights and FPIC in the Key RBC Instruments

1. Explicit Reference

Besides referring to ILO C 169, whose standards corporations may wish to consider,⁹⁷³ the ILO MNE Declaration does not include any further explicit reference to indigenous peoples and their rights. Nevertheless, it is argued that corporations' compliance with the Declaration's recommendations on employment, training, conditions of work and life, and industrial relations may foster sustainability, partnerships with indigenous peoples, employee engagement and learning from indigenous peoples' unique knowledge and contributions.⁹⁷⁴

The UNGPs include three explicit references to indigenous peoples: first, in terms of the additional standards that corporations may wish to consider (referred to above),⁹⁷⁵ second, in the context of states' guidance to corporations on how to respect human rights, particularly on how to effectively consider [in the process of human rights due diligence] 'issues of (...) vulnerability and/or

⁹⁷¹ UNGA, '2013 Report WGBHR' paras 18–31.

⁹⁷² *ibid* paras 19, 21, 24; Doyle, FPIC 227–228.

⁹⁷³ ILO, 'MNE Declaration' para 10(d), Annex I. See also <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_549433/lang-en/index.htm> accessed 24 April 2022.

⁹⁷⁴ <https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_549433/lang-en/index.htm> accessed 24 April 2022.

⁹⁷⁵ HRC, 'UNGPs' Commentary Principle 12.

marginalization, recognizing specific challenges that may be faced by indigenous peoples',⁹⁷⁶ and in the context of (legal) barriers that indigenous peoples may face in accessing remedy mechanisms.⁹⁷⁷ Furthermore, the Commentary on Principle 3 of the UNGPs on the operational aspects of states' duty to protect further emphasizes the need for greater clarity in some areas of law, including those governing access to land and land tenure to ensure protection of both rights holders and corporations, clearly pointing to indigenous peoples. While the principle of FPIC was mentioned in the 1994 report of the UNCTC and later affirmed in the commentary on the UN Draft Norms,⁹⁷⁸ FPIC was not explicitly included in the UN's Protect, Respect and Remedy Framework or in the UNGPs given that the principle and its meaning were still the subject of debate.⁹⁷⁹

In a similar vein as the UNGPs, the OECD Guidelines make only sparse explicit reference to indigenous peoples' (rights). Indigenous peoples are explicitly mentioned in Chapter IV on human rights in relation to additional standards that corporations may wish to consider (referred to above)⁹⁸⁰ as well as in Chapter V on employment and industrial relations, which emphasizes that indigenous peoples as members of vulnerable groups should enjoy equal opportunities for training as potential work forces in business operations.⁹⁸¹ Efforts to firmly embed indigenous peoples' rights in the 2011 edition of the OECD Guidelines have allegedly failed due to the resistance of some states.⁹⁸² The

⁹⁷⁶ *ibid* Commentaries Principles 3, 18, 20, 26-27.

⁹⁷⁷ *ibid* Commentaries Principles 26-27.

⁹⁷⁸ UNCHR, 'Report of the Centre on Transnational Corporations Submitted Pursuant to Sub-Commission Resolution 1990/26: Transnational Investments and Operations on the Lands of Indigenous Peoples' (15 June 1994) UN Doc E/CN.4/Sub.2/1994/40 para 24; UNCHR, 'Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (26 August 2003) UN Doc E/CN.4/Sub.2/2003/38/Rev.2 para 10(c).

⁹⁷⁹ John Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101(4) *The American Journal of International Law* 819, 825.

⁹⁸⁰ OECD, '2011 Guidelines' 32, para 40.

⁹⁸¹ *ibid* 40-41, para 58.

⁹⁸² Nieuwenkamp, 'Staying Ahead'.

lack of FPIC and land governance, for instance, is perceived as 'unfinished business' and a 'moral hole' that should be filled with the next revision of the OECD Guidelines.⁹⁸³

2. Implicit Reference

(a) *Stakeholder Engagement*

Although there is little explicit reference to indigenous peoples' (rights), reference is made implicitly or at least can be assumed, particularly in terms of indigenous peoples' participatory rights. A central theme that is emphasized in all three key RBC instruments is stakeholder engagement.⁹⁸⁴

The UNGPs embed effective stakeholder engagement by means of meaningful consultation with (potentially) affected and other relevant stakeholders as an essential component of the process of human rights due diligence. Adapted to the corporation's size and the nature and context of the operation, stakeholder engagement should help in accurately identifying and assessing any actual or potential adverse impact⁹⁸⁵ and in verifying whether adverse impacts are being addressed⁹⁸⁶ and should be part of and help in communicating how corporations have addressed their human rights impacts.⁹⁸⁷ Regarding assessing human rights impacts, the UNGPs further emphasize environmental, social impact and human rights impact assessments as important tools in which

⁹⁸³ *ibid*; Herman Mulder and Martijn Scheltema, 'Synthesis and Further Perspectives' in OECD (ed), *OECD Guidelines for Multinational Enterprises – A Glass Half Full: A Liber Amicorum for Dr. Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct 2013-2018* (OECD 2018) 15; Marian Ingrams and Joseph Wilde-Ramsing, 'The State of Remedy under the OECD Guidelines: Understanding NCP Cases Concluded in 2018 through the Lens of Remedy' (OECD Watch Briefing Paper, 2019) 13 <<https://www.oecdwatch.org/wp-content/uploads/sites/8/2019/06/State-of-Remedy-2018-2019-06-08.pdf>> accessed 23 April 2022; Marian Ingrams, 'State of Remedy 2020: Understanding Community-and Civil Society-Led Complaints Concluded in 2020 through the Lens of Remedy' (OECD Watch Briefing Paper, 2021) 3 <<https://www.oecdwatch.org/state-of-remedy-2020/>> accessed 2 April 2022. See also the recommendation of former SRRI Anaya to include more specific guidance on indigenous peoples' rights within the OECD Guidelines, Anaya, 'Update'; Seck 80.

⁹⁸⁴ EU, ILO and OECD 4.

⁹⁸⁵ HRC, 'UNGP's Principle 18, Commentary Principle 18.

⁹⁸⁶ *ibid* Principle 20, Commentary Principle 20.

⁹⁸⁷ *ibid* Commentary Principle 3, Principle 21, Commentary Principle 21. See also OHCHR, 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide' (2012) UN Doc HR/PUB/12/02 Questions 57, 61.

stakeholders should have a say for reasons of accuracy and trust.⁹⁸⁸ Assessing human rights impacts via such assessments 'should be undertaken at regular intervals: prior to a new activity or relationship; prior to major decisions or changes in the operation (...); in response to or anticipation of changes in the operating environment (...); and periodically throughout the life of an activity or relationship'.⁹⁸⁹

What meaningful stakeholder engagement means in specific situations, including in situations involving indigenous peoples, and who identifies as a stakeholder is not prescribed in the UNGPs, however.⁹⁹⁰ In stipulating that consultation should be conducted directly with potentially affected stakeholders and consider potential barriers such as language difficulties to understand the concerns of potentially affected stakeholders,⁹⁹¹ the UNGPs provide some insight into what the term 'meaningful' could include. Should direct consultation not be possible or feasible, corporations are recommended to consider 'reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society' or the stakeholders' legitimate representatives.⁹⁹² In this context, the UNGPs' subsequently published interpretive documents bring further clarification by stipulating the following:

A Stakeholder refers to any individual who may affect or be affected by an organization's activities. An affected stakeholder refers (...) to an individual whose human rights have been affected by an enterprise's operations, products or services.

Stakeholder engagement or consultation refers (...) to an ongoing process of interaction and dialogue between an enterprise and its potentially affected stakeholders that enables the enterprise to hear, understand and respond to their interests and concerns, including through collaborative approaches.⁹⁹³

Furthermore, according to the interpretive documents, consultation requires sensitivity in terms of potential barriers such as literacy or language, cultural differences, and power imbalances and an inclusive approach, ie, consultation processes should reach out to individuals or groups that may otherwise be excluded.⁹⁹⁴

⁹⁸⁸ HRC, 'UNGPs' Commentary Principle 18; OHCHR, 'Interpretive Guide' Questions 37, 49.

⁹⁸⁹ HRC, 'UNGPs' Commentary Principle 18.

⁹⁹⁰ Buhmann, 'NCP Statements' 397.

⁹⁹¹ HRC, 'UNGPs' Commentary Principle 18.

⁹⁹² *ibid*; OHCHR, 'Interpretive Guide' Questions 30, 41, 42.

⁹⁹³ OHCHR, 'UNGPs FAQ' Annex I.

⁹⁹⁴ OHCHR, 'Interpretive Guide' Questions 42, 57.

In sum, under the UNGPs, stakeholder engagement is generally understood as ‘an important means of understanding the concerns and interest of affected stakeholders and of building effective [and trusting] relationships with these crucial groups on an ongoing basis.’⁹⁹⁵ Stakeholder engagement demonstrates that stakeholders’ views and human rights are taken seriously and helps a corporation understand both what constitutes and impacts stakeholders’ human rights and how significant an impact may be for them.⁹⁹⁶

By including the UNGPs’ provision on meaningful consultation as a means to identify and assess adverse impacts, the approach taken by the ILO MNE Declaration appears to be in line with the UNGPs. However, given the Declaration’s labour focus, it particularly emphasizes the central role of freedom of association and collective bargaining as well as industrial relations and social dialogue in the process of engagement.⁹⁹⁷

The OECD Guidelines are more detailed on stakeholder engagement than the UNGPs and ILO MNE Declaration but less clear on how stakeholder engagement relates to the concept of corporate due diligence.⁹⁹⁸ Introduced with the OECD Guidelines’ revision in 2011,⁹⁹⁹ the concept of stakeholder engagement was not firmly presented as part of the due diligence process.¹⁰⁰⁰ Enshrined in a separate provision next to risk-based due diligence,¹⁰⁰¹ under the OECD Guidelines, engaging stakeholders is recommended alongside conducting risk-based due diligence.¹⁰⁰² It is only with the subsequent OECD RBC Guidance Documents that both aspects of stakeholder engagement are emphasized, namely, stakeholder engagement as expected conduct of corporations in itself and as an essential activity of risk-based due diligence and thus ‘as an important means of implementing due diligence’ and by implication human rights due diligence.¹⁰⁰³

As elaborated below, this is well illustrated in the OECD Stakeholder Guidance. This guidance ‘provides a due diligence framework for enterprises operating in the extractive sector to identify and manage risk with regard to stakeholder engagement activities to ensure they play a role in avoiding and addressing ad-

⁹⁹⁵ *ibid* Questions 42, 61.

⁹⁹⁶ *ibid* Question 42.

⁹⁹⁷ ILO, ‘MNE Declaration’ paras 10(e), 63.

⁹⁹⁸ Mestad 79.

⁹⁹⁹ OECD, ‘2011 Update’ 15, 24–25.

¹⁰⁰⁰ See eg OECD, ‘Stakeholder Guidance’ 18; Mestad 79.

¹⁰⁰¹ OECD, ‘2011 Guidelines’ 20, paras 10 and 14.

¹⁰⁰² OECD, ‘Stakeholder Guidance’ 17–18.

¹⁰⁰³ *ibid* 10, 18–19; Mestad 79.

verse impacts as defined in the OECD Guidelines.’¹⁰⁰⁴ In short, due diligence for stakeholder engagement activities helps ensure that the process of due diligence – of which stakeholder engagement is part – is carried out properly. In this context, the guidance notes:

[I]f stakeholder engagement activities are not properly supported, developed or executed, their due diligence function may not be realised, and adverse impacts may not be avoided or addressed. Furthermore, poor stakeholder engagement can in and of itself give rise to actual or perceived adverse impacts and jeopardies potential benefits to stakeholders.¹⁰⁰⁵

In sum, under the OECD RBC framework – referring to the OECD Guidelines and the subsequent OECD RBC Guidance Documents (as illustrated in more detail below) – stakeholder engagement is part of the concept of risk-based (human rights) due diligence but, constituting a general RBC concept in itself enshrined in Chapter II of the OECD Guidelines,¹⁰⁰⁶ due diligence should also be carried out for stakeholder engagement. Stakeholder engagement is thus both a means and an end in fostering responsible business conduct. This dual role of stakeholder engagement in the OECD RBC framework marks a difference from the UNGPs, which embed stakeholder engagement in the process of human rights due diligence and thus ‘merely’ depict it as a means but not as an end in itself.

Further differences can be distilled from the language used to describe and define stakeholder engagement, with the OECD Guidelines going into more detail in terms of process and context than the UNGPs. Under the OECD Guidelines, corporations are expected to ‘[e]ngage with relevant stakeholders (...) to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities’, such as projects with intensive use of water or land.¹⁰⁰⁷ Stakeholder engagement is defined as ‘interactive processes (...) through, for example, meetings, hearings or consultations proceedings’, which are ‘characterised by two-way communication and [depend] on the good faith of the participants on both sides.’¹⁰⁰⁸

Again, in essence, consultation with indigenous peoples under the UN and ILO frameworks is based on the premise of enabling genuine and meaningful in-

¹⁰⁰⁴ OECD, ‘Stakeholder Guidance’ 15–16.

¹⁰⁰⁵ *ibid* 18.

¹⁰⁰⁶ OECD, ‘2011 Guidelines’ 20, para 14, 25, para 25; OECD, ‘Stakeholder Guidance’ 18.

¹⁰⁰⁷ OECD, ‘2011 Guidelines’ 20, para 14, 21, para 1, 25, para 25. The OECD Guidelines include further reference to stakeholder engagement, see *ibid* 34 para 46, 42, para 2(b).

¹⁰⁰⁸ *ibid* 25, para 25.

clusion of indigenous peoples in decision-making affecting them. Consultation processes are characterized by mutual respect and good faith interaction; conducted at an early stage and on an ongoing basis, ie, prior to any operations and throughout the lifetime of a project; free from any coercion, manipulation or intimidation; and adapted and appropriate to the circumstances and (cultural) context at hand. Importantly, indigenous peoples should be included in the design and implementation of the consultation process and be able to participate via their own institutions and freely choose their representatives. Reaching agreement and obtaining indigenous peoples' consent should be the objective, and in specific situations, it is even viewed as a prerequisite for projects to proceed further. Consultation is thus not merely a tick-off or listening exercise but a process and a means whereby indigenous peoples voice their own agenda.¹⁰⁰⁹

Generally, neither of the two key RBC instruments' notions of stakeholder engagement fully reflects good faith consultation as defined above. Nevertheless, some elements of good faith consultation are reflected in both the OECD Guidelines and the UNGPs framing stakeholder engagement as a process conducted in good faith and in an interactive and two-way manner. Furthermore, the UNGPs emphasize the importance of addressing challenges and barriers that stakeholder engagement may entail and be sensitive to issues, including cultural differences. In stating that stakeholder engagement should enable stakeholders' views to be taken into account in decision-making affecting them, the OECD Guidelines even suggest some room for influence by those affected. However, it has been argued that in theory and practice, stakeholder engagement is predominantly framed from a corporate rather than a stakeholder or even rights holder perspective. Maher and Buhmann speak of a business-led top-down approach to stakeholder engagement rather than a bottom-up approach where affected stakeholders would take the lead to ensure more socially just results. The same criticism is voiced regarding impact assessment studies.¹⁰¹⁰

In conclusion, what meaningful stakeholder engagement or consultation actually entails in specific situations, including with indigenous peoples, is pre-

¹⁰⁰⁹ See above [Chapter 2, Section I, B. 2.](#) and [Section II, A. 3., B.-C.](#)

¹⁰¹⁰ Rajiv Maher and Karin Buhmann, 'Meaningful Stakeholder Engagement: Bottom-Up Initiatives within Global Governance Frameworks' (2019) 107 *Geoforum* 231, 231-232 with further references. See also Tara J. Melish and Errol Meidinger, 'Protect, Respect, Remedy and Participate: "New Governance" Lessons for the Ruggie Framework' in Radu Mares (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Martinus Nijhoff Publishers 2012) 330-335.

scribed neither by the UNGPs nor the OECD Guidelines.¹⁰¹¹ Stakeholder engagement is framed neither as a right in and of itself nor as an expression of the right to participate and be consulted or even to give or withhold one's consent.¹⁰¹² Against this background and considering the little coverage of indigenous peoples' (rights) in the key RBC instruments generally, these instruments' clarification of the corporate responsibility to respect indigenous peoples' rights, particularly their participatory rights, is limited.¹⁰¹³ Nevertheless, as illustrated in the following sections, the concept of stakeholder engagement has been further clarified by the OECD RBC Guidance Documents addressing stakeholder engagement, particularly regarding indigenous peoples, in more detail.

(b) *Sustainable Development and Environmental Protection*

Given the OECD Guidelines' broad scope, further linkage to indigenous peoples can be identified beyond the references above. Regarding indigenous peoples' aspirations to self-determine their own pace and path of economic, cultural, and social development within the state they reside in,¹⁰¹⁴ the OECD Guidelines' recommendations on sustainable development and protection of the environment deserve special emphasis considering that the protection of indigenous peoples and their way of life goes hand in hand with the latter two issues.¹⁰¹⁵ In this context, Chapter II, which contains common fundamental principles for the recommendations in the OECD Guidelines' subsequent chapters,¹⁰¹⁶ holds that corporations should '[c]ontribute to economic, environmental and social progress with a view to achieving sustainable development'.¹⁰¹⁷ In a similar vein, Chapter V on the environment recommends that corporations 'take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner con-

¹⁰¹¹ Buhmann, 'NCP Statements' 397. See also OECD, 'Stocktaking Report on the OECD Guidelines for Multinational Enterprises' (OECD, 2022) 37-38 <<https://mneguidelines.oecd.org/stocktaking-report-on-the-oecd-guidelines-for-multinational-enterprises.pdf>> accessed 26 April 2022.

¹⁰¹² Notably, in contrast to the UNGPs, the OECD Guidelines use the term 'rights-holders', see OECD, '2011 Guidelines' 34, para 45.

¹⁰¹³ Seck 83.

¹⁰¹⁴ Preamble UNGA, 'UNDRIP'; Rombouts, 'Evolution' 175, 221; Barelli, 'FPIC in UNDRIP' 248.

¹⁰¹⁵ Rombouts, *Having a Say* 396. For a more detailed examination of the OECD Guidelines' environment chapter and its connection to indigenous peoples, see Seck 80-83.

¹⁰¹⁶ OECD, '2011 Guidelines' 21, para 1.

¹⁰¹⁷ *ibid* 19, para 1.

tributing to the wider goal of sustainable development'.¹⁰¹⁸ In this context, the OECD Guidelines recommend that corporations collect and evaluate adequate and timely information on environmental, health, and safety impacts of their operations and assess and address them through, for example, environmental impact assessments; regularly monitor and verify their environmental, health, and safety targets/objectives; and 'provide the public and workers with adequate, measurable, and verifiable (...) and timely information on potential environmental, health and safety impacts' as well as 'engage in adequate and timely communication and consultation with the communities directly affected by their environmental, health and safety policies (...) and by their implementation'.¹⁰¹⁹ With respect to social and economic effects on developing states, corporations are also encouraged to raise the bar of environmental performance throughout all their operations irrespective of whether they are required by the policies and laws of the state in which they operate.¹⁰²⁰

B. OECD RBC Guidance Documents, Indigenous Peoples' Rights and FPIC

With the OECD RBC Guidance Documents, the OECD Guidelines have seen further clarification, including in terms of indigenous peoples. Developed with a multi-stakeholder approach (including the OHCHR and the ILO) and flanked by OECD Council recommendations enhancing their legitimacy,¹⁰²¹ the overarching purpose of the general and sector-specific OECD RBC Guidance Documents is the implementation of the OECD Guidelines and thus deepening and broadening the understanding of responsible business conduct and the core concept of corporate risk-based due diligence.¹⁰²² Given that the latter concept is also inherent to the UNGPs and the ILO MNE Declaration, the OECD RBC Guidance Documents may also contribute to the clarification of these instruments.¹⁰²³

Constituting the only corporate due diligence instruments based on an internationally recognized RBC standard thus far,¹⁰²⁴ the OECD RBC Guidance Documents are a response to the need of the private sector to make the OECD

¹⁰¹⁸ *ibid* 42.

¹⁰¹⁹ *ibid* 42-43, paras 1-3.

¹⁰²⁰ *ibid* 43, para 6, 46, para 71.

¹⁰²¹ OECD, 'Stakeholder Guidance' 5; OECD, 'OECD-FAO Guidance' 11-12; OECD, 'DD Guidance' 3. See also Kaufmann, 'Verantwortung' 332.

¹⁰²² <<http://mneguidelines.oecd.org/sectors/>> accessed 24 April 2022.

¹⁰²³ EU, ILO and OECD 5-6; OECD, 'DD Guidance' 3.

¹⁰²⁴ Kaufmann, 'Verantwortung' 333.

Guidelines' recommendations tangible for daily business and translate them for specific business sectors and RBC contexts.¹⁰²⁵ Against this background, they further buttress the living instrument character of the OECD Guidelines, which have been adapted in previous years and might undergo further revision in the years to come to respond to the challenges and developments posed to and faced by corporations.¹⁰²⁶ As such, OECD RBC Guidance Documents are valuable tools for several stakeholders, including corporations, governments, civil society, workers, consumers and individuals or communities affected by corporate conduct, as well as NCPs.¹⁰²⁷ NCPs should promote the use of OECD RBC Guidance Documents by corporations, but they themselves may profit from these documents in terms of gaining further knowledge of the OECD Guidelines, other RBC standards and approaches recommended in specific sectors from which they may draw when resolving disputes and determining approaches to recommend to corporations and industry sectors.¹⁰²⁸ Importantly, neither the OECD RBC Guidance Documents nor the OECD Council Recommendations have binding force, but the latter reflect 'the common position and political commitment of OECD members and non-member adherents'.¹⁰²⁹

Due to their focus on indigenous peoples and stakeholder engagement, the OECD-FAO Guidance and OECD Stakeholder Guidance adopted in 2016 and 2017, respectively, and developed with the involvement of indigenous peoples, are particularly relevant for the purposes of this thesis.¹⁰³⁰ Given the land-consuming nature of agricultural and extractive activities, both sectors are known for their large community footprint, making meaningful stakeholder engagement particularly important.¹⁰³¹ As put forward by the OECD Stakeholder Guidance, meaningful stakeholder engagement is central for the purposes of sustainable development, promoting inclusive growth and respecting human rights.¹⁰³² In addition to this sectoral guidance documents, in 2018, the

¹⁰²⁵ OECD, 'OECD-FAO Guidance' 11; Kaufmann, 'Verantwortung' 332-333; Buhmann, 'NCP Statements' 393; <<http://mneguidelines.oecd.org/sectors/>> accessed 24 April 2022.

¹⁰²⁶ Kaufmann, 'Quo Vadis' 33; Mulder and Scheltema 14-18.

¹⁰²⁷ OECD, 'DD Guidance' 9-10; OECD, 'Stakeholder Guidance' 16; OECD, 'OECD-FAO Guidance' 15, 18.

¹⁰²⁸ OECD, 'Stakeholder Guidance' 10; OECD, 'DD Guidance' 9.

¹⁰²⁹ OECD, 'OECD-FAO Guidance' 3; OECD, 'Stakeholder Guidance' 4; OECD, 'DD Guidance' 3.

¹⁰³⁰ OECD, 'Stakeholder Guidance' 5; OECD, 'OECD-FAO Guidance' 11-12. The Advisory Group of the OECD-FAO Guidance held meetings with the Advisory Group of the OECD Stakeholder Guidance.

¹⁰³¹ OECD, 'Stakeholder Guidance' 3, 14.

¹⁰³² *ibid* 10.

OECD adopted the OECD DD Guidance.¹⁰³³ Referenced earlier in this thesis, this document provides detailed guidance on the concept of risk-based due diligence regarding the RBC issues covered in the OECD Guidelines and, as such, on stakeholder engagement as part of the due diligence process. The following elaborations begin with the more general OECD DD Guidance followed by the two specific Guidance Documents in chronological order.

1. OECD Due Diligence Guidance for Responsible Business Conduct (2018)

As indicated earlier, with the OECD RBC Guidance Documents, stakeholder engagement was clearly linked to the process of due diligence. The OECD DD Guidance depicts stakeholder engagement as an important activity throughout the process of (human rights) due diligence. Stakeholder engagement is relevant in identifying and assessing actual and potential impacts in one's own activities, assessing business relationships in terms of real or potential adverse impacts, devising prevention and mitigation responses to the risk of adverse impacts, identifying forms of remedy and design of remediation processes, and tracking and communicating how actual and potential adverse impacts are addressed.¹⁰³⁴

Throughout the OECD DD Guidance specific reference is made to human rights impacts and the response that they require. As a means to assess the nature and extent of adverse impacts, the guidance advises corporations to use information from their own or from third parties' environmental, social and human rights impact assessments, which should be evaluated in terms of accuracy and credibility.¹⁰³⁵ In addition, as secondary sources, corporations may wish to consider studies conducted by indigenous communities or their representative organizations on the key issues that may be relevant to project development.¹⁰³⁶ In this context, one might also think of the emerging trend in which indigenous peoples worldwide are formalizing their own engagement rules and procedures.¹⁰³⁷

When assessing human rights impacts, the guidance specifies that corporations should 'pay special attention to potential adverse impacts on individuals

¹⁰³³ OECD, 'DD Guidance'.

¹⁰³⁴ *ibid* 18–19, 50.

¹⁰³⁵ *ibid* 26, 47, 63.

¹⁰³⁶ *ibid* 64.

¹⁰³⁷ Doyle and others, 'FPIC Protocols'. See also the community-based human right impact assessment guide 'Getting it Right', developed by the NGO Rights & Democracy, <<http://hria.equalit.ie/en/>> accessed 24 April 2022; Maher and Buhmann 233.

from groups or populations that may have a heightened risk of vulnerability or marginalisation'.¹⁰³⁸ This involves paying special attention to potential barriers that vulnerable groups may face in terms of stakeholder engagement relating to language, culture, power imbalances, divisions within the community or gender.¹⁰³⁹ Similarly, corporations should communicate on human rights impacts that they cause or contribute to in a timely, culturally sensitive, and accessible manner.¹⁰⁴⁰ Should direct consultation – as the primary and preferred form – not be possible or feasible, for instance due to a large number of stakeholders or (potential) negative consequences, reasonable alternatives must be considered such as consulting credible and independent experts, including human rights defenders, civil society groups, trade unions or stakeholder representatives.¹⁰⁴¹

Stakeholders are defined as 'as persons or groups who have interests that are or could be impacted by an enterprise's activities'.¹⁰⁴² Where such interests are individual or collective human rights held by individuals or groups, including indigenous communities, these stakeholders are referred to as rights holders.¹⁰⁴³ Similar to risk-based human rights due diligence, the nature and extent of stakeholder engagement depends on the interests (potentially) impacted.¹⁰⁴⁴ In this sense, the guidance notes: 'Enterprises can prioritise the most severely impacted or potentially impacted stakeholders or rights holders for engagement. The degree of impact on stakeholders or rightsholders may inform the degree of engagement'.¹⁰⁴⁵

Importantly, the guidance elaborates further on the characteristics of meaningful stakeholder engagement, which were only rudimentarily defined in the OECD Guidelines. In doing so, the guidance brings meaningful stakeholder engagement under the OECD Guidelines more in tune with the requirements of good faith consultations as set out in [Chapter 2](#) of this thesis. Meaningful stakeholder engagement is characterized by two-way communication, meaning that corporations and stakeholders 'freely express opinions, share perspectives and listen to alternative viewpoints to reach a mutual understanding'.¹⁰⁴⁶ It further means that 'relevant stakeholders have the opportunity to

¹⁰³⁸ OECD, 'DD Guidance' 27.

¹⁰³⁹ *ibid* 51.

¹⁰⁴⁰ *ibid* 33, 85.

¹⁰⁴¹ *ibid* 27, 49–51.

¹⁰⁴² *ibid* 48.

¹⁰⁴³ *ibid*.

¹⁰⁴⁴ *ibid* 17.

¹⁰⁴⁵ *ibid* 19, 49.

¹⁰⁴⁶ *ibid* 49.

help design and carry out engagement activities themselves'.¹⁰⁴⁷ Parties to the engagement process should engage in good faith, which means that corporations engage 'with the genuine intention to understand how relevant stakeholder interests are affected by its activities [and that the corporation] is prepared to address adverse impacts it causes or contributes to'.¹⁰⁴⁸ Stakeholders for their part should 'honestly represent their interests, intentions and concerns'.¹⁰⁴⁹

Furthermore, under the guidance, stakeholder engagement should be conducted in a responsive manner, meaning that the corporation 'seeks to inform its decision by eliciting the views of those likely to be affected by the decision' and engages and consults with stakeholders 'prior to taking any decisions that may impact them' and on an ongoing basis, that is, 'throughout the lifecycle of an operation or activity', making stakeholder engagement not 'a one-off endeavour'.¹⁰⁵⁰ Responsive engagement also 'involves the timely provision of all information needed by the potentially impacted stakeholders and rightsholders to be able to make an informed decision as how the decision of the enterprise could affect their interests'. Lastly, it involves 'follow-through on implementation of agreed commitments, ensuring that adverse impacts (...) are addressed including through provisions of remedies'.¹⁰⁵¹

Although the nature and form of stakeholder engagement as put forward under the guidance are stated in general terms and not tailored to a specific group of stakeholders such as indigenous peoples, the characteristics of a good faith consultation process can be distilled. Under the guidance, stakeholder engagement is framed as including those affected, who should have a say in the design and be able to conduct engagement activities themselves. This signifies transformation from a top-down to a more bottom-up approach to stakeholder engagement. Furthermore, the guidance incorporates what could be termed a 'free, prior, and informed consultation model', which ideally ends in 'mutual understanding' of the corporation and the stakeholders; however, it uses less far-reaching language than, for instance, Art. 6 of ILO C 169, under which consultation should be undertaken 'with the objective of achieving agreement or consent to the proposed measures'.¹⁰⁵² Notably, however, the

¹⁰⁴⁷ *ibid.*

¹⁰⁴⁸ *ibid.*

¹⁰⁴⁹ *ibid.*

¹⁰⁵⁰ *ibid* 27, 49–50.

¹⁰⁵¹ *ibid* 49–50.

¹⁰⁵² Art. 6(2) ILO, 'C 169'. See also above text to [Fn 223–243](#); Doyle, FPIC 186, referring to so-called 'less than FPIC' participatory engagement models.

guidance explicitly recognizes – in reference to the UNDRIP and ILO C 169 – that in ‘some cases, stakeholder engagement or consultation is a right in and of itself’.¹⁰⁵³

2. OECD-FAO Guidance for Responsible Agricultural Supply Chains (2016)

The OECD-FAO Guidance ‘has been developed to help enterprises observe existing standards for responsible business conduct along agricultural supply chains’, including the OECD Guidelines and other relevant standards such as the IFC Performance Standards.¹⁰⁵⁴ In this regard, however, the guidance clarifies that ‘[n]ot all adherents to the [OECD Declaration of 1976] (...), or members of the FAO endorse the standards considered in this Guidance’.¹⁰⁵⁵ Structured in four parts, the guidance contains pertinent considerations for corporations in terms of indigenous peoples’ land and resource rights as well as participatory rights and related risks.¹⁰⁵⁶

(a) Customary Land Tenure Rights

Setting the background in line with the UNDRIP and ILO C 169, the guidance recognizes the special bond that indigenous peoples have with lands, territories and resources, noting that land should not simply be viewed from an economic perspective, namely, as a ‘productive asset’. The bond should also be viewed from a socio-cultural and environmental perspective that recognizes the central role of land in indigenous peoples’ social, cultural and religious practices and as a source of various ecosystem services on which indigenous peoples and others may depend.¹⁰⁵⁷ As such, the guidance recognizes the importance of land, territories and resources for the enjoyment of other rights, including cultural rights.

¹⁰⁵³ OECD, ‘DD Guidance’ 50.

¹⁰⁵⁴ OECD, ‘OECD-FAO Guidance’ 3. For a comprehensive list of the standards considered in the guidance, see *ibid* 16–18. In addition to the OECD Guidelines, the following three key standards are considered in the guidance: the Principles for Responsible Investment in Agriculture and Food Systems; the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security; and the Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources.

¹⁰⁵⁵ *ibid* 16. For a critical view on this qualification, see Seck 88, 95.

¹⁰⁵⁶ Other cross-cutting risks include human rights; labour rights; health, food security and nutrition; environmental protection and sustainable use of resources; governance, technology and innovation; and animal welfare, see OECD, ‘OECD-FAO Guidance’ 20, 50, 61–63.

¹⁰⁵⁷ *ibid* 61.

According to the guidance, it is precisely because of this special bond of indigenous peoples with lands, territories and resources – marking a distinguishing feature of indigenous peoples – that corporate-related impacts on land may affect them differently or more adversely than they do other stakeholder groups.¹⁰⁵⁸ Moreover, indigenous peoples' tenure rights over lands, territories and resources that they have traditionally occupied, owned and used may not always be adequately recognized or protected by the state in which they reside.¹⁰⁵⁹ In this sense, the guidance contends that where national laws may not exist or are weak, ie, not reflecting the full extent of legitimate tenure rights, or are poorly implemented, corporations may be at particular risk of not meeting their responsibility to respect indigenous peoples' customary land and resource rights and by implication the associated rights, such as cultural rights.¹⁰⁶⁰ Such risk may be augmented if states do not provide clear and transparent rules for consultation between corporations and stakeholders, which may lead to the exclusion of pertinent rights holders from the consultation process, potentially resulting in tension and conflict between corporations and communities.¹⁰⁶¹ Furthermore, tension and conflict as well as reputational risks may arise where corporations are connected to an expropriation for which states have not fulfilled their obligation to provide due compensation, consult with indigenous peoples or obtain their consent.¹⁰⁶²

In view of these risks and corporations' responsibility to conduct risk-based human rights due diligence, the guidance holds that corporations should not presume adequate protection of indigenous peoples' customary land and resource rights by national frameworks but rather ensure that they proactively respect these rights, which involves undertaking good faith, effective and meaningful consultation with (potentially) affected indigenous communities.¹⁰⁶³ Furthermore, corporations 'have responsibilities to ensure that their operations do not lead to the resettlement of local communities without meaningful consultations or their forced evictions without proper compensation'.¹⁰⁶⁴ Should a corporation be connected to an expropriation for which states have not fulfilled their obligations, the guidance suggests that corporations consider options to withdraw from the planned operations.¹⁰⁶⁵

¹⁰⁵⁸ *ibid* 78-79.

¹⁰⁵⁹ *ibid* 61-62.

¹⁰⁶⁰ *ibid* 35, 61-62, 78-79.

¹⁰⁶¹ *ibid* 35, 62.

¹⁰⁶² *ibid* 62.

¹⁰⁶³ *ibid* 20, 36, 61.

¹⁰⁶⁴ *ibid* 62.

¹⁰⁶⁵ *ibid*.

The approach taken in the guidance is a clear reflection of corporations' responsibility to respect human rights independently of states' willingness or capability to fulfil their human rights obligations. Furthermore, it shows that what is expected socially, namely, to consider and respect customary land tenure rights, can go further than what is stipulated and required legally.

In terms of preventing adverse impacts on and mitigating risks related to indigenous peoples' land tenure rights, the guidance – in drawing from pertinent standards –¹⁰⁶⁶ suggests that corporations:

Identify rights holders – who consist not only of holders of officially recognised tenure rights, but also of (...) indigenous and customary tenure rights that may not have been officially registered and titled, including women's tenure rights – and other relevant stakeholders, including through local and open consultations.

Establish a committee representative of the relevant stakeholders to advise on impact assessments, particularly on initial phases (screening and scoping) and on management, monitoring and contingency plans. Special considerations should be given to ensure the adequate representation of indigenous peoples (...).¹⁰⁶⁷ [Regarding impact assessments, the guidance further proposes that corporations] invite affected communities to be involved in [designing and] conducting the impact assessment, soliciting information from them, and provide them with regular feedback throughout all stages of the impact assessment.¹⁰⁶⁸

Consider feasible alternative investments if proposed investments lead to the physical and/or economic displacement of local communities, recognising that states should expropriate only where rights to lands, fisheries or forests are required for a public purpose and that they should clearly define the concept of public purpose in law.

When tenure rights holders are negatively impacted by operations, work with the government to ensure that tenure rights holders receive a fair, prompt and appropriate compensation for those tenure rights negatively impacted by the operations by: holding good faith, effective and meaningful consultation on the compensation offered and ensuring consistent and transparent application of compensation standards; giving preference to land-based compensation, that is commensurate in quality, size and value, and otherwise providing compensation at full replacement cost for lost as-

¹⁰⁶⁶ Pertinent standards include the IFC Performance Standards; the Voluntary Guidelines on Responsible Governance and Tenure of Land, Fisheries and Forests in the Context of National Food Security of the Committee on World Food Security; and the Akwé: Kon Voluntary Guidelines as part of the Convention on Biological Diversity, see *ibid* 73-74.

¹⁰⁶⁷ *ibid* 63.

¹⁰⁶⁸ *ibid* 25, 51-52.

sets – including assets other than land (crops, water resources, irrigation infrastructure and land improvements) – and other assistance to help improve or restore their standard of living or livelihoods; monitoring the implementation of the compensation arrangement.¹⁰⁶⁹ [Providing remedy may further include returning the land to legitimate rights holders.]¹⁰⁷⁰

Where government capacity is limited, play an active role in the resettlement planning, implementation and monitoring.¹⁰⁷¹

In addition to proposing measures regarding indigenous peoples' land tenure rights, the guidance includes important considerations for corporations regarding benefit sharing and consultation with indigenous peoples, dedicating a section on the latter (Annex B).

(b) Benefit Sharing

As shown earlier in this thesis, benefit sharing is to be understood as a right arising from the recognition of indigenous peoples' land and resource rights and should thus not be viewed simply as an act of corporate charity.¹⁰⁷² In this sense, the guidance notes that benefit sharing is 'separate (and may be additional) to compensation for unavoidable adverse impacts' and in reference to Art. 15 of ILO C 169 that indigenous peoples in specific circumstances 'may be entitled to share the benefits arising from operations if enterprises use their land, resources or knowledge'.¹⁰⁷³ Corporations should ensure via consultation that benefit sharing is fair and equitable and based on mutual agreement.¹⁰⁷⁴ Risks associated with benefit sharing, such as the exclusion of certain communities from the agreement or benefits not being shared with the whole community, should be mitigated through meaningful stakeholder engagement in the process of due diligence. Benefit sharing is depicted as a means to both maximize the positive impacts of corporations' operations on indigenous communities and minimize the adverse impacts of corporate action.¹⁰⁷⁵

¹⁰⁶⁹ *ibid* 63.

¹⁰⁷⁰ *ibid* 37.

¹⁰⁷¹ *ibid* 63.

¹⁰⁷² See above text to [Fn 489](#).

¹⁰⁷³ OECD, 'OECD-FAO Guidance' 52.

¹⁰⁷⁴ *ibid* 26.

¹⁰⁷⁵ *ibid* 52-53.

(c) *Consultation and the Principle of FPIC*

Acknowledging indigenous peoples' particular vulnerabilities linked to their special bonds with the lands, territories, and resources that they inhabit and use, their socio-economic status, and their cultural specificities, the guidance recognizes the need for special, differentiated, and innovative consultation procedures with indigenous peoples where decisions will affect them.¹⁰⁷⁶ Noting that corporations should obey national laws and respect internationally recognized human rights, the guidance suggests that corporations undertake good faith, effective and meaningful consultation with indigenous communities through their own representative institutions and before initiating any operations that may affect them as well as throughout and at the end of their operations.¹⁰⁷⁷

Consultation should be undertaken without intimidation, in a climate of trust, and pay due regard to power imbalances, ie, by providing technical and legal assistance.¹⁰⁷⁸ Furthermore, corporations should 'take full and fair consideration of the views expressed', allow sufficient time for communities to prepare their response, and verify that community representatives do in fact represent the communities' views.¹⁰⁷⁹ Indigenous peoples' characteristics in terms of lands and resources, cultural values and heritage, and their socio-economic status should be considered and respected when engaging with them. For instance, consultation should 'explore intangible value associated with sacred sites or areas of cultural significance' such as beliefs and traditional practices.¹⁰⁸⁰

Highlighting the challenges related to identifying indigenous peoples, such as the lack of a single definition of indigenous peoples or the fact that indigenous peoples are heterogeneous rather than homogeneous groups, the guidance – in drawing from ILO C 169 – refers to self-identification 'as a fundamental criterion for determining indigenous peoples'.¹⁰⁸¹

The theme of meaningful stakeholder engagement is recurrent, running like a thread throughout the OECD-FAO Guidance. Indigenous peoples' inclusion in different stages and steps of the due diligence process, such as engagement processes and impact assessments, is clearly depicted in the guidance as a

¹⁰⁷⁶ *ibid* 50, 78–79.

¹⁰⁷⁷ *ibid* 26, 50, 80.

¹⁰⁷⁸ *ibid* 50.

¹⁰⁷⁹ *ibid* 51.

¹⁰⁸⁰ *ibid* 79; OECD, 'Stakeholder Guidance' 93.

¹⁰⁸¹ OECD, 'OECD-FAO Guidance' 78.

means to identify and manage adverse impacts on indigenous peoples' rights in agricultural supply chains.¹⁰⁸² Furthermore, the guidance emphasizes that engaging with indigenous peoples also makes good business sense since 'a lack of consultations with stakeholders likely to be affected by the operations prevents enterprises from realistically assessing the project viability and form identifying effective and context-specific response measures'.¹⁰⁸³ It can create trust among stakeholders, reduce oppositions and lower transaction costs.¹⁰⁸⁴

The guidance is the first OECD RBC Guidance Document exploring FPIC based on the UNDRIP and ILO C 169 as well as other pertinent standards.¹⁰⁸⁵ The guidance suggests that corporations undertake consent-seeking consultation with indigenous peoples 'consistent with achieving the ends of [the UNDRIP] and with due regard for particular positions and understanding of individual states'.¹⁰⁸⁶ In this sense, the guidance notes:

Irrespective of regulatory or operational requirements and throughout their project planning, [corporations] should anticipate that indigenous peoples may expect consultation seeking FPIC and that risk may be generated if such expectations are not met. In countries where FPIC is not mandated, enterprises should consider local expectations, the risks posed to indigenous peoples, and to the operations as a result of local opposition. They should pursue an engagement strategy that meets the legitimate expectations of indigenous peoples to the extent that they do not violate domestic law.¹⁰⁸⁷

The guidance lays out a range of key steps that corporations should consider when engaging in FPIC-seeking consultation procedures. As a starting point, it clarifies that these processes should start 'as soon as possible during project planning', that is, prior to beginning or authorizing any activities for which FPIC should be sought.¹⁰⁸⁸ In addition, FPIC-seeking processes should be iter-

¹⁰⁸² *ibid* 20, 26, 50, 55, 79.

¹⁰⁸³ *ibid* 50.

¹⁰⁸⁴ *ibid*.

¹⁰⁸⁵ *ibid* 26. Regarding the principle of FPIC, the guidance contains reference to the following instruments: Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security; Committee on World Food Security's Principles for Responsible Investment in Agriculture and Food Systems; Akwé: Kon Voluntary Guidelines; and Principles for Responsible Investment in Agriculture and Food Systems of the Committee on World Food Security, see *ibid* 78, 80-83.

¹⁰⁸⁶ *ibid* 26.

¹⁰⁸⁷ *ibid* 80.

¹⁰⁸⁸ *ibid*.

ative and continuous and provide all information relating to the project in a timely, objective, accurate and understandable manner.¹⁰⁸⁹ Furthermore, corporations should:

Agree with affected indigenous peoples on a consultation process for working towards seeking FPIC. This should identify the specific current and future activities where consent should be sought. In some cases it might be appropriate to commit to this process through a formal or legal agreement. The process should always be based on good faith negotiation free of coercion, intimidation or manipulation.

Consult and agree on what constitutes appropriate consent for affected indigenous peoples in accordance with their governance institutions, customary laws and practices, e.g. whether this is a majority vote from the community or approval of the council of elders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions.

Document commitments/agreements that have been reached, including, as relevant, specification of what activities consent has been granted for or withheld, any conditions of consent, and areas of ongoing negotiation and share them with the indigenous community in a form and language they can understand and in a timely manner.

Determine what action(s) will be taken in the event that: a) indigenous peoples refuse to enter into negotiations; and b) indigenous peoples do not give their consent for activities in their territory.¹⁰⁹⁰

Regarding this last key step, the guidance suggests that corporations consult indigenous peoples to understand the reasons behind their refusal to engage or to give consent and to identify whether their concerns can be addressed or accommodated. Where proceeding with the activity will cause adverse impacts, corporations should take steps to cease or prevent such impact. Should a corporation conclude – through its due diligence – that consent is required to proceed with an activity and consent is not forthcoming, the activities should not proceed unless FPIC is subsequently granted.¹⁰⁹¹ As an example, the guidance refers to the FPIC approach of the IFC according to which a project should not proceed without the consent of indigenous peoples if it would require their relocation, regardless of any authorization by the state.¹⁰⁹² Another explicit example of a situation in which seeking consent may be relevant

¹⁰⁸⁹ *ibid.*

¹⁰⁹⁰ *ibid.*

¹⁰⁹¹ *ibid* 81.

¹⁰⁹² *ibid* 62, 81. See also below text to [Fn 1222–1237](#).

concerns indigenous peoples' privacy. In this regard, the guidance notes that seeking consent may be an issue 'when recording information about rituals, ceremonies and rites of passage to ensure against disruption of cultural life'.¹⁰⁹³

(d) *Interim Conclusion*

In recognizing indigenous peoples' customary land tenure and cultural rights, their right to benefit sharing and their rights to be consulted and participate in decision-making affecting them, the OECD-FAO Guidance takes a considerable step forward compared to the OECD Guidelines. In doing so, the guidance clearly conveys the message that respect for these rights should be ensured in corporate activities in the agricultural sector – suggesting a framework of risk-based due diligence. Meaningful consultation with indigenous peoples occupies a particular position within the guidance, which highlights both the right dimension and the due diligence dimension of consultation. Throughout the guidance, meaningful engagement with indigenous peoples in the form of consultation is depicted as a central element of the due diligence process that helps identify and manage adverse impacts on indigenous peoples associated with corporate activities in the agricultural sector. Under the latter dimension, meaningful consultation with indigenous peoples functions somewhat as a safeguard for ensuring corporate respect for indigenous peoples' rights and a means to mitigate corporate risks. In terms of the form and nature of consultation processes, the guidance appears largely in tune with the requirements of good faith consultation under [Chapter 2](#) suggesting free, prior, and informed consultation processes that pay due respect to indigenous peoples' characteristics and own decision-making institutions.

The explicit identification and recognition of FPIC, albeit not as a right in itself, is particularly notable regarding indigenous peoples' participatory rights. Similar to the issue of customary land tenure rights, the guidance implies that corporations should not presume adequate protection of indigenous peoples' participatory rights but instead should anticipate that consent-seeking consultation is expected from them throughout a project's life cycle.

Framing 'seeking FPIC' somewhat as a general (social) expectation irrespective of regulatory or operational requirements certainly signifies an important step towards acknowledging and operationalizing FPIC on a corporate level but bears a risk of ambiguity. In using aspirational language such as 'seeking [FPIC]' – for instance, 'to ensure against disruption of cultural life' –¹⁰⁹⁴ and 'work-

¹⁰⁹³ OECD, 'OECD-FAO Guidance' 79.

¹⁰⁹⁴ *ibid.*

ing towards seeking FPIC¹⁰⁹⁵ or conducting consultation 'in order to obtain [FPIC]',¹⁰⁹⁶ the guidance itself is silent as to when FPIC should not be merely sought as an objective of consultation but rather obtained as a requirement. In this regard, lacking its own examples, the guidance refers to other standards that require FPIC in specific contexts such as the IFC Performance Standard 7, which requires consent for relocation, and the Roundtable on Sustainable Palm Oil (RSPO) regarding using land for palm oil plantations.¹⁰⁹⁷ The guidance thus conveys the message that seeking FPIC is the objective but under specific standards and defined circumstances may also be a requirement.

This understanding is buttressed by the guidance's suggested approach to situations in which indigenous peoples refuse to engage or withhold consent. In these situations, corporations cannot simply view robust, free, prior, and informed consultation as sufficient but are advised to react to the outcome of a consultation process. Corporations should re-engage with indigenous peoples to see whether ongoing concerns can be addressed or accommodated and conduct due diligence to identify whether consent is required for a project to proceed. Where proceeding with a project will cause adverse impacts, corporations are advised to take necessary steps to prevent or stop them. A possible action in this regard could be withdrawing from a project, as suggested by the guidance in terms of a corporation's connection to expropriation. Furthermore, the guidance's recommendation that corporations consider the risks posed to indigenous peoples where FPIC is not mandated by states speaks to the importance of potential adverse impacts as a decisive factor that may trigger FPIC. Overall, the guidance also highlights the material risk for corporations that may be generated if they do not engage in consultation seeking FPIC.

¹⁰⁹⁵ *ibid* 80.

¹⁰⁹⁶ *ibid* 26.

¹⁰⁹⁷ *ibid* 78. For further information on the IFC and FPIC, see below 1199-1259. For further information on the RSPO and FPIC, see RSPO, 'Principles and Criteria: For the Production of Sustainable Palm Oil' (2018) Principle 4 <<https://rspo.org/resources/certification/rspo-principles-criteria-certification/rspo-principle-criteria-for-the-production-of-sustainable-palm-oil-2018>> accessed 11 April 2022; Mark Wielga and James Harrison, 'Assessing the Effectiveness of Non-State-Based Grievance Mechanisms in Providing Access to Remedy for Rightsholders: A Case Study of the Roundtable on Sustainable Palm Oil' (2021) 6(1) Business and Human Rights Journal 67, 81-82, 84-86; below text to [Fn 1661](#)-1667.

3. OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector (2017)

The OECD Stakeholder Guidance 'provides practical guidance to mining, oil and gas enterprises in addressing the challenges related to stakeholder engagement'.¹⁰⁹⁸ By establishing a due diligence framework for meaningful stakeholder engagement in the extractive sector, the guidance aims at helping extractive corporations identify and manage risks to stakeholders impacted by their activities with a particular focus on indigenous peoples and other groups given their unique status and vulnerabilities.¹⁰⁹⁹ The undercurrent of the guidance is that regardless of the requirements in law, meaningful stakeholder engagement is a critical means to avoid and address adverse impacts, including human rights infringements and environmental degradation, and to promote economic growth and sustainable development with stakeholders contributing important knowledge.¹¹⁰⁰ The guidance draws on and refers to existing standards in addition to the OECD Guidelines but also includes the same qualification as the OECD-FAO Guidance, clarifying that not all adherents of the OECD Declaration of 1976 'endorse the standards considered in [the] Guidance'.¹¹⁰¹ Like the OECD-FAO Guidance, it further emphasizes the function of stakeholder engagement in reducing business risks and in obtaining and retaining a social licence to operate.¹¹⁰²

As the last OECD RBC Guidance Document examined in this thesis, it has several substantive points of overlap with the previously examined OECD-FAO Guidance and the OECD DD Guidance. However, although focusing on due diligence and meaningful stakeholder engagement in the extractive sector, by providing a due diligence framework for stakeholder engagement, the OECD Stakeholder Guidance contributes valuable insight into the latter two concepts' understanding and implementation, which may even be generalized to other sectors.¹¹⁰³ Indeed, as shown further below, the OECD Stakeholder Guidance deepens procedural and substantive aspects of due diligence and meaningful stakeholder engagement already covered in the OECD-FAO Guidance and OECD DD Guidance. Therefore, the following sections focus on the OECD

¹⁰⁹⁸ OECD, 'Stakeholder Guidance' 3.

¹⁰⁹⁹ *ibid* 3, 10, 17, 92.

¹¹⁰⁰ *ibid* 10, 14, 16, 18.

¹¹⁰¹ *ibid* 3. For instance, in terms of the FPIC principle, the OECD Stakeholder Guidance inter alia references the IFC Performance Standards, see *ibid* 98.

¹¹⁰² *ibid* 14. The term 'social licence to operate' is not used in the OECD-FAO Guidance, see OECD, 'OECD-FAO Guidance' 50.

¹¹⁰³ See eg OECD, 'Stakeholder Guidance' 19.

Stakeholder Guidance's particularities and contribution in terms of due diligence and stakeholder engagement, paying special attention to engagement with indigenous peoples.

(a) *Due Diligence Framework and Meaningful Stakeholder Engagement*

In line with the OECD DD Guidance, the OECD Stakeholder Guidance defines meaningful stakeholder engagement as engagement that is conducted on an ongoing basis and in a two-way, good faith and responsive manner.¹¹⁰⁴ However, in terms of 'two-way engagement', the guidance more strongly emphasizes the importance of moving away from a primarily top-down, corporate-led approach to stakeholder engagement to a more mutual process of decision-making that allows the active involvement of stakeholders in driving engagement activities. As such, the guidance includes the following phrase, which is lacking in the OECD RBD Guidance: 'Some sharing of decision-making power through moving away from the enterprise as a primary decision-maker to a more mutual process of decision-making between the interested and affected parties is important.'¹¹⁰⁵ This emphasis on the importance of stakeholder inclusion in due diligence processes exists throughout the guidance.¹¹⁰⁶

In line with the OECD DD Guidance and the OECD-FAO Guidance, the OECD Stakeholder Guidance also differentiates between stakeholders and rights holders, explicitly acknowledging that indigenous peoples may be rights holders as individuals or as a group given their collective rights. In this sense, the guidance notes that 'identifying rights-holders is the first step to ensure that human rights are recognised and respected'.¹¹⁰⁷ Stakeholders are defined as 'persons or groups who are or could be directly or indirectly affected by a project or activity'.¹¹⁰⁸ From a due diligence point of view, priority for engagement 'should be given to those stakeholders for whom the risk of adverse impacts is

¹¹⁰⁴ ibid 18, 20. See also OECD, 'DD Guidance' 49.

¹¹⁰⁵ OECD, 'Stakeholder Guidance' 18.

¹¹⁰⁶ See eg ibid 34-35, 55.

¹¹⁰⁷ OECD, 'DD Guidance' 20.

¹¹⁰⁸ ibid 19.

greatest or the potential adverse impact is severe or could become irreparable', which may include indigenous peoples, who are listed in the guidance as a potential priority group.¹¹⁰⁹

Like the OECD DD Guidance, the OECD Stakeholder Guidance further highlights that 'stakeholder engagement activities may be proportional to the risks and impacts that an extractive operation may cause or contribute to'¹¹¹⁰ and depends on the type of extractive industry.¹¹¹¹ For example, where extractive operations may involve resettling communities, information sharing, consultation and negotiation may need to be more extensive than in the case of limited impacts, such as where extractive operations involve the modification of local transport routes.¹¹¹² Reflecting such a 'risk-based approach' to stakeholder engagement, the guidance distinguishes between different 'modes of engagement' including informing/reporting, consulting, negotiating and responding to consent processes, implementing commitments, responding to unforeseen adverse impacts, and benefit sharing.¹¹¹³

The due diligence framework proposed by the guidance to ensure that stakeholder engagement effectively serves its function to prevent and address adverse impacts generally incorporates the following key recommendations,¹¹¹⁴ all of which, apart from the first, are addressed to on-the-ground personnel of extractive sector corporations: 1) position stakeholder engagement strategically (addressed to management); 2) ensure strong understanding of the local and operating context; 3) ensure identification and prioritization of stakeholders; 4) establish the necessary support system for meaningful stakeholder engagement; 5) design appropriate and effective stakeholder engagement activities and processes; 6) ensure follow-through; 7) monitor and evaluate stakeholder engagement activities and respond to identified shortcomings.¹¹¹⁵

¹¹⁰⁹ OECD, 'Stakeholder Guidance' 19. The list of groups and individuals that may need to be given priority next to indigenous peoples includes: potentially impacted local communities (including nomadic communities or communities living near an extractive concession, downstream from a river near the site, or along a transport route or near associated infrastructure such as energy grids or processing plants); farmers; workers (including local and migrant workers); artisanal miners; host governments (local, regional and national); local civil society organizations (CSOs), community-based organizations and local human rights defenders.

¹¹¹⁰ *ibid.*

¹¹¹¹ *ibid* 19-22. See also OECD, 'DD Guidance' 49.

¹¹¹² OECD, 'Stakeholder Guidance' 19.

¹¹¹³ *ibid* 20, 62-65.

¹¹¹⁴ *ibid* 16.

¹¹¹⁵ *ibid* 24-26.

These recommended due diligence steps should not be understood as rigid and linear or as one-time processes but rather as 'a logical grouping of different processes'.¹¹¹⁶

In the guidance's Annex (A.-E.), these generally held key recommendations incorporating different steps and processes are adapted and specified in reference to specific groups, including indigenous peoples (Annex B). The guidance justifies such a specific focus on indigenous peoples as due to their specific characteristics *inter alia* relating to their special bond with land and resources and their spiritual and cultural heritage.¹¹¹⁷ Given this focus, the OECD Stakeholder Guidance provides important considerations for corporations in terms of understanding the (regulatory) context, ensuring that indigenous peoples are appropriately identified and prioritized, establishing the necessary support system for meaningful engagement with indigenous peoples, and designing appropriate and effective activities and processes for engagement with indigenous peoples.¹¹¹⁸ A recently conducted multi-stakeholder seminar organized by the Norwegian NCP and National Human Rights Institution shows that adequate implementation of these steps is essential to protect indigenous peoples' rights. The seminar provides valuable insights into the challenges faced by both business and indigenous peoples in the context of natural resource development.¹¹¹⁹

Given that in many aspects the same steps and principles of the due diligence framework for meaningful stakeholder engagement as laid out in the general part of the guidance (the part of the guidance excluding Annex A.-E.) apply in the context of engagement with indigenous peoples,¹¹²⁰ the subsequent sections reference both this general part and Annex B of the guidance on engagement with indigenous peoples focusing on the above key recommendations 2) to 5).¹¹²¹

(i) *Engagement with Indigenous Peoples: Understanding the Local Context*

As a starting point, personnel should understand the scope of impact of a project and the local context in which it is located and operationalized to identify and prioritize stakeholders and design appropriate engagement ac-

¹¹¹⁶ *ibid* 24.

¹¹¹⁷ *ibid* 92.

¹¹¹⁸ *ibid* 92-99.

¹¹¹⁹ Norwegian National Human Rights Institution and NCP Norway 24-26.

¹¹²⁰ OECD, 'Stakeholder Guidance' 92.

¹¹²¹ *ibid* 34-78, 92-99.

tivities.¹¹²² Understanding the local context requires the acquisition of information and knowledge in terms of: the regulatory context (ie, what expectations, commitments and legal requirements for engaging with indigenous people exist; what their legal status is; and whether indigenous peoples' (collective) rights are recognized); the area of impact (which may be broader in the context of indigenous peoples, ie, issues such as animal migration patterns or aspects of cultural heritage need to be considered); the existence of (formally recognized) customary land tenure rights; the existence of indigenous peoples' (formally recognized) governance structures and engagement and decision-making processes; historical marginalization or discrimination (ie, whether discriminatory laws are in force); cultural and spiritual heritage, including tangible aspects such as archaeological sites and intangible aspects such as oral traditions, languages, beliefs, religion and traditional practices, genetic resources and traditional knowledge.¹¹²³

Knowledge of these central issues should be acquired via different means and channels.¹¹²⁴ In this sense, reference is made to the importance of field research, consultation with technical personnel and local sources, and impact assessments (environmental, social, and human rights), which should be designed and conducted by personnel and stakeholders themselves.¹¹²⁵ Stakeholders may need to receive financial support to conduct assessments on their own or with experts of their own choosing.¹¹²⁶ Impact assessments are identified as primary document-based resources that provide valuable preliminary information on who is potentially impacted, what potential cumulative impacts may occur and issues on which corporations should engage with stakeholders.¹¹²⁷ Furthermore, corporations may consult studies undertaken by indigenous communities or their representatives relevant to project development. These studies, however, are listed as 'merely' secondary resources.¹¹²⁸ Regarding potential legal obligations in engagement with indigenous peoples, the guidance suggests that corporations seek legal expertise and consult legal sources.¹¹²⁹ Importantly, the acquired understanding should be continuously updated and verified for accuracy.¹¹³⁰

¹¹²² *ibid* 34.

¹¹²³ *ibid* 93.

¹¹²⁴ *ibid* 34.

¹¹²⁵ *ibid* 34–36.

¹¹²⁶ *ibid* 35.

¹¹²⁷ *ibid* 35, 37, 39.

¹¹²⁸ *ibid* 37.

¹¹²⁹ *ibid* 36, 92.

¹¹³⁰ *ibid* 34, 37–38.

In short, understanding the local context means getting it right from the beginning, building the basis for a robust stakeholder engagement framework.

(ii) *Identification and Prioritization of Indigenous Peoples*

A second step is ensuring that indigenous peoples are appropriately identified and prioritized. In this regard, and similar to the OECD-FAO Guidance, the OECD Stakeholder Guidance views self-identification as a central factor and emphasizes the need to take into consideration specific characteristics of indigenous peoples and of vulnerable groups within indigenous communities, such as women and children, regardless of their power and influence within their communities.¹¹³¹ Corporations should ‘identify the collective rights claimed by indigenous peoples, as well as the human rights of indigenous individuals who are potentially impacted by activities’.¹¹³² A table in the guidance designed specifically to identify potential human rights impacts of extractive activities explicitly references indigenous peoples in relation to resettlement, in-migration, and damage to cultural sites and areas. Other potential areas related to human rights impacts with no explicit mention of indigenous peoples yet potentially also affecting their rights include issues such as access to resources and food security, security, community health, gender relations, social change, conflict, and environmental degradation.¹¹³³

During the process of identification and prioritization, special attention should be given to the issue of representation. Here, the guidance clarifies that verifying stakeholder representatives in terms of accuracy, ie, whether they truly communicate the perspectives of their constituents, and inclusiveness, ie, whether they equally represent vulnerable groups within indigenous communities, is particularly important not to ‘undermine the objectives of stakeholder engagement and damage relationships’.¹¹³⁴ Corporations should regularly consult with stakeholders to check the adequacy of representation.¹¹³⁵ Furthermore, stakeholders should be able to select their own representatives with no interference by corporations to ensure their independence from the corporations. Proxy representatives, ie, representatives who do not belong to

¹¹³¹ *ibid* 48, 93-95. See also OECD, ‘OECD-FAO Guidance’ 78.

¹¹³² OECD, ‘Stakeholder Guidance’ 93.

¹¹³³ *ibid* 45-48.

¹¹³⁴ *ibid* 49.

¹¹³⁵ *ibid*.

the stakeholder group that they represent, such as civil society organization, should only be able to do so when requested and authorized by the stakeholders in question.¹¹³⁶

(iii) *Support System for Meaningful Engagement with Indigenous Peoples*

In terms of a support system for meaningful engagement with indigenous peoples, the guidance suggests both financial support, such as compensation for costs to indigenous communities, and non-financial support, including technical and legal support, community capacity building, or local facilitators, to ensure that indigenous communities can assess and represent their perspectives and interests. Such a support system should be determined in consultation with indigenous peoples.¹¹³⁷ Engagement should be conducted in a culturally sensitive, appropriate, and respectful manner free of intimidation, coercion, interference, and manipulation with stakeholders ‘treated like equals’ and communicating in their first language.¹¹³⁸

Furthermore, corporations should share ‘material information’ in a timely, accessible, accurate and objective manner to ensure that stakeholders engage in an informed manner. Stakeholders should be consulted on what information is material for them and in what form it should be shared.¹¹³⁹ As specified by the guidance, ‘material information’ refers to information ‘which would affect the decisions of stakeholders if it were not reported, or if it were misreported’, generally including ‘information about the operation and its foreseen impacts’ and ‘information about the stakeholder engagement process itself.’¹¹⁴⁰ In this regard, the guidance distinguishes between initial and ongoing provision of information. The former includes providing information on corporate policies and codes of conduct; impact assessments; current and planned activities, including ‘how much land and water will be used and where it will come from, planned infrastructure, anticipated life cycle of the project, land rehabilitation plans etc.’; risks of adverse impacts and how to manage them, specifically in terms of access to land, livelihoods and water, for instance, via resettlement plans or environmental mitigation plans; options for alternative project design; and commitments made under community benefit sharing agreements.¹¹⁴¹ Ongoing information should be provided in terms of planned engagement activi-

¹¹³⁶ *ibid* 50.

¹¹³⁷ *ibid* 55–56, 95.

¹¹³⁸ *ibid* 52, 55, 95.

¹¹³⁹ *ibid* 51, 53.

¹¹⁴⁰ *ibid* 53.

¹¹⁴¹ *ibid* 54.

ties and their supervision, which helps address stakeholder expectations. Furthermore, corporations should report on their compliance with regulations governing impacts and report back to stakeholders in terms of if and how their inputs are integrated into project and operation planning and checking whether this is to their satisfaction.¹¹⁴²

(iv) *Designing Appropriate and Effective Activities and Processes for Engagement with Indigenous Peoples*

Important consideration regarding the principle of FPIC is given in the key recommendation on designing appropriate and effective activities and processes for engagement, which refers to what mode of engagement with indigenous peoples is needed or even required and how it should be designed.¹¹⁴³ Reference to FPIC or consent procedures is made in both the general part and Annex B of the guidance, which implies that consent processes may also arise in contexts other than merely that of indigenous peoples'.¹¹⁴⁴

As indicated earlier, in the general part, the guidance distinguishes between different 'modes of engagement', clarifying that the applicability of a certain mode of engagement depends on factors such as types and stages of operations, regulatory and operational requirements and the engagement needs of stakeholder groups that can be identified via consultation.¹¹⁴⁵ Failing to identify, design and apply the appropriate mode of engagement can result in failing to adequately integrate stakeholder interests and views into project decision-making. Furthermore, when a specific mode of engagement is legally required, for instance, to obtain consent, corporations may face legal liability when failing to obtain so.¹¹⁴⁶

The guidance makes clear that consent may be regulatory approval administered by higher levels of government in regulatory and licensing processes, a legal or operational requirement or an expectation, particularly in the context of engagement with indigenous peoples.¹¹⁴⁷ In this respect, Annex B pro-

¹¹⁴² *ibid.*

¹¹⁴³ *ibid* 60-78, 95-99.

¹¹⁴⁴ This is further expressed in the following phrasing of the guidance: 'Government regulatory and licensing processes represent a structured form of consent generally administered by higher levels of government. In addition, to regulatory approval, consent of impacted communities may be a legal or operational requirement or an expectation in some operating contexts, particularly in the context of engagement with indigenous peoples'. See *ibid* 64. See also Seck 93.

¹¹⁴⁵ OECD, 'Stakeholder Guidance' 20, 62-64.

¹¹⁴⁶ *ibid* 62.

¹¹⁴⁷ *ibid* 64, 96.

vides that depending on international commitments and national law, FPIC is a legally binding obligation of some states and that corporations should always obey national law and regulations and respect pertinent internationally recognized human rights.¹¹⁴⁸ In this regard and identically to the OECD-FAO Guidance, the OECD Stakeholder Guidance explains that corporations ‘should pursue an engagement strategy that meets the legitimate expectations of indigenous peoples to the extent that it does not place them in violation of domestic law’.¹¹⁴⁹ Throughout their project planning, corporations should ‘anticipate that indigenous peoples may expect consultation seeking FPIC’ irrespective of regulatory or operational requirements.¹¹⁵⁰ Furthermore, in states where FPIC is not mandated, corporations ‘should consider local expectations, the risks posed to indigenous peoples and to the operations as a result of local opposition’.¹¹⁵¹ When seeking to implement FPIC, the OECD Stakeholder Guidance provides for the identical key steps as laid out in and previously referenced in the OECD-FAO Guidance. Furthermore, the OECD Stakeholder Guidance suggests the same approach where indigenous peoples refuse to engage or their consent is not forthcoming and references the IFC’s approach to FPIC in terms of relocation,¹¹⁵² noting:

[A] project financed by the IFC governed by IFC Performance Standards should not proceed, regardless of any authorisation by the State, if relocation of indigenous populations is required and FPIC has not been obtained from them. Conversely it will not be necessary to pursue FPIC in contexts where the rights of indigenous peoples are not being impacted.¹¹⁵³

The above reference to the IFC’s FPIC example is identical in the two guidance documents. The only yet important difference between them is the additional phrase of the OECD Stakeholder Guidance: ‘Conversely it will not be necessary to pursue FPIC in contexts where the rights of indigenous peoples are not being impacted’.¹¹⁵⁴

References to FPIC find further expression in the general part of the guidance, which stipulates: ‘Consent processes are appropriate when the objective is to obtain consent of impacted communities on whether a project may proceed or regarding mitigation of specific aspects of the project or impacts on specific

¹¹⁴⁸ *ibid* 95–96.

¹¹⁴⁹ *ibid* 97. See also OECD, ‘OECD-FAO Guidance’ 80.

¹¹⁵⁰ OECD, ‘Stakeholder Guidance’ 96.

¹¹⁵¹ *ibid* 96–97.

¹¹⁵² *ibid* 97–98; see above text to [Fn 1085](#)–1093.

¹¹⁵³ OECD, ‘Stakeholder Guidance’ 98.

¹¹⁵⁴ *ibid*.

rights'.¹¹⁵⁵ Corporations may use the following factors as an indication that consent is 'needed or required': first, where consent is required by law, enterprise policy or financing agreements; second, where proceeding with a project without consent would pose a significant risk to rights holders or operations.¹¹⁵⁶ Consent processes are said to be 'potentially relevant prior to feasibility studies, project exploration and project development or prior to major expansions'.¹¹⁵⁷ Furthermore, consent can be indicated in several ways, including by:

[M]ajority vote from the community, approval by a traditional decision-making body such as a council of elders, organised regional referendum or other forms determined by regulation or other mechanism defining the requirement for consent, or by agreement between the enterprise and the stakeholders themselves.¹¹⁵⁸

In relation to the design of consultation and consent processes, the OECD Stakeholder Guidance provides that every mode of engagement should be designed in a way that is appropriate to the context and audience and reflects best practices.¹¹⁵⁹ In terms of what constitutes best practices for engagement with indigenous peoples, the guidance emphasizes the importance of ensuring that indigenous peoples' specific characteristics, traditional processes and decision-making institutions are considered and reflected in engagement processes and that they are consulted during initial project planning.¹¹⁶⁰ Furthermore, engagement with indigenous peoples should be characterized by their ongoing inclusion in the design and implementation of different engagement activities and due diligence steps, including during impact assessments and monitoring and evaluation activities.¹¹⁶¹

The section on designing appropriate and effective stakeholder engagement activities also references benefit sharing as a mode of engagement. Benefit sharing is depicted in the guidance as a result agreed upon by the corporation and relevant stakeholders via consultation or negotiation. Relevant during all project stages, benefit sharing can be monetary or non-monetary. In contrast to the other modes of engagement aimed at avoiding and addressing adverse impacts, benefit sharing is depicted as a means to optimize shared value and

¹¹⁵⁵ *ibid* 64.

¹¹⁵⁶ *ibid*.

¹¹⁵⁷ *ibid*.

¹¹⁵⁸ *ibid* 63.

¹¹⁵⁹ *ibid* 67.

¹¹⁶⁰ *ibid* 98-99.

¹¹⁶¹ *ibid* 67-70, 98-99.

positive aspects of the operations.¹¹⁶² In contrast to the OECD-FAO Guidance, however, the OECD Stakeholder Guidance does not include any reference to benefit sharing as a right of indigenous peoples flowing from their land and resource rights in the general part or in Annex B.¹¹⁶³ This suggests an understanding that benefit sharing is something that the corporation may agree on via negotiation but not primarily a right that it must respect in the first place, lending the concept of benefit sharing a touch of corporate charity.

Finally, the guidance includes important considerations for how to identify and respond to external challenges to engagement and establish clear and functional processes to respond to grievances and provide appropriate remediation.¹¹⁶⁴

(b) Interim Conclusion

The above elaborations show that stakeholder engagement and (human rights) due diligence are mutually enforcing. Stakeholder engagement is a central element of corporate (human rights) due diligence that helps avoid and address adverse (indigenous rights) impacts and reduce business risk; concomitantly, due diligence helps get stakeholder engagement right and adapted to the needs and interests of those affected by corporate conduct, including indigenous peoples. Both concepts thus play a central role in ensuring corporate respect for indigenous peoples' rights. Like the OECD-FAO Guidance, the OECD Stakeholder Guidance recognizes indigenous peoples as holders of individual and collective rights and the need for extractive corporations to identify and respect those rights in their activities.

Special emphasis is given to indigenous peoples' participatory rights in Annex B of the guidance, depicting consultation with indigenous peoples similarly to the OECD-FAO Guidance – that is, as free, prior, and informed and in tune with the characteristics of stakeholder engagement (ongoing, two-way, responsive, and good faith) set out in detail in the OECD DD Guidance. Particularly noteworthy is the strong emphasis on 'two-way engagement' that allows for the active involvement of indigenous peoples in driving and implementing engagement activities, such as consultation processes, or for them to conduct impact assessments themselves. Compared to the OECD Guidelines and UNGPs, such emphasis signifies a progressive step towards a more bottom-up approach to stakeholder engagement, as advocated for by different actors and bodies.¹¹⁶⁵

¹¹⁶² *ibid* 65–66, 70.

¹¹⁶³ See above text to [Fn 1072](#)–1075.

¹¹⁶⁴ OECD, 'Stakeholder Guidance' 70–78.

¹¹⁶⁵ See above text to [Fn 656](#)–657, [1010](#).

Adopting the same approach to FPIC as the OECD-FAO Guidance, the above elaborations on FPIC are equally true of the OECD Stakeholder Guidance.¹¹⁶⁶ Nevertheless, in laying out a detailed due diligence framework for stakeholder engagement, the latter guidance provides some additional insight on FPIC, linking it more clearly to the (degree of) impact on indigenous peoples' rights.

The OECD Stakeholder Guidance's additional phrase '[c]onversely it will not be necessary to pursue FPIC in contexts where the rights of indigenous peoples are not being impacted',¹¹⁶⁷ could be read to state that by implication in contexts where the rights of indigenous peoples are being impacted, it will be necessary to pursue FPIC. Some further indication that impacts on indigenous peoples' (rights) trigger FPIC processes is given by the guidance in its explanation of consent as a mode of engagement noting that '[c]onsent processes are appropriate when the objective is to obtain consent of *impacted communities* on whether a project may proceed or regarding mitigation of specific aspects of the project or *impacts on specific rights*'.¹¹⁶⁸ In the same paragraph, the guidance contends further that it may be taken as an indication that consent 'is needed or required' when corporations determine that a project proceeding without consent would pose a 'significant risk to rights-holders or operations' –¹¹⁶⁹ an approach that touches upon the question of the degree of impact on indigenous peoples' rights and thus is somewhat reminiscent of the sliding scale approach to FPIC emerging from the normative framework on indigenous peoples' rights. The only explicit example of a 'significant risk' that triggers FPIC as a requirement is given by the guidance in relation to indigenous peoples' relocation, referencing the IFC Performance Standards. Furthermore, the guidance refers to FPIC as a requirement in situations in which it is a legal requirement.¹¹⁷⁰

Overall, given the vague and predominant aspirational language used in the different FPIC provisions of the guidance (ie, 'necessary to pursue FPIC', 'seeking FPIC', 'in order to obtain FPIC', 'FPIC processes are appropriate', 'consent is needed'),¹¹⁷¹ the guidance appears to suggest that where project activities impact indigenous peoples' rights, the objective of consultation is to obtain FPIC.

¹¹⁶⁶ See above 181–182.

¹¹⁶⁷ OECD, 'Stakeholder Guidance' 98.

¹¹⁶⁸ *ibid* 64 (emphasis added).

¹¹⁶⁹ *ibid*.

¹¹⁷⁰ *ibid*.

¹¹⁷¹ 'To pursue something' is usually translated as 'to do something or try to achieve something over a period of time', such as a goal, an aim or an objective, which appears more aspirational than absolute, see <https://www.oxfordlearnersdictionaries.com/us/definition/american_english/pursue> accessed 24 April 2022.

FPIC-seeking consultation is framed as a general expectation and a best practice model.¹¹⁷² Conversely, where indigenous peoples' rights are not impacted – which is hardly ever the case in the extractive sector –¹¹⁷³ free, prior, and informed consultation processes appear sufficient.¹¹⁷⁴ However, should corporations conclude via their due diligence that consent is required to proceed with an activity – which, as shown above, may be the case where project activity poses a significant risk to indigenous peoples – and the consultation process has not led to consent, the guidance suggests that 'activities should not proceed unless FPIC is subsequently forthcoming'.¹¹⁷⁵ In this sense, the guidance includes traces of the sliding scale approach to FPIC and affirms that corporations should respect the outcome of consultation, namely, respect that indigenous peoples are withholding their consent.

Such a reading of the FPIC provisions of the guidance also appears in tune with the risk-based approach to stakeholder engagement, as most clearly set out in the OECD Stakeholder Guidance and OECD DD Guidance. As indicated earlier, in situations such as relocation stakeholder engagement activities may need to be more extensive.¹¹⁷⁶ Similarly, the OECD DD Guidance notes: 'The degree of impact on (...) rightsholders may inform the degree of engagement'.¹¹⁷⁷

C. IFC Performance Standards, Indigenous Peoples' Rights and FPIC

1. General Remarks

In 2012, the IFC, the private sector arm of the World Bank, presented its Performance Standards on Environmental and Social Sustainability, effective for projects initiated after January 1, 2012.¹¹⁷⁸ The Performance Standards address private sector clients of IFC investments – that is, '[parties] responsible for implementing and operating the project that is being financed, or the recipients of the financing, depending on the project structure and type of financing'.¹¹⁷⁹

¹¹⁷² OECD, 'Stakeholder Guidance' 96, 98–99.

¹¹⁷³ HRC, '2013 Report SRRIP' para 28.

¹¹⁷⁴ OECD, 'Stakeholder Guidance' 98. See also the description of the engagement mode 'consultation', *ibid* 63.

¹¹⁷⁵ OECD, 'Stakeholder Guidance' 64, 98.

¹¹⁷⁶ See above text to [Fn 1111](#)–1113.

¹¹⁷⁷ OECD, 'DD Guidance' 49.

¹¹⁷⁸ IFC, 'Performance Standards'.

¹¹⁷⁹ *ibid* Overview, paras 1–2.

The Performance Standards define clients' responsibilities for managing their environmental and social risks throughout the life of an investment by the IFC, including regarding indigenous peoples (Standard 7).¹¹⁸⁰ More precisely, the Performance Standards '[provide] guidance on how to identify risks and impacts, and are designed to help avoid, mitigate, and manage risks and impacts as a way of doing business in a sustainable way, including stakeholder engagement and disclosure obligations of the client in relation to project-level activities'.¹¹⁸¹ Clients' compliance with the Performance Standards may be a condition for (continuous) financial support.¹¹⁸² The Performance Standards are a coherent framework that should be read together and cross-referenced as needed.¹¹⁸³ They are flanked by eight Guidance Notes, corresponding to each Performance Standard, providing guidance on the requirements enshrined in them.¹¹⁸⁴

The IFC Performance Standards are widely viewed as an important international standard of reference on responsible business conduct, including in terms of indigenous peoples.¹¹⁸⁵ As shown above, the IFC Performance Standards have witnessed uptake in RBC instruments such as the OECD RBC Guidance Documents and by the private sector.¹¹⁸⁶ A prominent example in the latter respect is the endorsement of the IFC Performance Standards by the Equator Principles, which underpin the policies of 131 financial institutions in thirty-eight states, 'covering the majority of international project finance debt

¹¹⁸⁰ <https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards> accessed 24 April 2022.

¹¹⁸¹ IFC, 'Performance Standards' Overview, para 1. The eight Performance Standards cover the following substantive areas: Assessment and Management of Environmental and Social Risks and Impacts (Standard 1); Labor and Working Conditions (Standard 2); Resource Efficiency and Pollution Prevention (Standard 3); Community Health, Safety, and Security (Standard 4); Land Acquisition and Involuntary Resettlement (Standard 5); Biodiversity Conservation and Sustainable Management of Living Natural Resources (Standard 6); Indigenous Peoples (Standard 7); and Cultural Heritage (Standard 8).

¹¹⁸² IFC, 'Policy' para 22: 'IFC will only finance investment activities that are expected to meet the requirements of the Performance Standards within a reasonable period of time. Persistent delays in meeting these requirements can lead to loss of financial support'. See also Doyle, FPIC 206, 208.

¹¹⁸³ IFC, 'Performance Standards' Overview, para 4.

¹¹⁸⁴ *ibid* Overview, para 8; IFC, 'Guidance Notes: Performance Standards on Environmental and Social Sustainability' (2012) <https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/publications_policy_gn-2012> accessed 27 April 2022.

¹¹⁸⁵ Doyle, FPIC 205-206; Doyle and Whitmore 108; UNGA, '2013 Report WGBHR' para 11.

¹¹⁸⁶ ICMM, 'Position Statement' 1; Greenspan and others 11, 14, 18-19, 26; Seck 71.

within developed and emerging markets'.¹¹⁸⁷ Another noteworthy example reflecting the IFC's pioneering role is the IFC's guidance document for corporations on the ILO C 169 published in 2007 – four years prior to the milestone year of 2011. The latter document notes:

If an IFC client is implementing a project where government's actions mean that the project does not meet the requirements of the Convention, it can find itself accused of “breaching” the principles of the Convention or of violating rights protected under the Convention.¹¹⁸⁸

This statement can be read to indicate a responsibility of corporations to respect indigenous peoples' rights enshrined in ILO C 169 independent of the willingness and ability of a state to comply with its obligations under ILO C 169.

2. Performance Standard 1

Performance Standard 1 establishes a general requirement for clients to institute a risk assessment system whenever a project bears social and environmental risks and impacts.¹¹⁸⁹ In principle, Standard 1 applies to all kinds of business activities and throughout a project, that is, from early developmental stages through to its closure.¹¹⁹⁰ A client shall ‘conduct a process of environmental and social assessment, and establish and maintain an [Environmental and Social Management System] appropriate to the nature and scale of the project and commensurate with the level of its environmental and social risk and impacts’.¹¹⁹¹ Such a system involves (i) policy; (ii) identification of risks and impacts; (iii) management programs; (iv) organizational capacity and competency; (v) emergency and preparedness and response; (vi) stakeholder engagement; and (vii) monitoring and review.¹¹⁹² Importantly, the process for identifying risks and impacts requires considering all relevant environmental and

¹¹⁸⁷ ‘The Equator Principles is a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risks in projects’. See <<https://equator-principles.com/members-reporting//>>; <<https://equator-principles.com/about/>> accessed 12 April 2022. They incorporate engagement with indigenous peoples, referring to FPIC. See EPFIs, ‘The Equator Principles’ (2020) <<https://equator-principles.com/wp-content/uploads/2020/05/The-Equator-Principles-July-2020-v2.pdf>> accessed 18 April 2022. See also Doyle, FPIC 209.

¹¹⁸⁸ IFC, ‘ILO Convention 169 and the Private Sector: Questions and Answers for IFC Clients’ (2007) 1 <https://de.scribd.com/fullscreen/16905434?access_key=key-2bcwe3uie9jldwflgjzr> accessed 27 April 2022.

¹¹⁸⁹ IFC, ‘Performance Standards’ Overview, paras 3–4, Standard 1, para 1.

¹¹⁹⁰ *ibid* Standard 1, para 4.

¹¹⁹¹ *ibid* Standard 1, para 5.

¹¹⁹² *ibid*.

social risks and impacts of a project, including those identified under Performance Standards 2 through 8.¹¹⁹³ If the risk assessment process under Standard 1 identifies social or environmental risks for indigenous peoples, Performance Standard 7 on indigenous peoples applies.¹¹⁹⁴

In essence, the different elements and operational steps in Standard 1's risk assessment system show several parallels to the risk-based due diligence system as laid out in the key RBC instruments, including similar processes and steps.¹¹⁹⁵ This is further buttressed in terms of human rights. The corporate responsibility to respect human rights is recognized in Standard 1, explaining that each Performance Standard has human rights dimensions that can be distilled when clients are guided by the Standards while engaging in due diligence.¹¹⁹⁶ In 'high risk circumstances', 'specific human rights due diligence as relevant to the particular business' may complement social and environmental risk identification.¹¹⁹⁷ Thus, under the Performance Standards, the concept of risk-based due diligence, particularly regarding human rights, is perceived and depicted as a concept that is complementary and mutually enforcing to the Standards' risk assessment system.¹¹⁹⁸

3. Performance Standard 7

IFC Performance Standard 7 contains important considerations for IFC clients in terms of managing corporate activity-related risks and impacts for indigenous peoples. In a similar vein to the above-covered OECD RBC Guidance Documents, this focus on indigenous peoples is justified on the grounds of indigenous peoples' specific characteristics relating to their marginalized status both legally and socially in society, their special relationship to lands and re-

¹¹⁹³ *ibid* Standard 1, para 7.

¹¹⁹⁴ *ibid* Standard 1, para 3, Standard 7, para 3.

¹¹⁹⁵ See above text to [Fn 911](#)-928.

¹¹⁹⁶ Seck 72; IFC, 'Performance Standards' Standard 1, para 3. See also IFC, 'Policy' para 12; IFC, 'Guidance Notes' Guidance Note 1, para 47.

¹¹⁹⁷ IFC, 'Performance Standards' Standard 1, para 7 at Fn 12. This may include conducting human rights impact assessments, see IFC, 'Guidance Notes' Guidance Note 1, para 47. For an in-depth analysis of human rights impact assessments in the business and human rights field and how it relates to environmental and social impact assessments, see Nora Götzmann, 'Human Rights Impact Assessment of Business Activities: Key Criteria for Establishing a Meaningful Practice' (2017) 2(1) *Business and Human Rights Journal* 87.

¹¹⁹⁸ IFC, 'Guidance Notes' Guidance Note 1, para 45.

sources, and their cultural specificities – making them ‘particularly vulnerable if their lands and resources are transformed, encroached upon, or significantly degraded.’¹¹⁹⁹ Against this backdrop, the undercurrent of Standard 7 is:

[T]o ensure that the development process fosters full respect for the human rights, dignity, aspirations, culture, and natural resource-based livelihoods of Indigenous Peoples. To anticipate and avoid adverse impacts of projects on indigenous communities, or when avoidance is not possible, to minimize, [restore] and/or compensate for such impacts¹²⁰⁰ [in a culturally appropriate manner commensurate with the nature and scale of such impacts and the vulnerability of the Affected Communities of Indigenous Peoples].¹²⁰¹

Via environmental and social risks and impact assessments, IFC clients will first identify all indigenous communities potentially affected within the project area of influence and second identify ‘the nature and degree of the expected direct and indirect economic, social, cultural (including cultural heritage), and environmental impacts on them.’¹²⁰²

In addition to ILO C 169, Standard 7 contains one of the most detailed descriptions of who may identify as and be considered ‘indigenous peoples’, referring to characteristics of self-identification as a distinct indigenous cultural group and recognition as such by others; collective attachment to distinct habitats and ancestral territories and related natural resources; distinct customary, cultural, social, economic or political institutions; and distinct languages and dialects.¹²⁰³ IFC clients may need to consult with experts to ascertain whether a particular group is considered an indigenous people under the above criteria.¹²⁰⁴

(a) Free, Prior, and Informed Consultation and Participation

As indicated above, the IFC Performance Standards also emphasize stakeholder engagement with affected communities (local communities directly affected by the project) and, where appropriate, other stakeholders (those not directly affected by a project but having an interest in it) as a crucial element for successfully managing a project’s risks and impacts.¹²⁰⁵ In several places, the Performance Standards speak to the importance that the risk assessment

¹¹⁹⁹ IFC, ‘Performance Standards’ Standard 7, paras 1, 11.

¹²⁰⁰ *ibid* Standard 7, para 2.

¹²⁰¹ *ibid* Standard 7, para 9.

¹²⁰² *ibid* Standard 7, para 8.

¹²⁰³ *ibid* Standard 7, paras 4–6. See also above text to [Fn 62–66](#).

¹²⁰⁴ IFC, ‘Performance Standards’ Standard 7, para 7.

¹²⁰⁵ *ibid* Overview, para 1, Standard 1, para 1, Standard 7, paras 9–10.

system implemented by IFC clients ‘take account of the outcome of the engagement process with Affected Communities as appropriate.’¹²⁰⁶ Stakeholder engagement is referred to as:

[A]n ongoing process that may involve, in varying degrees the following elements: stakeholder analysis and planning, disclosure and dissemination of information, consultation and participation, grievance mechanism, and on-going reporting to Affected Communities. The nature, frequency, and level of effort of stakeholder engagement may vary considerably and will be commensurate with the project’s risks and adverse impacts, and the project’s phase of development.¹²⁰⁷

Thus, like the other RBC documents covered above, the IFC Performance Standards also adopt a risk-based approach to stakeholder engagement bearing implications for engagement with indigenous peoples. While Standard 1 lays out general requirements and processes governing stakeholder engagement,¹²⁰⁸ Standard 7 deepens them and makes them more specific regarding indigenous peoples.¹²⁰⁹ When a project poses risks and adverse impacts to indigenous peoples, the more enhanced ‘informed consultation and participation’ process (ICP) will build upon the general process laid out in Standard 1 given that ‘[i]ndigenous peoples may be more vulnerable to the adverse impacts associated with project development than non-indigenous communities’.¹²¹⁰

The ICP process ‘involves a more in-depth exchange of views and information, and an organized and iterative consultation’.¹²¹¹ It provides sufficient time for indigenous peoples’ decision-making, incorporates their views into the clients’ decision-making, captures gender(ed) and age differences and involves members of affected communities and indigenous peoples’ representative bodies and organizations such as councils of elders or village councils.¹²¹² Representative bodies may further refer, among others, to community and religious leaders, civil society representatives or local government representatives. The Performance Standards make clear that the representation of such representative bodies should be verified by IFC clients in terms of accuracy and true

¹²⁰⁶ *ibid* Standard 1, paras 11,15.

¹²⁰⁷ *ibid* Standard 1, paras 25, 30.

¹²⁰⁸ *ibid* Standard 1, paras 30-32.

¹²⁰⁹ *ibid* Standard 7, para 2.

¹²¹⁰ *ibid* Standard 1, paras 31-32, Standard 7, paras 1, 10-11; IFC, ‘Guidance Notes’ Guidance Note 7, para 14.

¹²¹¹ IFC, ‘Performance Standards’ Standard 1, para 31.

¹²¹² *ibid* Standard 1, para 31, Standard 7, para 10; IFC, ‘Guidance Notes’ Guidance Note 1, para 105, Guidance Note 7, paras 15-16, 19.

representation of the views of the represented communities.¹²¹³ Furthermore, the IFC Guidance Note 7 explains that ICP processes 'should build upon existing customary institutions and decision making processes [used by indigenous peoples]¹²¹⁴ and that IFC clients should assess and when necessary consider and promote capacity building to enhance the effectiveness of ICP processes with indigenous peoples.¹²¹⁵

Consultation, including the ICP process with the abovementioned characteristics, is an early and ongoing documented two-way process that is free from external manipulation, coercion, intimidation, and interference.¹²¹⁶ It is characterized by 'prior disclosure and dissemination of relevant, transparent, objective, meaningful and easily accessible information which is in a culturally appropriate local language(s) and format'¹²¹⁷ for affected communities to 'understand the risks, impacts and opportunities of the project'.¹²¹⁸ Information should be disclosed and disseminated before decision-making affecting them and at every stage of project implementation on:¹²¹⁹ '(i) the purpose, nature, and scale of the project; (ii) the duration of proposed project activities; (iii) any risks to and potential impacts on such communities and relevant mitigation measures; (iv) the envisaged stakeholder engagement process; and (v) grievance mechanism'.¹²²⁰ To achieve this, consultation should start prior to project planning and continue during project implementation.¹²²¹

(b) Free, Prior, and Informed Consent

Not surprisingly – given the flag bearer role of the IFC in standard setting –¹²²² thus far, its approach taken in the Performance Standards towards engagement with indigenous peoples in terms of form and nature is largely in tune with those in the other RBC instruments, particularly the OECD RBC Guidance Documents. IFC clients are required to conduct free, prior, and informed

¹²¹³ IFC, 'Performance Standards' Standard 1, para 27.

¹²¹⁴ IFC, 'Guidance Notes' Guidance Note 7, para 17.

¹²¹⁵ *ibid* Guidance Note 7, para 20.

¹²¹⁶ IFC, 'Performance Standards' Standard 1, para 30; IFC, 'Guidance Notes' Guidance Note 7, para 15.

¹²¹⁷ IFC, 'Performance Standards' Standard 1, para 30; IFC, 'Guidance Notes' Guidance Note 7, para 19.

¹²¹⁸ IFC, 'Performance Standards' Standard 1, para 29.

¹²¹⁹ IFC, 'Guidance Notes' Guidance Note 7, para 15.

¹²²⁰ IFC, 'Performance Standards' Standard 1, para 29.

¹²²¹ IFC, 'Guidance Notes' Guidance Note 7, para 15.

¹²²² Doyle, FPIC 205-206.

consultation processes with indigenous peoples.¹²²³ However, a distinguishing aspect, particularly regarding the key RBC instruments, lies in the IFC's approach to the FPIC principle. Its incorporation into Standard 7 with the latest revision of the IFC Performance Standards already in 2011 is considered a 'watershed moment in international development history'¹²²⁴ since for the first time private entities relying on IFC financing are obligated to obtain FPIC from affected indigenous communities.¹²²⁵ The justification for including FPIC as an additional requirement in engagement processes with indigenous peoples lies in their '[particular vulnerability] to the loss of, the alienation from or exploitation of their land and access to natural and cultural resources'.¹²²⁶

In this sense, Standard 7 provides that IFC clients 'will obtain FPIC', that is, FPIC as a requirement is triggered when: the IFC client 'proposes to locate a project on, or commercially develop natural resources on lands traditionally owned by, or under the customary use of, Indigenous Peoples, and adverse impacts can be expected';¹²²⁷ the IFC client project requires the relocation of indigenous peoples from such lands and natural resources;¹²²⁸ the IFC client project 'may significantly impact on critical cultural heritage that is essential to the identity and/or cultural, ceremonial, or spiritual aspects of indigenous peoples' lives' such as sacred groves, water and waterways, trees and rocks;¹²²⁹ or 'a project proposes to use the cultural heritage including knowledge, innovations, or practices of Indigenous Peoples for commercial purposes'.¹²³⁰ As explained in Standard 7, FPIC is required with regards to project design, implementation, and expected outcomes related to the above potential impacts directly affecting indigenous communities.¹²³¹

Explaining that there is no universally accepted definition of FPIC, Standard 7 provides the following definition of FPIC:

FPIC builds on and expands the process of ICP (...) and will be established through good faith negotiation between the client and the Affected Commu-

¹²²³ IFC, 'Guidance Notes' Guidance Note 7, para 25.

¹²²⁴ Shalanda H Baker, 'Why the IFC's Free, Prior, and Informed Consent Policy Does Not Matter (Yet) to Indigenous Communities Affected by Development Projects' (2012) 30(3) *Wisconsin International Law Journal* 668, 669.

¹²²⁵ *ibid* 669-670, 678-680; Doyle, FPIC 205-206.

¹²²⁶ IFC, 'Performance Standards' Standard 7, para 11; Doyle, FPIC 206.

¹²²⁷ IFC, 'Performance Standards' Standard 7, paras 13-14.

¹²²⁸ *ibid* Standard 7, para 15.

¹²²⁹ *ibid* Standard 7, para 16.

¹²³⁰ *ibid* Standard 7, para 17; IFC, 'Guidance Notes' Guidance Note 7, para 27; Doyle, FPIC 158.

¹²³¹ IFC, 'Performance Standards' Standard 7, para 11; IFC, 'Guidance Notes' Guidance Note 7, para 28.

nities of Indigenous Peoples. The client will document: (i) the mutually accepted process between the client and Affected Communities of Indigenous Peoples, and (ii) evidence of agreement between the parties as the outcome of the negotiations. FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree.¹²³²

IFC Guidance Note 7 provides further explanation on the scope of FPIC, noting:

[FPIC] processes should ensure the meaningful participation of Indigenous Peoples in decision-making, focusing on achieving agreement while not conferring veto rights to individuals or sub-groups, or requiring the client to agree to aspects not under their control. [Furthermore], [w]here appropriate [FPIC processes] should also define what would constitute consent from [affected indigenous communities].¹²³³ [In addition], an FPIC agreement captures the [affected communities'] broad agreement on the legitimacy of the engagement process and the decision made [and]¹²³⁴ should document the roles and responsibility of both parties and specific commitments.¹²³⁵

In terms of benefit sharing, IFC Guidance Note 7 provides that where envisioned, benefit sharing 'should be determined on mutually agreed terms as part of the process of securing FPIC'.¹²³⁶ Furthermore, Standard 7 refers to the requirement of ensuring fair and equitable sharing of benefits in projects involving the utilization of natural resources central to indigenous communities' livelihoods and identity and in relation to projects commercializing the cultural heritage of indigenous peoples including knowledge, innovation, or practice.¹²³⁷

4. Interim Conclusion and Criticism

Standard 7 clearly recognizes indigenous peoples' customary land and resource rights and cultural rights and frames consultation and FPIC as safeguards for their protection and enjoyment.¹²³⁸ The four examples triggering

¹²³² IFC, 'Performance Standards' Standard 7, para 12; IFC, 'Guidance Notes' Guidance Note 7, paras 25, 33.

¹²³³ IFC, 'Guidance Notes' Guidance Note 7, para 22.

¹²³⁴ *ibid* Guidance Note 7, para 33.

¹²³⁵ *ibid* Guidance Note 7, para 38.

¹²³⁶ *ibid* Guidance Note 7, para 51.

¹²³⁷ IFC, 'Performance Standards' Standard 7, paras 14, 17.

¹²³⁸ Informed consultation and participation processes and FPIC are framed as objectives together with the objectives of avoiding adverse impacts and ensuring full respect for indigenous peoples' human rights, see *ibid* Standard 7, para 2. See also Doyle, *FPIC* 206, 208; Seck 74, 96.

the requirement of FPIC are largely in tune with the expectations under the UNDRIP and the jurisprudence of the human rights bodies somewhat reflecting a sliding scale approach to FPIC.¹²³⁹ Standard 7 refers to relocation and projects that 'may significantly impact on critical cultural heritage that is essential to [indigenous peoples' lives and identity]'.¹²⁴⁰ Furthermore, adverse impacts are defined to include 'loss of identity, culture, and natural resource-based livelihoods, as well as exposure to impoverishment and diseases',¹²⁴¹ threats to food security,¹²⁴² and 'impacts from loss of access to assets or resources or restrictions on land use resulting from project activities'.¹²⁴³

However, despite these significant features of Standard 7, the latter also faces criticism regarding its FPIC approach and the ambiguities it contains.¹²⁴⁴ Doyle argues, '[t]he extent to which the IFC's interpretation of the content of FPIC is consistent with the normative framework of indigenous peoples' rights and provides for indigenous peoples' control over its operationalisation is (...) less clear'.¹²⁴⁵

A central ambiguity relating to the IFC's FPIC concerns the question of what should happen if indigenous peoples' consent is not forthcoming in contexts other than relocation.¹²⁴⁶ While the IFC explicitly explains that if FPIC is not given in projects involving relocation, the project should not proceed,¹²⁴⁷ it remains silent on the other scenarios under Standard 7, which require FPIC.¹²⁴⁸ If FPIC is not forthcoming in the latter scenarios and projects are associated with ongoing violations of indigenous peoples' rights, the IFC has claimed that it will simply not provide funding for them.¹²⁴⁹

Moreover, further ambiguity has allegedly been introduced by IFC Guidance Note 7 regarding the timing of FPIC, suggesting that FPIC may not be required prior to the exploration phase of a project since a complete impact assessment

¹²³⁹ Doyle, FPIC 158; IFC, 'Performance Standards' Standard 7, paras 13-17. See also above text to [Fn 564-572](#), [614-630](#).

¹²⁴⁰ IFC, 'Performance Standards' Standard 7, paras 15-16 (emphasis added); Doyle, FPIC 158.

¹²⁴¹ IFC, 'Performance Standards' Standard 7, para 1; Doyle, FPIC 158.

¹²⁴² IFC, 'Guidance Notes' Guidance Note 7, para 12; Doyle, FPIC 158.

¹²⁴³ IFC, 'Performance Standards' Standard 7, para 14 at Fn 8; Doyle, FPIC 158.

¹²⁴⁴ See generally Baker 671, 688-695. See also Seck 77; Rombouts, *Having a Say* 213; Doyle, FPIC 206-208.

¹²⁴⁵ Doyle, FPIC 158.

¹²⁴⁶ *ibid* 206; IFC, 'Guidance Notes' Guidance Note 7, para 39.

¹²⁴⁷ IFC, 'Performance Standards' Standard 7, para 15.

¹²⁴⁸ Doyle, FPIC 206.

¹²⁴⁹ *ibid*; Rombouts, *Having a Say* 213.

is feasible only at a later stage in the project lifecycle.¹²⁵⁰ Such an understanding is not only considered inconsistent with the requirement stipulated in Standard 7 that FPIC processes are initiated by adverse impacts at the project design stage¹²⁵¹ but also negates the purpose of FPIC – namely, to include indigenous peoples in decision-making affecting them at the earliest stage possible, prior to the commencement of any activities and throughout the different project stages.¹²⁵² On such an understanding, Baker aptly argues, ‘once affected indigenous communities become engaged in the process, the development train has already left the station’¹²⁵³ and ‘consent is obtained *ex post facto*’.¹²⁵⁴

Other criticism has been voiced on the lack of clarity regarding what role indigenous peoples play in defining and implementing FPIC processes.¹²⁵⁵ It has been argued that neither Standard 7 nor IFC Guidance Note 7 addresses situations in which indigenous peoples control and implement key elements of impact assessments or define their own FPIC process.¹²⁵⁶ Indeed, the IFC Standards take a top-down rather than a bottom-up approach. For example, Standard 1 refers to ICP processes as ‘leading to the client’s incorporating into their decision-making process the views of the Affected [Indigenous] Communities’.¹²⁵⁷ Moreover, Standard 7 makes assumptions about indigenous peoples’ self-governance, such as referring to majority decision-making and to conducting joint FPIC processes with non-indigenous communities, which may not be adequate in particular situations and contexts.¹²⁵⁸

Despite the above shortcomings, consensus appears to exist that by dedicating a specific standard to indigenous peoples and by incorporating FPIC already in 2012, the IFC Performance Standards have certainly made indigenous peoples’ rights more tangible from a corporate perspective and contributed to crystalizing FPIC in the private sector.¹²⁵⁹

¹²⁵⁰ IFC, ‘Guidance Notes’ Guidance Note 7, para 29; Doyle, FPIC 206; Baker 692–694.

¹²⁵¹ IFC, ‘Performance Standards’ Standard 7, para 11.

¹²⁵² Doyle, FPIC 206–207; Baker 693–694. See above text to [Fn 643–670](#).

¹²⁵³ Baker 693.

¹²⁵⁴ *ibid* 694.

¹²⁵⁵ Doyle, FPIC 207.

¹²⁵⁶ *ibid* 158, 207.

¹²⁵⁷ IFC, ‘Performance Standards’ Standard 1, para 31.

¹²⁵⁸ Doyle, FPIC 207.

¹²⁵⁹ *ibid* 208–209. More critical, Baker 705.

III. Conclusion

Chapter 3 examined the regulatory framework directly addressing corporations with the aim of answering the first research question: What are the precise rules governing corporate responsibility with regard to indigenous peoples' rights and FPIC? As such, the chapter has focused on pertinent instruments, including the three key RBC instruments, relevant OECD RBC Guidance Documents and the IFC Performance Standards with a particular focus on the OECD instruments. In applying an indigenous peoples' rights lens to these instruments, the chapter has sought to distil pertinent provisions regarding indigenous peoples to further frame the contours of corporations' responsibility to respect indigenous peoples' rights and FPIC. This undertaking has brought the following findings to the fore.

The Business and Human Rights Field as a Dynamic Field Just as it took significant time before a firm acknowledgement of the corporate responsibility to respect human rights was established via the three key RBC instruments, it took time before respect for indigenous peoples' rights and FPIC was recognized as part of corporations' human rights responsibility. All the examined RBC instruments include references to indigenous peoples but in distinct ways and to different extents. Most striking is the difference between the UNGPs and the revised OECD Guidelines compared to the IFC Performance Standards. Close to each other in terms of their dates of development, the instruments differ greatly in their coverage of indigenous peoples' issues. While the key RBC instruments refer to indigenous peoples' issues only rudimentarily and mostly implicitly, the current 2012 edition of the IFC Performance Standards has a dedicated section on indigenous peoples with detailed references to FPIC. Still in existence nearly a decade later, the IFC Performance Standards have not lost any of their influence and continue to serve as an important standard of reference, *inter alia* finding entry into the OECD RBC Guidance Documents.

The OECD RBC Guidance Documents' central contribution regarding indigenous peoples is their detailed examination of the concepts of risk-based (human rights) due diligence and stakeholder engagement, laying out the concepts' relationship and implications for the corporate responsibility to respect indigenous peoples' rights and FPIC. With the OECD RBC Guidance Documents, the references to indigenous peoples in the OECD Guidelines have been further elaborated and clarified, placing the issue of business and indigenous peoples somewhat more in the spotlight. Both the OECD-FAO Guidance and the OECD Stakeholder Guidance incorporate a dedicated section on indigenous peoples.

Risk-Based Human Rights Due Diligence Adapted to the Particularities and Rights of Indigenous Peoples As this chapter illustrated, respecting indigenous peoples' rights means avoiding infringing on the rights of indigenous peoples and to addressing adverse rights impacts. To ensure corporate respect, corporations are expected to adopt a human rights policy paying due regard to indigenous peoples, carry out risk-based human rights due diligence and remedy impacts when they occur. At the core of this operational framework is risk-based human rights due diligence depicted as a process through which corporations identify and assess actual adverse human rights impacts; end, prevent or mitigate these impacts; track the implementation and results of their activities; and communicate how impacts are addressed. Due diligence is risk-based, which means that corporations may need to adapt the nature and extent of their due diligence efforts depending on the risks and nature of adverse impacts related to a specific situation.¹²⁶⁰ This has implications for conducting due diligence when there are risks of adverse impacts on indigenous peoples and their rights. Against this background, corporations should consider the following:

Identifying and Prioritizing Indigenous Peoples as Rights Holders Throughout all the RBC instruments covered in this chapter, indigenous peoples are referred to as vulnerable groups facing specific challenges (often not experienced by others) due to their marginalized status; specific characteristics in terms of cultural values and practices; and special bond to lands, territories, and resources. Given these characteristics, the RBC instruments – most elaborately the OECD RBC Guidance Documents and IFC Performance Standards – recognize that particular attention and potentially prioritization of indigenous peoples from a due diligence perspective may be necessary. In this sense, the OECD RBC Guidance Documents differentiate between stakeholders and rights holders, acknowledging that indigenous peoples may be rights holders as individuals or as a group given their collective rights. Prioritization of indigenous peoples in corporate due diligence first requires the identification of all indigenous communities potentially affected and of their collective and individual rights. Identifying indigenous peoples as rights holders is the first step to ensure that their rights are recognized and respected. Means for such identification include environmental, social, and human rights impact assessments; field research; and stakeholder engagement activities. Impact assessments in particular serve as tools to identify the nature and degree of the expected impacts and salient issues on which corporations should engage with indigenous peoples.

¹²⁶⁰ OECD, 'DD Guidance' 17.

Knowledge of the Regulatory Context and the Rights at Risk Rights explicitly referred to in the RBC instruments include indigenous peoples' customary land and resource rights, cultural rights, benefit sharing, and participatory rights. As stipulated in the OECD Stakeholder Guidance, respecting indigenous peoples' rights involves acquiring knowledge on the local and regulatory context, ie, applicable international and domestic law, area of impact, existence of indigenous peoples' governance structures and engagement and decision-making processes, prevalence of historical marginalization or discrimination, and existence of cultural and spiritual heritage.¹²⁶¹ Via due diligence, corporations can thus ensure that they observe the regulatory context.¹²⁶²

Notably, both the OECD-FAO Guidance and the OECD Stakeholder Guidance emphasize that corporations should not simply presume adequate protection of indigenous peoples' customary land and resource rights or their participatory rights but instead should take action to ensure respect for these rights. In this regard, the OECD-FAO Guidance refers to the responsibility of corporations to ensure that their operations do not lead to the resettlement of indigenous communities without consultation or proper compensation and that they are not connected to expropriation for which states have not fulfilled their obligations. Actions may, for instance, involve withdrawing from planned operations and considering feasible alternative investment.

Stakeholder Engagement as a Means and an End in Itself Ensuring respect for indigenous peoples' rights involves conducting good faith, effective and meaningful consultation with (potentially) affected indigenous communities through their own representative institutions and before initiating any operations that may affect them as well as throughout and at the end of operations. This responsibility to consult and engage with indigenous peoples runs like a thread through all the covered RBC instruments under the overarching concept of stakeholder engagement, although to different extents.¹²⁶³

Throughout the RBC instruments, stakeholder engagement is depicted as a central element of (human rights) due diligence. Corporations are expected to conduct meaningful stakeholder engagement to adequately identify and manage risks to stakeholders and rights holders. Stakeholder engagement can 'get

¹²⁶¹ See above text to [Fn 1123](#).

¹²⁶² OECD, 'OECD-FAO Guidance' 22.

¹²⁶³ In this regard, see also Karin Buhmann, 'Meaningful Stakeholder Engagement as an Aspect of Risk-Based Due Diligence Between the Economy, Politics and Law: The Constitutive Role of the Business and Human Rights Regime' in Rachael L Johnstone and Anne Merrild Hansen (eds), *Regulation of Extractive Industries: Community Engagement in the Arctic* (Routledge 2020) 95.

the facts straight, (...) raise the values that should be considered, and most of all, (...) clarify and present the interests and rights of local communities and individuals that need to be taken into account'.¹²⁶⁴ Without adequate stakeholder engagement as part of due diligence, corporations may risk not implementing due diligence adequately, that is, they may overlook salient information that would allow it to identify, assess, prevent, mitigate and address adverse impacts. Due diligence is thus informed by stakeholder engagement activities, and stakeholder engagement is a means to implement due diligence (due diligence dimension of stakeholder engagement and consultation). However, if conducted improperly, stakeholder engagement may bear risks itself and give rise to actual or perceived adverse impacts, such as by excluding pertinent rights holders from the engagement process, spurring distrust or opposition or even adversely impacting indigenous peoples' participatory rights (right dimension of stakeholder engagement and consultation).

Framed in general terms by the key RBC instruments with little information on the content, scope and nature of stakeholder engagement, the latter concept has thus been further clarified via the OECD RBC Guidance Documents and the IFC Performance Standards, which all include detailed references to engagement with indigenous peoples.

Risk-Based Approach to Stakeholder Engagement A common denominator of the OECD RBC Guidance Documents and IFC Performance Standards is their risk-based approach to stakeholder engagement. This means that the extent and nature of stakeholder engagement depend on the nature of interests (potentially) impacted and the degree of impact. Such an approach is reflected in all three OECD RBC Guidance Documents, which recognize the need for special and differentiated engagement and consultation with indigenous peoples. IFC Performance Standard 7, for its part, requires that IFC clients adopt a more enhanced engagement process (so-called 'Informed Consultation and Participation Process') should they identify risks to indigenous peoples.

Largely in tune with the criteria of good faith consultation as set out under [Chapter 2](#), as a bottom line, the OECD RBC Guidance Documents and IFC Performance Standards suggest a model of free, prior, and informed consultation with indigenous peoples. Engagement and consultation should be conducted in a culturally sensitive manner and take due account of indigenous peoples' traditional process and decision-making structures. Furthermore, given their marginalized status, meaningful engagement with indigenous peoples may require additional financial or non-financial support. In particular, the OECD RBC Guidance Documents speak to the importance of including indige-

¹²⁶⁴ Mestad 78.

nous peoples in stakeholder engagement activities, for instance, by including them in the design and implementation of consultation activities and in procedural steps of due diligence, such as impact assessments. Importantly, the RBC instruments emphasize that the acquired understanding and information should be regularly updated and verified in terms of accuracy. The same applies to stakeholders' and rights holders' representatives, whose representation should be verified in terms of accuracy and inclusiveness.

Notably, the OECD-FAO Guidance, OECD Stakeholder Guidance and IFC Performance Standard 7 do not stop at free, prior, and informed consultation but explicitly identify and recognize the principle of FPIC. In this sense, the two OECD RBC Guidance Documents stipulate that corporations should be aware that indigenous peoples may expect consultation seeking FPIC. Taking it a step further, IFC Standard 7 lists different scenarios in which indigenous peoples' consent must be obtained by IFC clients.

In line with the FPIC understanding under the indigenous peoples' rights framework set out in [Chapter 2](#), all three RBC instruments appear to take the approach that FPIC is required in situations involving indigenous peoples' relocation. In the latter scenario, corporations are advised not to proceed with the operation or the project. Beyond the case of relocation, however, the approach to FPIC becomes blurrier. IFC Performance Standard 7 has been criticized for not specifying further how IFC clients should proceed if FPIC is not forthcoming in the other scenarios. In this sense, the IFC has merely stated that ongoing violations of indigenous peoples' rights or disrespect for indigenous peoples' consent could result in the termination of project funding. Such action appears indicated but may not be satisfying from the perspective of those affected on the ground as the project already has caused adverse impact. Furthermore, clients of IFC projects remain in the dark regarding how to proceed in such situations. Criticism has also been voiced regarding the adequate timing of FPIC and the role of indigenous peoples in influencing FPIC processes under the IFC Performance Standards.

Some of this criticism can be somewhat mitigated by the two OECD RBC Guidance Documents, which clearly highlight the role and inclusion of indigenous peoples in engagement activities and suggest that FPIC-seeking consultation should start as soon as possible during project planning, that is, prior to any commencing or authorization of activities for which FPIC should be sought. Aside from relocation, however, the two OECD RBC Guidance Documents remain silent on what other scenarios can trigger not merely FPIC-seeking consultation as general expected conduct and a best practice but also trigger FPIC as an absolute requirement. Nevertheless, all three instruments include language suggesting that the greater the impact on indigenous peoples is, the

more important finding consent becomes. It can thus be argued that some traces of a sliding scale approach to FPIC can be distilled from the OECD-FAO Guidance, OECD Stakeholder Guidance and from IFC Performance Standard 7.

Certainly, the OECD RBC Guidance Documents and the IFC Performance Standards have contributed significantly in terms of further clarifying the contours of the corporate responsibility to respect indigenous peoples' rights, particularly in terms of the FPIC principle. Not included in the key RBC instruments due to the principle's contested status, the latter RBC instruments may not fill the 'moral hole' in the OECD Guidelines but may be used as guidance for future developments in the business and indigenous peoples' rights field.

What Are the Precise Rules Governing Corporate Responsibility with Regard to Indigenous Peoples' Rights and FPIC? The answer of the present chapter is the following: The precise rules governing corporate responsibility with regard to indigenous peoples' rights are those stemming from the above-covered RBC instruments, which, in framing this responsibility, use the key instruments ILO C 169 and the UNDRIP as points of reference. Both the concept of risk-based human rights due diligence and stakeholder engagement activities play a central role in ensuring corporate respect for indigenous peoples' rights. Effective and meaningful consultation and FPIC processes; environmental, social, and human rights impact assessments; and benefit-sharing are depicted as essential elements in the due diligence process and as important means for corporations to identify, prevent, assess, mitigate, and address adverse impacts of their business operations on indigenous peoples.

Chapter 4: OECD National Contact Points

While [Chapter 3](#) has focused on the business and indigenous peoples' rights nexus, examining relevant RBC instruments, Chapter 4 introduces the OECD National Contact Points, known as the OECD Guidelines' implementation and built-in state-based non-judicial grievance mechanism. The following sections elaborate on NCPs' institutional settings and their mandate. Broadly speaking, the NCP mechanism can be analysed from two angles: first, under its mandate to act as a non-judicial grievance mechanism and thus potentially as an important means to facilitate remedy to stakeholders wishing to raise issues concerning corporate conduct, and second, based on its role in addressing corporate business impacts worldwide and thus potentially as important responsible business authorities further clarifying the concept of responsible business conduct and its expectations for corporations in specific situations but also beyond individual cases. As indicated at the beginning, this thesis focuses on the latter role. It focuses on responsible business conduct regarding indigenous peoples, more precisely the corporate responsibility to respect indigenous peoples' rights and FPIC. Nonetheless, because remedy is a central element of the responsible business conduct discussion and NCPs are gaining importance in playing their part in this respect, their role in remedy will also be briefly touched upon in this chapter.

Chapter 4 forms the basis for [Chapter 5](#), which includes an in-depth analysis of cases concerning corporate operations and indigenous peoples' issues that have been dealt with by NCPs. As such, Chapter 4 clarifies central aspects of the NCP mechanism contributing to answering the second research question: How do NCPs interpret and apply these rules when resolving disputes pertaining to corporations and indigenous peoples? Do NCPs apply substantive indigenous peoples' rights norms to define corporate responsibility under the OECD Guidelines?

The chapter starts off by showing how the NCP mechanism is anchored in the OECD Guidelines and how it relates to other pertinent OECD bodies active in the context of responsible business conduct. In a second step, the institutional setting of the NCPs is examined, followed by elaborations on the NCPs' mandate, the procedures that they employ when handling complaints and their role in remedy and as sources of guidance for responsible business conduct. Last, the shortcomings of the NCP mechanism are highlighted, followed by concluding remarks.

I. Preliminary Remarks

As indicated earlier, the OECD Guidelines have two central distinguishing characteristics compared to other RBC instruments. First, they stand for a comprehensive government-endorsed framework of responsible business conduct. Part I of the OECD Guidelines enshrines recommendations addressed by states to MNEs on central RBC issues, including human rights.

Second, the OECD Guidelines are the only international RBC instrument that comes with a unique built-in implementation mechanism. The NCPs are anchored in the OECD Guidelines' implementation framework as set forth in Part II. Part II includes an OECD Council Decision under which signatory states to the OECD Declaration of 1976 make a legally binding commitment to further the implementation of the OECD Guidelines' recommendations by establishing NCPs.¹²⁶⁵ States agree to vest NCPs with human and financial resources for them to fulfil their responsibilities, one of which is handling complaints concerning the alleged non-observance of the OECD Guidelines by corporations.¹²⁶⁶ Currently, thirty-eight OECD member states and twelve non-OECD states adhere to the OECD Declaration of 1976.¹²⁶⁷

The OECD Council Decision also refers to the OECD Investment Committee, the other central body responsible for the OECD Guidelines' implementation.¹²⁶⁸ Broadly speaking, the OECD Investment Committee is the OECD body responsible for overseeing the functioning of the OECD Guidelines and clari-

¹²⁶⁵ OECD, '2011 Guidelines' 67-69.

¹²⁶⁶ *ibid* 68 I, para 1-4, 77, para 1; OECD, 'Implementing the OECD Guidelines for Multinational Enterprises: The National Contact Points from 2000 to 2015' (OECD, 2016) 20 <<https://mneguidelines.oecd.org/OECD-report-15-years-National-Contact-Points.pdf>> accessed 27 April 2022.

¹²⁶⁷ The thirty-eight OECD member states include: Australia, Austria, Belgium, Canada, Chile, Colombia, Costa Rica, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Lithuania, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Slovenia, South Korea, Spain, Sweden, Switzerland, Turkey, the UK, and the United States. The twelve non-OECD states include: Argentina, Brazil, Croatia, Egypt, Jordan, Kazakhstan, Morocco, Peru, Romania, Tunisia, Ukraine, and Uruguay, see <<https://www.oecd.org/investment/mne/oecddeclarationanddecisions.htm>> accessed 19 April 2022.

¹²⁶⁸ Barbara Linder, Karin Lukas and Astrid Steinkellner, 'The Right to Remedy: Extrajudicial Complaint Mechanisms for Resolving Conflicts of Interest between Business Actors and Those Affected by their Operations' (Ludwig Boltzmann Institute of Human Rights, 2013) 12 <http://humanrightsinbusiness.eu/wp-content/uploads/2014/07/Right-to-Remedy-Extrajudicial-Complaint-Mechanisms_study.pdf> accessed 24 April 2022.

fying their meaning.¹²⁶⁹ While NCPs regularly report to the OECD Investment Committee, the latter periodically reports to the OECD Council on issues covered by the OECD Guidelines and exchanges views with the OECD's advisory bodies, that is, the Business and Industry Advisory Committee (BIAC), the Trade Union Advisory Committee (TUAC), and OECD Watch, the formal representative of civil society to the OECD Investment Committee.¹²⁷⁰ Furthermore, the OECD Investment Committee delegates tasks to the OECD Working Party for Responsible Business Conduct (WPRBC). Established by the OECD Investment Committee in 2013, the WPRBC is tasked to 'assist in furthering the effectiveness of the Guidelines, fostering NCP functional equivalence, pursuing the proactive agenda, promoting engagement with non-adhering countries, partner organisations, and stakeholders, and serving as a central point of information on the Guidelines'.¹²⁷¹

In addition to the OECD Council Decision, Part II also includes a so-called 'Procedural Guidance' and a 'Commentary on the Implementation Procedures', which comprise information and explanations on aspects of the OECD Guidelines' implementation through NCPs and the OECD Investment Committee.¹²⁷² Like the commentaries in Part I of the OECD Guidelines, the commentary in Part II does not form part of the OECD Declaration or the OECD Council Decision. Therefore, both sets of commentaries have a declaratory rather than legally binding effect constituting the official interpretation of the OECD Guidelines.¹²⁷³ Annexed to the OECD Council Decision, the legal nature of the procedural guidance is less clear, however. The term 'guidance' and relevant

¹²⁶⁹ OECD, '2011 Guidelines' 68-69 II, paras 1-8, 74-75 II, paras 1-5, 77, para 4.

¹²⁷⁰ *ibid* 68 I, para 3, 68 II, para 2, 69 II, para 7.

¹²⁷¹ OECD, 'OECD Guidelines for Multinational Enterprises: Responsible Business Conduct Matters' (OECD, 2014) 18 <http://mneguidelines.oecd.org/MNEguidelines_RBCmatters.pdf> accessed 27 April 2022; van't Foort, 'History' 196.

¹²⁷² OECD, '2011 Guidelines' 71-89.

¹²⁷³ *ibid* 11; Linder, Lukas and Steinkellner 12 at Fn 37; Scott Robinson, 'International Obligations, State Responsibility and Judicial Review under the OECD Guidelines for Multinational Enterprises Regime' (2014) 30(78) *Utrecht Journal of International and European Law* 68, 71.

remarks in the OECD Council Decision and the commentary in Part II suggest that it is not legally binding for signatory states. However, covering basic procedural principles, it is seen as carrying normative weight.¹²⁷⁴

Clearly, the procedural guidance leaves the signatory states wide discretion in organizing their NCPs.¹²⁷⁵ While such a flexible approach is understandable from a political point of view, taking into account national particularities, it is challenging from a coherence point of view.¹²⁷⁶ As illustrated further below, the NCPs have different institutional settings, and when handling complaints, they follow their own rules of procedure, which are based upon and concretize the more generally held procedural guidance of the OECD Guidelines for the national context.

To foster (at least) minimal coherence among NCPs in fulfilling their mandate generally and particularly when handling complaints, the concept of 'functional equivalence' comes into play. According to this overarching concept, NCPs have to be visible, accessible, transparent and accountable 'to produce comparable outcomes under comparable situations'.¹²⁷⁷ Signatory states must provide information about their NCP and actively promote the OECD Guidelines (visibility); NCPs' procedures should be easily accessible, possibly by way of electronic communications and considering language barriers (accessibility); NCPs' procedures (unless no specific confidentiality obligation applies) should be transparent, which is a critical precondition for NCPs' credibility and accountability (transparency); and last, successful and effective implementation of the OECD Guidelines is likely to be achieved when NCPs are

¹²⁷⁴ See in particular OECD, '2011 Guidelines' 68 I, para 1, which includes the wording 'taking account of the attached procedural guidance'. See also *ibid* 77-78, paras 1-9; Juan C O Sanchez, 'The Roles and Powers of the OECD National Contact Points Regarding Complaints on an Alleged Breach of the OECD Guidelines for Multinational Enterprises by a Transnational Corporation' (2015) 84(1) *Nordic Journal of International Law* 89, 94-95; Leyla Davarnejad, 'In the Shadow of Soft Law: The Handling of Corporate Social Responsibility Disputes under the OECD Guidelines for Multinational Enterprises' [2011] *Journal of Dispute Resolution* 351, 363-364; Linder, Lukas and Steinkellner 23, 26.

¹²⁷⁵ OECD, '2011 Guidelines' 71 A.

¹²⁷⁶ Rolf H Weber, 'Development of Coherent Procedural Rules for OECD Guidelines Mediation' in Nicola Bonucci and Catherine Kessedjian (eds), *40 Ans des Lignes Directrices de l'OCDE pour les Entreprises Multinationales/40 Years of the OECD Guidelines for Multinational Enterprises* (Editions A. Pedone 2018) 102.

¹²⁷⁷ OECD, 'Annual Meeting of the National Contact Points for the OECD Guidelines for Multinational Enterprises: 2013 Chair's Report on the Activities of National Contact Points' (OECD, 2013) para 22 <<https://www.cancilleria.gob.ar/userfiles/ut/2013-annual-report-mne-guidelines.pdf>> accessed 25 April 2022; OECD, '2011 Guidelines' 71 I.

accountable for their activities (accountability).¹²⁷⁸ Thus, the criteria of functional equivalence correspond to the criteria with which normally grievance mechanisms should comply.¹²⁷⁹ Furthermore, the four criteria are in line with the effectiveness criteria for non-judicial grievance mechanisms as set out in Principle 31 of the UNGPs, which provides that state-based and non-state-based non-judicial grievance mechanisms should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning.¹²⁸⁰

To assess the performance of NCPs in fulfilling their mandate and to enhance functional equivalence, a voluntary peer review system was put in place. The latter serves as an important instrument to strengthen the NCP under review and the NCP system as a whole by providing a platform where good practices and lessons learned can be shared.¹²⁸¹ Currently, twenty NCPs have been peer reviewed.¹²⁸² As a further safeguard for enhancing functional equivalence and the effective implementation of the OECD Guidelines, the Investment Committee is moreover mandated to consider submissions on an NCP's handling of a complaint by member states, BIAC, TUAC and OECD Watch.¹²⁸³

II. Institutional Setting

Due to states' flexibility in organizing their respective NCPs, the fifty NCPs come with different structures and institutional settings, ie, financial and human resources, and differ in terms of stakeholder involvement and regarding

¹²⁷⁸ OECD, '2011 Guidelines' 79; Weber 102.

¹²⁷⁹ Weber 102.

¹²⁸⁰ HRC, 'UNGPs' Principle 31, Commentary Principle 31; OECD, 'Providing Access to Remedy: 20 Years and the Road Ahead' (OECD, 2020) 10-11 <<http://mneguidelines.oecd.org/ncps/ncps-at-20/>> accessed 21 April 2022; Weber 102.

¹²⁸¹ <<https://mneguidelines.oecd.org/ncppeerreviews.htm>> accessed 24 April 2022. See also Maartje van Putten, 'The NCP Work: Dancing on a Cord' in OECD (ed), *OECD Guidelines for Multinational Enterprises - A Glass Half Full: A Liber Amicorum for Dr. Roel Nieuwenkamp*, Chair of the OECD Working Party on Responsible Business Conduct 2013-2018 (OECD 2018) 54; Weber 103.

¹²⁸² <<https://mneguidelines.oecd.org/ncppeerreviews.htm>> accessed 24 April 2022.

¹²⁸³ OECD, '2011 Guidelines' 74 II, para 2. On the first-ever appeal to the OECD Investment Committee by OECD Watch, see <<https://www.oecdwatch.org/civil-society-watchdog-challenges-australian-governments-handling-of-complaint-about-human-rights-abuses-at-manus-island-asylum-centre/>> accessed 22 April 2022.

advisory and oversight bodies.¹²⁸⁴ Additionally, the methods to set up an NCP vary, ranging from formal acts to informal practice.¹²⁸⁵

As of December 2020, nineteen NCPs operate as a 'single-agency NCP'. Under this structure, decisions are made by an individual in a single ministry or by a group of individuals operating in the same service in the same ministry.¹²⁸⁶ The NCPs of Norway, Denmark, Lithuania, and the Netherlands are independent, ie, they follow the 'expert-based' structure under which decisions are made by experts who are external to the government.¹²⁸⁷ Twelve NCPs make decisions by a group of representatives from several ministries or government agencies and thus follow the 'inter-agency' structure.¹²⁸⁸ Ten NCPs follow the 'multipartite decision-making structure', which is tripartite if it involves members of the government and representatives of business and trade unions and quadripartite if representatives of civil society organization are included as a fourth stakeholder group. Of ten, the NCPs of Belgium, France, Latvia, Sweden and Tunisia are tripartite, and the NCPs of Croatia, the Czech Republic, Finland, Kazakhstan and the Slovak Republic are quadripartite.¹²⁸⁹ The NCPs of Australia and Korea have a hybrid structure, namely, single-agency and ex-

¹²⁸⁴ OECD, '2011 Guidelines' 71, A, paras 1-3; OECD, 'Structures and Procedures of National Contact Points for the OECD Guidelines for Multinational Enterprises' (OECD, 2018) 26-29, 42 <<https://mneguidelines.oecd.org/Structures-and-procedures-of-NCPs-for-the-OECD-guidelines-for-multinational-enterprises.pdf>> accessed 27 April 2022. On the opportunities and challenges of the different decision-making structures, see OECD, 'Guide for National Contact Points on Structures and Activities' (OECD, 2019) <<https://mneguidelines.oecd.org/Guide-for-National-Contact-Points-on-Structures-and-Activities.pdf>> accessed 27 April 2022.

¹²⁸⁵ Methods include legislative acts, governmental decrees and ministerial decrees, see OECD, 'Structures and Activities' paras 9-14.

¹²⁸⁶ The following NCPs operate with this structure: Argentina, Austria, Chile, Colombia, Estonia, Greece, Iceland, Ireland, Israel, Italy, Luxembourg, Mexico, New Zealand, Peru, Poland, Turkey, Ukraine, the UK and the United States of America, see OECD, 'Annual Report of the OECD Guidelines for Multinational Enterprises 2020' (OECD, 2021) 26 <<http://mneguidelines.oecd.org/2020-Annual-Report-MNE-Guidelines-EN.pdf>> accessed 27 April 2022. See also OECD, 'Structures and Activities' para 41.

¹²⁸⁷ OECD, 'Annual Report 2020' 27: NCPs with expert-based decision making are 'generally set up as entities independent of the government, although they are dependent upon the government for funding. Experts may be required to act in a personal capacity and not to represent particular interests or on the contrary may represent the views of the organisations that nominated them'.

¹²⁸⁸ The following NCPs operate with this structure: Brazil, Canada, Costa Rica, Germany, Hungary, Japan, Morocco, Portugal, Romania, Slovenia, Spain, and Switzerland, see *ibid* 26.

¹²⁸⁹ *ibid* 27; <<http://investcroatia.gov.hr/en/oecd-rbc-national-contact-point/>> accessed 24 April 2022.

pert-based (Australia) and inter-agency and expert-based (Korea).¹²⁹⁰ For the NCPs of Egypt, Jordan and Uruguay, information is currently missing.¹²⁹¹ A majority of NCPs are located in ministries with an economic portfolio, such as ministries of economy, business, investment and trade. The remaining NCPs are placed in ministries of foreign affairs or in investment promotion agencies. The Korean NCP is located in a private entity.¹²⁹²

Several NCPs are supported by advisory bodies that advise on the decision-making process and on the resolution of issues and recommendations.¹²⁹³ Often, advisory bodies are composed of members of different parts of the government and/or represent external stakeholders.¹²⁹⁴ Some bodies additionally provide limited oversight, such as regular meetings with stakeholders and open hearings, or are part of pre-existing government oversight. Very few NCPs have actual oversight bodies to monitor whether NCPs follow their own rules of procedure and whether they operate effectively.¹²⁹⁵

Regarding financial resources, some NCPs have access to a dedicated budget for their mandate, while others can – on an ad hoc basis – receive financial resources for promotional activities and/or for handling specific instances. Additionally, most NCPs have either dedicated part-time and/or full-time staff. Only a few NCPs report not having dedicated staff.¹²⁹⁶

III. Mandate

First referenced in the OECD Guidelines in 1983, NCPs are established to ‘further the effectiveness of the Guidelines’.¹²⁹⁷ This involves promotional activities on the OECD Guidelines and their substantive content and handling enquiries, and since 2000, NCPs also ‘contribute to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances’, which is OECD language for NCPs’ dispute resolution function.¹²⁹⁸ The latter function

¹²⁹⁰ OECD, ‘Annual Report 2020’ 27.

¹²⁹¹ *ibid* 27. On the different institutional settings see also the OECD’s report, OECD, ‘Road Ahead’ 11-12, 61-62.

¹²⁹² OECD, ‘Annual Report 2020’ 29.

¹²⁹³ OECD, ‘2011 Guidelines’ 80, para 11; OECD, ‘Annual Report 2020’ 31.

¹²⁹⁴ OECD, ‘Annual Report 2020’ 30-31, 50-51.

¹²⁹⁵ *ibid* 31; OECD, ‘Structures and Procedures’ 26-29; OECD, ‘Structures and Activities’ 15-17.

¹²⁹⁶ OECD, ‘Annual Report 2020’ 31-32, 50-51.

¹²⁹⁷ OECD, ‘2011 Guidelines’ 68 I, para 1; OECD, ‘Progress Report’ para 7.

¹²⁹⁸ OECD, ‘2011 Guidelines’ 3, 68 I, para 1, 72-74, B-D; OECD, ‘Progress Report’ para 20.

will be covered in more detail in the following sections constituting NCPs' core mandate from which their roles in both remedy and further clarifying responsible business conduct stem.

A. Promotional Activities

Enhancing the implementation of the OECD Guidelines requires that they be known by a broader audience, including within governmental structures and key stakeholders such as corporations, unions, NGOs, and other interested parties. As such, NCPs should undertake promotional activities to raise awareness of the OECD Guidelines and the expectations that they entail and inform the public about the NCP system and their mandate.¹²⁹⁹

B. Dispute Resolution or the 'Handling of Specific Instances'

Not formally defined in the OECD Guidelines, the term 'specific instance' is used to refer to 'situations of alleged non-observance of the Guidelines brought to NCPs'.¹³⁰⁰ The term 'non-observance' refers to 'a situation in which a multinational enterprise does not abide by the recommendations of the OECD Guidelines'.¹³⁰¹ In academic literature, specific instances are often equated with the terms 'complaints', 'disputes' or 'cases' and the term 'non-observance' with the terms 'breach', 'violation' or 'non-compliance'.¹³⁰² For the purposes of this thesis, to avoid terminological confusion, the terms 'complaint' and 'case' will be used interchangeably for 'specific instance'.

The basis for submitting a complaint to NCPs is very broad – any individual, organization, or other entity with a legitimate interest in a substantive matter covered by the OECD Guidelines may lodge a complaint with an NCP.¹³⁰³ The same applies to NCPs' purview. By assessing the conduct of corporations operating in or from the state of the NCP in various substantive areas, NCPs' ability to handle complaints is very broad and extraterritorial. Provided that there is a link to a state adhering to the OECD Guidelines, NCPs can handle complaints

¹²⁹⁹ OECD, '2011 Guidelines' 72 B, paras 1-3. For an overview of NCPs' promotional activities, see <<https://www.oecdwatch.org/indicator/promotional-plan/>> accessed 24 April 2022.

¹³⁰⁰ OECD, 'NCPs 2000-2015' 9.

¹³⁰¹ *ibid* 9.

¹³⁰² Buhmann, 'NCP Statements' 391; Christine Kaufmann and others, 'Access to Remedy: Study Commissioned by the FDFA with a View to Fulfilling Postulate 14.3663' (SCHR/SICL, 2017) 29, 79 <https://www.skmr.ch/cms/upload/pdf/180919_Access_to_Remedy.pdf> accessed 23 April 2022.

¹³⁰³ OECD, '2011 Guidelines' 72-74 C, paras 1-5, 82-83, para 25.

arising nearly anywhere.¹³⁰⁴ Similarly, NCPs can address a wide range of entities to ensure the widest possible observance of the OECD Guidelines.¹³⁰⁵ As such, NCPs have handled cases *inter alia* relating to multinational enterprises, small and medium-sized enterprises, state-owned enterprises, sporting federations and non-governmental organizations.¹³⁰⁶ Furthermore, NCPs can engage corporations that allegedly cause, contribute to, or are directly linked to impacts.¹³⁰⁷ Finally, due to the human rights chapter that is aligned with the UNGPs and the employment and industrial relations chapter that is aligned with the ILO's core Conventions, it is argued that the NCPs *de facto* also constitute the grievance mechanism of the UNGPs and ILO MNE Declaration.¹³⁰⁸

From NCPs' inception in 2000 to 2019, more than 500 cases have been brought to the NCP system covering different substantive issues ranging from human rights, labour, and environmental disputes to issues of tax avoidance and corruption in over 100 states, including more than fifty states that are not adhering to the OECD Guidelines.¹³⁰⁹ NGOs and trade unions are the primary users of the mechanism, followed by individuals.¹³¹⁰ Complaints relating to human rights issues covered in Chapter IV have accounted for more than half of all the cases submitted since 2011 (57%), followed by Chapter II on general principles (53%), covering the due diligence provisions of the OECD Guidelines, Chapter V on employment and workers' issues (40%) and Chapter VI on the environment (21%).¹³¹¹ The distribution of cases among the NCPs is not balanced, however. The NCPs of Brazil, France, Germany, the Netherlands, the UK, and the United States of America together have received more than half of all cases since 2000, while several NCPs have received no cases thus far.¹³¹² For the pur-

¹³⁰⁴ OECD, 'Progress Report' para 40; OECD, 'Road Ahead' 19.

¹³⁰⁵ OECD, '2011 Guidelines' 18, para 6. See also above text to [Fn 82-86](#).

¹³⁰⁶ OECD, 'Road Ahead' 17. On the challenges that this broad application may raise, see Bağlayan, 'Corporations' 160-161.

¹³⁰⁷ OECD, '2011 Guidelines' 20, paras 11-12; OECD, 'Road Ahead' 17.

¹³⁰⁸ OECD, 'Progress Report' para 39; Buhmann, 'NCP Statements' 391.

¹³⁰⁹ OECD, 'Cases Handled by the National Contact Points for Responsible Business Conduct' (OECD, 2019) <<https://mneguidelines.oecd.org/Flyer-OECD-National-Contact-Points.pdf>> accessed 27 April 2022; OECD, 'Road Ahead' 15, 19.

¹³¹⁰ OECD, 'Road Ahead' 20.

¹³¹¹ OECD, 'NCP Cases 2000-2019'.

¹³¹² OECD, 'Progress Report' para 22; OECD, 'Road Ahead' 61-62.

poses of this thesis, it is noteworthy that of seventeen complaints submitted to the NCPs between 30 September 2019 and 30 September 2020, six cases have related to indigenous peoples' issues.¹³¹³

1. Procedures for Handling Complaints

The OECD Guidelines' procedural guidance provides for a three-step procedure within an indicative timeline of twelve months for handling complaints: initial assessment, dispute resolution, and conclusion of the procedures.¹³¹⁴ As indicated earlier, the rather general OECD Guidelines' procedural guidance is further refined by the NCPs' own rules of procedure.¹³¹⁵ A recent study by the OECD indicates that forty-three out of forty-nine NCPs have published rules of procedure.¹³¹⁶ Thus, unsurprisingly, and as illustrated further below, when handling complaints, the scope and content of the procedure and the powers and objectives of each NCP in handling complaints vary accordingly.¹³¹⁷

As non-judicial bodies handling non-legal complaints, NCPs have no compulsory powers unless mandated differently by their respective governments.¹³¹⁸ NCPs cannot compel parties to take part in their respective proceedings, arrange for specific remedies and directly provide compensation to affected rights holders or impose sanctions on corporations and enforce their findings.¹³¹⁹ However, a few states have taken steps in this direction, for instance,

¹³¹³ NCP cases as reflected in the OECD Watch Database in this period of time, see <https://complaints.oecdwatch.org/cases/all-cases/casesearchview?b_start:int=0> accessed 16 March 2021. See also Annex: NCP Case Study.

¹³¹⁴ OECD, '2011 Guidelines' 72-74 C, paras 1-5.

¹³¹⁵ *ibid* 80, para 15.

¹³¹⁶ OECD, 'Road Ahead' 41.

¹³¹⁷ OECD, 'Structures and Procedures' 32-33; Sanchez 105-107. See also below text to [Fn 1330-1361](#), [1412-1428](#).

¹³¹⁸ OECD, '2011 Guidelines' 85, para 37; Linder, Lukas and Steinkellner 16.

¹³¹⁹ OECD, 'NCPs 2000-2015' 14; Kaufmann, 'Quo Vadis' 31. On positive aspects of non-adversarial means, such as mediation, see eg Shelley Marshall, 'OECD National Contact Points: Better Navigating Conflict to Provide Remedy to Vulnerable Communities' (Non-Judicial Redress Mechanisms Report Series 16, Corporate Accountability Research, 2016) 38 <<https://corporateaccountabilityresearch.net/njm-report-xvi-oecd-ncp>> accessed 22 April 2022.

by attaching hard consequences to non-participation in or non-compliance with the NCP procedure, such as the withdrawal of governmental support.¹³²⁰

(a) *Coordination and Cooperation*

Considering today's global corporate structures and operations, complaints brought to NCPs are increasingly complex and technical in nature, requiring not only expert knowledge in different fields but also cooperation and coordination between NCPs.¹³²¹ Suggesting some flexibility, the OECD Guidelines' procedural guidance provides that issues will generally be dealt with by the NCP of the state in which the issues have arisen.¹³²² Here, the term 'issues' is not to be confused with the term 'impacts'. Since an 'impact' can give rise to several issues or allegations relating to the responsibilities of several corporate actors along the supply chain, the term 'issues' may refer to corporations and their operations across national borders and thus may potentially trigger the responsibility of various NCPs.¹³²³ Depending on the circumstances and the number of potentially responsible NCPs, a distinction is made between lead and supporting NCPs. In designating a lead NCP, NCPs enjoy discretion but should be oriented towards the overarching goal of furthering the effectiveness of the OECD Guidelines and contribute to the resolution of issues.¹³²⁴ While the lead NCP has the primary responsibility for handling a complaint and holds decision-making power, the supporting NCP assumes an assisting role.¹³²⁵

In situations where the operations of corporations relate to the same impact referred to in separate yet related complaints, these complaints should be handled by the responsible NCPs in parallel.¹³²⁶ Generally, NCPs should cooperate and consult, especially on substantive matters, to ensure consistent con-

¹³²⁰ OECD, 'Road Ahead' 25; Auswärtiges Amt, 'Nationaler Aktionsplan: Umsetzung der VN-Leitprinzipien für Wirtschaft und Menschenrechte 2016-2020' (2017) 17-18 <<https://www.auswaertiges-amt.de/blob/297434/8d6ab29982767d5a31d2e85464461565/nap-wirtschaft-menschenrechte-data.pdf>> accessed 27 April 2022.

¹³²¹ OECD, 'Progress Report' paras 31-32.

¹³²² OECD, '2011 Guidelines' 82, para 23.

¹³²³ OECD, 'Guide for National Contact Points on Coordination when Handling Specific Instances' (OECD, 2019) 6 <<https://mneguidelines.oecd.org/Guide-for-NCPs-on-Coordination-when-handling-Specific-Instances.pdf>> accessed 28 April 2022.

¹³²⁴ OECD, '2011 Guidelines' 71 I, 72 C, 82, para 24; OECD, 'Coordination' 6-8, 15-16.

¹³²⁵ OECD, 'Coordination' 5 at Fn 3.

¹³²⁶ *ibid* 7.

clusions and interpretations of the OECD Guidelines.¹³²⁷ In line with the procedural guidance's flexible approach, NCPs are not precluded from considering submissions that have already been handled by fellow NCPs or by other bodies.¹³²⁸ Nonetheless, forum shopping and the alleged lack of coherence among NCPs are subjects of debate.¹³²⁹

(b) Step 1: Initial Assessment

In a first step, NCPs assess 'whether the issues raised merit further examination and respond to the parties involved'.¹³³⁰ In doing so, NCPs determine – ideally within three months – whether the complaint is submitted in good faith and relevant to the implementation of the OECD Guidelines. They examine whether the issue is material and substantiated, the identity of the party and their interest in the issue at stake, whether and how corporate activities are linked to the issues raised, the relevance of applicable law and procedures, and how similar issues are handled in domestic or international proceedings.¹³³¹

If the NCP concludes that the consideration of the issues raised does not contribute to the purposes and effectiveness of the OECD Guidelines, it concludes the procedure by issuing a statement explaining, at a minimum, the issues raised and the reasons for its decision. If the submission merits further consideration and the parties involved agree, the NCP will offer its good offices and may make public its decision.¹³³² Only a few NCPs publish their affirmative initial assessment statements.¹³³³ In weighing the core criteria of transparency against the need to preserve confidentiality, the NCP may identify the parties or protect their identity.¹³³⁴

¹³²⁷ OECD, '2011 Guidelines' 82, paras 23-24; OECD, 'Coordination' 8-9.

¹³²⁸ OECD, '2011 Guidelines' 83, para 26; OECD, 'Coordination' 10.

¹³²⁹ OECD, 'Coordination' 5; below text to [Fn 1453](#)-1455.

¹³³⁰ OECD, '2011 Guidelines' 72 C, para 1. See generally OECD, 'Guide for National Contact Points on the Initial Assessment of Specific Instances' (OECD, 2019) <<https://mneguidelines.oecd.org/Guide-for-National-Contact-Points-on-the-Initial-Assessment-of-Specific-Instances.pdf>> accessed 24 April 2022.

¹³³¹ OECD, '2011 Guidelines' 82-83, para 25. For a detailed examination of the admissibility criteria, see Bağlayan, 'Corporations' 186-200.

¹³³² OECD, '2011 Guidelines' 72-73 C, paras 2-3(a), 84, paras 31-33.

¹³³³ OECD, 'NCPs 2000-2015' 65; <<https://www.oecdwatch.org/oecd-ncps/national-contact-points-ncps/ncp-evaluations-outcomes-and-analysis/>> accessed 11 January 2021.

¹³³⁴ OECD, '2011 Guidelines' 84, para 32.

(c) *Step 2: Dispute Resolution*

(i) *Procedural Aspect*

Where the NCP decides that the issues raised in the complaint merit further examination, it offers its ‘good offices’ and ‘with the agreement of the parties involved, will facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist the parties in dealing with issues.’¹³³⁵ This is an approach common to what is termed ‘alternative dispute resolution’. Alternative dispute resolution ‘refers to forms of dispute resolution that involve the active engagement of the parties concerned but are not litigation.’¹³³⁶ It may range from voluntary, dialogue-based mediation with non-binding outcomes – as employed by NCPs – to the more adjudicative process of binding arbitration.¹³³⁷

There is consensus that basic procedural principles as applied in judicial grievance mechanisms must be equally observed in non-judicial grievance mechanisms.¹³³⁸ This is reflected in the procedural guidance, which provides that NCPs should act in accordance with the following basic procedural principles: impartiality – equal treatment of the parties is a key prerequisite of the NCP procedures; predictability – the procedures and their outcome should be foreseeable; equitability – parties should be able to participate in the procedure on fair and equitable terms including by having reasonable access to sources of information; and compatibility – the contents and outcome of the NCP procedure should be in accordance with the OECD Guidelines.¹³³⁹ These principles are in line with the overarching principle of functional equivalence and the effectiveness criteria of Principle 31 of the UNGPs on non-judicial mechanisms.¹³⁴⁰ Where relevant, NCPs should cooperate and consult with the parties involved, relevant stakeholders, experts and authorities and other NCPs.¹³⁴¹ Some NCPs foresee the use of professional and external mediators and lay

¹³³⁵ *ibid* 72 C, para 2(d), 84, para 29.

¹³³⁶ Linder, Lukas and Steinkellner 6.

¹³³⁷ *ibid* 6–7.

¹³³⁸ Weber 111.

¹³³⁹ OECD, ‘2011 Guidelines’ 72 C, 81–82, para 22; Weber 101–102. For a detailed assessment of the Dutch NCP’s effectiveness in its handling of complaints, see van’t Foort, Lambooy and Argyrou Aikaterini.

¹³⁴⁰ OECD, ‘2011 Guidelines’ 81–82, para 22; OECD, ‘Road Ahead’ 10–11.

¹³⁴¹ OECD, ‘2011 Guidelines’ 72 C, para 2(a–b).

down specific criteria for decision-making during mediation and detailed confidentiality criteria. In addition, some NCPs are endowed with specific investigatory powers, such as conducting field research and visits.¹³⁴²

The procedures of good offices remain confidential, but regarding the core criteria of transparency, NCP statements concluding the procedure are to be made public.¹³⁴³

(ii) *Substantive Aspect*

In terms of the 'applicable law' during the good offices phase, the OECD Guidelines broadly state that NCPs 'will (...) assist [the parties involved] to deal with the issues raised (...) in accordance with applicable law [and] contribute to [their resolution] in a manner that is (...) compatible with the principles and standards of the Guidelines'.¹³⁴⁴ Against this background and because the OECD Guidelines' recommendations draw upon and are consistent with internationally recognized instruments,¹³⁴⁵ the 'applicable law' in NCP cases that may guide dispute resolution is not limited to the OECD Guidelines themselves but may refer to and include substantive norms, standards, and principles that may be relevant in the resolution of a dispute submitted to the NCPs. In other words, responsible business conduct – as set out in the OECD Guidelines – may be mirrored by NCPs against the regulatory framework on which the OECD Guidelines draw and in which responsible business conduct is embedded to inform their assessment of the issue at hand.¹³⁴⁶ Since there are no limitations regarding the 'applicable law' – as long as the latter is mirrored in or

¹³⁴² OECD, 'Structures and Procedures' 19, 32-35. The Danish rules of procedure are unique in that they foresee that any NCP member may initiate a case for review by their own initiative. Furthermore, they provide that the NCP can perform 'an actual investigation of a case', see Danish Government, 'Executive Order on a Mediation and Complaints-Handling Institution for Responsible Business Conduct' (Unofficial English Version, 2012) Section 3(2), 12(3) <<https://businessconduct.dk/file/298160/executive-order-on-mediation.pdf>> accessed 23 April 2022. See also NCP Norway, 'Procedural Guidelines for Handling Specific Instances: NCP Norway' (2014) 10 <https://files.nettsteder.regjeringen.no/wpuploads01/blogs.dir/263/files/2014/01/FINAL_KPprosedyreregler_eng_godkj.pdf> accessed 23 April 2022; <<https://www.oecdwatch.org/indicator/>> accessed 24 April 2022.

¹³⁴³ OECD, '2011 Guidelines' 73, paras 3-4, 84, para 31. See generally OECD, 'Guide for National Contact Points on Confidentiality and Campaigning when Handling Specific Instances' (OECD, 2019) <<https://mneguidelines.oecd.org/Guide-for-NCPs-on-Confidentiality-and-campaigning-when-handling-specific-instances.pdf>> accessed 28 April 2022.

¹³⁴⁴ OECD, '2011 Guidelines' 72 C.

¹³⁴⁵ *ibid* 3, 44, para 60, 46, para 69; EU, ILO and OECD.

¹³⁴⁶ OECD, 'DD Guidance' 9; Buhmann, 'NCP Statements' 409; Kaufmann, 'Quo Vadis' 33; Marshall 26.

referenced by the OECD Guidelines – NCPs may therefore even invoke non-incorporated and non-ratified treaties to substantiate their final statements.¹³⁴⁷ Different studies examining NCP cases show that NCPs refer to international standards beyond the OECD Guidelines when handling complaints.¹³⁴⁸

(d) Step 3: Conclusion of the Procedure

The manner in which an NCP procedure is concluded and what an NCP's so-called 'final statement' entails depend on whether the parties have reached an agreement and on the NCP's own rules of procedures.

Where parties reach an agreement, the OECD Guidelines' procedural guidance foresees the publishing of a statement in which the NCP describes the issues raised, the procedures employed and when agreement was reached.¹³⁴⁹ Furthermore, it is at the NCP's discretion to include recommendations on the implementation of the OECD Guidelines.¹³⁵⁰ Information on the content of the agreement is only made public when the parties agree thereto.¹³⁵¹ The parties involved in a procedure may seek the NCP's support regarding follow-up on their implementation of the agreement – also referred to as the fourth procedural step.¹³⁵² As illustrated in the section below and in [Chapter 5](#), parties may agree on a variety of issues.¹³⁵³

Should the parties involved reach no agreement or a party is not willing to participate or engage in good faith in the NCP procedure, the NCP also publishes a final statement. This statement should explain why the NCP decided to accept the case and describe the procedures employed, the issues raised and – as stipulated in the commentary on the procedural guidance – identify the parties involved.¹³⁵⁴ Furthermore, 'the NCP will (...) make recommendations as ap-

¹³⁴⁷ Bağlayan, 'Bottom-Up Approach' 389. See also *Society for Threatened Peoples v Credit Suisse*, NCP Switzerland (Initial Assessment, 19 October 2017) 6.

¹³⁴⁸ See eg Buhmann, 'NCP Statements' 397-398; Seck 85, 95; Bağlayan, 'Corporations' 210. See also OECD, 'Guide for National Contact Points on Recommendations and Determinations' (OECD, 2019) 27 <<https://mneguidelines.oecd.org/Guide-for-National-Contact-Points-on-Recommendations-and-Determinations.pdf>> accessed 27 April 2022.

¹³⁴⁹ OECD, '2011 Guidelines' 73, para 3(b).

¹³⁵⁰ *ibid* 73, para 3(b), 84-85, paras 34-36; OECD, 'Recommendations and Determinations' 6.

¹³⁵¹ OECD, '2011 Guidelines' 73, para 3(b).

¹³⁵² *ibid* 84, para 34. See generally OECD, 'Guide for National Contact Points on Follow Up to Specific Instances' (OECD, 2019) <<https://mneguidelines.oecd.org/ncps/Guide-for-National-Contact-Points-on-Follow-Up-to-Specific-Instances.pdf>> accessed 27 April 2022.

¹³⁵³ See below [Chapter 5, Section III](#).

¹³⁵⁴ OECD, '2011 Guidelines' 73, para 3(c), 85, para 35.

appropriate, on the implementation of the Guidelines.¹³⁵⁵ Given the stronger language, it appears that recommendations are not (or at least not entirely) at the discretion of the NCP.¹³⁵⁶ Additionally, where appropriate, the statement ‘could also include the reasons that agreement could not be reached’,¹³⁵⁷ which has been interpreted – albeit not by the OECD itself –¹³⁵⁸ to create an implicit basis for so-called determinations issued by some NCPs.¹³⁵⁹ Determinations are an NCP’s acknowledgement of whether a corporation is in compliance with the OECD Guidelines.¹³⁶⁰

Illustrative in this context are the Norwegian NCP’s rules of procedure. Should mediation fail, ie, because it is rejected by the parties concerned or unsuccessful in facilitating an agreement, the Norwegian NCP moves to an examination of the case to assess whether it is justified. In doing so, it may engage in further information gathering and consultation with relevant bodies and experts, conduct field visits and interviews with relevant authorities and communities and make technical assessments. After reviewing all the information gathered, the NCP determines whether the corporation has complied with the OECD Guidelines’ expectations in full or in part or whether its conduct is deemed non-compliant with and thus in violation of OECD Guidelines.¹³⁶¹

¹³⁵⁵ *ibid* 85, para 35 (emphasis added).

¹³⁵⁶ OECD, ‘Recommendations and Determinations’ 6.

¹³⁵⁷ OECD, ‘2011 Guidelines’ 73, para 3(c), 85, para 35.

¹³⁵⁸ OECD, ‘Recommendations and Determinations’ 6.

¹³⁵⁹ Sander van’t Foort and Tineke Lambooy, ‘Effective or Not?: The Crucial Role of Effectiveness in Specific Instances’ in OECD (ed), *OECD Guidelines for Multinational Enterprises – A Glass Half Full: A Liber Amicorum for Dr. Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct 2013–2018* (OECD 2018) 73. See also Sanchez 108, 124, who argues that the power to make a conclusion as to whether the corporation acted in compliance with the OECD Guidelines can be distilled ‘from the main objective of NCPs – i.e. to “further the effectiveness of the Guidelines”, the explicit powers envisaged for them in the OECD instruments, the objective of functional equivalence, and the right of a victim of a human rights violation to an effective remedy’. For further details on recommendations and determinations, see below text to [Fn 1412–1444](#).

¹³⁶⁰ OECD, ‘Recommendations and Determinations’ 22.

¹³⁶¹ NCP Norway 9–10. The Danish and UK NCPs follow a similar approach, see Danish Government Section 14; UK Department for International Trade, ‘UK National Contact Point Procedures for Dealing with Complaints Brought under the OECD Guidelines for Multinational Enterprises’ (2019) Section 4.6 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/851589/uk-ncp-specific-in-stance-procedures.pdf> accessed 23 April 2022. See also <<https://www.oecdwatch.org/indicator/determinations/>> accessed 24 April 2022; Sanchez 101–107.

Both recommendations and determinations are intensely debated within the OECD and its RBC partners (BIAC, TUAC, and OECD Watch) and among NCPs and scholars, as they feed into the more general debate on NCPs' effectiveness, their non-adversarial nature, and their role in remedy.¹³⁶² However, recommendations and determinations pinpoint another but equally important potential role of NCPs, which goes beyond resolving disputes. As illustrated further below, it refers to NCPs as sources of guidance for responsible business conduct both in a specific situation and beyond the individual case.¹³⁶³

2. NCPs and Remedy

[Chapter 2](#) has shown that being entitled to human rights does not necessarily mean that their full enjoyment is guaranteed, making the availability of effective remedies a necessity.¹³⁶⁴ Access to remedy is a human right in itself, expressly guaranteed by international human rights instruments,¹³⁶⁵ yet it also functions as a fundamental and essential facilitator of the protection and enjoyment of all other human rights.¹³⁶⁶ It entails both a procedural element, referring to 'the processes by which arguable claims of human rights violations are heard and decided',¹³⁶⁷ and a substantive element, referring to the relief afforded to the individual seeking remedy and thus to the procedure's outcome.¹³⁶⁸

Understood in broader usage, access to a process entails the right to seek a remedy before a court or a tribunal but is also inclusive of remedies offered by competent authorities that perform a dispute resolution function outside of the court system, so-called non-judicial mechanisms.¹³⁶⁹ Such a broad understanding of the remedy's procedural element has also been adopted by the UNGPs, which, as indicated earlier, identify non-judicial grievance mech-

¹³⁶² See eg OECD, 'Recommendations and Determinations'; OECD, 'Road Ahead'. See also Sanchez 98-100, 105-107, 119-121; Evaristus Oshionebo, 'The OECD Guidelines for Multinational Enterprises as Mechanisms for Sustainable Development of Natural Resources: Real Solutions or Window Dressing?' (2013) 17(2) *Lewis & Clark Law Review* 545, 586; UNGA, '2013 Report WGBHR' para 36.

¹³⁶³ See below text to [Fn 1387-1411](#).

¹³⁶⁴ See above text to [Fn 493-497](#); Francesco Francioni, 'The Right of Access to Justice under Customary International Law' in Francesco Francioni (ed), *Access to Justice as a Human Right* (OUP 2007) 1.

¹³⁶⁵ Art. 2(3) ICCPR.

¹³⁶⁶ HR Committee, 'GC No. 31' paras 15-17; Francioni 1.

¹³⁶⁷ Dinah Shelton, *Remedies in International Human Rights Law* (3rd edn, OUP 2015) 16.

¹³⁶⁸ *ibid.*

¹³⁶⁹ Francioni 4.

anisms as a type of remedy mechanism for corporate-related harm ‘complementing and supplementing judicial mechanisms’.¹³⁷⁰ They further emphasize remedy’s substantive element, noting that remedy may include ‘apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition’.¹³⁷¹

NCPs’ role as potential avenues for remedy has particularly been spurred by the inclusion of the human rights chapter in the OECD Guidelines and is reflected in several NAPs,¹³⁷² which refer to NCPs as means for implementing Pillar III of the UNGPs on access to remedy.¹³⁷³ Whether NCPs are avenues for remedy, effective in terms of both process, such as whether they are accessible, and outcome is intensely and contentiously debated in the OECD, among its RBC partners and scholars.¹³⁷⁴ Particularly on the question of what constitutes an ‘effective outcome’ views vary,¹³⁷⁵ reflecting that alternative dispute

¹³⁷⁰ HRC, ‘UNGPs’ Principle 27, Commentary Principle 27.

¹³⁷¹ *ibid* Commentary Principle 25.

¹³⁷² HRC, ‘Operationalizing’ para 102; Joseph Wilde-Ramsing, ‘The Road to Remedy under the OECD Guidelines’ in OECD (ed), *OECD Guidelines for Multinational Enterprises - A Glass Half Full: A Liber Amicorum for Dr. Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct 2013-2018* (OECD 2018) 84. See also above text to [Fn 1311](#).

¹³⁷³ OECD, ‘National Action Plans on Business and Human Rights to Enable Policy Coherence for Responsible Business Conduct’ (OECD, 2017) <<https://mneguidelines.oecd.org/NAP-to-enable-policy-coherence-for-RBC.pdf>> accessed 27 April 2022; Christine Kaufmann, ‘National Contact Points and Access to Remedy under the UNGP: Why Two Can Make a Dream so Real’ in Nicola Bonucci and Catherine Kessedjian (eds), *40 Ans des Lignes Directrices de l’OCDE pour les Entreprises Multinationales/40 Years of the OECD Guidelines for Multinational Enterprises* (Editions A. Pedone 2018) 178-181.

¹³⁷⁴ OECD, ‘Road Ahead’ 22, 33-34; Marian Ingrams and Joseph Wilde-Ramsing, ‘The State of Remedy under the OECD Guidelines: Understanding NCP Cases Concluded in 2019 through the Lens of Remedy’ (OECD Watch Briefing Paper, 2020) <<https://www.oecd-watch.org/wp-content/uploads/sites/8/2020/06/State-of-Remedy-2020.pdf>> accessed 23 April 2022; Roel Nieuwenkamp, ‘Outcomes from OECD National Contact Point Cases: More Remedy than You May Think!’ (*Friends of the OECD Guidelines for Multinational Enterprises*, 27 November 2017) <<https://friendsoftheoecdguidelines.word-press.com/>> accessed 25 April 2022; van’t Foort and Lambooy; Stéfanie Khoury and David Whyte, ‘Sidelineing Corporate Human Rights Violations: The Failure of the OECD’s Regulatory Consensus’ (2019) 18(4) *Journal of Human Rights* 363, 371-373.

¹³⁷⁵ See above [Fn 1374](#); OECD, ‘Road Ahead’ 22, 33-34; HRC, ‘UNGPs’ Commentary Principle 25: ‘The remedies provided (...) may take a range of substantive forms the aim of which, generally speaking, will be to counteract or make good any human rights harms that have occurred’.

resolution – as employed by NCPs – comes with different interpretations of effectiveness and how it relates to remedy.¹³⁷⁶ A point of reference in this debate are the effectiveness criteria for non-judicial grievance mechanisms as stipulated in Principle 31 of the UNGPs, not least because one searches in vain for a detailed and explicit reference to remedy in the OECD Guidelines that could provide further guidance.¹³⁷⁷

Against this background, it is suggested that a non-judicial grievance mechanism's effectiveness in terms of outcome may, for instance, relate to its ability to resolve disputes or effectuate remedy in the forms referred to in the UNGPs.¹³⁷⁸ It may also refer to the ability to clarify disputed issues raised by the parties, the ability to prevent future conflicts between the parties, such as in NCPs' case via recommendations – which suggests a forward-looking rather than a reactive approach – and the acknowledgement of wrongdoing in the form of determinations.¹³⁷⁹ In the alternative, it may be measured by the number of agreements reached by the parties.¹³⁸⁰

Whether these possible outcome constitute effective remedy or partial remedy largely depends on the viewer's perspective as remedy may mean different things to different people in different situations, allowing for a variety of possible remedies.¹³⁸¹ Revealing in this regard are also studies of victimology showing that the significance of public acknowledgement of (past) events or wrongdoing, the value of truth in itself, and the hope that uncovering violations may help prevent future ones should not be underestimated.¹³⁸² In this regard, the OECD Guidelines and UNGPs, as well as the more recently adopted OECD RBC Guidance Documents, refer to engagement and consultation with impacted rights holders and their representatives in the determination of the remedy

¹³⁷⁶ van't Foort and Lambooy 68.

¹³⁷⁷ Kaufmann, 'NCPs' 181; van't Foort and Lambooy 73.

¹³⁷⁸ van't Foort and Lambooy 68; Wilde-Ramsing 85–86.

¹³⁷⁹ van't Foort and Lambooy 68, 70, 72; OECD, 'Road Ahead' 23; Ingrams and Wilde-Ramsing, '2018 State of Remedy' 2; Ingrams and Wilde-Ramsing, '2019 State of Remedy' 2–3.

¹³⁸⁰ van't Foort and Lambooy 72; OECD, 'Road Ahead' 22–23.

¹³⁸¹ See amongst others UNGA, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (18 July 2017) UN Doc A/72/162 para 22; Ingrams and Wilde-Ramsing, '2018 State of Remedy'; Marshall 37; OECD, 'Progress Report' para 27.

¹³⁸² For an overview, see Sanchez 116–118. See also Norwegian National Human Rights Institution and NCP Norway 10.

and the process of remediation.¹³⁸³ Regarding indigenous peoples, processes should be culturally appropriate and take into account or make use of indigenous peoples' own procedures.¹³⁸⁴

A recently published OECD study taking stock of NCPs' contribution to access to remedy for corporate-related impacts notes that since 2011, up to 47% of NCP cases led to a change in corporations' policies to avoid similar impacts in the future, while up to 40% of cases resulted in an agreement between the parties. Some agreements included reparation for the parties concerned or financial compensation.¹³⁸⁵ Clearly, whether NCP-facilitated outcomes constitute effective remedy for those seeking it requires further research.¹³⁸⁶

3. NCPs as Potential Sources of Guidance and Norms for Responsible Business Conduct

(a) *General Remarks*

A second function of NCPs, which is receiving increasing attention, is as potential sources of guidance and norms for responsible business conduct.¹³⁸⁷ As indicated earlier, during the different stages of the NCP procedure, NCPs adopt and publish so-called initial, final and follow-up statements. Since 2011, NCPs have adopted and published over 300 of these statements.¹³⁸⁸ NCP statements are attested to have informative and normative value, primarily given their public nature and the NCPs government-backed institutional setting.¹³⁸⁹ As argued in scholarly work, NCP statements not only provide information on

¹³⁸³ OECD, '2011 Guidelines' 34, para 46; OECD, 'DD Guidance' 34-35, 50, 88; OECD, 'Stakeholder Guidance' 77; HRC, 'UNGPs' Principle 31.

¹³⁸⁴ OECD, 'Stakeholder Guidance' 99.

¹³⁸⁵ OECD, 'Road Ahead' 22. See also Marshall 15, 37. For a critical assessment of NCP procedures' outcomes, see Khoury and Whyte 368-369.

¹³⁸⁶ OECD, 'Road Ahead' 32-34.

¹³⁸⁷ Bağlayan, 'Corporations'; Bağlayan, 'Bottom-Up Approach'; Buhmann, 'NCP Statements'; van't Foort, 'Due Diligence'; Larry C Backer, 'The Arc of Triumph and Transformation of the OECD Guidelines: Quo Vadis Triumph? Into a Era of Transformation! Triumphi Quo Vadis? Temporibus Transmutatio Parere' in OECD (ed), *OECD Guidelines for Multinational Enterprises - A Glass Half Full: A Liber Amicorum for Dr. Roel Nieuwenkamp, Chair of the OECD Working Party on Responsible Business Conduct 2013-2018* (OECD 2018) 45. See also OECD, 'Road Ahead' 7, 23-24.

¹³⁸⁸ OECD, 'Road Ahead' 24.

¹³⁸⁹ *ibid*; Marshall 4; Buhmann, 'NCP Statements' 391, 409.

the procedures as such but may also provide insight into the substantive work of NCPs with implications for responsible business conduct, including in terms of the corporate responsibility to respect human rights.¹³⁹⁰

By examining and increasingly assessing corporate conduct on a case-by-case basis, applying the provisions of the OECD Guidelines and considering that most complaints submitted to NCPs relate to Chapter IV on human rights and Chapter II on due diligence, it is argued that NCPs' 'jurisprudence' can be valuable in unpacking the content of corporations' responsibility to respect human rights and the contours of human rights due diligence.¹³⁹¹ If included in NCPs' statements, NCPs' recommendations and determinations may offer an opportunity to highlight good practices but also to identify areas where improvement and further clarifications are needed in terms of the correct implementation of the OECD Guidelines by corporations.¹³⁹² As such, it is suggested by some that NCPs' 'jurisprudence' may offer concrete guidance for corporations on how to (better) meet expectations under the current RBC framework – particularly the OECD Guidelines –¹³⁹³ but may further inform governmental recommendations and action, social expectations or even requirements for business.¹³⁹⁴ As indicated above, thus far, up to 47% of NCP cases have led to an internal policy change by corporations.¹³⁹⁵ In the words of Buhmann, 'Like courts' jurisprudence, NCP statements are a source of insights into what constitutes conduct in line with particular normative directives'.¹³⁹⁶

In her comprehensive analysis of a cohort of NCP cases relating to human rights, Bağlayan finds that the following norms can be distilled from NCP statements: the rights to free speech and freedom of assembly, the right to life, the right to FPIC of indigenous peoples and the right to privacy.¹³⁹⁷ According to her study, NCPs have also found that prohibitions of human trafficking,

¹³⁹⁰ Buhmann, 'NCP Statements' 393, 409; Bağlayan, 'Bottom-Up Approach' 374, 379.

¹³⁹¹ Bağlayan, 'Bottom-Up Approach' 375-376, 378, 385-386, 388-389; Buhmann, 'NCP Statements' 391-392, 396-398, 406, 409; van't Foort, 'Due Diligence' 69-75; Backer 45; OECD, 'DD Guidance' 88. For a detailed analysis, see Bağlayan, 'Corporations' 177, 206-250, 254.

¹³⁹² OECD, 'Road Ahead' 23-24; Buhmann, 'NCP Statements' 409; Bağlayan, 'Bottom-Up Approach' 383.

¹³⁹³ Buhmann, 'NCP Statements' 391, 396; Bağlayan, 'Bottom-Up Approach' 375, 377, 388-389.

¹³⁹⁴ Buhmann, 'Social Licence' 710; OECD, 'Road Ahead' 25; Mulder and Scheltema 18; Backer 45. For a concrete example in which an NCP identified a governance gap that was subsequently addressed by the respective government (in casu the Dutch NCP and the Dutch government), see van't Foort, 'Due Diligence' 72.

¹³⁹⁵ OECD, 'Road Ahead' 22.

¹³⁹⁶ Buhmann, 'Stakeholder Engagement' 92; Buhmann, 'NCP Statements' 409.

¹³⁹⁷ Bağlayan, 'Bottom-Up Approach' 385; Bağlayan, 'Corporations' 206-250.

slavery, child labour, and forced labour are norms applicable to corporate conduct.¹³⁹⁸ She finds that in several cases, NCPs analyse due diligence responsibility, ie, using the concept of due diligence to explain the expected conduct from corporations, rather than focusing on the substantive rights at hand.¹³⁹⁹ The two additional NCP case analyses by Buhmann and Sander support this finding.¹⁴⁰⁰

All three analyses emphasize the untapped potential of NCPs to further clarify the responsibility to respect human rights and the room for improvement in doing so.¹⁴⁰¹ They point to differences in the 'jurisprudence' and the approach taken among the NCPs under scrutiny.¹⁴⁰² For instance, there is no uniform language and terminology used in statements and, as shown further below, no coherence among NCPs in terms of issuing statements that include recommendations and/or determinations.¹⁴⁰³ Exemplary in this regard is also the so-called POSCO case submitted to the Dutch, Korean and Norwegian NCPs, which arrived at three different conclusions in response to the exact same complaint.¹⁴⁰⁴

In terms of what factors are relevant for NCPs to fulfil the function as sources of guidance, the scholarly work thus far seems to highlight the issues of coherence and specificity. NCP statements will need to be sufficiently detailed and use a uniform language to give substantive direction.¹⁴⁰⁵ A coherent 'jurispru-

¹³⁹⁸ Bağlayan, 'Bottom-Up Approach' 386-387.

¹³⁹⁹ *ibid* 388.

¹⁴⁰⁰ Buhmann, 'NCP Statements' 397-399, 402-406, 409; van't Foort, 'Due Diligence' 69-75.

¹⁴⁰¹ See eg Bağlayan, 'Corporations' 249-250, 254-255. Although less critical in the subsequently published article, see Bağlayan, 'Bottom-Up Approach' 388-389.

¹⁴⁰² On the aspect of coherence, see van't Foort, 'Due Diligence' 74; Bağlayan, 'Corporations' 249. On the aspect of differences, see Buhmann, 'NCP Statements' 410; Bağlayan, 'Corporations' 205, 254.

¹⁴⁰³ Buhmann, 'NCP Statements' 394-395, 400-401, 409.

¹⁴⁰⁴ Notably, the POSCO case concerned three different responding corporations. For an in-depth analysis of the POSCO case, see Samantha Balaton-Chrimes, 'POSCO's Odisha Project: OECD National Contact Point Complaints and a Decade of Resistance' (Non-Judicial Redress Mechanisms Report Series 5, Corporate Accountability Research, 2015) 33-37, 39-40 <<https://corporateaccountabilityresearch.net/njm-report-v-posco-odisha>> accessed 22 April 2022. See also the NCP case *KTNC Watch et al v Daewoo International et al*, NCP South Korea (Initial Assessment, 7 July 2015) 10, in which the South Korean NCP held: 'The decision of a foreign NCP in similar or the same specific instance does not bind other country's NCP but it may provide useful reference'.

¹⁴⁰⁵ Buhmann, 'NCP Statements' 394, 401, 406, 409.

dence' within a single NCP and the NCP system as such also appear central for the purposes of functional equivalence and equal treatment of the parties involved, despite national specificities.¹⁴⁰⁶

Given the only-recent uptake of analysis of this NCP function,¹⁴⁰⁷ future research into the latter is certainly indicated. It will eventually provide further clarification on not only what criteria must be met by NCPs to fulfil this function but also the content of the corporate responsibility to respect human rights and other substantive RBC issues enshrined in the OECD Guidelines.¹⁴⁰⁸ Currently, it appears that many statements providing substantive direction are issued by the same group of NCPs, which are perceived as the more progressive ones with relatively independent structures.¹⁴⁰⁹ Increases in the number of cases submitted to NCPs, and importantly, in the number of guiding statements issued by NCPs other than the forerunner and awareness of each other's decisions appear central for further insight.¹⁴¹⁰ However, similar to the existing diverging debate as to whether NCPs serve as avenues for remedy, it does not seem unrealistic that the function of NCPs as sources of norms and guidance for responsible business conduct may also trigger diverging views.¹⁴¹¹

¹⁴⁰⁶ ibid 395, 401, 406, 409; van't Foort, 'Due Diligence' 74.

¹⁴⁰⁷ Before the scholarly work cited above, [Fn 1399](#)–1400, only limited work had analysed NCP statements, see for an overview Buhmann, 'NCP Statements' 392; van't Foort, 'Due Diligence' 62.

¹⁴⁰⁸ Buhmann, 'NCP Statements' 409–410; van't Foort, 'Due Diligence' 75.

¹⁴⁰⁹ This group includes the NCPs of Denmark, the Netherlands, Norway and the UK, see Buhmann, 'NCP Statements' 409; van't Foort, 'Due Diligence' 68–73. In addition to these four NCPs, Bağlayan also analysed several statements of the NCPs of Canada, Germany, France, and the United States of America, see Bağlayan, 'Corporations' 206–250. Notably, whether a statement is deemed to provide substantive direction is a matter of interpretation. Furthermore, all three scholarly analyses referred to above applied their own collection and selection methods of pertinent NCP cases.

¹⁴¹⁰ Bağlayan, 'Bottom-Up Approach' 389; Buhmann, 'NCP Statements' 409–410; van't Foort, 'Due Diligence' 74–75. See also Bağlayan, 'Corporations' 249–250.

¹⁴¹¹ Buhmann seems to distinguish between a single NCP serving as a source of normative guidance and the potential of NCPs to provide normative guidance as a collective, see Buhmann, 'NCP Statements' 401, 409–410. See also Bağlayan, 'Corporations' 177–178.

(b) NCP Statements: Recommendations and Determinations

(i) Facts and Figures

Current OECD statistics show that the issuance of both recommendations and determinations as part of final statements is a practice carried out by NCPs irrespective of whether their rules of procedure provide for them.¹⁴¹² According to the OECD's working definitions, '[r]ecommendations are suggested actions the parties are encouraged to take in order to resolve the issues; and in particular, suggested actions that the enterprise in question is encouraged to take in order to observe the Guidelines'.¹⁴¹³ In turn, '[d]eterminations are statements by NCPs setting out their views on whether the company observed the Guidelines'.¹⁴¹⁴ A distinction is thus made between determinations of observance and of non-observance.¹⁴¹⁵ Since the procedural guidance does not mandate NCPs to issue such determinations, at least not explicitly, they are optional.¹⁴¹⁶

Identifying recommendations and determinations as such is a matter of interpretation and may produce different results depending on the viewpoint of the observer. The language used may be explicit and categorical or rather nuanced or implicit.¹⁴¹⁷ Given this potential ambiguity and overlap, the OECD defined different types of recommendations and determinations. There are three types of recommendations: *specific recommendations* (suggesting precise actions on the issues raised), *medium specific recommendations* (suggesting general actions on the issues raised), and *general recommendations* (suggesting general actions for better future compliance with the OECD Guidelines).¹⁴¹⁸

¹⁴¹² OECD, 'Recommendations and Determinations' 7-9. The numbers and information are retrieved from a sample of 211 complaints submitted in or after 2011 and closed (concluded or not accepted) by 2018. Of forty-eight NCPs, nine NCPs provide for the issuance of determinations in their rules of procedure. As of 2019, the following NCPs provide for determinations in either policy or practice since 2011: Australia (practice), Canada (practice), Chile (practice and policy), Colombia (policy), Denmark (practice), Finland (policy and practice), France (practice), Italy (practice), South Korea (practice), Lithuania (policy), Luxembourg (policy), Morocco (practice), the Netherlands (practice), Norway (policy and practice), Poland (policy), Sweden (practice), Ukraine (policy), and the UK (policy and practice). This list only includes NCPs that have published rules of procedure and/or handled complaints since 2011.

¹⁴¹³ *ibid* 5.

¹⁴¹⁴ *ibid* 6.

¹⁴¹⁵ *ibid* 12.

¹⁴¹⁶ *ibid* 6. But see Sanchez 93, 97, 108-119.

¹⁴¹⁷ OECD, 'Recommendations and Determinations' 8.

¹⁴¹⁸ *ibid* 20, 29.

There are two types of determinations: direct and indirect. *Direct determinations* are presented as an outcome of the procedure and indicate whether the OECD Guidelines were observed.¹⁴¹⁹ *Indirect determinations* 'give an indication of the NCP's opinion as to the observance of the OECD Guidelines' and are thus more implicit.¹⁴²⁰

Mostly, recommendations and determinations are issued in relation to Chapter II on general policies, followed by Chapter IV on human rights – the latter being the chapter most frequently invoked in NCP submissions – and Chapter V on employment and industrial relations.¹⁴²¹ Recurring themes are stakeholder engagement, (human rights) due diligence and its absence or inadequacy.¹⁴²² Furthermore, the survey shows that recommendations and determinations are more likely to be issued when complaints are accepted by NCPs for further consideration.¹⁴²³ Determinations in non-accepted cases mostly refer to corporations' observance of the OECD Guidelines.¹⁴²⁴ Unlike recommendations – being issued both where an agreement is reached and (more frequently) where no agreement is reached – determinations are rarely issued when agreement is reached by the parties within and outside of NCP procedures. Determinations are thus mostly issued in accepted cases where the parties involved did not reach agreement.¹⁴²⁵ The OECD data also show that the complexity of a case – which may refer to issues occurring in non-adhering states or to a variety of substantive issues – does not pose a barrier to the issuance of recommendations and determinations.¹⁴²⁶ However, cultural factors such as the corporation's location may influence the decision to issue a determination.¹⁴²⁷ Overall, the collected data suggest an increase in the issuance ratio of both recommendations and determinations over the period considered (2012 – 2018).¹⁴²⁸

¹⁴¹⁹ *ibid* 22.

¹⁴²⁰ *ibid* 24.

¹⁴²¹ *ibid* 14–16.

¹⁴²² *ibid*.

¹⁴²³ *ibid* 16–17.

¹⁴²⁴ *ibid* 17.

¹⁴²⁵ *ibid* 12, 16–18, 22, 26, 28.

¹⁴²⁶ *ibid* 19.

¹⁴²⁷ *ibid* 29.

¹⁴²⁸ *ibid* 28, Figure 4.

(ii) *Opportunities and Challenges*

The above development challenges the NCPs' non-adversarial nature but comes with opportunities for the NCP system and the topic of responsible business conduct. Recommendations are perceived as beneficial since they can be creatively tailored to each specific case, clarifying expected conduct, preventing harm before it occurs and providing a basis for discussion where harm occurs and for follow-up actions.¹⁴²⁹ For providing guidance on the course of action to take, the clearer formulated it is, the better it is.¹⁴³⁰ While recommendations are preventative, forward-looking and solution-oriented and thus for the most part considered in line with NCPs' non-adversarial nature, it is strongly debated among NCPs and other stakeholders whether the same applies to determinations.¹⁴³¹

Opponents fear a shift towards an adversarial process where a constructive solution-oriented approach gives way to a defensive, semi-judicial one and acts as a deterrent to corporations to take part in the procedures.¹⁴³² Based on the understanding that the non-adversarial nature of mediation excludes the issuance of determinations, one could object that once mediation fails, the good offices phase is terminated and the complaint procedures enter a post-mediation phase that could be open to determinations.¹⁴³³ Additionally, the issue of potential lawsuits against NCPs, the currently rather unknown effect of determinations on parallel or future judicial proceedings and procedural challenges associated with determinations are raised and viewed critically by some NCPs.¹⁴³⁴

Proponents, on the other hand, stress the potential of determinations in raising the normative value of the OECD Guidelines as an international standard of conduct and in shedding light on their concrete expectations and on the question of why certain corporate conduct does or does not comply with the OECD Guidelines, underlining a 'pedagogical' and clarifying aspect of determinations.¹⁴³⁵ Furthermore, it is argued that determinations of both observance and non-observance pave the way for recommendations. A clear determination of observance may help manage expectations by explaining why the NCP did not decide in favour of a submitter's request. A clear determination of non-

¹⁴²⁹ *ibid* 26; Marshall 37–38.

¹⁴³⁰ OECD, 'Recommendations and Determinations' 26.

¹⁴³¹ *ibid* 26–33; Marshall 38.

¹⁴³² OECD, 'Recommendations and Determinations' 29, 31.

¹⁴³³ This understanding seems to be supported by TUAC, see *ibid* 32.

¹⁴³⁴ *ibid* 30.

¹⁴³⁵ *ibid* 29.

observance lays the basis for robust recommendations by defining their scope and substance.¹⁴³⁶ This understanding appears supported by the UK and German NCPs, which in 2011 took the following view:

[I]n some instances (such as when conciliation/mediation fails or is declined), [assessments on a company's compliance with the Guidelines] may be necessary in order to make meaningful recommendations to a company. In their view, it would not be logical to make recommendations to a company on how to bring its practices into line with the Guidelines without first indicating if the company has departed from those Guidelines.¹⁴³⁷

In addition, determinations possibly encourage companies to participate in the procedures earnestly and in good faith not least because of the reputational damage that may result from non-participation in NCP procedures or non-compliance with the OECD Guidelines, with potential impacts on corporations' economic situation and social licence to operate.¹⁴³⁸ OECD Watch, for instance, notes a strong correlation between the agreements reached under an NCP's process and that same NCP's practice of issuing determinations.¹⁴³⁹

Despite the non-binding nature of NCPs' recommendations and determinations for their addressees,¹⁴⁴⁰ the above highlights both the clarifying and guiding and the naming and shaming aspects of the latter means. Determinations may particularly serve as a stick to the carrot in the voluntary procedure given the lack of sanctions compared to judicial procedures.¹⁴⁴¹ While consensus seems to exist in terms of issuing recommendations, opinions diverge greatly on determinations, and it remains to be seen where this longstanding debate is heading. Clearly, the current diverging stances on determinations are not conducive to functional equivalence.¹⁴⁴² The middle way suggested by some to make the issuance of determinations dependent 'on whether, based on the circumstances of the case, the NCP believes that it may help further the effec-

¹⁴³⁶ *ibid* 30; Marshall 50.

¹⁴³⁷ OECD, 'OECD Guidelines for Multinational Enterprises: Report by the Chair of the 2011 Meeting of the National Contact Points' (OECD, 2011) 24 <<http://www.oecd.org/investment/mne/49247209.pdf>> accessed 27 April 2022.

¹⁴³⁸ OECD, 'Recommendations and Determinations' 29, 31-32; Buhmann, 'NCP Statements' 394; Marshall 39-40, 50-51; Sanchez 110.

¹⁴³⁹ OECD, 'Recommendations and Determinations' 29, 31.

¹⁴⁴⁰ See above text to [Fn 1318](#)-1319.

¹⁴⁴¹ OECD, 'Recommendations and Determinations' 29, 32.

¹⁴⁴² van't Foort and Lambooy 73.

tiveness of the Guidelines¹⁴⁴³ may be a starting point but lacks clear guidance in terms of the scope, content and nature of determinations (ie, in which situations determinations are mandatory), leaving NCPs with wide discretion.¹⁴⁴⁴

IV. Critics and Challenges

Various sources have criticized the NCP system in terms of institutional setting and performance. This criticism *inter alia* relates to the lack of sufficient human and financial resources, lack of oversight by independent bodies and composition and location of some NCPs within a single ministry, which – given the lack of stakeholder engagement – raises concerns about their impartiality, independence, legitimacy and ability to handle complex cases.¹⁴⁴⁵ Further criticism focuses on barriers to accessibility such as NCPs' low visibility and outreach and the misinterpretation or narrow interpretation of the procedural guidance's admissibility criteria allegedly resulting in the premature rejection of complaints.¹⁴⁴⁶

Furthermore, in terms of accessibility and equitability, a recent report of the OECD notes a lack of (foreign) language skills and access to online technologies, resource imbalances and the prevalence of reprisals against submitting parties as challenges that must be addressed, taking due note of vulnerable groups including indigenous communities.¹⁴⁴⁷ A recently published study on the prevalence of reprisals in NCP procedures shows that of a sample of 250 cases filed by NGOs or communities since 2000, at least 25% involved reprisals against complainants or others, with 64% of those reprisals occurring in the land-intensive extractive and agricultural sectors and 55% of those affected being members of indigenous communities or other community members.¹⁴⁴⁸

¹⁴⁴³ OECD, 'Recommendations and Determinations' 29.

¹⁴⁴⁴ van't Foort and Lambooy 73.

¹⁴⁴⁵ OECD, 'Progress Report' paras 8, 12-13, 17-19, 46; Ingrams and Wilde-Ramsing, '2019 State of Remedy' 3; OECD, 'Road Ahead' 32-33; Wilde-Ramsing 86; Oshionebo 585.

¹⁴⁴⁶ OECD, 'Road Ahead' 31; Ingrams and Wilde-Ramsing, '2018 State of Remedy' 1-2.

¹⁴⁴⁷ OECD, 'Road Ahead' 29-30, 34. See also HRC, 'UNGPs' Commentary Principle 27, Principle 31(b),(d), Commentary Principle 31.

¹⁴⁴⁸ Marian Ingrams and Ana Zbona, 'Use with Caution: The Role of the OECD National Contact Points in Protecting Human Rights Defenders' (OECD Watch/BHRR, 2019) <<https://www.oecdwatch.org/wp-content/uploads/sites/8/2019/06/Reprisals-NCP-system.pdf>> accessed 22 April 2022. For potential safeguards against reprisals, see Marshall 46.

Similarly, the challenges and barriers faced by indigenous peoples seeking remedy for corporate-related harm via judicial and non-judicial remedy mechanisms are well documented.¹⁴⁴⁹

Additionally, criticism is voiced regarding unpredictability and delays in the procedures for handling complaints (the timeframe of twelve months is seldom upheld)¹⁴⁵⁰ and on restrictive policies on transparency and confidentiality.¹⁴⁵¹ Moreover, the non-adjudicatory role of NCPs and the voluntary nature of dispute resolution procedures raise concerns in terms of NCPs' ability to hold corporations accountable and capacity to remedy corporate-related harm.¹⁴⁵² Similarly, the lack of enforcement of recommendations and discrepancies among NCP procedural rules, particularly regarding their powers to conduct examinations and issue determinations, is viewed critically.¹⁴⁵³ Such differences may not only result in incoherent outcomes and lack of predictability and fairness¹⁴⁵⁴ but also lead to forum shopping, given the different public perceptions of NCPs' performance.¹⁴⁵⁵

¹⁴⁴⁹ Cathal M Doyle and others, 'Business and Human Rights: Indigenous Peoples' Experiences with Access to Remedy - Case Studies from Africa, Asia and Latin America' (AIPP/Almá-ciga/IWGIA, 2015) <<https://enip.eu/wp-content/uploads/2015/03/Business-and-Human-Rights-Indigenous-Peoples-Experience-with-Access-to-Remedy.pdf>> accessed 23 April 2022; Shelley Marshall and Samantha Balaton-Chrimes, 'Tribal Claims against the Vedanta Bauxite Mine in Niyamgiri, India: What Role Did the UK OECD National Contact Point Play in Instigating Free, Prior and Informed Consent?' (Non-Judicial Redress Mechanisms Report Series 9, Corporate Accountability Research, 2016) 32-34 <<https://corporateaccountabilityresearch.net/njm-report-ix-vedanta>> accessed 22 April 2022.

¹⁴⁵⁰ OECD, 'Road Ahead' 31-32; Ingrams and Wilde-Ramsing, '2018 State of Remedy' 1-2.

¹⁴⁵¹ Ingrams and Wilde-Ramsing, '2018 State of Remedy' 1-2, 13-14; Ingrams and Wilde-Ramsing, '2019 State of Remedy' 1, 3, 15-16; Wilde-Ramsing 86.

¹⁴⁵² Oshionebo 583, 586; John Ruggie and Tamaryn Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges' [2015] Corporate Social Responsibility Initiative Working Paper 66, 21 <<https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/crifu/files/workingpaper.66.oecd.pdf>> accessed 21 April 2022; Khoury and Whyte 376-377.

¹⁴⁵³ Oshionebo 586-587; Wilde-Ramsing 86.

¹⁴⁵⁴ HRC, 'Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Report from an Expert Workshop entitled "Business Impacts and Non-Judicial Access to Remedy: Emerging Global Experience" Held in Toronto in 2013' (28 April 2014) UN Doc A/HRC/26/25/Add.3 para 33(h).

¹⁴⁵⁵ Weber 102; Kaufmann, 'NCPs' 177; OECD, 'Coordination' 4, 24. See also the opportunities and challenges associated with different NCP structures, OECD, 'Structures and Activities' 7-15.

V. Conclusion

Chapter 4 introduced the NCPs from institutional, mandate and procedural points of view. As such, it has clarified central aspects of the NCP mechanism, laying the basis for [Chapter 5](#), which examines cases handled by NCPs to answer the second research question.

As the only responsible business authorities of their kind, NCPs bear potential in terms of both remedy and clarifying further responsible business conduct and its operationalization via risk-based due diligence, including in the realm of human rights. However, the above suggests that to what extent and how effectively this potential is being realized depends on factors such as the implementation of functional equivalence, the functioning and mandate of each individual NCP based on their own rules of procedures, compliance with basic procedural criteria, and the depth and clarity of NCP statements. The current picture shows a rather fragmented framework of NCPs in terms of institutional setting and from a procedural point of view with challenges that need to be addressed. This has been acknowledged by the OECD in a recently published report that lays out future steps for ensuring more coherent and even functioning across the NCP community.¹⁴⁵⁶ Furthermore, in November 2020, the WPRBC initiated a stocktaking exercise on the key developments, achievements and challenges related to the OECD Guidelines.¹⁴⁵⁷

¹⁴⁵⁶ OECD, 'Road Ahead' 28-46. Furthermore, in recent years the OECD has published different guides for NCPs, including on the rights of indigenous peoples, see OECD, 'Guide for National Contact Points on the Rights of Indigenous Peoples when Handling Specific Instances' (OECD, 2022) <<http://mneguidelines.oecd.org/ncps/how-do-ncps-handle-cases.htm>> accessed 26 April 2022.

¹⁴⁵⁷ OECD, 'Stocktaking Report'.

Chapter 5: NCPs' 'Jurisprudence' on Indigenous Peoples

While the aim of the previous chapter was to introduce the NCPs from institutional, mandate, and procedural points of view, Chapter 5 delves into the substantive work of NCPs. In light of the aim of this thesis to further unpack corporations' responsibility to respect indigenous peoples' rights and FPIC, the present chapter examines NCP cases relating to indigenous peoples. More precisely, it aims to distil the features of indigenous peoples' rights and FPIC currently applied to corporate actors by examining the substance of NCP statements and to compare the results with the requirements of the corporate responsibility to respect human rights as enshrined in the OECD Guidelines and other pertinent instruments examined in [Chapter 3](#). Reference is also made to [Chapter 2](#) to embed the discussion in the ILO and UN frameworks.

The underlying assumption of this undertaking is that the work of NCPs – examining corporate conduct on a case-by-case basis – can be valuable in further unpacking the corporate responsibility to respect indigenous peoples' rights and FPIC in terms of content and operationalization. As such, Chapter 5 aims to answer the second research question, which reads: How do NCPs interpret and apply these rules when resolving disputes pertaining to corporations and indigenous peoples? Do NCPs apply substantive indigenous peoples' rights norms to define corporate responsibility under the OECD Guidelines? Against this background, Chapter 5 adds to the emerging scholarly work studying the substantive work of NCPs. However, this thesis deviates from previous scholarly work on NCPs' substantive work, as it chooses to focus on a specific group of rights holders, namely, indigenous peoples, rather than on specific substantive themes such as human rights or human rights due diligence.¹⁴⁵⁸

As shown in [Chapter 3](#), due to the sparse and vague coverage of indigenous peoples' (rights) in the key RBC instruments, they provide limited guidance and clarification regarding the corporate responsibility to respect indigenous peo-

¹⁴⁵⁸ Previous scholarly work focused on human rights due diligence and human rights supply chain responsibilities as well as other sub-elements of due diligence, see van't Foort, 'Due Diligence'; Buhmann, 'NCP Statements'.

ples' rights and FPIC. While this has been somewhat mitigated by the subsequently adopted OECD RBC Guidance Documents, open questions such as the approach to FPIC beyond cases of relocation remain, indicating the need for further guidance for corporations. The growing caseload of NCPs on human rights and indigenous peoples' rights testifies to this need. A closer look at the complaints submitted in recent years shows that NCPs are increasingly confronted with cases relating to indigenous peoples.¹⁴⁵⁹

To grapple with the above, the present chapter is structured as follows: First, the methodology used in this chapter is introduced, referring to the case collection and selection process, sources of information used and methods to examine the NCP cases. Second, a typology of NCP cases relating to indigenous peoples is established, providing some statistics on these cases and some preliminary insight into where a closer look at substance is warranted. Third, the chapter delves into researching the substance of NCP statements on selected cases, followed by concluding remarks.

I. Methodology of Chapter 5

To answer the second research question of this thesis, both an exploratory and an expository approach are applied.¹⁴⁶⁰ The methods used to analyse NCPs' 'jurisprudence' relating to indigenous peoples are empirical, consisting of a quantitative analysis of NCP cases to create a typology of the cases relating to indigenous peoples and doctrinal legal research to systematically analyse the content of and reasoning adopted in NCP statements.

¹⁴⁵⁹ See below text to [Fn 1464](#) and [Figure 2](#).

¹⁴⁶⁰ On the exploratory approach including quantitative data analysis, see eg Anthony J Onwuegbuzie and Nancy L Leech, 'On Becoming a Pragmatic Researcher: The Importance of Combining Quantitative and Qualitative Research Methodologies' (2005) 8(5) *International Journal of Social Research Methodology* 375, 382-383. On the expository approach including doctrinal legal analysis, see Cryer and others 9; Hutchinson and Duncan 85, 106, 110-113, 116-118.

A. NCP Case Collection and Selection Process

The cases analysed in this chapter are extracted from two main databases tracking NCP cases: the *OECD Database of Specific Instances*¹⁴⁶¹ and the database managed by *OECD Watch*¹⁴⁶², a global network of civil society organizations that is part of the official institutional structure created by the OECD Guidelines.¹⁴⁶³ The case collection and selection process involved the following steps. First, both databases were searched and compared to compile a list of the cases submitted to the NCPs from June 2000 to 30 September 2019 (1st list of cases). By looking at the short case descriptions accessible on both databases, cases with a link to human rights and/or reproducing relevant keywords (see keywords below) were – in a second step – filtered from the 1st list of cases generating a 2nd list of cases. Using this approach, irrelevant cases such as labour disputes and workers' rights issues as well as cases with no link to human rights were eliminated. Third, the 2nd list of cases was subdivided into **four groups of cases** based on different key criteria to avoid overly narrow case selection. Last, pertinent cases from 30 September 2019 to 30 September 2020, fitting in the first group of cases were taken from the OECD Watch database only. This step seemed indicated since this interval featured a high number of complaints submitted to NCPs relating to indigenous peoples – six of a total of seventeen cases.¹⁴⁶⁴ As of 30 September 2020, a total of ninety-three cases had been extracted from the two databases and divided into four groups.

Given the different technical specifications of the two databases, tracking and displaying cases in their own manner with both lacking a comprehensive record of all cases submitted to NCPs and lacking a search option for indige-

¹⁴⁶¹ The first case listed in the OECD database is from June 2000, see <<https://mneguidelines.oecd.org/database/>> accessed 24 April 2022.

¹⁴⁶² The first case listed in the OECD Watch database is from May 2001, see <<https://www.oecdwatch.org/complaints-database/>> accessed 24 April 2022.

¹⁴⁶³ The database of the Trade Union Advisory Committee (TUAC) was not used in the process since it stopped being accessible during the case selection process in 2019. Furthermore, the database only collects labour-related cases submitted by trade unions, see <<https://tuac.org/mne-guidelines-complaints/>> accessed 24 April 2022; Buhmann, 'NCP Statements' 399.

¹⁴⁶⁴ <<https://complaints.oecdwatch.org/cases/all-cases/casesearchview>> accessed 16 March 2021.

nous peoples specifically, identifying relevant cases is challenging.¹⁴⁶⁵ Searching for relevant cases regarding indigenous peoples thus necessitated a search of both databases and a content analysis of the databases' short case descriptions, documents published by NCPs and complaint documents.¹⁴⁶⁶ Given the caveats associated with the two databases, the compilation of NCP cases in this thesis does not make claims of completeness, but it is argued that the interpretative, hand-coding approach taken to gather case data relating to indigenous peoples provides this thesis with a representative data set for its purposes.

The **1st group of cases** have a *direct* link to indigenous peoples' (rights) and/or FPIC. This group includes cases containing the keyword *indigenous (peoples)* in their short case descriptions on the OECD database and/or OECD Watch database. This group has a total of twenty-eight cases.

The **2nd group of cases** have a *direct* link to indigenous peoples' (rights) and/or FPIC. This group includes cases containing the following keywords in the NCP documents¹⁴⁶⁷ alone or in combination: *consultation* (only in combination); *FPIC*; *indigenous (peoples)*, *tribal (peoples)*. This group has a total of ten cases.

The **3rd group of cases** potentially relate to and/or address indigenous peoples' issues but are not clearly framed as such. This group includes cases displaying specific keywords in their short database descriptions, the complaint and/or NCP documents. One (or more) of the following keywords had to be present for a case to be placed in this group: culture; cultural (heritage, site(s), right(s); indigenous (peoples/communities)¹⁴⁶⁸; rural communities; self-determination; traditional (communities, lands, landowners, livelihoods). Often, these keywords were displayed in conjunction with the following terms: community dialogue; consent (often displayed in complaint documents); consultation; displacement; expropriation; expulsion; (land) eviction; (forced) land acquisitions; loss of land; (involuntary) (re)settlements. Cases simply displaying the keyword *local community/communities* were only placed in this group if linked to a specific name of a group of people. This group has a total of twenty-eight cases.

¹⁴⁶⁵ On the different technical specifications of the databases and their caveats, see OECD, 'NCPs 2000-2015' 34, 36-37; Bağlayan, 'Bottom-Up Approach' 381-384; Buhmann, 'NCP Statements' 399-400. In the meantime, OECD Watch has updated its website now providing a search filter for indigenous peoples, see <https://www.oecdwatch.org/complaints-database/?fwp_oecd_complaint_affected_people=indigenous> accessed 24 April 2022.

¹⁴⁶⁶ See also Buhmann, 'NCP Statements' 399-400, searching for pertinent NCP cases addressing (human rights) due diligence.

¹⁴⁶⁷ NCP documents include initial assessments and final statements.

¹⁴⁶⁸ As included in complaint documents.

The **4th group of cases** have a potential loose link to indigenous peoples' issues. This group includes cases containing specific keywords in their short database descriptions, the complaint and/or NCP documents. One (or more) of the following keywords had to be present for a case to be placed in this group: consultation; (impact on) local communities; (impact on) affected communities; stakeholder engagement with local communities. Often, these cases also involve the following terms: community dialogue; displacement; expropriation; expulsion; (land) eviction; (forced) land acquisitions; loss of land; (involuntary) (re)settlements. This group has a total of twenty-seven cases. However, the line between group three and four is narrow.

For reasons of delimitation and considering the aim of this chapter, only the cases in the first and second groups directly addressing indigenous peoples were selected for further analysis – a total of thirty-eight cases. The cases listed in the third and fourth groups may serve for further research.¹⁴⁶⁹

While the thirty-eight cases were used for the quantitative analysis, the more in-depth substantive analysis of the statements adopted by NCPs necessitated a further selection of cases. Of the thirty-eight cases, rejected cases (ie, the complaint was considered not to merit any further examination following the initial assessment)¹⁴⁷⁰ and pending cases (ie, the NCP's initial assessment to reject or accept the case for further examination is pending) were excluded from the analysis. This winnowing was performed because cases' acceptance by NCPs indicates the latter's examination and analysis of the issues at stake, making it more likely that these cases would contribute to the purposes of this thesis than would rejected or pending cases. This is buttressed by the findings of an OECD study indicating that recommendations and determinations are more likely to be issued when complaints are accepted by NCPs for fur-

¹⁴⁶⁹ For instance, it would be interesting to research how NCPs assess stakeholder engagement with local communities not identifying as indigenous compared to communities identifying as indigenous. Furthermore, by examining the third group of cases more closely, additional relevant cases addressing indigenous peoples' issues might be identified, which could provide further insight.

¹⁴⁷⁰ Importantly, and as already rightly observed by Bağlayan, an NCP's rejection of a case does not necessarily mean that the allegations raised in the complaint are not material. NCPs have rejected cases for other reasons such as where the parties were willing to seek a solution outside of the NCP procedure, the parties were unwilling to enter mediation or on the grounds that NCPs will not review governmental processes and decisions. See Bağlayan, 'Bottom-Up Approach' 383 at Fn 82; *Amadiba Crisis Committee v MRC Ltd.*, NCP Australia (Final Statement, 8 March 2013) 2; *Southeast Alaska Conservation Council v Seabridge Gold*, NCP Canada (Final Statement, 13 November 2017).

ther examination.¹⁴⁷¹ This further selection resulted in a total of twenty-seven cases. Of these, an additional five accepted cases were excluded from the substantive analysis since the good offices was not finalized by the 1st of March 2021, with no final statement published yet. The respective initial assessments of these five cases did not yield any substantive direction contributing to the purposes of this thesis. Thus, a total of twenty-two cases were identified for the substantive in-depth analysis. A full list of all ninety-three cases and their respective parameters can be found in the Annex attached to this thesis.

B. Methods Applied in the Analysis of NCPs' Cases on Indigenous Peoples

The selected NCP case cohort is analysed in a twofold manner. First, the thirty-eight selected NCP cases are examined based on a quantitative analysis. More precisely, what follows in [Section II](#) is a quantitative analysis of the information extracted from the NCPs' initial assessments and/or final statements, which were retrieved from the websites of pertinent NCPs. Where necessary, further information was gathered from the databases of the OECD and OECD Watch.¹⁴⁷² The cases are analysed using a set of criteria to develop a typology of the NCP cases relating to indigenous peoples. Based on simple counts and frequencies, the analysis aims to provide initial insights and identify overall patterns that could not be identified based solely on single NCP cases.¹⁴⁷³ The criteria analysed include: the lead NCP handling the case; the case status as of 1 March 2021 (pending, accepted, rejected); the date of complaint submission; the notifier of the case; the industry sector involved (from which industry sector was the respondent corporation); the country of business operation; the key issue raised (what was the complaint about, and which provisions of the OECD Guidelines were allegedly not complied with by the respondent corporation). The system of classification of industry sectors and the notifying party are based on the classifications used by the OECD. As such, the OECD

¹⁴⁷¹ See above text to [Fn 1423](#).

¹⁴⁷² For a detailed overview, see Annex: NCP Case Study.

¹⁴⁷³ Mark A Hall and Ronald F Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96(1) California Law Review 63, 81, 117-118.

differentiates among twenty industrial sectors¹⁴⁷⁴ and seven notifying parties, including corporation, government, individual, (local) community (organization), NGO, trade union, and multi-stakeholder consortium (complaint submitted jointly by a combination of the following actors: NGO, trade union, community (organization), individual(s)).¹⁴⁷⁵

Second, the doctrinal legal research method – referred to as the method of research into the law and legal concepts as generated by the legislature and the courts –¹⁴⁷⁶ is used to analyse the twenty-two identified cases. More precisely, this method is used to analyse the decisions and reasoning adopted by the NCPs in these twenty-two cases against the backdrop of the previously established regulatory framework in [Chapters 2](#) and [3](#).¹⁴⁷⁷ Well aware that NCPs are not judicial bodies and their decisions not legal decisions, in conformity with previous scholarly work on NCP decisions,¹⁴⁷⁸ it is nevertheless argued that this is a viable method to examine how NCPs interpret and apply the rules of the regulatory framework when handling disputes pertaining to corporations and indigenous peoples and whether NCPs apply substantive indigenous peoples' rights norms to define responsibility under the OECD Guidelines. The documents examined in this analysis include documents issued by the respective NCPs, including initial assessments, final and follow-up statements, and other documents, such as reports. The NCP websites were referenced to obtain NCP documents.

¹⁴⁷⁴ The industry sectors are the following: accommodation and food service; activities of extraterritorial organizations and bodies; administrative and support service activities; agriculture, forestry and fishing; arts, entertainment and recreation; construction; education; electricity, gas, steam and air conditioning supply; financial and insurance activities; human health and social work activities; information and communication; manufacturing; mining and quarrying; other service activities; professional, scientific and technical activities; public administration and defence; real estate activities; transportation and storage; water supply, sewerage, waste management and remediation activities; wholesale and retail trade, see <<https://mneguidelines.oecd.org/specificinstances.htm>> accessed 24 April 2022.

¹⁴⁷⁵ OECD, 'NCPs 2000-2015' 35.

¹⁴⁷⁶ Hutchinson and Duncan 85, 116.

¹⁴⁷⁷ *ibid* 118; Hall and Wright 87.

¹⁴⁷⁸ The doctrinal research method has been applied in previous scholarly work analysing NCP decisions, see van't Foort, 'Due Diligence' 68-69.

II. Typology of NCPs' Indigenous Peoples' Cases

A. NCPs Involved, Submission Dates, and Case Status

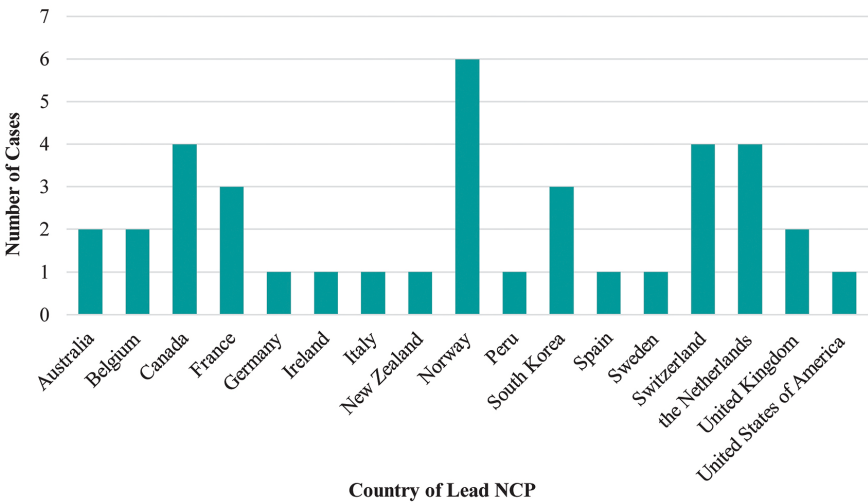


Figure 1: Seventeen Lead NCPs and the Number of Cases Handled by Them

As shown in Figure 1 above, the thirty-eight identified cases are handled by a total of seventeen NCPs. The NCPs of Canada, the Netherlands, Switzerland, and Norway have handled the most cases at four to six each. They are followed by the NCPs of France and South Korea with three cases each and then the NCPs of Australia, Belgium and the UK with two each. A minority of the NCPs are located in states that have indigenous peoples living within their territories, including Australia, Canada, New Zealand, Norway, Peru, Sweden, and the United States of America. Of the thirty-eight cases, twenty-two have been submitted to NCPs in states with no indigenous communities of their own, including the Netherlands, France, South Korea, and Switzerland.¹⁴⁷⁹ While all seventeen of the states that adhere to the OECD Declaration of 1976 ratified the ICCPR, ICESCR and ICERD, except the United States of America, which is

¹⁴⁷⁹ See eg International Labour Office, 'Implementing ILO C 169' 51-52, 140, 142-145; Mamo and others 27-623.

currently only a signatory state to the ICESCR,¹⁴⁸⁰ five ratified ILO C 169 – Germany, the Netherlands, Norway, Peru, and Spain.¹⁴⁸¹ Peru has also ratified the ACHR.¹⁴⁸² All seventeen states have endorsed the UNDRIP.¹⁴⁸³

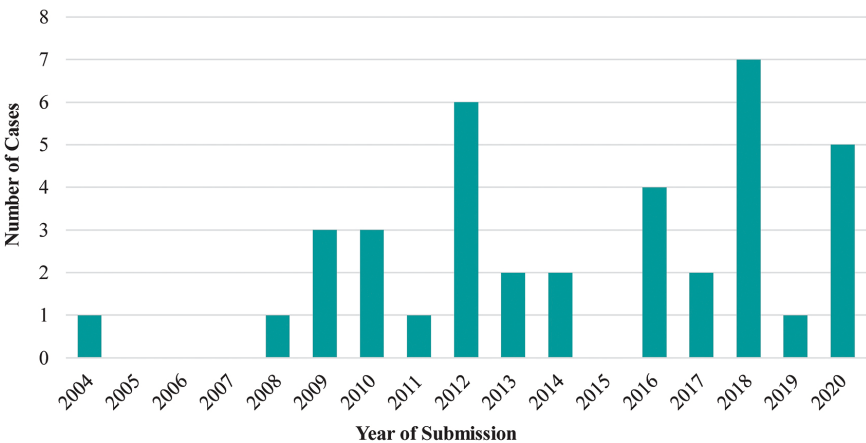


Figure 2: Distribution of NCP Cases Concerning Indigenous Peoples Submitted to the NCPs throughout a Period of Seventeen Years

In terms of the year of submission, Figure 2 above shows that most cases have been submitted after the 2011 revision of the OECD Guidelines, which introduced a human rights chapter and the concept of stakeholder engagement. There was a peak of seven cases in 2018, followed by six in 2012 and a total of five submissions in 2020 as of 30 September 2020. The earliest case relating to indigenous peoples was submitted to the Belgium NCP in 2004.

¹⁴⁸⁰ <<https://indicators.ohchr.org/>> accessed 24 April 2022.
¹⁴⁸¹ <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314> accessed 24 April 2022.
¹⁴⁸² <<https://www.cidh.oas.org/basicos/english/Basic4.Amer.Conv.Ratif.htm>> accessed 24 April 2022.
¹⁴⁸³ <<https://www.un.org/press/en/2007/ga10612.doc.htm>> accessed 24 April 2022.

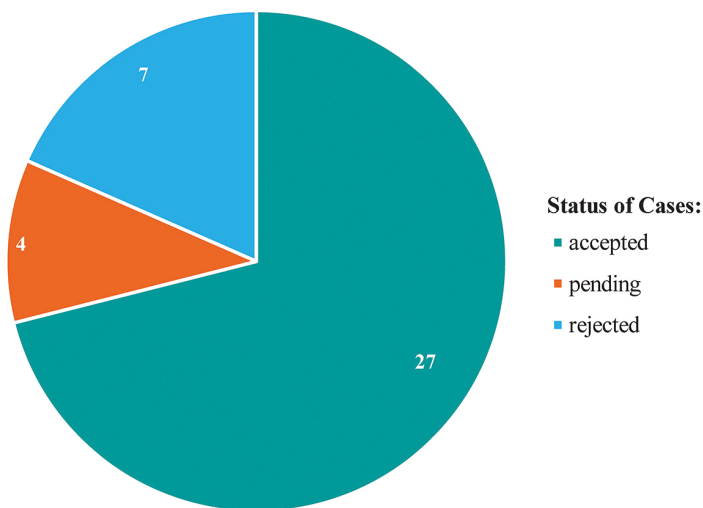


Figure 3: Status of NCP Cases as of 1 March 2021

As shown in Figure 3 above, of the thirty-eight identified cases submitted, as of 1 March 2021, four are currently pending, seven have been rejected and twenty-seven have been accepted. A special case is a complaint submitted to the South Korean NCP against three corporations (POSCO, KEXIM and NPS). The South Korean NCP accepted the complaint against POSCO and NPS but rejected the complaint against KEXIM.¹⁴⁸⁴ The case is listed as accepted.

¹⁴⁸⁴ KTNC Watch et al v POSCO/NPS/KEXIM, NCP South Korea (Initial Assessment, 9 September 2020).

B. Parties Involved and the Country of Business Operation

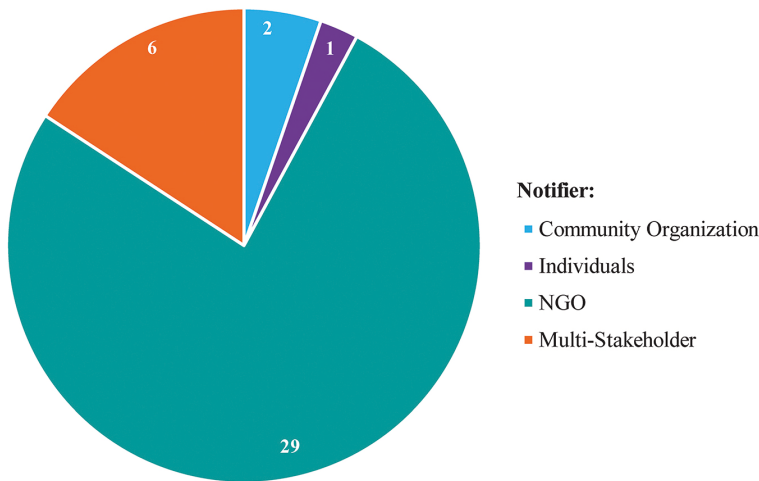


Figure 4: Number of NCP Cases Submitted by Notifying Parties

The analysis of the parties involved and the country of business operation(s) presents the following picture: Most complaints have been submitted by NGOs – a total of twenty-nine, followed by six submitted by multi-stakeholder groups, ie, complaints submitted jointly by a combination of the following actors: NGOs, trade unions, community organizations, and individuals. The remaining three complaints come from community organizations or individuals. The low number of cases submitted by the latter groups raises the issue of accessibility of and representation within NCP procedures.

As shown in Figure 5 below,¹⁴⁸⁵ by far, the largest number of complaints submitted concern the extractive sector. In fourteen cases, the responding corporation has been active in the mining and quarrying industry, followed by business activities in agriculture, forestry, and fishing. These numbers are not surprising given the land-consuming nature of the agricultural and extractive sectors. In several cases, the respondents have been corporations with financial and insurance activities. These corporations have generally been financially involved in projects active in the extractive, agricultural, or energy sector.

¹⁴⁸⁵ When an NCP complaint addresses two or more corporations, all relevant industry sectors in which these corporations are active were included in the count of respondent industry sectors. For further detail, see Annex: NCP Case Study.

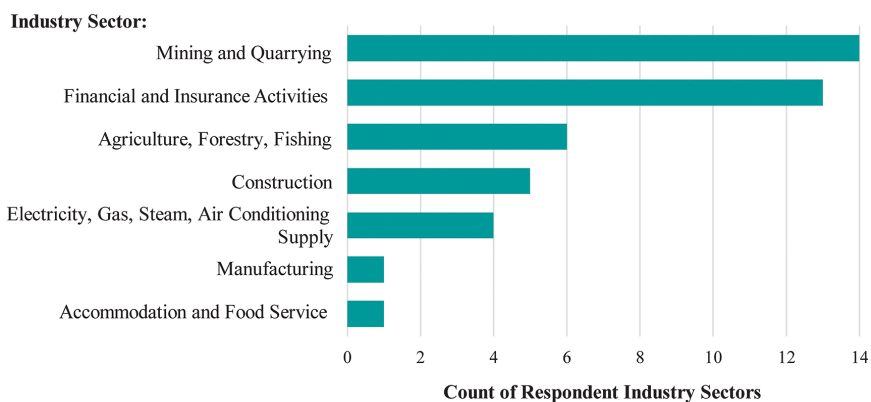


Figure 5: Distribution of the Respondent Industry Sectors Involved in the NCP Cases Concerning Indigenous Peoples

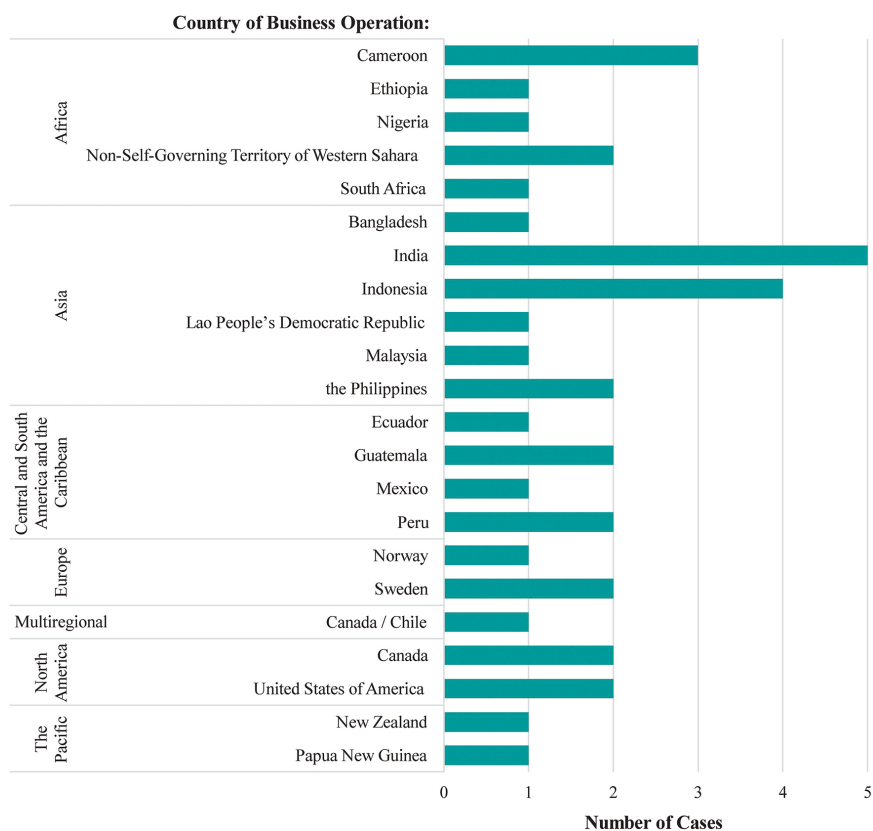


Figure 6: Distribution of the Countries in which Business Operations Affecting Indigenous Peoples Took Place

The collected data also generate results in terms of the geographical distribution of cases relating to indigenous peoples. As shown in *Figure 6* above, most of the issues raised have taken place in states not adhering to the OECD Declaration of 1976 and thus lacking an NCP, located in Africa, Asia, and Central and South America and the Caribbean. Of the twenty-one states listed above,¹⁴⁸⁶ eight are adherents to the OECD Declaration of 1976 (Canada, Chile, Mexico, New Zealand, Norway, Peru, Sweden, United States of America).¹⁴⁸⁷

C. Cited Chapters of the OECD Guidelines and Key Issues Raised

As shown in *Figure 7* below, among the thirty-eight cases identified, Chapter IV on human rights followed by Chapter II on general policies, including the provisions on risk-based due diligence, and Chapter VI on the environment are the most cited chapters of the 2011 edition of the OECD Guidelines. Chapter IV on human rights is cited in twenty-six out of thirty-eight NCP cases. The predecessor of the 2011 OECD Guidelines, the 2000 edition, is also cited in several complaints, mostly Chapter II on general policies and Chapter V on the environment, followed by Chapter III on disclosure. The 2000 edition of the OECD Guidelines is cited in cases in which the issues raised occurred prior to the 2011 revision.

¹⁴⁸⁶ Currently, the political status of the Non-Self-Governing Territory of Western Sahara is unclear and unsolved. Morocco claims the territory and has 'reintegrated' the territory, see <<https://minurso.unmissions.org/background>> accessed 24 April 2022.

¹⁴⁸⁷ <<https://www.oecd.org/investment/mne/oecddeclarationanddecisions.htm>> accessed 12 April 2022.

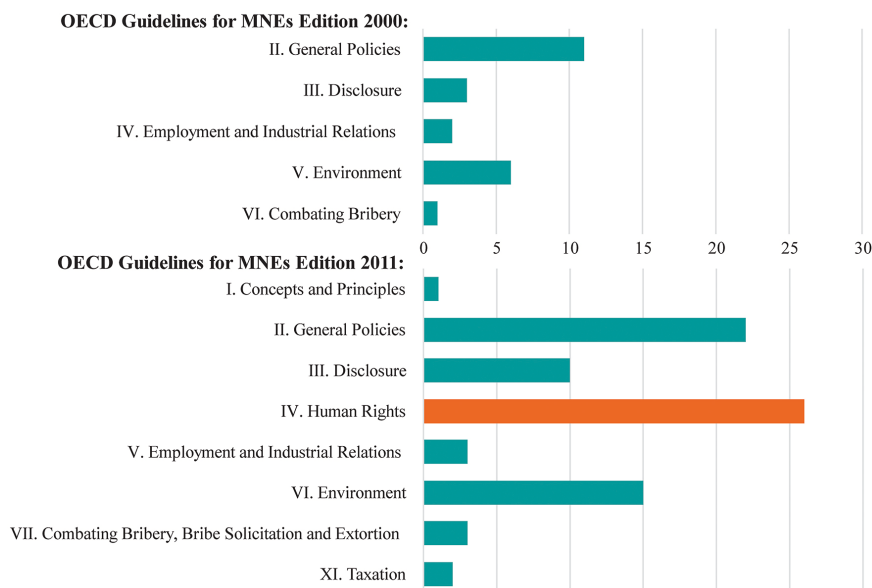


Figure 7: Distribution of Cited Chapters of the OECD Guidelines in the NCP Cases Concerning Indigenous Peoples

A broad range of issues raised can be distilled from the cases, although with some recurring themes. The lack of consultation, FPIC or risk-based (human rights) due diligence or the inadequacy thereof is raised in the majority of cases. Often, the issue of consultation and FPIC is raised in connection with indigenous peoples' lands and territories that they inhabit, and resources that they use. In several cases, complainants also allege the failure of the responding corporations to conduct (comprehensive) environmental and social impact assessments that are inclusive of and engage affected communities or to inform about the outcome of such assessments. This lack of information, transparency and communication on projects or corporations' activities also arises in cases alleging non-compliance with Chapter III of the OECD Guidelines on disclosure. In very few cases are issues of bribery, tax avoidance and employment and working conditions raised. Similarly, some cases refer to the lack or inadequacy of mitigation and remediation measures for adverse impacts on the environment or human rights. These issues include lack of compensation for lands, inadequacy of corporations' policies and codes of conduct or their non-compliance with those policies, and inadequacy of corporate-level grievance mechanisms.

In terms of adverse impacts, a variety of issues are raised relating to impacts on both the environment and the rights of those affected. The issues men-

tioned include pollution of water and soil, loss of biodiversity, risks to the ecosystem, and deforestation – impacts that affect the way of life of indigenous peoples, curtailing their enjoyment of their economic, social, and cultural rights. The complaints speak of displacement and forced evictions of indigenous peoples, deprivation of means of livelihood, retaliation and violence against indigenous peoples, destruction of cultural and sacred sites and also address broader themes such as marginalization, discrimination, poverty, and the creation of social division or the climate crisis and environmental sustainability. Rights of indigenous peoples that are explicitly mentioned include their right to life; rights to an adequate standard of living, food, water, health, and housing; their cultural rights and freedom of religion; their rights to self-determination and development; and their rights to lands, territories, and resources, including property and customary land tenure rights.¹⁴⁸⁸

III. Key Issues of the Corporate Responsibility to Respect Indigenous Peoples' Rights and FPIC: A Closer Look at NCPs' Reasoning

As indicated above, the following aims to systematically examine NCP statements to distil the currently applied features of indigenous peoples' rights and FPIC relating to corporate actors and to compare the results with the requirements on the corporate responsibility to respect human rights as enshrined in the OECD Guidelines and other pertinent instruments examined in [Chapter 3](#). References are also made to the ILO and UN frameworks, as laid out in [Chapter 2](#). The purpose of this analysis is to gain insight into NCPs' reasoning regarding the corporate responsibility to respect indigenous peoples' rights and FPIC. Given the limited guidance from the OECD Guidelines and the other key RBC instruments, NCPs may contribute to further unpacking the latter responsibility. Particularly relevant in this undertaking are recommendations and determinations issued by NCPs, albeit without adopting the detailed categories established and adopted by a recent OECD study.¹⁴⁸⁹ Notably, the analysis does not aim to examine the outcome of a case and aspects of remediation for indigenous peoples or the practices of corporations, which would fall outside of the scope of this thesis and particularly of research question two.

To answer the second research question in a structured and comparable way, the analysis of NCPs' reasoning is divided into six subgroups representing key issues addressed by NCPs, as shown above in the typology: meaningful stake-

¹⁴⁸⁸ For further detail, see below [Chapter 5, Section III](#) and [Annex: NCP Case Study](#).

¹⁴⁸⁹ See above text to [Fn 1412](#)–1420.

holder engagement, consultation, and FPIC; environmental, social, and human rights impact assessments; corporate (human rights) policy; (human rights) due diligence; remediation; and indigenous peoples' rights. Furthermore, in terms of sequence, the twenty-two selected cases are analysed according to the year that the final statement was issued, starting with the earlier cases and ending with the more recently concluded ones. Given, the overarching concept of due diligence with its sub-elements of stakeholder engagement and impact assessment studies, overlap and cross-references between the different categories are unavoidable.

A. Meaningful Stakeholder Engagement, Consultation, and FPIC

1. Adopted Reasoning

A key issue in several cases is meaningful stakeholder engagement and consultation. Many complaints refer to the linkage between the alleged violation of indigenous peoples' rights and flawed or lacking meaningful stakeholder engagement and consultation processes. The case of *Survival International v Vedanta Resources Plc.*, for instance, involved allegations in which the UK registered mining corporation Vedanta Resources Plc. (henceforth: Vedanta) had failed to consult with the Dongria Kondh concerning a projected bauxite mine in the Niyamgiri Hills in India. This mine would allegedly result in environmental, health and safety impacts on the indigenous community and adversely affect their rights recognized under the UNDRIP and UN Conventions, including the right to practise their religion with its spiritually and culturally distinct ties to the Niyamgiri Hills, which are revered as sacred.¹⁴⁹⁰ After Vedanta declined the UK NCP's offer of mediation, the NCP proceeded to examine the complaint.¹⁴⁹¹

In its final statement published in 2009, the UK NCP elaborated further on the allegations. In terms of what constitutes adequate and timely consultation as recommended in Chapter V, para 2b of the 2000 OECD Guidelines, the NCP based its examination on Art. 10 of the Akwé: Kon Voluntary Guidelines, developed by the Secretariat of the Convention on Biological Diversity. In the NCP's view, the latter would provide a good yardstick for the requirements 'adequate' and 'timely' 'because it takes into account the specific needs of in-

¹⁴⁹⁰ *Survival International v Vedanta Resources Plc.*, NCP UK (Final Statement, 25 September 2009) 1, 3-4, 8, 18.

¹⁴⁹¹ *ibid* 6.

digenous peoples'.¹⁴⁹² Given that Vedanta had only given notice of consultation meetings in writing via local newspapers in English, ignoring the high probability of illiteracy in the indigenous community (as also shown in Vedanta's own environmental impact assessment), the NCP upheld the complainant's allegations, concluding that Vedanta had failed to put in place adequate and timely consultation processes that would allow for the Dongria Kondh's views to be collected and taken into account. Vedanta should have used more accessible means of communication to engage the indigenous community more effectively.¹⁴⁹³ This lack of consideration of the community's views was further buttressed by the corporation's environmental impact assessment, showing that the decision to build the mine was solely based on economic grounds.¹⁴⁹⁴ Against this background, the NCP determined that Vedanta had not taken adequate steps to respect the rights and freedoms of the indigenous community consistent with India's commitments under various international human

¹⁴⁹² *ibid* 14. For more information on the Akwé: Kon Voluntary Guidelines, see eg Rombouts, *Having a Say* 322-331. Art. 10 of the *Akwé: Kon Voluntary Guidelines* reads as follows: 'The proponent of a development proposal or the responsible government authority should engage in a process of notification and public consultation of intention to carry out a development. Such notification should use all normal public means of notification (print, electronic and personal media, including newspapers, radio, television, mailings, village/town meetings, etc.), take into account the situation of remote or isolated and largely non-literate communities, and ensure that such notification and consultation take place in the language(s) of the communities and region that will be affected. Such notification should clearly identify the proponent, contain a brief summary of the proposal, the sites and communities likely to be affected, anticipated impacts (if any) on the conservation and sustainable use of biological diversity, as well as possible cultural and social impacts, arrangements for public consultation, contact details, key dates in the life of the project, including those regarding impact assessment procedures, and identify obligations under national and subnational laws as well subregional, regional and international agreements'. See SCBD, 'Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment Regarding Developments Proposed to Take Place on, or which Are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities' (SCBD, 2004) 9-10 <<https://www.cbd.int/doc/publications/akwe-brochure-en.pdf>> accessed 3 April 2022.

¹⁴⁹³ *Survival International v Vedanta Resources Plc.*, NCP UK (Final Statement, 25 September 2009) 11, 13-16.

¹⁴⁹⁴ *ibid* 12.

rights instruments (ie, the UNDRIP, ICCPR and ICERD), referring to Vedanta's non-compliance with the 2000 OECD Guidelines (Chapter II, paras 2 and 7, Chapter V, para 2b).¹⁴⁹⁵

'With the aim of assisting Vedanta in bringing its practice into line with the Guidelines', the UK NCP recommended that Vedanta 'immediately and adequately engage with the Dongria Kondh' and seek their views 'on the construction of the bauxite mine, [their] access to the project affected area, ways to secure [their] traditional livelihood, and exploring alternative arrangements (other than re-settlement)'.¹⁴⁹⁶ On the procedural aspects of a consultation process, the NCP referred to the Akwé: Kon Voluntary Guidelines as a guide and the 2008 ICMM position paper of 2008 as a benchmark. At a minimum, communication on the consultation process in both language and form should be easily understood to reach the highest number of Dongria Kondh and their representatives, such as by employing the Dongria Kondh language and means other than written communication.¹⁴⁹⁷ Consultation with potentially affected indigenous groups should take place prior to the execution and the finalization of the project and 'not remain a "paper policy"' but rather be translated 'into concrete procedures and actions on the ground'.¹⁴⁹⁸ Notably, the UK NCP further stated that the corporation 'should respect the outcome of the consultation process' and consider implementing SRSR Ruggie's key steps for a basic human rights due diligence process.¹⁴⁹⁹

Two years later, in 2011, the Norwegian NCP issued its final statement in the case of ***Future In Our Hands (FIOH) v Intex Resources ASA***. This case concerned a nickel mine project in the central region of the Philippines' Mindoro Island (The Mindoro Nickel Project) planned by Norway-based corporation Intex Resources ASA (henceforth: Intex). The complainants inter alia contended that consultations to obtain FPIC on the project were flawed since the representative organization participating in the consultation did not represent indigenous peoples from areas directly impacted by the mine project, making

¹⁴⁹⁵ Since the case was submitted prior to 2011, the UK NCP referred to the 2000 edition of the OECD Guidelines, more precisely to Chapter II, para 2, which recommends that corporations '[r]espect the human rights of those affected by their activities consistent with the host government's international obligations and commitments'. See *ibid* 18-20; OECD, 'OECD Guidelines for Multinational Enterprises' (OECD, 2000) 14, para 2.

¹⁴⁹⁶ *Survival International v Vedanta Resources Plc.*, NCP UK (Final Statement, 25 September 2009) 21.

¹⁴⁹⁷ *ibid* 14-15, 23.

¹⁴⁹⁸ *ibid* 21-22.

¹⁴⁹⁹ *ibid* 21; HRC, 'Framework' paras 59-64. For an in-depth analysis of the case of *Survival International v Vedanta Resources Plc.*, see Marshall and Balaton-Chrimes.

Intex non-compliant with Chapter II, para 7 of the 2000 OECD Guidelines.¹⁵⁰⁰ Intex disputed the allegations, inter alia noting that the indigenous peoples claiming to have rights to the lands were not legally eligible to participate in consultation since they did not reside in the affected area.¹⁵⁰¹ Finally, concerns were raised in relation to the transparency of financial transactions, bringing to the fore Chapters III and VI of the 2000 OECD Guidelines.¹⁵⁰² After the parties declined to enter mediation, the Norwegian NCP examined the issues raised based on the 2000 edition of the OECD Guidelines, with a particular focus on the requirements of consultation and FPIC processes.¹⁵⁰³ It inter alia considered whether Intex had engaged in consultation with legitimate indigenous peoples – addressing the issues of representation; whether consultation was held in a free, prior, and informed manner; and the timeliness and sufficiency of the information provided to the communities.¹⁵⁰⁴

The NCP's analysis began by emphasizing that the OECD Guidelines apply to corporations whose operations are still in the planning or exploratory stage and laying out the regulatory framework for both home and host state obligations. It referred to the UNDRIP (Arts. 18, 32(2)), ILO C 169 (Art. 6(1a), 14(1)) and to the Philippines' Indigenous Peoples Rights Act of 1997 (IPRA).¹⁵⁰⁵ The NCP commended the Philippines for having adopted legislation and procedures protecting the interests of indigenous peoples, including the FPIC provisions of the UNDRIP, but acknowledged gaps in their implementation.¹⁵⁰⁶ Noteworthy in this regard seems the NCP's comment that '[w]here there is weak national implementation or legislation, or a discrepancy between national and international standards, the NCP encourages the company to base its business on the more stringent standard'.¹⁵⁰⁷ Given that Intex is based in Norway, the NCP also referred to Norway's international obligations, citing a 2011 concluding observation of the CERD '[placing] a duty on Norway to ensure the stan-

¹⁵⁰⁰ *Future In Our Hands (FIOH) v Intex Resources ASA*, NCP Norway (Final Statement, 30 November 2011) 14, 17, 19.

¹⁵⁰¹ *ibid* 17.

¹⁵⁰² *ibid* 30–32.

¹⁵⁰³ *ibid* 6, 13.

¹⁵⁰⁴ *ibid* 21–29, 40–46.

¹⁵⁰⁵ *ibid* 6, 17–19, 21–22.

¹⁵⁰⁶ *ibid* 6, 17–19.

¹⁵⁰⁷ *ibid* 12. This interpretation seems to go further than what the 2000 edition of the OECD Guidelines included and the provision introduced with the 2011 revision of the OECD Guidelines, see OECD, '2000 Guidelines' 39, para 2; OECD, '2011 Guidelines' 17, para 2: '[I]n countries where domestic laws and regulations conflict with the principles and standards of the [OECD Guidelines], enterprises should seek ways to honour such principles and standards to the fullest extent which does not place them in violation of domestic law'.

dards affirmed in the [ILO C 169] are applied not just in indigenous territories in Norway, but also by Norwegian companies operating overseas.¹⁵⁰⁸ The NCP also referred to IFC Performance Standard 7 on indigenous peoples.¹⁵⁰⁹

In examining whether Intex had consulted with legitimate indigenous peoples and their representatives, the NCP highlighted the ‘frequent inaccuracy with which indigenous representatives are selected’, also referring to the uncertainty surrounding Intex’s selection of representatives in the consultation and FPIC processes. According to the NCP, it was not clear – given the lack of evidence – that the two indigenous associations consulted by Intex (representing some members of the indigenous peoples who would be affected by the project) ‘have been chosen as the [legitimate] representatives of [all] the affected indigenous groups “pursuant to their own decision-making processes” [to act on their behalf]’.¹⁵¹⁰ The issue of ‘all the affected indigenous groups’ relates to the question examined by the NCP as to whether Intex had identified which indigenous peoples should be consulted. Based on the Commentary on Chapter II of the 2000 OECD Guidelines, Art. 14(1) of ILO C 169, Arts. 1(2) of the IC-CPR and ICESCR, and a concluding observation of the CERD to the Philippines, IFC Performance Standard 7, the IPRA, and the *Saramaka Case* of the IACtHR, the NCP adopted a broad and inclusive approach to whom corporations should consult,¹⁵¹¹ noting:

The indigenous peoples understood as “affected” include not only those that inhabit the land, but also those who use it according to their tradition and culture. The NCP understands the term “affected” as referring to *all* affected indigenous peoples, and not only a fraction of the group or tribe, or those inhabiting the land who may be forced to relocate due to the project or related infrastructure. It would be contrary to the intention of instruments designed to protect indigenous peoples or tribes to allow a fraction of the group, without individually based property rights, to enter into agreements affecting the tribe without consulting the tribe in its entirety. The effect of this may be that members of the tribe become unable to use the land according to tribal customs.¹⁵¹²

¹⁵⁰⁸ *Future In Our Hands (FIOH) v Intex Resources ASA*, NCP Norway (Final Statement, 30 November 2011) 21.

¹⁵⁰⁹ *ibid* 6.

¹⁵¹⁰ *ibid* 22. For more detailed information on the Mangyan peoples including eight indigenous groups with different languages and traditions, see *ibid* 19–20.

¹⁵¹¹ *ibid* 23 at Fn 58–62; OECD, ‘2000 Guidelines’ 39, para 4.

¹⁵¹² *Future In Our Hands (FIOH) v Intex Resources ASA*, NCP Norway (Final Statement, 30 November 2011) 23.

Different sources consulted by the NCP clearly indicated the overlap of the mining area with recognized land ownership claims by indigenous tribes, the presence of indigenous groups other than those who gave their FPIC in the affected area, and the practice of shifting cultivation by several indigenous groups, which was deemed as an indication for their occupation of the land prospected for the mine project, as well as the farming of the land by some without inhabiting it. Furthermore, alleged other nomadic indigenous peoples existed in the surrounding areas who might be affected by the mine.¹⁵¹³ Against this background, and by adopting a broader approach to what the 'affected area' included than Intex – which defined it as the site of the mine – the NCP 'finds evidence that indigenous peoples who have not been consulted are likely to be affected by the [mine project] both within the site and by associated infrastructure'.¹⁵¹⁴ The latter included 'access roads, transmission lines and other associated facilities, including a proposed 42 km conveyor corridor and other transportation routes to the processing site'.¹⁵¹⁵ Additionally, the NCP referred to Philippine authorities' approval of FPIC consultation at an early stage of the project but also their argument highlighting the need for further consultation in the future.¹⁵¹⁶ Against this background, acknowledging Intex's lack of 'a clear, proactive, stakeholder engagement strategy',¹⁵¹⁷ the NCP found the following:

The company should have systematically investigated whether indigenous peoples other than those [which issued FPIC] could be impacted by project components (mine and infrastructure), and if the groups with which they consulted were the legitimate representatives of all the affected indigenous peoples. This should have been done at an early stage in the project in accordance with the OECD Guidelines and IFC Performance Standards [which in Standard 7 requires the identification of all affected communities through impact assessment and the establishment of an ongoing relationship as early as possible].¹⁵¹⁸

Considering Intex's failure 'to undertake broader and more systematic assessments of affected indigenous groups and consult with these groups', the NCP determined that Intex did not act in compliance with Chapter II of the 2000 OECD Guidelines.¹⁵¹⁹ Acknowledging that the OECD Guidelines do not include

¹⁵¹³ *ibid* 23-24.

¹⁵¹⁴ *ibid* 24-25.

¹⁵¹⁵ *ibid* 24. See also *ibid* 5: 'The "project" includes all project components including the mine site, the processing site, residual deposit and transportation routes on land and at sea'.

¹⁵¹⁶ *ibid* 25.

¹⁵¹⁷ *ibid* 27.

¹⁵¹⁸ *ibid* 25, 27.

¹⁵¹⁹ *ibid* 29; OECD, '2000 Guidelines' 14, introductory remarks and para 7.

‘detailed standards to which companies should adhere’, it held that corporations ‘are expected to consider the views of other stakeholder before, during and at the termination of projects’.¹⁵²⁰

In terms of whether the consultation and FPIC processes conducted by Intex were in line with the ‘informed’ requirement, the NCP – referring to the UN-DRIP and the IPRA – was sceptical because the FPIC agreements were not in local languages and FPIC was obtained prior to the finalization of the project design and prior to the completion of the environmental impact assessment, which included vital information concerning potential adverse impacts. This ultimately led the NCP to conclude that the FPIC issued was not sufficiently informed.¹⁵²¹ Citing the SRRIP, the NCP noted that free and informed decision-making by indigenous peoples necessitates ‘full and objective information about all aspects of the project that will affect them’.¹⁵²²

The NCP did not examine the ‘free’ requirement, at least not explicitly. However, its elaborations in relation to Intex’s financing of community development touches upon this issue, mainly the element of ‘free’ meaning free from manipulation. It also gave some insight into the issue of ‘a social licence to operate’.¹⁵²³ Under consideration was Intex’s financial transactions for the building of a dike to prevent flooding in a village. This raised the concern of whether Intex was using development projects to secure community support.¹⁵²⁴ The NCP did not find Intex in breach of the 2000 OECD Guidelines provisions, as the action complied with local requirements. It also acknowledged that supporting community projects was a common practice in the mining sector, and in casu, the support request came from the village and was not solicited by Intex.¹⁵²⁵ However, the NCP nevertheless found ‘it inadvisable (...) to provide financial support to the community projects prior to approval or gaining required social acceptability by locally impacted communities’, as this ‘exposes the company to criticism that they are doing so in order to secure endorsements’.¹⁵²⁶ This was particularly important for Intex given the corporation’s lack of ‘a transparent, publicly disclosed system for allocating community de-

¹⁵²⁰ *Future In Our Hands (FIOH) v Intex Resources ASA*, NCP Norway (Final Statement, 30 November 2011) 5.

¹⁵²¹ *ibid* 9-10, 25-26. See also below text to [Fn 1625](#)-1636.

¹⁵²² *Future In Our Hands (FIOH) v Intex Resources ASA*, NCP Norway (Final Statement, 30 November 2011) 26.

¹⁵²³ *ibid* 7-8, 30-35.

¹⁵²⁴ *ibid* 30-31, 34.

¹⁵²⁵ *ibid* 34-35.

¹⁵²⁶ *ibid* 35.

velopment funds¹⁵²⁷ – a system that the NCP recommended that Intex establish to ensure a transparent process and ‘to avoid garnering support for the project through financial or other beneficial means’¹⁵²⁸

The NCP also recommended that Intex – based on the 2011 OECD Guidelines – conduct due diligence for the entire project impact area and regarding all matters covered in the OECD Guidelines, including in relation to human rights impacts. It explained that identifying indigenous groups potentially affected by the project and their priorities and consultation requirements was part of the due diligence process.¹⁵²⁹ Consultation processes should be part of a ‘clear, proactive, stakeholder engagement strategy’ giving indigenous groups sufficient time to respond and paying due account to language, form, and other potential barriers to effective engagement.¹⁵³⁰ Notably, the NCP advised that the engagement strategy should build upon existing indigenous structures rather than building new structures for indigenous peoples.¹⁵³¹ It also recommended that Intex respect the outcome of the consultation.¹⁵³² IFC Performance Standard 7 and the Akwé: Kon Voluntary Guidelines were referred to by the NCP as guidance on how to identify and consult with indigenous peoples. IFC Performance Standard 7 enshrines the requirement to inter alia consult on mitigation measures and development benefits.¹⁵³³

In the case of ***Fredemi Coalition v Goldcorp Inc.***, the Canadian NCP addressed issues raised in relation to a gold and silver mine in Guatemala (the Marlin Mine) owned and operated by Canadian corporation Goldcorp Inc. (henceforth: Goldcorp). The complaint asserted that the mine’s operations inter alia would violate the communal property rights and the right to FPIC of the people of San Miguel Ixtahuacán. In terms of stakeholder engagement, the NCP explained in its final statement published in 2011:

Generally, mining companies which undertake significant operations should endeavour to use effective communication strategies in order to engage the communities affected by the mine and to disseminate information of a technical or scientific nature. This process and activity is a critical element of corporate social responsibility which, if managed successfully, may bene-

¹⁵²⁷ *ibid.*

¹⁵²⁸ *ibid* 49.

¹⁵²⁹ *ibid* 10, 47–48.

¹⁵³⁰ *ibid* 48.

¹⁵³¹ *ibid*, 7, 28, 48.

¹⁵³² *ibid* 10.

¹⁵³³ *ibid* 10, 47–49. The NCP assessed the complaint based on the 2000 edition of the OECD Guidelines but issued the recommendations for the future based on the 2011 edition of the OECD Guidelines, see *ibid* 6.

fit all parties concerned. At the same time, community members should be willing to engage with the company. A lack of effort by either party can lead to erroneous perceptions and misunderstandings, lack of trust, opposition and grievances.¹⁵³⁴

A complaint submitted to the Dutch NCP provides further insight into the requirements of successful stakeholder engagement. The case of ***Lok Shakti et al v ABP/APG*** concerned the construction of a steel plant in India by South Korean-based corporation POSCO, of which ABP/APG – a Dutch pension fund and its manager – is a minority shareholder.¹⁵³⁵ In 2013, the complainants, ABP/APG and the Dutch NCP agreed that there was a need for ‘a constructive and meaningful stakeholder consultation process between POSCO and all affected stakeholders’.¹⁵³⁶ The complainants and ABP/APG jointly agreed that:

[F]or a successful dialogue it is essential that all parties have access to the information about all of POSCO's proposed investment plans in Odisha and their timeframes, covering its plans for the development of a steel plant, all its mining plans in the State as well as all infrastructural works required for the feasibility of the overall investment.¹⁵³⁷

The parties and the Dutch NCP maintained that an Independent Review and Assessment Mission – including at least one member from India or of Indian origin having a ‘sound understanding of the local situation and context’ – could help facilitate such a multi-stakeholder consultation process among POSCO, the local communities, and local and international NGOs.¹⁵³⁸ This mission, the parties agreed, should inter alia ‘prepare a high level assessment of the social, environmental and human rights aspects of all proposed POSCO investments in Odisha’ and ‘assess how meaningful ongoing stakeholder engagement can be set up, in which the right to free, prior and informed consent is assured, including compliance with rights of indigenous peoples and forest dwellers, as defined by the [UNDRIP]’.¹⁵³⁹

In the case of ***CCFD et al v Michelin***, the French NCP noted some inadequacies in stakeholder engagement in relation to Michelin's projected tire plant in Tamil Nadu in India allegedly impacting local communities, including the in-

¹⁵³⁴ *Fredemi Coalition v Goldcorp Inc.*, NCP Canada (Final Statement, 3 May 2011).

¹⁵³⁵ *Lok Shakti Abhiyan et al v ABP/APG*, NCP the Netherlands (Final Statement, September 2013) 2.

¹⁵³⁶ *ibid* 6, 8. For a more detailed elaboration of the case, see below text to [Fn 1678](#)-1694.

¹⁵³⁷ *Lok Shakti Abhiyan et al v ABP/APG*, NCP the Netherlands (Final Statement, September 2013) 6.

¹⁵³⁸ *ibid* 6, 8.

¹⁵³⁹ *ibid* 6.

indigenous people of Irula ethnicity. The complaint *inter alia* asserted that Michelin had acted in violation of the 2000 and 2011 OECD Guidelines by acquiring land for the construction of the plant without prior consultation of the local population and indigenous group and without respecting the latter's FPIC, calling for the suspension of construction.¹⁵⁴⁰ The French NCP concluded in 2013 that Michelin had not acted in violation of the OECD Guidelines and had respected the rights of indigenous peoples, arguing that the adverse impacts caused by a political decision were not attributable to the corporation.¹⁵⁴¹ Nevertheless, the NCP noted some inadequacies in terms of consultation and information processes with the affected communities. It noted that the 'excessively informal nature of the contacts' held by Michelin with the communities 'do not entirely fulfil OECD recommendations to "provide stakeholders with meaningful opportunities for their views to be taken into account (...) [referring to] a lack of opportunities for local communities to express their views'.'¹⁵⁴² It recommended that Michelin create a formal stakeholder mechanism.¹⁵⁴³

In its second follow-up statement published in 2016, the French NCP *inter alia* welcomed Michelin's approach, innovative in the rubber sector, of integrating the principle of FPIC, pointing to Michelin's adapted due diligence system.¹⁵⁴⁴ Furthermore, the NCP generally highlighted the importance that corporations 'pay particular attention to the consent of local communities and to issues related to land or financial compensation following loss of use of a rural area'. It also noted that corporations 'need to obtain all the information concerning the communities' consent so as to avoid problems created by other entities'.¹⁵⁴⁵ As guidance in this respect, it suggested the OECD-FAO Guidance and the OECD Extractive Guidance.¹⁵⁴⁶ Last, regarding Michelin's steering system for its adapted CSR policy, the NCP recommended that the corporation consider offering representatives of the eight villages most affected by the plant seats on its CSR Board.¹⁵⁴⁷

¹⁵⁴⁰ <<https://www.oecdwatch.org/complaint/ccfd-et-al-vs-michelin/>> accessed 24 April 2022; *CCFD et al v Michelin*, NCP France (Final Statement, 27 September 2013) 1-2, 10.

¹⁵⁴¹ *CCFD et al v Michelin*, NCP France (Final Statement, 27 September 2013) 4, 6-7.

¹⁵⁴² *ibid* 9; OECD, '2011 Guidelines' 20, para 14.

¹⁵⁴³ *CCFD et al v Michelin*, NCP France (Final Statement, 27 September 2013) 9, 12.

¹⁵⁴⁴ *CCFD et al v Michelin*, NCP France (Follow-Up Statement II, 29 February 2016) 5. See also *Society for Threatened Peoples v Credit Suisse*, NCP Switzerland (Final Statement, 16 October 2019) 2; *Friends of the Earth et al v Rabobank*, NCP the Netherlands (Final Statement, 15 January 2016) 4. For more details on these two cases, see below text to [Fn 1661](#)-1670.

¹⁵⁴⁵ *CCFD et al v Michelin*, NCP France (Follow-Up Statement II, 29 February 2016) 4.

¹⁵⁴⁶ *ibid*.

¹⁵⁴⁷ Whether these would include indigenous peoples is not specified further by the NCP, see *ibid*.

In the case of ***IAP and WDM v GCM Resources Plc.***, the activities of a UK registered corporation in relation to a coal mine project were scrutinized by the UK NCP. The complaint asserted that GCM Resources Plc's (henceforth: GCM) projected mine in Phulbari in Bangladesh would violate the rights of communities living in this area (including indigenous groups) by displacing them and destroying their basis of subsistence and livelihoods. Additionally, irregularities in relation to stakeholder engagement and consultation were raised, ie, lack of consultation by or undue influence on the part of the corporation.¹⁵⁴⁸ In its examination, the UK NCP focused on whether GCM's actions in preparing and communicating the mine development plans were in line with the OECD Guidelines' provision to '[d]evelop self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate' as well as with the human rights provisions (2000: Chapter II, paras 2, 7; 2011: Chapter II, paras 2, 7, Chapter IV, paras 1, 5).¹⁵⁴⁹

In its final statement published in 2014, the UK NCP concluded that GCM was in partial breach of its responsibility to develop trusted self-regulatory practices and management systems but in compliance with the OECD Guidelines' human rights provisions.¹⁵⁵⁰ In relation to the former, the NCP acknowledged that GCM had committed to applying self-regulatory practices in line with pertinent international standards such as the IFC Performance Standards. It noted that the work on the environmental and social impact assessment (ESIA) was undertaken by renowned specialist consultants and that the planning documents concerning the ESIA were extensive and detailed, inter alia including a Public Consultation and Disclosure Plan, Resettlement Plan, and Indigenous Peoples' Development Plan. The documents provided further information on planned or already undertaken consultation activities.¹⁵⁵¹ However, the NCP explained that GCM had not adequately communicated its development plans since key documents were not accessible in local languages, its communication and activities were misinterpreted, and it had limited direct engagement with the communities. Moreover, in the NCP's view, GCM relied too heavily on the Bangladeshi government to foster trust with the affected

¹⁵⁴⁸ *IAP and WDM v GCM Resources Plc.*, NCP UK (Initial Assessment, 14 June 2013) 3; *IAP and WDM v GCM Resources Plc.*, NCP UK (Final Statement, 20 November 2014) 5, 11-13; For more background information on the case, including on the criticism relating to the final statement, see <<https://www.oecdwatch.org/complaint/iac-wdm-vs-gcm-resources-plc/>> accessed 24 April 2022.

¹⁵⁴⁹ *IAP and WDM v GCM Resources Plc.*, NCP UK (Final Statement, 20 November 2014) 9.

¹⁵⁵⁰ *ibid* 3, 19.

¹⁵⁵¹ *ibid* 10-11.

communities. Hence, 'GCM's communications did not apply practices or systems that foster confidence and mutual trust'.¹⁵⁵² GCM inter alia should have ensured that its communication channels were open for communities to receive up-to-date information on the status of the project and the corporation's intentions and activities. It recommended that GCM base its communication plan on a full assessment of risk to increase information and consider communities' views.¹⁵⁵³

In terms of whether GCM's preparation and communication of its development plans were in line with its responsibility to respect human rights, the NCP inter alia noted that there was no 'evidence of a failure to engage with affected communities that indicates a failure to respect the rights of people affected by the company's activities nor has it identified adverse human rights impacts arising from inadequacies in the company's communication activities'.¹⁵⁵⁴ Exercising undue influence or intimidation would constitute a failure to respect human rights, however. Regarding similar allegations in the present case, the UK NCP did not find evidence substantiating them.¹⁵⁵⁵

In the case of *Jijnjevaerie Saami Village v Statkraft*, the Norwegian and Swedish NCPs jointly addressed a wind park project in northern Sweden planned by Statkraft SCA Vind AB and Norwegian state-owned corporation Statkraft AS (henceforth collectively referred to as Statkraft). Located in the area of the indigenous reindeer-herding collective of Jijnjevaerie Saami Village, the project allegedly impacted their ability to pursue reindeer husbandry – which constitutes the basis of their economic and cultural survival – and could potentially lead to their dislocation. Furthermore, the complaint asserted that the consultations conducted by Statkraft with the community had been flawed by not taking into account their views and failing to obtain their FPIC. The complainants considered Statkraft to be in breach of the OECD Guidelines (2000: Chapter II, paras 1-2 and 2011: Chapter II, paras 1-2, 14, Chapter IV, paras 1-2, 5 and Chapter VI, paras 2a-b).¹⁵⁵⁶

In their final statement published in 2016, the NCPs limited their examination to issues that had not already been considered by the Swedish court system.¹⁵⁵⁷ They focused on the question of whether Statkraft had taken into account the

¹⁵⁵² *ibid* 13-14.

¹⁵⁵³ *ibid* 20.

¹⁵⁵⁴ *ibid* 15.

¹⁵⁵⁵ *ibid* 15-16.

¹⁵⁵⁶ *Jijnjevaerie Saami Village v Statkraft*, NCPs Norway/Sweden (Final Statement, 9 February 2016) 3-6, 11.

¹⁵⁵⁷ *ibid* 8-10.

Saami village's interests and respected their human rights.¹⁵⁵⁸ This included a more detailed examination of whether and how the corporation had consulted the Saami community to obtain their FPIC.¹⁵⁵⁹ According to the NCPs, the 2011 OECD Guidelines 'entail a greater responsibility on the part of enterprises for respecting fundamental human rights, including the right of indigenous peoples to be consulted in connection with measures that affect their traditional livelihood and way of life'.¹⁵⁶⁰ Referencing Art. 10 of the UNDRIP, they further noted that despite the lack of an international consensus on all aspects of the FPIC requirement, it is undisputed that corporations engaged in a project affecting indigenous peoples' rights are expected to carry out consultation by entering into fair and proper negotiations with a view to obtaining the affected parties' FPIC. In turn, communities are expected to participate properly in the consultation process.¹⁵⁶¹ In terms of the nature of consultation processes, the NCPs explained that consultations are meant to be a continuing process that must be maintained and adapted to address new circumstances such as changes in the severity of impacts.¹⁵⁶² Furthermore, the NCPs considered it international practice that corporations 'help to ensure that indigenous groups can participate in the negotiations and be provided with necessary information' – for instance, that set out in the ICMM principles.¹⁵⁶³ Genuine consultation may require compensation measures for indigenous groups and awareness on the part of corporations that indigenous groups may have limited administrative resources.¹⁵⁶⁴ In this regard, the NCPs commended Statkraft for covering some expenses of the indigenous communities in relation to the consultation processes and impact assessments.¹⁵⁶⁵

The NCPs concluded that Statkraft had conducted consultations and acted in compliance with pertinent provisions of the 2000 and 2011 OECD Guidelines but noted that Statkraft 'could work in a manner that even more clearly promotes indigenous peoples' rights and the implementation of the Guidelines' such as by fostering mutual trust and giving greater consideration to the vulnerability of indigenous communities in planning the project.¹⁵⁶⁶ The NCPs *inter alia* recommended joint measures by the parties involved, such as joint

¹⁵⁵⁸ *ibid* 3.

¹⁵⁵⁹ *ibid* 11-15.

¹⁵⁶⁰ *ibid* 15.

¹⁵⁶¹ *ibid*.

¹⁵⁶² *ibid*.

¹⁵⁶³ *ibid*.

¹⁵⁶⁴ *ibid* 12, 15.

¹⁵⁶⁵ *ibid* 15.

¹⁵⁶⁶ *ibid* 11-16.

mapping of the impact of the project and joint monitoring of existing agreements; prior consultation before creating business plans with a view to obtaining FPIC; continuous attendance of the corporation at all consultation meetings by individuals having sufficient authority; and considering the assistance and attendance of an independent third party within the framework of a consultation process. Regarding consultation with indigenous peoples, the NCPs also referred to the OECD Stakeholder Guidance.¹⁵⁶⁷ Notably, the NCPs directly addressed the Saami Community, observing that it would have been beneficial if there were a coordinated process between the indigenous groups in the regions for how to deal with development projects, including ‘a well thought-through plan for [the Saami Village’s] use of the area.’¹⁵⁶⁸

In the case of ***Southeast Alaska Conservation Council v Imperial Metals***, submitted to the Canadian NCP, stakeholder engagement and representation were the central focus. The complaint inter alia alleged that Imperial Metals was in breach of several provisions of the 2011 OECD Guidelines by having failed to carry out due diligence concerning the potential environmental and human rights impacts, particularly concerning the Alaskan ecosystem and fisheries, of Red Chris Mine in British Columbia, Canada – an open pit gold and copper mine. Also alleged was a failure to engage and disclose information to Alaskan stakeholders, such as Southeast Alaska tribal representatives.

In terms of the latter allegation, the NCP noted in its final statement of 2020 that based on the 2011 OECD Guidelines and OECD Stakeholder Guidance, stakeholder engagement was to be understood as a continuous undertaking throughout the life of a project, advocating for the establishment of a dialogue between the parties concerning the issues raised in the complaint. It recommended that Imperial Metals (and Newcrest Mining Limited)¹⁵⁶⁹ draw on the OECD Stakeholder Guidance for ‘[putting] in place a comprehensive stakeholder consultation strategy that includes a process to identify communities that could potentially be affected by [their] activities’ and ensure that identified communities were adequately consulted and informed throughout the life of the project. In line with the OECD Stakeholder Guidance and OECD Guidelines, the NCP further recommended that corporations ‘not (...) limit the identification of affected stakeholders to what is required legislatively [but] to an-

¹⁵⁶⁷ ibid 16. For further detailed information on the case, see Norwegian National Human Rights Institution and NCP Norway.

¹⁵⁶⁸ *Jijnjevaerie Saami Village v Statkraft*, NCPs Norway/Sweden (Final Statement, 9 February 2016) 16.

¹⁵⁶⁹ The NCP extended its final statement to Newcrest Mining Limited, which had acquired 70% of and was involved in the operation of the Red Chris Mine, see *Southeast Alaska Conservation Council v Imperial Metals*, NCP Canada (Final Statement, 8 May 2020).

ticipate and include stakeholders that stand to be directly and/or indirectly affected by the mine's activities over the life of the mine'. Last, corporations should make their efforts on the above recommendations public.¹⁵⁷⁰

The case of ***Unión Hidalgo v EDF Group***, submitted to the French NCP, provides insight into the different actors and their responsibilities in consultation processes with indigenous peoples. The complaint concerned a windfarm project planned for Mexico's Oaxaca State by a subsidiary of EDF Renewables Mexico (henceforth: EDF Renewables) from EDF Group. The windfarm was planned for an area where the indigenous Zapotec community lived. The complainants contended that the Zapotec had not been informed and consulted by the corporations nor given their consent to the project. In the complainants' view, EDF Group and EDF Renewables had thus failed to conduct adequate human rights due diligence.¹⁵⁷¹ EDF Group and EDF Renewables in turn contended that consultation with indigenous peoples was the responsibility of Mexican authorities, as stipulated in domestic law.¹⁵⁷² The involvement of corporations (in casu EDF Renewables) was foreseen only in two phases of the government's consultation process, namely, the phases of provision of 'information on the project' to affected communities and the 'negotiation of agreements'.¹⁵⁷³ Against this background, the respondent corporations took the stance that EDF Renewables was not able to engage with the indigenous group outside of the official government-led indigenous consultation process.¹⁵⁷⁴

The NCP noted that the consultation process conducted by Mexican authorities was ongoing during the NCP's procedures but was experiencing delays.¹⁵⁷⁵ In reference to Mexican regulations on consultation it acknowledged that – in line with international standards (ie, Art. 6 of ILO C 169) – consultation is not the responsibility of corporations to carry out.¹⁵⁷⁶ Nevertheless, referring to the stakeholder engagement provision of the 2011 OECD Guidelines,¹⁵⁷⁷ the NCP concluded that the EDF Group could have ensured that its subsidiaries informed and engaged with identified stakeholders prior to the official commencement of the indigenous consultation by Mexican authorities. It referred to stakeholder engagement as a key element of the due diligence process and

¹⁵⁷⁰ *ibid.*

¹⁵⁷¹ *Unión Hidalgo v EDF Group*, NCP France (Final Statement, 10 March 2020) 1, 3.

¹⁵⁷² *ibid* 11, 13.

¹⁵⁷³ *ibid* 7, 10–11.

¹⁵⁷⁴ *ibid* 13.

¹⁵⁷⁵ *ibid* 11.

¹⁵⁷⁶ *ibid* 10, 13.

¹⁵⁷⁷ OECD, '2011 Guidelines' 20, para 14.

as particularly relevant where vulnerable groups or communities or indigenous peoples are present. Moreover, the NCP was of the view that by accepting the NCP's good offices, the corporations were enabled to inform and engage with the community in parallel to the consultation process.¹⁵⁷⁸ Last, the NCP concluded that EDF Group could have extended its consultation and due diligence measures beyond the legal and administrative sphere to the social, cultural, and customary spheres by engaging with institutions specializing in the latter areas and land tenure issues to better identify and prevent social risks to indigenous peoples.¹⁵⁷⁹

Against this background, the NCP recommended that EDF Group and EDF Renewables adjust their stakeholder engagement policy, particularly in relation to indigenous peoples, to ensure that all stakeholders potentially affected – particularly those bearing social and cultural interests – would be included and engaged with and to ensure that land tenure issues would be addressed. It also recommended the development of a CSR committee, composed of different stakeholders to enable a permanent and transparent system of dialogue for other wind farm projects.¹⁵⁸⁰

2. Summery and Reflections

A common denominator in the cases referenced above is the linkage between the alleged violations of indigenous peoples' rights and the lack of adequate consultation and engagement with the affected communities. This is not surprising given the safeguard function of consultation processes and the FPIC principle for the realization of indigenous peoples' rights – in the above cases predominantly the rights to lands, natural resources, and culture.¹⁵⁸¹

The above NCP reasoning can be divided into three categories: The first gives insight into the scope, form, and nature of stakeholder engagement, consultation and FPIC processes, the second into the relationship between states' duty and corporations' responsibility to engage and consult; and the third sheds light on how NCPs embed stakeholder engagement, consultation processes, and the FPIC principle in the corporate responsibility framework.

Scope, Form and Nature of Stakeholder Engagement, Consultation, and FPIC Processes In terms of the scope of consultation processes, NCPs emphasize the importance of an all-inclusive approach that identifies *all* indigenous com-

¹⁵⁷⁸ *Unión Hidalgo v EDF Group*, NCP France (Final Statement, 10 March 2020) 13.

¹⁵⁷⁹ *ibid* 14.

¹⁵⁸⁰ *ibid* 2.

¹⁵⁸¹ See above text to [Fn 14, 480–483](#).

munities directly and indirectly affected and potentially affected by project operations. This requires a broad understanding of the impact area, including not only the project site but also the associated infrastructure, and may require consultation beyond what is legally required.¹⁵⁸² Not only those indigenous communities inhabiting lands or those owning officially recognized land titles but also those using the land and the resources need to be included. Such a reference to indigenous peoples' customary land tenure rights is most clearly visible in the reasoning of the Norwegian NCP in the case concerning Intex.¹⁵⁸³

Regarding the nature of consultation and FPIC processes, NCPs highlight the importance of processes that are free, prior, and informed in nature and adapted to the needs and circumstances of indigenous peoples and that take their vulnerability into account. A successful dialogue necessitates access to up-to-date information on project plans and key elements – generated via impact assessment studies – by those affected to enable their decisions-making.¹⁵⁸⁴ The Norwegian NCP determined that this requirement had not been fulfilled by Intex since the corporation did not provide information on the impact assessment in the dialect of the indigenous groups affected and obtained consent prior to finalizing the project design and the environmental impact assessment containing essential information.¹⁵⁸⁵ The importance of good faith engagement from both the corporation and the indigenous community was raised by the NCPs in the cases concerning Statkraft and Goldcorp.¹⁵⁸⁶ Furthermore, consultation processes are to be understood as continuous throughout a project's lifecycle, beginning before it starts and continuing through to its execution and finalization.

The 'consent' element is touched upon as well. The French NCP highlighted the importance of acquiring information on the consent of indigenous peoples to avoid risks, and the UK and Norwegian NCPs recommended that corporations respect the outcome of the consultation process. From a corporate perspective, the latter statement implies that a corporation must consider alternatives if FPIC is not granted for business operations.

The form and means of consultation as such should be accessible and understandable, ie, in the language of indigenous communities and considering bar-

¹⁵⁸² See above text to [Fn 31](#)-32, [273](#)-281, [1063](#)-1071, [1087](#).

¹⁵⁸³ See above text to [Fn 273](#)-281, [408](#)-418, [771](#), [1057](#)-1071.

¹⁵⁸⁴ See below text to [Fn 1623](#)-1636.

¹⁵⁸⁵ See above text to [Fn 648](#)-651, [1088](#)-1089, [1250](#)-1254.

¹⁵⁸⁶ OECD, '2011 Guidelines' 25, para 25. See also above text to [Fn 642](#).

riers such as illiteracy.¹⁵⁸⁷ Due regard must be paid to indigenous communities' own decision-making structures by basing engagement strategies on these structures and to the representativity of selected representatives.¹⁵⁸⁸ Moreover, due care should be paid to a transparent system of community support to avoid conflict with the constituent element of a 'free' process. In the case concerning GCM, the UK NCP considered the exertion of undue influence during consultation a failure to respect human rights. Last, NCPs note that successful dialogue requires a sound understanding of the local situation and context and, if indicated, may require joint measures by the parties as well as compensation measures and financial support. In referring to financial support and compensation measures, the NCPs of Sweden and Norway thus addressed potential barriers to engagement activities and how to alleviate them. While the OECD Guidelines do not provide for such measures, the latter may be read into the UNGPs and are explicitly mentioned in the OECD Stakeholder Guidance.¹⁵⁸⁹

To comply with these modalities of consultation and FPIC processes, corporations are advised by NCPs to develop a formal and proactive stakeholder engagement and communication strategy that is not pro forma and simply providing information but rather translates into concrete procedures and actions on the ground. In the case concerning Michelin, the French NCP deemed the corporation's informal engagement activities with communities not to be fully in line with the 2011 OECD Guidelines' recommendation to 'provide stakeholders with meaningful opportunities for their views to be taken into account' (Chapter II, para 14). Similarly, Intex's lack of such a stakeholder engagement strategy led to a determination of non-compliance with the 2000 OECD Guidelines by the Norwegian NCP. A similar consideration was made by the UK NCP in the case concerning Vedanta. However, NCPs have also made determinations of compliance with the OECD Guidelines in terms of stakeholder engagement, such as the Norwegian and Swedish NCPs in the case concerning Statkraft.¹⁵⁹⁰ The understanding that stakeholder engagement and consultation activities should be supported by a strategy is currently most clearly re-

¹⁵⁸⁷ See also *Survival International v WWF*, NCP Switzerland (Final Statement, 21 November 2017) 6.

¹⁵⁸⁸ See above text to [Fn 219](#)-222, [642](#), [1212](#)-1215.

¹⁵⁸⁹ HRC, 'UNGPs' Commentary Principle 18; OECD, 'Stakeholder Guidance' 55-56, 95. See also above text to [Fn 639](#), [994](#), [1137](#).

¹⁵⁹⁰ See below text to [Fn 1703](#)-1704.

flected in the IFC Performance Standards, the OECD-FAO Guidance and the due diligence framework proposed by the OECD Stakeholder Guidance to ensure that stakeholder engagement effectively serves its function.¹⁵⁹¹

Stakeholder Engagement and the Relationship of States' Duties and Corporations' Responsibilities The NCPs have shed further light on the relationship between states' human rights duties and corporations' human rights responsibilities, affirming that the latter exist independently 'of States' abilities and/or willingness to fulfil their human rights obligations'.¹⁵⁹² Regarding weak national legislation, gaps in states' implementation of the indigenous peoples' rights framework or discrepancies between international and national standards, the Norwegian NCP more generally encouraged corporations to align their business with the more stringent standards. In terms of the corporate responsibility to engage stakeholders and the state duty to consult with indigenous peoples, the French NCP referred to corporations' independent responsibility to engage and inform stakeholders despite the primary duty of the state to conduct consultations as stipulated in Mexican domestic law and ILO C 169.¹⁵⁹³ It concluded that EDF Group could have ensured stakeholder engagement prior to the official commencement of the government-led consultation process. The latter recommendation points to how corporations may seek ways to fully honour the OECD Guidelines' standards – in casu the provision on stakeholder engagement (Chapter II, para 14) – without placing themselves in breach of domestic law.¹⁵⁹⁴ Similarly, in the case concerning GCM, the UK NCP highlighted corporations' own responsibility to foster trust within the societies where they operate, noting that GCM has relied too heavily on the Bangladeshi government in this regard. The reasoning adopted by the Italian NCP in the case of *Survival International v Salini Impregilo S.p.A.* seems to deviate from the above understanding of corporations' independent responsibility. In this case, the NCP appeared to hinge consultation processes conducted

¹⁵⁹¹ See above text to [Fn 1085-1090](#), [1114-1164](#), [1206-1221](#).

¹⁵⁹² OECD, '2011 Guidelines' 31-32, para 37.

¹⁵⁹³ See above text to [Fn 31](#), [540](#).

¹⁵⁹⁴ OECD, '2011 Guidelines' 17, para 2. Regarding direct engagement, the SRRIP has noted: 'By virtue of their right to self-determination, indigenous peoples are free to enter into negotiations directly with companies if they so wish'. See HRC, '2013 Report SRRIP' para 61. Obviously, for this approach to be feasible, domestic law must not prohibit stakeholder engagement activities carried out by third actors such as corporations, even informally. The French NCP does not provide further information in this regard, however.

by corporations on a partial or total lack of a state's consultation process – hence making the corporate responsibility to consult dependent on a state's consultation duty.¹⁵⁹⁵

Appearing instructive regarding corporations' responsibility is the approach taken in the OECD RBC Guidance Documents, which observe that '[i]rrespective of regulatory or operational requirements and throughout their project planning, corporations should anticipate that indigenous peoples may expect consultation seeking FPIC and that risk may be generated if such expectations are not met'.¹⁵⁹⁶

Embedding Stakeholder Engagement, Consultation, and FPIC Processes in the RBC Framework In terms of placing stakeholder engagement, consultation and FPIC processes in the corporate responsibility framework, a clear common denominator throughout NCPs' reasoning is the acknowledgement that these processes and activities are an essential component of the process of human rights due diligence and thus key to corporations' compliance with their responsibility to respect indigenous peoples' rights.¹⁵⁹⁷ In addition to the due diligence dimension of consultation, the NCPs have acknowledged that stakeholder engagement and consultation is a right in and of itself. Both the due diligence and the right dimension of consultation can most clearly be distilled from the case concerning Statkraft. In this case, the Swedish and Norwegian NCPs noted that the OECD Guidelines include the responsibility to respect indigenous peoples' right to be consulted, which – undisputedly – entails the responsibility to consult with indigenous peoples with a view to obtaining their FPIC. In assessing whether Statkraft had respected the rights of the indigenous community affected by its operations, the NCPs examined whether Statkraft has conducted human rights due diligence.¹⁵⁹⁸ On other occasions, NCPs have welcomed the explicit inclusion of the FPIC principle into corporations' due diligence systems.

In the case concerning EDF Group, the French NCP highlighted the importance of considering not only administrative and legal measures throughout due diligence and consultation but also extending them to cultural, social, and customary spheres. Such interpretation is reminiscent of the approach taken in the OECD-FAO Guidance and the OECD Stakeholder Guidance, which stipulate that indigenous peoples' characteristics in terms of lands and re-

¹⁵⁹⁵ See above text to [Fn 1086](#)-1087, [1100](#), [1148](#)-1151. For further details on the complaint and case, see below text to [Fn 1753](#)-1764.

¹⁵⁹⁶ OECD, 'OECD-FAO Guidance' 80; OECD, 'Stakeholder Guidance' 96.

¹⁵⁹⁷ For further elaborations on human rights due diligence, see below text to [Fn 1678](#)-1717.

¹⁵⁹⁸ See below text to [Fn 1703](#)-1704.

sources, cultural values, and socio-economic status should be considered and respected when engaging with them.¹⁵⁹⁹ Furthermore, in the latter case, the French NCP also emphasized the issue of prioritization of stakeholders in consultation and engagement activities. As indicated above, it recommended that the corporation adapt its stakeholder strategy, particularly with view to indigenous peoples. Both the OECD DD Guidance and the OECD Stakeholder Guidance refer to the prioritization of stakeholders and rights holders as a key step in the process of due diligence. It reflects the risk-based approach to due diligence and stakeholder engagement.¹⁶⁰⁰

To inform their assessment of the issues at stake, NCPs have referred to a variety of standards and mechanisms addressing indigenous peoples' rights. The IFC Performance Standards and the Akwé: Kon Voluntary Guidelines were used and recommended by NCPs as a standard of guidance concerning the form and nature of consultation processes and the identification of indigenous peoples. When looking at the earlier decisions made by NCPs, it appears that compliance with latter standards would mean compliance with the recommendations of the OECD Guidelines. From 2016 onwards, the OECD RBC Guidance Documents were added as standards of guidance NCPs recommended corporations to follow next to the IFC Performance Standards. The Protect, Respect and Remedy Framework of SRSR Ruggie was recommended for the implementation of human rights due diligence in the Vedanta case of 2009. Furthermore, in the latter case, the UK NCP further referred to the ICMM Position Paper as a benchmark for extractive industries.

The ILO C 169 and the UNDRIP, as well as the work of the SRRIP, were used by the NCPs as standards and sources of reference demarcating corporations' responsibilities with view to indigenous peoples' rights. For instance, in highlighting the need to consider indigenous peoples' customary land tenure rights and the project area, including its associated infrastructure, and to carry out comprehensive consultation with affected indigenous peoples, the Norwegian NCP's reasoning shows parallels to the interpretations taken by the ILO supervisory bodies interpreting ILO C 169 as well as the SRRIP interpreting the UNDRIP.¹⁶⁰¹ Similarly, the interpretation of the form and nature of consultation and FPIC processes largely is in tune with the one taken in the UN and ILO frameworks, the OECD RBC Guidance Documents and the IFC Performance Standard.¹⁶⁰²

¹⁵⁹⁹ OECD, 'OECD-FAO Guidance' 79; OECD, 'Stakeholder Guidance' 93-95.

¹⁶⁰⁰ See above text to [Fn 1045](#), [1109](#)-1113, [1131](#)-1133.

¹⁶⁰¹ See above text to [Fn 273](#)-281, [618](#), [771](#), [1057](#)-1071.

¹⁶⁰² For a summary, see above [Chapter 2, Section IV](#).

Strikingly, however, the central element of conducting consultation procedures in two-way communication, as stipulated in the OECD Guidelines,¹⁶⁰³ has received only marginal attention from NCPs. In clarifying this abstract notion, the OECD DD Guidance and OECD Stakeholder Guidance equal two-way communication with stakeholders' involvement in the design and implementation of engagement activities. The OECD Stakeholder Guidance refers 'to the sharing of decision-making power through moving away from the enterprise as a primary decision-maker'.¹⁶⁰⁴ Hence, understood in this sense, two-way communication can help with the transition from the currently prevalent business-led top-down approach to stakeholder engagement to a more bottom-up approach.¹⁶⁰⁵ Traces of two-way communication can merely be found in two cases submitted to the Norwegian NCP concluded in 2011 and 2016 and thus prior to the adoption of the OECD RBC Guidance Documents in 2017 and 2018. In the case concerning Intex, the NCP recommended the corporation to assess indigenous peoples' consultation requirements and to build engagement activities upon existing indigenous structures. Less explicit, in the case concerning Statkraft, both the Swedish and Norwegian NCPs recommended that the corporation consider joint measures with the respondent indigenous community in terms of existing agreements.¹⁶⁰⁶ Notably, the involvement of indigenous peoples in the development of impact assessment studies has received more attention from NCPs.¹⁶⁰⁷

In light of this and considering the progressive interpretation of two-way communication by the OECD RBC Guidance Documents, the NCPs would need to catch up and focus on indigenous peoples' involvement in the design and the requirements of consultation processes. Currently, their 'jurisprudence' supports a business-led top-down rather than a bottom approach to stakeholder engagement.¹⁶⁰⁸ A more progressive approach by NCPs in this regard would also be timely and in tune with the emerging trend of indigenous peoples' consultation and FPIC protocols.¹⁶⁰⁹ A step in the right direction represents a case submitted to the Canadian NCP. Albeit rejected by the NCP, it recommended the respondent corporation explicitly to endorse and implement

¹⁶⁰³ OECD, '2011 Guidelines' 25, para 25.

¹⁶⁰⁴ OECD, 'Stakeholder Guidance' 18.

¹⁶⁰⁵ See above text to [Fn 639](#), [655](#)–[657](#), [1010](#).

¹⁶⁰⁶ See above text to [Fn 1556](#)–[1568](#).

¹⁶⁰⁷ See below text to [Fn 1619](#), [1634](#), [1642](#).

¹⁶⁰⁸ Similar critic is raised regarding IFC Performance Standard 7, see above text to [Fn 1256](#)–[1257](#).

¹⁶⁰⁹ Doyle and others, 'FPIC Protocols'. See also above text to [Fn 656](#)–[657](#).

the OECD Stakeholder Guidance in which it finds useful and targeted guidance for 'two-way, responsive and participatory stakeholder and community participation'.¹⁶¹⁰

A further shortcoming of NCPs' adopted reasoning relates to the FPIC principle. The few NCPs that have addressed the FPIC principle, more precisely the 'consent' element, have done so in a rather vague manner. The NCPs of Sweden and Norway, for instance, acknowledged the lack of consensus on all aspects of the FPIC principle and referred to corporations' responsibility to carry out consultation *with a view to obtaining FPIC*. In the two early cases of Vedanta (2009) and Intex (2011), the NCPs of the UK and Norway recommended corporations to respect the outcome of consultations. Furthermore, NCPs commended the inclusion of the FPIC principle in the process of due diligence or advised corporations to gain information on indigenous communities' consent.

While the understanding to carry out consultation 'with a view to obtaining FPIC' appears to be in tune with the generally accepted understanding that achieving indigenous peoples' consent is the objective of a consultation process, the latter understanding to respect the outcome of a consultation process points more to FPIC as a required outcome rather than an objective.¹⁶¹¹ Without further specification by the NCPs, what is meant by respecting the outcome, it is difficult to decipher a clear meaning and practical consequences for corporations, however. Even though relocation and resettlement are issues in both early cases, neither of them includes language that would point to the significance and degree of impacts on indigenous peoples and thus to the sliding scale approach to FPIC.¹⁶¹² Furthermore, after these cases concluded in 2009 and 2011, no other NCP has issued a similar recommendation thus far, and the UK and Norwegian NCPs did not restate their earlier recommendation to respect the outcome.¹⁶¹³ Hence, the current jurisprudence of NCPs with view to FPIC is rather tentative, and thus far, little can be said as to when FPIC is not merely an objective but a requirement to proceed with business operations. Nevertheless, the recommendation by the UK and Norwegian NCPs to respect the outcome shows somewhat parallels to the approach taken by the OECD RBC Guidance Documents towards FPIC.¹⁶¹⁴

¹⁶¹⁰ *Southeast Alaska Conservation Council v Seabridge Gold*, NCP Canada (Final Statement, 13 November 2017).

¹⁶¹¹ See above text to [Fn 234-243](#), [614-631](#).

¹⁶¹² On the sliding scale approach, see above text to [Fn 614-631](#), [722](#).

¹⁶¹³ Searching through the twenty-two NCP cases analysed in this thesis, to the author's knowledge no similar recommendations were issued.

¹⁶¹⁴ See above text to [Fn 1090-1093](#) and [Chapter 3, Section II, B. 2\(d\), 3\(b\)](#).

An explanation for this tentative approach may lie in the controversy surrounding indigenous peoples' participatory rights and the limited guidance provided by the key RBC instruments, particularly the OECD Guidelines.

B. Environmental, Social, and Human Rights Impact Assessments

1. Adopted Reasoning

Impact assessment studies are a recurring theme in several NCP cases. In addition to examining adequate and timely consultation processes, the UK NCP also addressed the issue of a human rights impact assessment in the case of ***Survival International v Vedanta Resources Plc.*** concluded in 2009. By failing to assess the bauxite mine's impacts on the indigenous community via an indigenous or human rights impact assessment or other means, the complaint asserted that Vedanta allegedly had not complied with the 2000 OECD Guidelines (Chapter II, paras 2,7) and not taken adequate steps to respect the rights and freedoms of Dongria Kondh.¹⁶¹⁵

The UK NCP upheld the allegations and concluded that Vedanta was in breach of Chapter II having failed to 'develop and apply effective self-regulatory practices to foster a relationship of confidence and mutual trust'.¹⁶¹⁶ The UK NCP acknowledged that Vedanta had carried out an environmental impact assessment which included an analysis of the socio-economic environment, yet criticized that latter study did not address the impacts of the mine on the Dongria Kondh.¹⁶¹⁷ The UK NCP noted that despite challenges related to keeping track of international human rights obligation in host countries, corporations 'should nonetheless establish a system that helps them assess and keep track of the human rights impact of their economic activities'.¹⁶¹⁸ Accordingly, the NCP recommended Vedanta to include a human and indigenous rights impact assessment in its project management process and to implement it – with the participation of indigenous peoples –¹⁶¹⁹ in order to create 'concrete procedures and actions on the ground'.¹⁶²⁰ The Akwé: Kon Voluntary Guidelines serve as a standard of reference in this regard. Furthermore, Vedanta should

¹⁶¹⁵ *Survival International v Vedanta Resources Plc.*, NCP UK (Final Statement, 25 September 2009) 1.

¹⁶¹⁶ *ibid.*

¹⁶¹⁷ *ibid* 17.

¹⁶¹⁸ *ibid* 18.

¹⁶¹⁹ *ibid* 17.

¹⁶²⁰ *ibid* 21–22.

consider the key steps of human rights due diligence as developed by SRSR Ruggie.¹⁶²¹ Notably, the 2000 edition of the OECD Guidelines did not include any reference to social or human rights impact assessments.¹⁶²²

In the complaint ***Future In Our Hands (FIOH) v Intex Resources ASA***, an environmental and social impact assessment (EIA/ESIA) during a project planning phase was examined.¹⁶²³ The complaint against Intex submitted to the Norwegian NCP asserted that the environmental, health and safety risks of the nickel mine project were not adequately communicated to the indigenous communities affected, allegedly putting Intex in breach of Chapter V, paras 1-2 of the 2000 OECD Guidelines.¹⁶²⁴ The latter chapter requires corporations to collect and evaluate timely and adequate information on the environmental, health and safety impacts of projects.¹⁶²⁵

In 2011, the NCP inter alia commended Intex's EIA for providing information on the design and major elements of the project and on the communities directly or indirectly affected.¹⁶²⁶ However, by mirroring the EIA against the requirements of Chapter V of the OECD Guidelines and IFC Performance Standard 1, the NCP discovered some major deficiencies in terms of the EIA's content and how latter was communicated.¹⁶²⁷ In the NCP's view, no sufficiently detailed and clear information was provided for important aspects of the project, such as where and how waste disposal will be carried out or the location of the processing plant.¹⁶²⁸ Furthermore, the NCP acknowledged that neither the draft nor the completed EIA was made generally available let alone accessible in the languages of the indigenous communities.¹⁶²⁹ In addition, the information provided in terms of resettlements and thereto related land compensation as well as the potential altering in communities cultivation practices was deemed inconsistent by the NCP.¹⁶³⁰ Against this background, the NCP found that 'the lack of available and detailed environmental [and social] information to date is contrary to the OECD and IFC obligations to provide "adequate and timely

¹⁶²¹ ibid 21-23.

¹⁶²² OECD, '2000 Guidelines' 19, para 3.

¹⁶²³ *Future In Our Hands (FIOH) v Intex Resources ASA*, NCP Norway (Final Statement, 30 November 2011) 9.

¹⁶²⁴ ibid 5, 13, 36, 40.

¹⁶²⁵ OECD, '2000 Guidelines' 19, paras 1-2.

¹⁶²⁶ *Future In Our Hands (FIOH) v Intex Resources ASA*, NCP Norway (Final Statement, 30 November 2011) 40-41.

¹⁶²⁷ ibid 9, 42-44.

¹⁶²⁸ ibid 43, 45.

¹⁶²⁹ ibid 44.

¹⁶³⁰ ibid 45.

information” and to begin consultations [early in the assessment process]’.¹⁶³¹ Such lack of information ‘makes it difficult for the affected community to evaluate and determine whether to support the [Mindoro project]’.¹⁶³²

The NCP recommended Intex to revise the EIA by including more complete information on all components and associated infrastructure of the projects in line with IFC Performance Standard 1 and to communicate the results via understandable and illustrated data.¹⁶³³ The EIA should be developed in dialogue with all relevant groups affected by the project – including indigenous peoples – providing feedback and reviewed by an independent third party.¹⁶³⁴ Failing to do so would, according to the NCP, constitute a violation of Chapter V of the OECD Guidelines.¹⁶³⁵ The NCP attached a detailed list of recommendations on what the revised EIA/ESIA should include. For example, the NCP *inter alia* recommended analyses of the social values of the river system in this region.¹⁶³⁶

Similarly, in the case of **CCFD *et al* v Michelin**, the French NCP dealt with inadequacies of an impact assessment study in relation to Michelin’s projected tire plant in Tamil Nadu in India allegedly impacting indigenous people of Irula ethnicity.¹⁶³⁷

The French NCP concluded in 2013 that Michelin had generally respected the 2000 and 2011 OECD Guidelines and the rights of indigenous peoples.¹⁶³⁸ Nevertheless, the NCP regretted the lack of an in-depth environmental, social, and human rights impact assessment prior to the development of the plant, which prevented Michelin from considering ‘all the community’s needs at the start’.¹⁶³⁹ The NCP deemed the conducted environmental study by Michelin insufficient since several potential adverse environmental, health and safety impacts of the plant have not been adequately analysed.¹⁶⁴⁰

Against this background, it commended Michelin for committing to prepare and conduct an environmental, social and human rights impact assessment in the near future – considering it as an element of due diligence – as well as

¹⁶³¹ *ibid* 45–46.

¹⁶³² *ibid* 45.

¹⁶³³ *ibid* 11.

¹⁶³⁴ *ibid* 11, 46, 49–50.

¹⁶³⁵ *ibid* 10, 46.

¹⁶³⁶ *ibid* 51–52.

¹⁶³⁷ <<https://www.oecdwatch.org/complaint/ccfd-et-al-vs-michelin/>> accessed 24 April 2022; CCFD *et al* v Michelin, NCP France (Final Statement, 27 September 2013) 1, 8–10.

¹⁶³⁸ CCFD *et al* v Michelin, NCP France (Final Statement, 27 September 2013) 4–7.

¹⁶³⁹ *ibid* 6–10.

¹⁶⁴⁰ *ibid* 9–10.

for planning to develop an action plan to adapt its CSR policy and its internal due diligence system based on the impact study's results.¹⁶⁴¹ The NCP noted that the latter impact assessment should be in line with the 2011 OECD Guidelines, particularly Chapters IV and V, pay due attention to 'the specificities and needs of [the] communities' and be conducted after discussions with communities and other stakeholders.¹⁶⁴² Furthermore, the impact assessment should also include 'avoidance, reduction and compensation measures in the event of any notable detrimental residual impact'.¹⁶⁴³ Finally, measures proposed based on the impact study should be monitored and tracked for their effectiveness, and local communities should be involved in the follow-up of the study.¹⁶⁴⁴

In the case of *Norwegian Support Committee for Western Sahara v Sjøvik AS*, the Norwegian NCP facilitated an agreement regarding fish processing operations by Sjøvik AS (henceforth: Sjøvik) in Western Sahara allegedly impacting the Saharawi people.¹⁶⁴⁵ Sjøvik inter alia agreed to carry out an environmental and social impact assessment for its activities in line with the 2011 OECD Guidelines, including Chapter II, para 14 on stakeholder engagement and the UNGPs, and to publish the assessment report in line with Chapter III on disclosure.¹⁶⁴⁶ Regarding conducting a human rights impact assessment, the NCP recommended Sjøvik to draw on human rights expertise as recommended in Principle 18 of the UNGPs and highlighted the heightened human rights due diligence requirement when operating in or from conflict areas, such as the one of Non-Self-Governing Territory of Western Sahara.¹⁶⁴⁷

2. Summary and Reflections

The above shows the importance of environmental, social, and human rights impact assessments for the protection of indigenous peoples' rights and liveli-

¹⁶⁴¹ *ibid* 6, 8-9, 11-12. In its second follow-up statement, the French NCP commended Michelin for complying with its commitments, see *CCFD et al v Michelin*, NCP France (Follow-Up Statement II, 29 February 2016) 3-6; *CCFD et al v Michelin*, NCP France (Follow-Up Statement II Appendix, 29 February 2016).

¹⁶⁴² *CCFD et al v Michelin*, NCP France (Final Statement, 27 September 2013) 7, 11-12.

¹⁶⁴³ *CCFD et al v Michelin*, NCP France (Follow-Up Statement I, 14 May 2014) 3.

¹⁶⁴⁴ *CCFD et al v Michelin*, NCP France (Final Statement, 27 September 2013) 12.

¹⁶⁴⁵ See below text to [Fn 1738](#)-1740.

¹⁶⁴⁶ *Norwegian Support Committee for Western Sahara v Sjøvik AS*, NCP Norway (Final Statement, 3 July 2013) 6.

¹⁶⁴⁷ *ibid* 1-2.

hoods and thus the safeguard function of these assessment studies.¹⁶⁴⁸ Based on the results of such studies, indigenous communities can evaluate and determine whether to support a project.¹⁶⁴⁹ This necessitates adequate, timely, coherent, and comprehensive communication and information, both on the impact study itself and on the results it generates. In terms of a comprehensive impact assessment study, the Norwegian NCP stressed the importance of providing information on all components of a project, including associated infrastructure. Furthermore, the adopted reasoning of the NCPs refers to the inclusion of indigenous peoples in the development of such studies as well as in their follow-up. Additionally, the inclusion of independent third parties to conduct such studies or to review them is noted by the NCPs. In the case concerning GCM, the UK NCP acknowledged that the impact assessment study was carried out by renowned special consultants.¹⁶⁵⁰ Hence, the modalities of impact assessments as depicted by the NCPs largely mirror those set out in the RBC instruments, particularly the UNGPs and OECD RBC Guidance Documents.¹⁶⁵¹

From the four cases, it can further be distilled that impact assessment studies should be embedded in corporations' due diligence process as a means to assess and track the impacts of their operations and to identify affected indigenous communities.¹⁶⁵² The UNGPs, IFC Performance Standards, and the Akwé: Kon Voluntary Guidelines are referenced as standards for orientation in addition to the OECD Guidelines. In the case concerning Intex, the Norwegian NCP deemed the failure to provide detailed environmental information contrary to the requirements of the 2000 OECD Guidelines and IFC Performance Standards. Similarly, in the case concerning Vedanta, the UK NCP determined the latter corporation's non-compliance with the 2000 OECD Guidelines by failing to carry out an indigenous or human rights impact assessment to assess its impacts on Dongria Kondh despite the existence of an environmental impact assessment. From a corporate perspective, this points to the need to assess all potential impacts, not merely those on the environment but also so-

¹⁶⁴⁸ On the safeguard function, see above text to [Fn 272](#), [458](#), [480](#)–483. Chapter V on the environment, which incorporates the recommendation to conduct environmental impact assessments, is the third most cited chapter of the OECD Guidelines, see above [Figure 7](#).

¹⁶⁴⁹ See eg above text to [Fn 512](#)–514, [721](#).

¹⁶⁵⁰ See also Norwegian National Human Rights Institution and NCP Norway 4, 24.

¹⁶⁵¹ See above text to [Fn 988](#)–989, [1068](#), [1124](#)–1127, [1139](#)–1142, [1161](#), [1202](#).

¹⁶⁵² See above text to [Fn 914](#)–918, [988](#)–989, [1127](#) and below text to [Fn 1695](#)–1697.

cial and particularly human rights impacts. This also becomes apparent in the other cases referred to above, which refer to more than merely environmental impact assessment studies.¹⁶⁵³

All in all, except for the Norwegian NCP in the case concerning Intex, the NCPs provide more general insight on the content of these studies rather than concrete insight on pertinent aspects of impact assessment studies with view to indigenous peoples, however.

C. Corporate (Human Rights) Policy

1. Adopted Reasoning

In several cases, reference is made to corporations' (human rights) policy statements, which are allegedly either lacking and inadequate or the corporation has not been living up to it.¹⁶⁵⁴ As shown in the cases below, this has resulted in the alteration of (human rights) policy statements according to the conditions adopted in agreement between the respective parties to a case.

An example in this latter regard is the case of **ForUM and Friends of the Earth Norway v Cermaq ASA** before the Norwegian NCP involving allegations of inadequate considerations of indigenous peoples' rights in Canada and Chile. The parties issued a joint agreement annexed to the NCP's final statement of August 2011. A main request of the complainant was the change of the policies of Cermaq ASA's (henceforth: Cermaq) headquarters so that salmon farming operations abroad will be adjusted in a consistent manner.¹⁶⁵⁵ In the joint statement, Cermaq expressed its respect for indigenous peoples' rights in line with ILO C 169 and the UNDRIP noting that 'Cermaq's operations in areas with indigenous peoples in Chile, Canada and Norway will be in accordance with the provisions of these agreements' and that the corporation 'will seek to enter into mutually beneficial agreements with indigenous people in all areas where

¹⁶⁵³ See also below text to [Fn 1695](#)–1697. For more information on human rights impact assessments and how they relate to environmental and social impact assessments, see OECD, '2011 Guidelines' 34, para 45; HRC, 'UNGPs' Commentary Principle 18; Götzmann 88–91.

¹⁶⁵⁴ See eg *Survival International v Vedanta Resources Plc.*, NCP UK (Final Statement, 25 September 2009) 19, 22–23; *Society for Threatened Peoples v Credit Suisse*, NCP Switzerland (Initial Assessment, 19 October 2017) 2.

¹⁶⁵⁵ *ForUM and Friends of the Earth Norway v Cermaq ASA*, NCP Norway (Final Statement, 10 August 2011) 7, 10.

their rights are affected by Cermaq's operations, including in Chile'.¹⁶⁵⁶ Since there was an agreement between the parties involved, the Norwegian NCP decided to forego an examination of the allegations raised.¹⁶⁵⁷

A similar scenario can be observed in the case of **Fivas v Norconsult AS** successfully mediated by the Norwegian NCP in June 2015. The complainants and Norconsult AS (henceforth: Norconsult) agreed on a joint statement concerning Norconsult's involvement (through its subsidiary NorPower Sdn Bhd) in a major hydropower project in Malaysia adversely impacting indigenous groups.¹⁶⁵⁸ Norconsult agreed to ensure that its Group Code of Ethics and governing documents are in line with the 2011 OECD Guidelines and to conduct human rights due diligence reviews.¹⁶⁵⁹ In the statement, Norconsult maintained that they 'respect indigenous peoples' rights in accordance with [ILO C 169] and the [UNDRIP]' and that its operations worldwide shall be in accordance with the provisions enshrined in these instruments.¹⁶⁶⁰

In the case of **Friends of the Earth et al v Rabobank**, the Dutch NCP delved into Rabobank's business relationships by virtue of its lending services to Bumitama Agri Group, an agri-business group active in the palm oil industry in Indonesia.¹⁶⁶¹ The complaint asserted that Rabobank was non-compliant with the due diligence provisions of the OECD Guidelines by not fulfilling its responsibility to prevent or mitigate alleged negative impacts as a result of the activities of Bumitama Agri Group partially financed by Rabobank.¹⁶⁶²

In its final statement published in 2016, the NCP referred to the adverse impacts associated with the palm oil industry, including deforestation, environmental problems and land expropriation, acknowledging the importance of 'a commitment to sustainability' in the industry, inter alia, on the part of corporations.¹⁶⁶³ It focused on the implementation of Rabobank's palm oil supply chain policy, which aims at contributing to the realization of a sustainable palm oil supply chain and its membership in the RSPO, defined as the

¹⁶⁵⁶ ibid 4.

¹⁶⁵⁷ ibid 1.

¹⁶⁵⁸ *Fivas v Norconsult AS*, NCP Norway (Joint Statement, 2 June 2015) 1-2.

¹⁶⁵⁹ ibid 3.

¹⁶⁶⁰ ibid.

¹⁶⁶¹ *Friends of the Earth et al v Rabobank*, NCP the Netherlands (Final Statement, 15 January 2016) 2.

¹⁶⁶² *Friends of the Earth et al v Rabobank*, NCP the Netherlands (Initial Assessment, 16 December 2014) 2-3. The complainants claimed that Rabobank has breached Chapter II, paras 10, 12 and Chapter IV, commentary 45.

¹⁶⁶³ *Friends of the Earth et al v Rabobank*, NCP the Netherlands (Final Statement, 15 January 2016) 2.

‘global multi-stakeholder initiative to transform the market towards the production and use of certified sustainable palm oil’.¹⁶⁶⁴ As a member of the RSPO, Rabobank follows RSPO procedures and principles requiring its business customers to apply the same.¹⁶⁶⁵ Based on the RSPO principles, Rabobank expects its customers via its policy to respect human rights and to obtain FPIC prior to project new palm oil development.¹⁶⁶⁶

In light of the challenges associated with the palm oil industry, the discussions between the parties, and the challenges linked to RSPO, Rabobank stated that it ‘will address the consequences of non-compliance with the FPIC requirement in the provisions of its palm oil policy’ and adjust its current approach to handling complaints concerning adverse impacts caused by clients by publishing the complaints procedure including time frames.¹⁶⁶⁷

The FPIC principle was also the key issue in the case of ***Society for Threatened Peoples v Credit Suisse*** concluded by the Swiss NCP in 2019. The complaint concerned Credit Suisse’s business relationship with corporations engaged in the building of the Dakota Access Pipeline in the United States of America and thereto related adverse impacts on indigenous peoples, such as the destruction of cultural sites and the environment. The complainants contended that Credit Suisse was in breach of the OECD Guidelines by having failed to conduct human rights-due diligence, to encourage its investees to prevent or mitigate adverse impacts linked to the project, and to comply with its own internal oil and gas policy.¹⁶⁶⁸ During the NCP process, the parties jointly agreed that the focus of dialogue was not the Dakota Access Pipeline project or any other project as such, rather the concept of FPIC and its operationalization given its significance for the issues raised in case at hand.¹⁶⁶⁹ The parties ultimately agreed that Credit Suisse commits to include FPIC in its internal sector-specific policies for Oil & Gas, Mining and Forestry & Agribusiness in the following manner:

¹⁶⁶⁴ *Friends of the Earth et al v Rabobank*, NCP the Netherlands (Initial Assessment, 16 December 2014) 3; *Friends of the Earth et al v Rabobank*, NCP the Netherlands (Final Statement, 15 January 2016) 3.

¹⁶⁶⁵ *ibid.*

¹⁶⁶⁶ *ibid.* 4.

¹⁶⁶⁷ *ibid.* On the implementation of these commitments, see *Friends of the Earth et al v Rabobank*, NCP the Netherlands (Evaluation, 23 July 2018). On challenges linked to RSPO’s complaint mechanism, see eg Wielga and Harrison.

¹⁶⁶⁸ *Society for Threatened Peoples v Credit Suisse*, NCP Switzerland (Initial Assessment, 19 October 2017) 1-2.

¹⁶⁶⁹ *Society for Threatened Peoples v Credit Suisse*, NCP Switzerland (Final Statement, 16 October 2019) 2.

When there is credible evidence that the proceeds of a project-related transaction are used for activities which may negatively impact an area used or traditionally claimed by an indigenous community, Credit Suisse expects its clients, with respect to this transaction, through active engagement with the respective authorities, regulatory bodies and affected communities, to demonstrate alignment with specific key objectives and requirements of the [IFC] *Performance Standard 7 – Indigenous Peoples*, which incorporate the principles of the [UNDRIP] and the concept of [FPIC].¹⁶⁷⁰

The review of the human rights policy was also an issue in the case of ***Alianza por la Solidaridad v Grupo ACS-COBRA*** submitted to the Spanish NCP. The case concerned a Spanish corporation operating as a contracted constructor of several phases of the Renace hydroelectric project built on the Cahabón River in Alta Verapaz, Guatemala. The complaint asserted that the Renace project had caused adverse impacts on the environment and on the way of life of the Q'eqchi' indigenous people. The community allegedly had not been consulted on the project in line with ILO C 169, and its access to the Cahabón River, having religious significance for the community, is being curtailed. Furthermore, the project lacks a comprehensive environmental impact assessment study.¹⁶⁷¹

In 2019, the Supreme Court of Justice of Guatemala issued a decision in which it obliged the Guatemalan government to carry out a free, prior, and informed consultation process with the indigenous community affected by the Renace project pursuant to ILO C 169 and to engage with other stakeholders, including Renace S.A., a further corporation involved in the Renace project. Latter ruling also required the issuance of an environmental report.¹⁶⁷²

In acknowledging that the climate in the region was tense and welcoming the ruling of the Guatemalan Supreme Court of Justice, in its final statement of 2019, the NCP issued some recommendations to the Spanish corporation on its human rights policy, its due diligence, and its role in remediation (on the latter two see further below).¹⁶⁷³ With view to the former, the NCP recommended that the Spanish contractor review its human rights policy. Even though the latter policy already included reference to ILO C 169, the NCP recommended that with view to future projects, free, prior, and informed consultation with

¹⁶⁷⁰ *ibid.*

¹⁶⁷¹ *Alianza por la Solidaridad v Grupo ACS-COBRA*, NCP Spain (Final Statement, 19 December 2019) 3, 5.

¹⁶⁷² *ibid* 4, 9.

¹⁶⁷³ *ibid* 9–11.

indigenous peoples pursuant to the UNDRIP be ensured. Furthermore, the revision should foresee the active supervision of local partners around the world in line with the OECD DD Guidance.¹⁶⁷⁴

2. Summary and Reflections

A common denominator in the above cases is corporations' commitment to respecting indigenous peoples' rights in line with ILO C 169 and the UNDRIP as agreed upon by the counterparty or as recommended by the Spanish NCP in the case of *Alianza por la Solidaridad v Grupo ACS-COBRA*. Notably, in the latter case, the Spanish NCP welcomed the inclusion of ILO C 169 in the corporation's human rights policy yet deemed it important to extend it by the UNDRIP with view to free, prior, and informed consultation processes.

What can be distilled from both scenarios is the extension of the normative baseline of the UNGPs and OECD Guidelines. It shows that corporations are not limited to respect ILO's fundamental conventions and the International Bill of Human Rights as a baseline expectation but, with view to indigenous peoples, are willing as well as recommended to commit to respect additional human rights instruments, in casu the key indigenous peoples' rights instruments: the UNDRIP and ILO C 169.¹⁶⁷⁵ Furthermore, the central focus on the FPIC principle within these commitments shows the conceptualization of FPIC as a principle or a standard to be complied with by corporations.¹⁶⁷⁶

From the rather generally held commitments above, little can be said as to whether these commitments are in tune with the model policy statement as recommended by the UN Working on Business and Human Rights with view to indigenous peoples, however. Providing the most detailed insight, the commitment by Credit Suisse shows the centrality of IFC Performance Standard 7 as a source and a standard of reference and guidance for the FPIC principle. Furthermore, and in line with the recommendations of the UN Working Group, it sets out when and how it will seek to ensure respect for FPIC.¹⁶⁷⁷

¹⁶⁷⁴ *ibid* 11.

¹⁶⁷⁵ See above text to [Fn 956-972](#); Buhmann, 'NCP Statements' 405-406.

¹⁶⁷⁶ See above text to [Fn 602, 1544-1547](#).

¹⁶⁷⁷ See above text to [Fn 900-910](#).

D. (Human Rights) Due Diligence

1. Adopted Reasoning

NCPs have also elaborated on (human rights) due diligence and the different key sub-elements to identify and assess actual or potential impacts, integrate and act upon these findings, track the implementation and results of due diligence activities, and communicate how impacts are addressed. An example with a detailed examination of these sub-elements and how they apply to minority shareholders is the case of *Lok Shakti Abhiyan et al v NBIM* submitted to the Norwegian NCP. The identical complaint was also submitted to the NCPs of South Korea (*Lok Shakti Abhiyan et al v POSCO*) and the Netherlands (*Lok Shakti Abhiyan et al v ABP/APG*),¹⁶⁷⁸ with the former rejecting and the latter accepting the complaint.¹⁶⁷⁹

The complainants contended the breach of the 2011 OECD Guidelines by the South Korean Pohang Iron and Steel Enterprise (POSCO) and its subsidiary POSCO India (henceforth addressed together and referred to as POSCO) and two of its investors, the Norwegian Bank Investment Management (NBIM – a manager of the Norwegian State Pension Fund Global) and the Dutch Pension Fund ABP and its pension administrator APG.¹⁶⁸⁰ The complainants claimed that the planned construction of a steel plant in the Jagatsinghpur District in India will lead to physical and economic displacement of more than 20,000 peoples, including individuals having special legal protections under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act of 2006, which covers indigenous and tribal peoples.¹⁶⁸¹ They contended that POSCO had neither undertaken meaningful stakeholder consultation with affected communities to identify the scope and severity of human rights, social and environmental impacts nor conducted comprehensive environmental and human rights due diligence rendering POSCO incapable of preventing or mitigating these impacts during the construction and future operation of the plant.¹⁶⁸² With view to ABP/APG and NBIM, the complainants

¹⁶⁷⁸ See above text to [Fn 1535](#)–1539.

¹⁶⁷⁹ See above [Fn 1404](#).

¹⁶⁸⁰ *Lok Shakti Abhiyan et al v NBIM*, NCP Norway (Final Statement, 27 May 2013) 5, 11, 15.

¹⁶⁸¹ *ibid* 16; <https://www.ilo.org/dyn/natlex/natlex4.detail?p_isn=110071&p_lang=en> accessed 23 April 2022.

¹⁶⁸² *Lok Shakti Abhiyan et al v NBIM*, NCP Norway (Final Statement, 27 May 2013) 16.

maintained that the funds themselves had not taken the appropriate steps to seek to prevent or mitigate POSCO's adverse impacts with which they are directly linked through their financial relationship with POSCO.¹⁶⁸³

In May 2013, the Norwegian NCP published its final statement in which it addressed the allegation against NBIM, having previously established that the OECD Guidelines do apply to minority shareholders.¹⁶⁸⁴ Before delving into an examination of the case, the Norwegian NCP unsuccessfully tried to seek information from NBIM concerning how it manages its responsible investment policy *inter alia*, asking how NBIM engages with corporations that might be in violation of indigenous peoples' rights.¹⁶⁸⁵ In its final statement, the Norwegian NCP did not explicitly refer to indigenous peoples' issues, yet by examining NBIM's human rights due diligence responsibilities against the background of the alleged violation of indigenous peoples' rights by POSCO, it nevertheless provided some insight into how these responsibilities can relate to indigenous peoples.¹⁶⁸⁶

The NCP found NBIM's due diligence and managerial systems to prevent possible harm according to the 2011 OECD Guidelines' human rights chapter too narrow as it merely included children's rights.¹⁶⁸⁷ Taking due account of NBIM's large size and investment scope, it considered it as 'troubling that other rights appear to be excluded entirely, when the wide range of companies in which it invests undoubtedly impact other rights, sometimes significantly'.¹⁶⁸⁸ It noted that since corporations' responsibilities are connected to impacts 'enterprises should be prepared to address the impacts they have, not just those they find of interest'.¹⁶⁸⁹ Due diligence should be conducted before an investment and 'on an on-going basis after the acquisition of a shareholding in a company'.¹⁶⁹⁰ The NCP ultimately determined that NBIM was in breach of the OECD Guidelines 'by not having any strategy on how to react if it becomes aware of human

¹⁶⁸³ *ibid* 11; *Lok Shakti Abhiyan et al v ABP/APG*, NCP the Netherlands (Final Statement, September 2013) 4. For a detailed examination of the *Lok Shakti Abhiyan et al v NBIM*, *ABP/APG*, *POSCO* case, see Balaton-Chrimes.

¹⁶⁸⁴ *Lok Shakti Abhiyan et al v NBIM*, NCP Norway (Final Statement, 27 May 2013) 6, 21-23; *Lok Shakti Abhiyan et al v ABP/APG*, NCP the Netherlands (Final Statement, September 2013) 5-6.

¹⁶⁸⁵ *Lok Shakti Abhiyan et al v NBIM*, NCP Norway (Final Statement, 27 May 2013) 25, 52.

¹⁶⁸⁶ *ibid* 25-40.

¹⁶⁸⁷ *ibid* 7-8, 27-29, 37.

¹⁶⁸⁸ *ibid* 28-29.

¹⁶⁸⁹ *ibid* 8, 27.

¹⁶⁹⁰ *ibid* 30. The same reasoning was adopted by the NCP of the Netherlands, see *Lok Shakti Abhiyan et al v ABP/APG*, NCP the Netherlands (Final Statement, September 2013) 5.

rights risks related to companies in which [it] invested, apart from child labour violations'.¹⁶⁹¹ It recommended that NBIM '[e]xpand human rights due diligence in connection with its investments to address the whole range of human rights that may be relevant to its investments, beyond just child labour'¹⁶⁹² and 'identify which human rights risks are prevalent in the various sectors or types of investments and develop a strategy to address these'.¹⁶⁹³

The NCP also addressed NBIM's leverage and recommended specific actions NBIM should take with respect to POSCO about the alleged human rights abuses in connection with its investment in POSCO: first, to investigate them and second, once the allegations are deemed well-founded, to use its leverage, solely or together with other shareholders, inter alia to 'persuade POSCO to strengthen its engagement with all stakeholders and to address their concerns'.¹⁶⁹⁴

In the case of ***IAP and WDM v GCM Resources Plc.*** concerning a coal mine in Bangladesh, the UK NCP issued some explanation on human rights due diligence. In its final statement published in 2014, the UK NCP focused on whether GCM's actions in preparing and communicating the mine development plans were in line with the human rights provisions of the 2011 OECD Guidelines (Chapter IV, paras 1, 5).¹⁶⁹⁵ In relation to GCM's responsibility to conduct human rights due diligence, the UK NCP acknowledged GCM's commitment to revise its environmental and social impact assessment (ESIA) documents, ie, by undertaking a human rights impact assessment and to adapt it in line with the newly revised IFC Performance Standards.¹⁶⁹⁶ The NCP explained that the finalization of this update and the publishment of the human rights impact assessment before starting its work to acquire land for the mine would demonstrate that GCM is continuing to meet its due diligence responsibility under the OECD Guidelines, urging GCM to act upon this commitment.¹⁶⁹⁷ Furthermore, the NCP noted that GCM's plans on the mine would also need to consider the UNDRIP, which includes the right to FPIC.¹⁶⁹⁸

¹⁶⁹¹ Lok Shakti Abhiyan et al v NBIM, NCP Norway (Final Statement, 27 May 2013) 6, 25-26.

¹⁶⁹² ibid 9, 46-48.

¹⁶⁹³ ibid 10, 46-48.

¹⁶⁹⁴ ibid 45-46; OECD, '2011 Guidelines' 20, para 12, 33, para 43. See also Lok Shakti Abhiyan et al v ABP/APG, NCP the Netherlands (Final Statement, September 2013) 5, 8. The Dutch NCP determined that APG had acted in compliance with the requirements in the OECD Guidelines because it did use its leverage and complied with its responsibilities as a shareholder.

¹⁶⁹⁵ IAP and WDM v GCM Resources Plc., NCP UK (Final Statement, 20 November 2014) 9.

¹⁶⁹⁶ ibid 16-18.

¹⁶⁹⁷ ibid 18, 20.

¹⁶⁹⁸ ibid 18.

Notably, in relation to the process of acquiring land, which, as shown in the corporation's previous ESIA documents, would require legislative measures, the NCP noted that both the IFC Standards and to a certain extent the OECD Guidelines would 'suggest that companies should assist governments that lack relevant expertise'.¹⁶⁹⁹

Land rights issues and the use of leverage were also under scrutiny in the case of ***Survival International v WWF*** (Worldwide Fund for Nature International) submitted to the Swiss NCP. The complaint asserted WWF's alleged involvement in land theft and violent abuse against the Baka indigenous pygmies in Cameroon. WWF was allegedly in breach of the 2011 OECD Guidelines by failing to conduct due diligence and by failing to make its support for the demarcation of the protected areas conditional upon the FPIC of the Baka people which, in the complainant's view, curtailed or even denied latter community's access to their traditional territories and natural resource central to their livelihoods.¹⁷⁰⁰ In light of the mediation procedures that brought about an agreement between the parties on certain aspects but also highlighted the divergent views on other aspects, such as in terms of the respective responsibility of WWF and the government of Cameroon as concerns FPIC, the Swiss NCP adopted some recommendations.¹⁷⁰¹ In the NCP's view, WWF should inter alia 'continuously [engage] to help ensure open and transparent FPIC processes in Cameroon, including by pushing for the government to publish FPIC information online to demonstrate their compliance'.¹⁷⁰²

In the case of ***Jijnjevaerie Saami Village v Statkraft*** concerning the wind park project affecting the indigenous reindeer-herding collective of Jijnjevaerie Saami Village, the Swedish and Norwegian NCPs endeavoured to clarify as to whether Statkraft had taken the Saami village's interests into account and respected their human rights.¹⁷⁰³ This included an assessment of whether Statkraft has conducted human rights due diligence, which was answered in the affirmative by the NCPs. They commended Statkraft for establishing and following its Code of Conduct, which includes respect for human rights, its dialogue with the community on compensation schemes, its conducted en-

¹⁶⁹⁹ ibid 10.

¹⁷⁰⁰ <<https://www.oecdwatch.org/complaint/survival-international-vs-wwf/>> accessed 24 April 2022; *Survival International v WWF*, NCP Switzerland (Final Statement, 21 November 2017) 1.

¹⁷⁰¹ *Survival International v WWF*, NCP Switzerland (Final Statement, 21 November 2017) 4-6.

¹⁷⁰² ibid 6.

¹⁷⁰³ *Jijnjevaerie Saami Village v Statkraft*, NCPs Norway/Sweden (Final Statement, 9 February 2016) 3.

vironmental impact assessments, which included the community's views, the adaptation of measures and activities to reindeer migration, and its extensive consultations with the indigenous community.¹⁷⁰⁴

In the case of ***Friends of the Earth et al v Rabobank*** concerning Rabobank's business relationship with a palm oil corporation, the Dutch NCP referred to RSPO's multi-stakeholder approach as good practice and in line with the due diligence and stakeholder engagement approach envisaged in the OECD Guidelines. It commended Rabobank's membership with RSPO but generally emphasized financial institutions' own responsibility 'to exercise individual leverage to seek to prevent or mitigate the impact of their business conduct and to increase their leverage if necessary with regard to their own clients' and the need to develop own policies.¹⁷⁰⁵ Disengagement with clients was deemed by the NCP as a last resort that would need to be gauged in light of the goal of sustainability and related potential adverse impacts. It argued that 'disengagement of financial institutions that adhere to the RSPO principles will in general not benefit the goal of sustainability'.¹⁷⁰⁶ The NCP generally encouraged financial institutions to actively participate in due diligence initiatives both in the palm oil and financial industry and referred to the OECD-FAO Guidance with view to conducting due diligence.¹⁷⁰⁷

Similarly, in the case of ***Alianza por la Solidaridad v Grupo ACS-COBRA***, which concerned the Renace hydroelectric project in Guatemala, the Spanish NCP noted that the contracted Spanish constructor corporation was not exempt from conducting due diligence and to comply with international standards beyond compliance with domestic law based on Chapter II, para 12 of the 2011 OECD Guidelines. This would also include requiring local partners to comply with latter standards.¹⁷⁰⁸ In this regard, the Spanish NCP also recommended that the Spanish corporation urge its local partner Renace S.A. to actively participate in the process requested by the Guatemalan Supreme Court of Justice to find areas to improve the quality of life of local communities. Last, the NCP recommended the Spanish corporation addressed by the complaint to

¹⁷⁰⁴ *ibid* 13-14.

¹⁷⁰⁵ *Friends of the Earth et al v Rabobank*, NCP the Netherlands (Final Statement, 15 January 2016) 4.

¹⁷⁰⁶ *ibid.*

¹⁷⁰⁷ *ibid* 4-5.

¹⁷⁰⁸ *Alianza por la Solidaridad v Grupo ACS-COBRA*, NCP Spain (Final Statement, 19 December 2019) 10.

also collaborate with the Supreme Court of Justice by submitting relevant impact studies and documents or to even prepare, in conjunction with an independent third party, a new environmental impact study when indicated.¹⁷⁰⁹

2. Summary and Reflections

The above cases address different aspects of human rights due diligence. The cases concerning NBIM, GCM and Statkraft, for instance, underline the function of human rights due diligence as a process through which corporations know and show that they meet their responsibility to respect human rights. In the former case, the Norwegian NCP emphasized the need for a corporation to know and identify what its human rights risks are and to address and prioritize these risks accordingly. NBIM's focus on children's rights despite its large size and investment scope was deemed too narrow by the Norwegian NCP to be in tune with the expectation of the OECD Guidelines to conduct risk-based human rights due diligence and to identify actual or potential impacts. The case concerning Statkraft also shows the importance of understanding due diligence as an ongoing and dynamic process that may need adaptation depending on changing circumstances.¹⁷¹⁰ The issue of prioritization as a key element in the due diligence process was also an issue in the case concerning EDF Group referred to earlier. The French NCP recommended the adaption of the corporation's stakeholder engagement policy, particularly with view to indigenous peoples.¹⁷¹¹

The cases concerning GCM and Statkraft refer to the 'show' element, providing some insight into the substantive aspects of human rights due diligence with view to indigenous peoples. The NCP decisions reenforced earlier NCP decisions above, reiterating that environmental, social, and human rights impact assessments, stakeholder engagement, consultation and FPIC processes and mitigation measures are key elements of the process of human rights due diligence.¹⁷¹² The implementation of a range of latter key elements by Statkraft prompted the NCPs of Sweden and Norway to conclude that Statkraft has carried out human rights due diligence, ultimately determining that Statkraft has respected the rights of the Saami community and acted in observance of the OECD Guidelines. Hence, compliance with their responsibility to respect indigenous peoples' rights requires carrying out adequate human rights due dili-

¹⁷⁰⁹ *ibid* 11.

¹⁷¹⁰ See above text to [Fn 921-929](#), [1107-1113](#).

¹⁷¹¹ See above text to [Fn 1579-1580](#). Similar considerations were made by the Norwegian NCP in the case concerning Intex, see above text to [Fn 1529-1533](#).

¹⁷¹² See above [Chapter 5, Section III, A.-B.](#)

gence. Furthermore, as discussed earlier in the case concerning EDF Group, the French NCP noted that due diligence measures should not merely cover the legal sphere but also the customary, cultural, and social spheres.¹⁷¹³

The above cases further address the types of corporate involvement in adverse human rights impacts and the expectation that they trigger in terms of addressing them. For instance, NBIM, Rabobank and the Spanish constructor corporation have been accused of direct links to human rights violations by virtue of their business relationships. In the three cases, the NCPs emphasized that being directly linked to adverse human rights impacts does not exempt corporations from their responsibility to conduct due diligence to seek to prevent or mitigate adverse impacts. This includes, as emphasized by the NCPs, the responsibility to use leverage to influence the entity, causing an adverse impact.¹⁷¹⁴ For instance, the Norwegian NCP recommended that NBIM use its leverage to persuade POSCO to strengthen stakeholder engagement. Considering the RSPO's multi-stakeholder approach to be a good practice, the Dutch NCP deemed Rabobank's disengagement from its business partner not beneficial and a last resort in terms of appropriate responses with business relationships as stipulated by the 2011 OECD Guidelines.¹⁷¹⁵

In the cases concerning WWF and GCM, the respective NCPs called on the latter entities to engage with and assist host governments in processes concerning FPIC and land acquisition. This recommendation to assist with the process of land acquisition where the host government lacks expertise resembles the approach taken by the OECD-FAO Guidance advising that corporations work with the government to ensure respect and fair compensation for tenure rights holders.¹⁷¹⁶ The latter document was also referred to by the Dutch NCP in reference to conducting due diligence in the agricultural supply chain.¹⁷¹⁷ NCPs have thus confirmed corporations' responsibility to leverage business relationships and support host governments' responsibilities with the aim of contributing to advancing recognition and protection of indigenous peoples' rights.

¹⁷¹³ See above text to [Fn 1579-1580](#), [1599](#).

¹⁷¹⁴ On the different types of involvement and the issue of leverage, see above text to [Fn 880-897](#).

¹⁷¹⁵ OECD, '2011 Guidelines' 25, para 22.

¹⁷¹⁶ See above text to [Fn 1070-1071](#).

¹⁷¹⁷ See also below text to [Fn 1750](#).

E. Remediation

1. Adopted Reasoning

In four NCP cases, (access to) remediation for indigenous peoples was examined. In the case of ***TuK Indonesia v Roundtable on Sustainable Palm Oil***, the Swiss NCP facilitated a dialogue between the NGO TuK Indonesia (henceforth: TuK) and the RSPO registered in Zurich, Switzerland. The complaint concerned a previous complaint submitted by TuK to the complaint mechanism of RSPO concerning palm oil production by the Malaysian corporation Sime Darby Berhad and its subsidiary and related impacts on the land and on the Dayak Hibun communities of Kerunang Hamlet and Entapang Hamlet in West Kalimantan in Indonesia.¹⁷¹⁸ In the complaint submitted to the Swiss NCP, TuK contended that RSPO had breached Chapter IV on human rights of the 2011 OECD Guidelines by failing to ensure that the complaint that had been submitted to its complaint procedures was determined within a reasonable time. Furthermore, RSPO certified Sime Darby Berhad as compliant with RSPO principles despite the unresolved land conflict between the corporation and the communities.¹⁷¹⁹ According to TuK, the focus of the NCP procedures should be to '[elaborate] an action plan between RSPO and TuK regarding the resolution of the ongoing RSPO complaint'.¹⁷²⁰ In the course of the NCP process concluded in 2019, the parties managed to agree on an action plan for the legal review of the complaint by the RSPO complaint mechanism.¹⁷²¹ As of today, the status of the complaint before RSPO is set on 'investigation'.¹⁷²²

Similarly, in the case of ***Obelle Concern Citizens & FOCONE v Shell***, the functioning of the grievance mechanism of Shell Petroleum and Development Company of Nigeria Limited (henceforth: SPDC) – a subsidiary of Royal Dutch Shell (henceforth: RDS) – was under scrutiny by the Dutch NCP, which published its final statement in February 2020. The complaint asserted that SPDC and RDS were in breach of the 2011 OECD Guidelines on account of gas fire

¹⁷¹⁸ *TuK Indonesia v Roundtable on Sustainable Palm Oil*, NCP Switzerland (Final Statement, 5 June 2019) 1.

¹⁷¹⁹ *TuK Indonesia v Roundtable on Sustainable Palm Oil*, NCP Switzerland (Initial Assessment, 31 May 2018) 1-2.

¹⁷²⁰ *TuK Indonesia v Roundtable on Sustainable Palm Oil*, NCP Switzerland (Final Statement, 5 June 2019) 1.

¹⁷²¹ *ibid* 2-4.

¹⁷²² <<https://askrspo.force.com/Complaint/s/case/50090000028ErzsAAC/detail>> accessed 24 April 2022. On the challenges linked to the RSPO complaint mechanisms, see Wielga and Harrison.

eruptions and oil spillages that had severely impacted the environment and human rights of the Obelle peoples, affecting their land, natural resources, and livelihoods. Furthermore, the Obelle people were allegedly not meaningfully engaged and consulted in the impact assessment studies, and no individual from the indigenous community had ever been employed by SPDC.¹⁷²³

Following a suggestion by the NCP, the complainants submitted the original NCP complaint to SPDC's Community Feedback Mechanism (CFM), established in 2012, to try to resolve the issues. After a lack of agreement on outstanding issues, several months later the NCP resumed its offices to support the parties in resolving these issues with the '[intention] to promote the effective handling of complaints, compatible with the OECD Guidelines, in a manner that is impartial, predictable, equitable and transparent'.¹⁷²⁴ As acknowledged by the NCP, the information received from both parties showed that CFM meetings had stopped. There had been continuous distrust among the parties and disagreements on the content of meeting minutes and the accessibility of information.¹⁷²⁵ After SPDC was unable to accept the NCP's good offices, the NCP issued its final statement in which it addressed the CFM in light of the OECD Guidelines' and UNGPs' requirements for effective grievance mechanisms. Considering the lack of receipt of sufficient information on the CFM procedures and their alignment with the latter standards, the NCP concluded that 'SPDC has failed to demonstrate that its grievance mechanisms functions in a manner that can be considered (...) consistent with the OECD Guidelines and the UNGPs'.¹⁷²⁶ It noted:

[F]or a grievance mechanism to be transparent there should be public information available about the procedure it offers, including timeframes, and there should be clear and frequent communication about the progress of individual complaints in order to keep the parties to a grievance procedure informed. Additionally, aggrieved parties should have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on equal, fair, informed and respectful terms. Furthermore, providing transparency about the mechanism's performance (i.e. statistics, case studies) to wider stakeholders can be important for the legitimacy of the system.¹⁷²⁷

¹⁷²³ *Obelle Concern Citizens & FOCONE v Shell*, NCP the Netherlands (Final Statement, 27 February 2020) 1-2, 5.

¹⁷²⁴ *ibid* 3.

¹⁷²⁵ *ibid* 6-7.

¹⁷²⁶ *ibid* 7-8.

¹⁷²⁷ *ibid* 7.

Referencing the OECD Stakeholder Guidance, the NCP added that corporations should involve and consult with stakeholders on 'how adverse impacts are remediated and in assessing the value of damages'.¹⁷²⁸

The NCP also referred to RDS's responsibility in relation to local activities of SPDC and remediation, noting that RDS should use its leverage to 'stimulate its subsidiary to provide remedy or participate in processes to provide for remedy'.¹⁷²⁹ It recommended that both SPDC and RDS further develop the CFM and 'ensure its full compliance with the OECD Guidelines and UNGPs as a matter of urgency'.¹⁷³⁰ Should the parties fail to resolve this complaint via the CFM procedures within a reasonable period, the NCP recommended that RDS address the issue at a higher level in the corporation.¹⁷³¹

Similarly, consultation with affected stakeholders on remediation was also an issue in the case of **Southeast Alaska Conservation Council v Imperial Metals** concerning the operations of a gold and copper mine. The Canadian NCP delved into the issue of representation and related challenges, directly addressing the submitting party. It noted that some of the requests made by the advocacy organization Southeast Alaska Conservation Council (henceforth: SEACC), such as damage payments for those harmed by corporate activity, would require the 'identification of specific groups and/or communities whose interests SEACC represents'. In the NCP's view, the fact that SEACC did not adequately consult and inform the communities whose interests were allegedly at stake about its decision to submit a complaint to the NCP compromised the success of the mediation process, putting into question the legitimacy and relevance of decisions and agreements reached. The NCP recommended that SEACC put in place a stakeholder engagement strategy that provides insight into how SEACC will ensure that communities' interests and objectives are clearly identified and communicated.¹⁷³²

In the case of **Alianza por la Solidaridad v Grupo ACS-COBRA**, the focus was not on a grievance mechanism as such but rather on remediation from a substantive point of view. The Spanish NCP recommended that the Spanish corporation involved in the construction of the Renace hydroelectric project in-

¹⁷²⁸ *ibid.*

¹⁷²⁹ *ibid* 8.

¹⁷³⁰ *ibid.*

¹⁷³¹ *ibid.*

¹⁷³² *Southeast Alaska Conservation Council v Imperial Metals*, NCP Canada (Final Statement, 8 May 2020).

form the indigenous community affected that it regretted the possible harms that its omissions may have caused and that it was collaborating with the Guatemalan judicial system to mitigate and remediate these harms.¹⁷³³

2. Summary and Reflections

The common denominator of the above cases is the issue of remediation. The cases focus on both the effective functioning of grievance mechanisms and the third element of corporations' responsibility to respect human rights, namely, to provide for or cooperate in the remediation of actual adverse human rights impacts.¹⁷³⁴ While the first three cases shed some light on how indigenous peoples and their representatives have used the NCP mechanism to facilitate access to remedy before other grievance mechanisms, the last of the above cases provides some insight into how remedy can look on the ground. The Spanish NCP's recommendation to the corporation to communicate its regrets strongly resembled an apology, which is a form of remedy listed in the UNGPs.¹⁷³⁵

The case handled by the Dutch NCP also generally shows the important parameters for a corporate-led grievance mechanism to demonstrate that it functions in a manner that can be considered consistent with the OECD Guidelines, UNGPs and OECD Stakeholder Guidance. In this regard, both the Dutch and the Canadian NCPs emphasize the importance of involving and consulting stakeholders with a view to remediation, from both a corporate perspective and the perspective of those presenting a complaint on behalf of indigenous communities, thereby also highlighting the key issue of representation.¹⁷³⁶

Ultimately, the four cases also show the variety of issues and the range of entities that NCPs deal with when handling complaints.¹⁷³⁷ For example, in the case of Rabobank, the Dutch NCP deemed RSPO's multi-stakeholder approach a good practice, while in the case examined above, RSPO as an entity was the respondent in the proceedings before the Swiss NCP.

¹⁷³³ *Alianza por la Solidaridad v Grupo ACS-COBRA*, NCP Spain (Final Statement, 19 December 2019) 11.

¹⁷³⁴ See above text to [Fn 887](#), [933](#).

¹⁷³⁵ HRC, 'UNGP's' Commentary Principle 25.

¹⁷³⁶ See above text to [Fn 920](#), [1383](#). On the issue of representation, see eg above text to [Fn 219](#)-222, [1067](#), [1134](#)-1136, [1212](#)-1213.

¹⁷³⁷ See above text to [Fn 1306](#), [1309](#).

F. Indigenous Peoples' Rights

1. Adopted Reasoning

The purpose of this last category is to highlight NCPs' reasoning in terms of indigenous peoples' substantive rights. While the above categories have certainly touched upon indigenous peoples' rights, particularly their right to be consulted, other rights such as their rights to lands and resources or cultural rights have mostly been addressed indirectly by focusing on the safeguard function of consultation and FPIC processes and impact assessment studies in protecting these rights. In contrast, the cases below provide some insight into how NCPs and corporations have addressed indigenous peoples' rights to self-determination, development and lands and natural resources.

For instance, the case of **Norwegian Support Committee for Western Sahara v Sjøvik AS**, submitted to the Norwegian NCP, gives some insight on the exploitation of resources and related corporate responsibilities. The complaint concerned the operations of Sjøvik in the disputed Non-Self-Governing Territory of Western Sahara, permitted and licenced by Moroccan authorities and taking place under the Moroccan flag. The complainants contended that by operating a fishing vessel and running a fish-processing plant through its subsidiary, Sjøvik was allegedly in breach of Chapter IV, para 1 the 2011 OECD Guidelines as it 'failed to respect the Saharawi[s]' right to self-determination and rights to consent to and benefit from their natural resources'.¹⁷³⁸ As a consequence of the successful mediation process, resulting in a joint statement of the parties in 2013, the Norwegian NCP forwent an examination of the merits of the case.¹⁷³⁹ The parties inter alia agreed that '[i]f the *de facto* authorities for any reason or at any time are prevented due to practical or legal concerns to fulfil their responsibility to protect, companies bear a particular responsibility for complying with international norms on the exploitation of resources and respect for human rights'.¹⁷⁴⁰

In the case of **Sherpa et al v Socapalm/Bolloré SA/Financière du Champ de Mars/Socfin/Socfinaf SA**, submitted to the NCPs of France, Belgium and Luxembourg, the French NCP (as the lead NCP) concluded that Cameroon-based palm oil corporation Socapalm had not complied with Chapter II, para 2 of

¹⁷³⁸ *Norwegian Support Committee for Western Sahara v Sjøvik AS*, NCP Norway (Final Statement, 3 July 2013) 7. On the Saharawi people, see eg Castellino and Doyle 25.

¹⁷³⁹ *Norwegian Support Committee for Western Sahara v Sjøvik AS*, NCP Norway (Final Statement, 3 July 2013) 1.

¹⁷⁴⁰ *ibid* 5.

the 2000 OECD Guidelines concerning respect for human rights.¹⁷⁴¹ The NCP noted in its 2013 final statement that Socapalm's activities had not 'sufficiently respected the rights of the local communities as outlined in the UN conventions, particularly in relation to indigenous pygmy groups'.¹⁷⁴² Without going into greater detail, the NCP *inter alia* acknowledged long-lasting land conflicts, observing that issues relating to land tenure were sparking great tensions referring to land handover delays, lack of plantation boundaries and inadequate compensation to support local development.¹⁷⁴³ It also referred to a ruling by the Cameroonian courts that found security guards hired by Socapalm guilty of violence towards local communities.¹⁷⁴⁴ In 2013, the case resulted in an agreement between the parties (ie, the complainants and the Bolloré Group, a minority shareholder in Socapalm and the main addressee in the proceedings before the French NCP) to draw up a roadmap for Socapalm.¹⁷⁴⁵ This roadmap *inter alia* referred to land-related issues such as compensation for local communities for the loss of access to and use of land and communication and dialogue with local communities, mainly to address land-related problems.¹⁷⁴⁶

In its final statement and follow-up statement, the French NCP predominantly focused on Bolloré Group's influence on Socapalm and Socfin Group (its business partners) and problems implementing the roadmap for Socapalm.¹⁷⁴⁷ In the view of the French NCP land-related problems addressed in the roadmap would require more examination via impact assessment studies and the intervention of local (governmental) stakeholders.¹⁷⁴⁸ Furthermore, it commended the establishment of dialogue platforms with communities but emphasized that these platforms should 'ensure a level playing field for the different local

¹⁷⁴¹ *Sherpa et al v Socapalm/Bolloré SA/Financière du Champ de Mars/Socfin/Socfinaf SA*, NCP France (Final Statement, 3 June 2013) 6, 8, 10.

¹⁷⁴² *ibid* 10.

¹⁷⁴³ *Sherpa et al v Socapalm/Bolloré SA/Financière du Champ de Mars/Socfin/Socfinaf SA*, NCP France (Follow-Up Statement, 18 May 2016) 2, 4.

¹⁷⁴⁴ *Sherpa et al v Socapalm/Bolloré SA/Financière du Champ de Mars/Socfin/Socfinaf SA*, NCP France (Final Statement, 3 June 2013) 8, 10.

¹⁷⁴⁵ *ibid* 1, 2, 6, 14.

¹⁷⁴⁶ *ibid* 14; *Sherpa et al v Socapalm/Bolloré SA/Financière du Champ de Mars/Socfin/Socfinaf SA*, NCP France (Follow-Up Statement, 18 May 2016) 4.

¹⁷⁴⁷ *Sherpa et al v Socapalm/Bolloré SA/Financière du Champ de Mars/Socfin/Socfinaf SA*, NCP France (Final Statement, 3 June 2013) 13-14; *Sherpa et al v Socapalm/Bolloré SA/Financière du Champ de Mars/Socfin/Socfinaf SA*, NCP France (Follow-Up Statement, 18 May 2016) 2-8.

¹⁷⁴⁸ *Sherpa et al v Socapalm/Bolloré SA/Financière du Champ de Mars/Socfin/Socfinaf SA*, NCP France (Follow-Up Statement, 18 May 2016) 4.

community representatives [and other stakeholders] with a view to laying the foundations for constructive talks capable of resolving conflicts'.¹⁷⁴⁹ The French NCP further welcomed the commitments made by Socfin Group to respect FPIC and align its practices with international standards, including RSPO and the IFC Performance Standards and recommended that the Bolloré Group consider the OECD-FAO Guidance in relation to plantations in which it was a shareholder.¹⁷⁵⁰

The lead in the procedures was handed over to the Belgium NCP in 2016, after Socfin Group, a majority shareholder of Socapalm and business partner of the Bolloré Group, accepted its good offices.¹⁷⁵¹ In its 2017 final statement, also the Belgian NCP commended Socfin Group for its commitment to implement standards such as RSPO but also acknowledged that much work remained to be done, inter alia referring to ongoing resistance by local communities to the plantations despite the dialogue platforms. It critiqued the merely partial implementation of the Socapalm roadmap by Socfin Group, inter alia recommending that the latter prioritize Cameroon in its business operations, increase representation of local communities in consultations, and apply the processes and due diligence concept as laid out in the OECD-FAO Guidance.¹⁷⁵²

In 2016, the Italian NCP was asked to mediate in the case of **Survival International v Salini Impregilo S.p.A.** The parties were Survival International Italia, an NGO representing the indigenous peoples of the Lower Omo Valley in Southwestern Ethiopia and Lake Turkana in Kenya, and Salini Impregilo S.p.A. (henceforth: Salini), operating as an engineering, procurement, and construction contractor in infrastructure projects. The Gibe III Dam project, in which Salini was involved as a contractor of the Ethiopian Electric Power Corporation (EEPCo), had allegedly violated the indigenous communities' right to self-determination by failing to implement adequate consultation and FPIC procedures, their right to development by failing to conduct an environmental impact assessment, and their rights to lands and natural resources due to impacts on the lands and territories that they depended upon for their liveli-

¹⁷⁴⁹ *ibid* 5. See also *Unión Hidalgo v EDF Group*, NCP France (Final Statement, 10 March 2020) 14.

¹⁷⁵⁰ *Sherpa et al v Socapalm/Bolloré SA/Financière du Champ de Mars/Socfin/Socfinaf SA*, NCP France (Follow-Up Statement, 18 May 2016) 5, 8.

¹⁷⁵¹ *ibid* 7.

¹⁷⁵² *Sherpa et al v Socapalm/Bolloré SA/Financière du Champ de Mars/Socfin/Socfinaf SA*, NCP Belgium (Final Statement, 15 June 2017) 4-5; *Sherpa et al v Socapalm/Bolloré SA/Financière du Champ de Mars/Socfin/Socfinaf SA*, NCP France (Follow-Up Statement, 18 May 2016) 5.

hoods.¹⁷⁵³ The complaint asserted that Salini was non-compliant with the 2011 OECD Guidelines' provisions on human rights due diligence since Salini – before becoming involved – 'was or should have been aware of the potential impact of the dam on the human rights of affected communities, as well as of the fact that the Governments of Ethiopia and Kenya had not addressed the issue'.¹⁷⁵⁴ Furthermore, the complainants deemed the artificial flooding plan envisaged as a mitigation measure inadequate. This plan resulted as a measure from an environmental and social impact assessment conducted by Salini in 2008/2009.¹⁷⁵⁵

In its final statement issued in 2017, the Italian NCP partly examined the issues raised in the complaint under both the 2000 and 2011 editions of the OECD Guidelines. The indigenous peoples' rights to self-determination and development allegedly impacted by the dam project did not, according to the NCP, merit further examination. The NCP considered respecting the right to self-determination and ensuring the right to development to fall in the realm of a state's duty, which could not be ascribed to corporations acting with the state's consent. Furthermore, the NCP questioned whether the right to development was considered an autonomous right under international law, arguing that its content would be difficult to identify.¹⁷⁵⁶ Furthermore, neither the complainants' request for a new environmental and social impact assessment nor the allegations concerning the lack of human rights due diligence were considered to merit further examination. The former was not considered due to the advanced stage of the project (the Gibe III dam was inaugurated in December 2016), and the latter was not considered due to the lack of a corporate responsibility in 2006 to implement a due diligence process under the 2000 OECD Guidelines.¹⁷⁵⁷ However, indigenous peoples' right to freely dispose of their natural resources and the correlated obligation to obtain FPIC from the indigenous peoples affected merit further consideration given their basis in

¹⁷⁵³ *Survival International v Salini Impregilo S.p.A.*, NCP Italy (Final Statement, 8 June 2017) 2-4.

¹⁷⁵⁴ *ibid* 3.

¹⁷⁵⁵ *ibid* 4, 11.

¹⁷⁵⁶ *ibid* 9; *Survival International v Salini Impregilo S.p.A.*, NCP Italy (Initial Assessment, 19 January 2017) 3.

¹⁷⁵⁷ *Survival International v Salini Impregilo S.p.A.*, NCP Italy (Final Statement, 8 June 2017) 8-9; *Survival International v Salini Impregilo S.p.A.*, NCP Italy (Initial Assessment, 19 January 2017) 4.

international standards to which the OECD Guidelines refer.¹⁷⁵⁸ In light of the international standards, the OECD Guidelines and the practice of other NCPs, the Italian NCP noted:¹⁷⁵⁹

[T]he timely and appropriate communication and consultation of the communities affected by investment projects should be ensured not only by the government of the State to which the population belongs or by the contracting state authorities, but also – in case of partial or total lack (...) – by the enterprise.¹⁷⁶⁰

The NCP acknowledged that since 2007, several consultations with community representatives had taken place during the environmental and social impact assessment processes – including regarding the artificial flooding plan – ‘after an initial lack of information’ provided to the communities in the period before 2007.¹⁷⁶¹

The NCP issued a range of recommendations to Salini regarding its contribution to the implementation of the artificial flooding plan, which aimed to regulate and control water releases into the valley, allowing the continuation of communities’ local traditions.¹⁷⁶² Noting that the artificial flooding plan is ‘crucial in order to ensure that indigenous peoples have free disposal of the resources necessary for their subsistence and to maintain their traditional agriculture, livestock farming and fishing practices’,¹⁷⁶³ the NCP recommended that Salini provide further technical support for implementing the plan and use its leverage to ensure that the EEPCo carried out the activities foreseen in the plan, such as ‘conducting wide-range consultations with the downstream communities and their elective leaders in defining the goal for flow releases’.¹⁷⁶⁴

¹⁷⁵⁸ *Survival International v Salini Impregilo S.p.A.*, NCP Italy (Final Statement, 8 June 2017) 9; OECD, ‘2011 Guidelines’ 32, para 40.

¹⁷⁵⁹ The Italian NCP referred to the following NCP cases: *Survival International v Vedanta Resources Plc.*; *Future In Our Hands (FIOH) v Intex Resources ASA*; *Jijnjevaerie Saami Village v Statkraft*, see *Survival International v Salini Impregilo S.p.A.*, NCP Italy (Final Statement, 8 June 2017) 9 at Fn 21.

¹⁷⁶⁰ *ibid* 9. See also the NCP’s final statement in Italian, *Survival International v Salini Impregilo S.p.A.*, NCP Italy (Dichiarazione Finale, 8 June 2017) 9.

¹⁷⁶¹ *Survival International v Salini Impregilo S.p.A.*, NCP Italy (Final Statement, 8 June 2017) 10–12.

¹⁷⁶² *ibid* 11–12.

¹⁷⁶³ *ibid* 13.

¹⁷⁶⁴ *ibid* 12–13.

In the case of *Jijnjevaerie Saami Village v Statkraft*, the Swedish and Norwegian NCPs commented generally on encroachment on indigenous peoples' rights. Citing the work of the SRRIP,¹⁷⁶⁵ the NCPs held that the rights of indigenous peoples may be restricted to achieve a relevant social objective, which must represent more than simply economic interests or gains – in this specific case sustainable energy production.¹⁷⁶⁶ The NCPs hinted that measures restricting indigenous peoples' rights must comply with certain requirements, however.¹⁷⁶⁷

2. Summary and Reflections

In the case concerning Salini, the Italian NCP clearly dismissed the notion that indigenous peoples' rights to self-determination and development fall within the realm of the corporate responsibility to respect indigenous peoples' rights. In contrast, it found that the rights of indigenous peoples to freely dispose of their natural resources and to be consulted are norms applicable to corporate conduct.¹⁷⁶⁸ A similar observation can be made regarding the case concerning Sjøvik. The parties in the specific case did not elaborate on the issue of self-determination but did emphasize corporations' responsibility to comply with international norms on the exploitation of resources. The importance of respect for land and resource rights was further emphasized by the French NCP in several cases. In the above case concerning Socapalm and Bolloré SA and in the case concerning Michelin, the NCP referred to compensation for loss of access to and use of lands and resources.¹⁷⁶⁹ In the case concerning EDF Group, the French NCP recommended that the corporation address land tenure issues, noting that 'land tenure issues have social, cultural and customary dimensions stemming from the relationship that indigenous peoples maintain with the land' and that due diligence and consultation measures should

¹⁷⁶⁵ HRC, '2013 Report SRRIP'.

¹⁷⁶⁶ *Jijnjevaerie Saami Village v Statkraft*, NCPs Norway/Sweden (Final Statement, 9 February 2016) 12, 14.

¹⁷⁶⁷ In terms of legitimate restrictions, the NCPs referred to a Swedish court decision that limited the area of the licence granted to Statkraft, arguing 'that this development would have a serious impact on sustainable reindeer herding for the Saami village, and that a development of this kind would be deemed to be in contravention of [Art. 27 ICCPR]'. See *ibid* 12. See also above text to [Fn 452](#)–460, [475](#)–477, [683](#)–693.

¹⁷⁶⁸ On the relation between indigenous peoples' right to self-determination and their participatory and land and resource rights, see above text to [Fn 96](#)–105, [599](#). See also HRC, '2013 Report SRRIP' para 9.

¹⁷⁶⁹ See above text to [Fn 1545](#), [1643](#). On the issue of compensation, see above text to [Fn 270](#), [429](#), [1064](#), [1069](#).

be adopted accordingly.¹⁷⁷⁰ The issue of benefit sharing has not been meaningfully addressed by the NCPs in the above four cases or in the remaining cases examined in this chapter despite its importance as a safeguard and as a right arising from the recognition of indigenous peoples' land and resource rights.¹⁷⁷¹

Also notable is the NCPs' lack of distinction between stakeholders and rights holders. In all twenty-two cases examined in this chapter, indigenous communities addressed are referred to by the NCPs as stakeholders and not as rights holders. Considering that 'stakeholder engagement' is the predominant terminology used in the OECD Guidelines, this is not surprising.¹⁷⁷² However, a glance at the recently adopted OECD RBC Guidance Documents, which emphasize the distinction between stakeholders and rights holders, suggests the importance of this distinction.¹⁷⁷³ In this sense, the OECD Stakeholder Guidance notes:

Identifying rights-holders is the first step to ensure human rights are recognised and respected.¹⁷⁷⁴ If impacted stakeholders, particularly rights-holders and vulnerable populations, are not explicitly recognised and prioritised during stakeholder identification and mapping activities (...) adverse impacts may not be avoided or addressed through engagement activities.¹⁷⁷⁵

Certainly, rights holders are subsumed under the broader term of stakeholders,¹⁷⁷⁶ but an explicit reference to indigenous peoples as rights holders would more clearly emphasize their individual and collective rights. It would underline that the right to be consulted is a right in and of itself and not 'merely' a mode of stakeholder engagement and an element of human rights due diligence. Furthermore, it would help in prioritizing the most vulnerable groups and those most severely impacted.¹⁷⁷⁷

In the case concerning Statkraft, the Swedish and Norwegian NCPs more generally acknowledged that indigenous peoples' rights may be subject to limita-

¹⁷⁷⁰ *Unión Hidalgo v EDF Group*, NCP France (Final Statement, 10 March 2020) 14; above text to [Fn 1579-1580](#).

¹⁷⁷¹ See above text to [Fn 489](#), [517](#), [1072-1075](#), [1163](#). Some reference to benefit sharing can be found, however, in the case concerning Intex, see *Future In Our Hands (FIOH) v Intex Resources ASA*, NCP Norway (Final Statement, 30 November 2011) 43, 45, 4, 50.

¹⁷⁷² OECD, '2011 Guidelines' 34, para 45.

¹⁷⁷³ OECD, 'DD Guidance' 48; OECD, 'Stakeholder Guidance' 19-20.

¹⁷⁷⁴ OECD, 'Stakeholder Guidance' 20.

¹⁷⁷⁵ *ibid* 44.

¹⁷⁷⁶ *ibid* 20; OECD, 'DD Guidance' 48.

¹⁷⁷⁷ OECD, 'DD Guidance' 50; OECD, 'Stakeholder Guidance' 47, 92. See also above text to [Fn 1045](#), [1067](#), [1107-1109](#).

tions but emphasized that these limitations must comply with certain criteria and – as previously noted by the UK NCP in the case concerning Vedanta – cannot be based solely on economic grounds.¹⁷⁷⁸

IV. Conclusion

Chapter 5 endeavoured to analyse NCP cases pertaining to indigenous peoples with the aim of further clarifying the corporate responsibility to respect indigenous peoples' rights and FPIC in terms of content and operationalization. As such, after examining the regulatory framework pertaining to indigenous peoples and corporations in [Chapters 2](#) and [3](#) and the NCP mechanism in [Chapter 4](#), the present chapter sought to answer the second research question of this thesis: How do NCPs interpret and apply these rules when resolving disputes pertaining to corporations and indigenous peoples? Do NCPs apply substantive indigenous peoples' rights norms to define corporate responsibility under the OECD Guidelines? The approach taken was two-pronged, involving a typology of cases that formed the basis by providing preliminary insight and some statistics on different aspects of the cases and a substantive analysis of the reasoning of the NCPs in the selected cases.

Typology and Statistics The established typology has affirmed some aspects of the business and indigenous peoples' rights field, which were elaborated on in previous chapters. For example, throughout the thesis, a particular focus lay on the extractive and agricultural industry sectors most likely to generate business-related impacts on indigenous peoples due to their often invasive and consuming activities in terms of lands and resources. This finds expression in [Figure 5](#), from which it can be distilled that corporations active in the extractive and agricultural industries were most often the responding parties in NCPs' indigenous peoples' cases either directly, or indirectly via financial involvement. [Figure 5](#) also reflects the plurality of actors involved in development projects as described at the beginning of this thesis.¹⁷⁷⁹ [Figure 7](#) in turn shows the central link between indigenous peoples' rights and a clean and healthy environment.¹⁷⁸⁰ Both the human rights and the environment chapters of the OECD Guidelines are among the most cited chapters in the NCP cases. [Figure 2](#) somewhat mirrors the increase in cases after the introduction of the human rights chapter into the OECD Guidelines in 2011, with a peak of cases relating to indigenous peoples' issues submitted to NCPs in 2012. Similarly, the

¹⁷⁷⁸ See above text to [Fn 1494](#).

¹⁷⁷⁹ See above text to [Fn 57–59](#).

¹⁷⁸⁰ See above text to [Fn 273–280](#), [1014–1020](#).

numbers in [Figure 3](#) appear consistent with the overall statistics of the OECD, showing that NGOs are among the primary users of the NCP mechanism.¹⁷⁸¹ Conversely, the relatively low number of cases submitted by indigenous individuals and communities raises issues of accessibility and representation – both themes that were covered in the thesis.

Substantive Analysis The analysis of NCPs' reasoning highlights the broad spectrum of actors and issues that NCPs have dealt with in cases concerning business-related impacts on indigenous peoples' (rights). The central focus of their reasoning is operationalization of the corporate responsibility to respect human rights, including indigenous peoples' rights and FPIC. NCPs have addressed corporations' policy commitment or lack thereof, the core element of human rights due diligence and, to a limited extent, remediation. In particular, corporations' responsibility to carry out human rights due diligence adapted to risks of indigenous peoples' rights impacts runs like a thread throughout the selected NCP cases.

In terms of the latter, NCPs have provided information on the modalities and scope of key elements of the due diligence process, including stakeholder engagement activities such as consultation processes and impact assessment studies. The reasoning of the Swedish and Norwegian NCPs in the case concerning Statkraft suggests that the scope of consultation processes includes the FPIC principle. The NCPs noted that corporations should consult with indigenous peoples with a view to obtaining their FPIC. Throughout the cases, the NCPs' reasoning shows that both consultation with indigenous peoples and carrying out impact assessment studies are key to identifying, preventing, and mitigating adverse impacts on indigenous peoples' rights. Thus, in line with previous bodies referred to in [Chapter 2](#) of this thesis, the NCPs also affirm the safeguard function of consultation processes and impact assessment studies for the protection of indigenous peoples' rights.

In a few cases, mediation by NCPs has led to change, resulting in corporations' commitment to change their policy statements. In the single case before it, the Spanish NCP touched upon how remediation may look on the ground. Other issues covered relate to how the corporate responsibility to respect indigenous peoples' rights and FPIC connects to the duties of states regarding indigenous peoples. Furthermore, NCPs have emphasized corporations' responsibility to use their leverage to influence the entity causing adverse impacts on indigenous peoples.

¹⁷⁸¹ OECD, 'Road Ahead' 20.

NCPs have also addressed what substantive rights corporations should respect when conducting business on indigenous ground, thus providing information on the content of the corporate responsibility to respect indigenous peoples' rights and FPIC. Most clearly, NCPs have affirmed corporations' responsibility to respect indigenous peoples' right to be consulted in a free, prior, and informed manner – although this is a right to a process rather than a substantive right.¹⁷⁸² In terms of the meanings of the elements 'free', 'prior' and 'informed', the NCP reasoning is in tune with the meanings in the ILO and UN frameworks. In terms of the inclusion of indigenous peoples in the decision-making of the consultation process as such, however, NCPs have thus far not provided substantive direction.

Regarding the FPIC principle, more precisely the 'consent' element, the NCPs are less outspoken. Only in two out of twenty-two cases have NCPs recommended that corporations respect the outcome of consultation processes without specifying further what is meant by this, ie, whether business operations should not proceed until FPIC is granted. Against this background and considering the reasoning of the Swedish and Norwegian NCPs, acknowledging corporations' responsibility to consult with indigenous peoples with a view to obtaining their FPIC, it is safe to say that NCPs align themselves – at least the few addressing the FPIC principle – with the understanding that obtaining indigenous peoples' consent is the objective of a consultation process.¹⁷⁸³ This understanding is most clearly promoted within the ILO framework and can also be distilled from the UN framework. However, in recent years, the UN framework has appeared to advocate for a more progressive approach to FPIC, known as the sliding scale approach. According to the latter approach, the more significant the impact on indigenous peoples is, the more likely FPIC is to progress from an objective to a required outcome. To date, a sliding scale approach to FPIC cannot be distilled from NCP cases.

NCPs have further referred to corporations' responsibility to respect indigenous peoples' customary land tenure rights, albeit not as forthrightly as with their participatory rights. Further research on the cases listed in groups three and four in the Annex to this thesis may provide further insight in this respect.¹⁷⁸⁴ Indigenous peoples' cultural rights have not been addressed explicitly but have been touched upon in NCPs' reasoning on human rights due diligence and consultation processes. Benefit sharing has not been addressed by

¹⁷⁸² Åhrén 225. See also above text to [Fn 436](#).

¹⁷⁸³ See above text to [Fn 234–243](#), [614](#).

¹⁷⁸⁴ See Annex: NCP Case Study.

NCPs, and the rights to self-determination and development were deemed by the Italian NCP to fall beyond the scope of corporations' responsibility to respect indigenous peoples' rights and FPIC but within the duties of states.

Answers to the Second Research Question Considering the above, the second part of the research question as to whether NCPs apply substantive indigenous peoples' rights norms to define corporate responsibility under the OECD Guidelines can be answered in the affirmative, at least partly. NCPs do apply indigenous peoples' rights norms to the conduct of corporations – most clearly the right to be consulted – but thus far have not done so in defining corporate responsibility under the OECD Guidelines. As observed in previous scholarly work, the analysis of the above cases also shows that NCPs have focused more on the process and elements of human rights due diligence to define corporations' responsibility under the OECD Guidelines rather than on the violation and content of indigenous peoples' substantive rights.¹⁷⁸⁵ For example, NCPs have issued determinations of both compliance and non-compliance with the OECD Guidelines in relation to adequate, flawed and lacking human rights due diligence. An example indicating the application of substantive rights to define corporate responsibility is the statement by the UK NCP in the case concerning GCM. In relation to corporate consultation and communication with indigenous peoples, the UK NCP noted that exercising undue influence or intimidation would represent a failure to respect human rights.

In terms of the first part of the research question reading – How do NCPs interpret and apply the rules of the regulatory framework on corporations and indigenous peoples when resolving disputes pertaining to corporations and indigenous peoples? – the following can be noted: First, the twenty-two cases differ in the extent to which indigenous peoples and their rights are addressed by NCPs. For instance, indigenous peoples' (rights) were only addressed peripherally in the cases concerning NBIM and Rabobank, in the cases concerning Statkraft and Vedanta, the business impacts on the indigenous reindeer-herding collective of Jijnjevaerie Saami Village and the indigenous community of the Dongria Kondh, respectively, were at the centre of the NCPs' examinations. Consequently, the reasoning and recommendations adopted by the NCPs vary in terms of depth and providing substantive direction. The most detailed and extensive analysis of the substantive and procedural aspects of consultation and FPIC processes and the modalities of impact assessment studies is provided in the two earliest cases concerning Vedanta and Intex, concluded by the UK NCP in 2009 and the Norwegian NCP in 2011. The reasoning adopted

¹⁷⁸⁵ Bağlayan, 'Bottom-Up Approach' 388; Bağlayan, 'Corporations' 254-255. See also above text to [Fn 1399](#)-1400.

by the NCPs in these cases was also ahead of its time in recommending that the corporations involved carry out due diligence or consider stakeholders' views throughout a project's lifecycle – neither issue was included in the 2000 edition of the OECD Guidelines.¹⁷⁸⁶ The final statement in the Intex case was heralded by indigenous networks as a valuable source of guidance for corporations and other NCPs.¹⁷⁸⁷ Furthermore, it has been argued that the Vedanta case has very likely influenced India's subsequent governmental and court decisions on Vedanta's bauxite mine.¹⁷⁸⁸ Additionally, in subsequent cases, NCPs have adopted tailored recommendations, albeit not in the same depth, and often more generally held recommendations.¹⁷⁸⁹

Second, despite the differences in specification and depth, the reasoning and recommendations adopted by the NCPs in the different categories appear largely consistent and comparable, with two exceptions. The approach taken by the Italian NCP in hinging consultation processes conducted by corporations on the partial or total lack of a state's consultation process appears to clearly deviate from the reasoning adopted by other NCPs framing corporations' responsibility to carry out consultation as existing independently of states' consultation duties. Surprisingly, however, the Italian NCP is the only NCP in the context of the above analysis that has explicitly referenced other NCPs' final statements in cases relating to indigenous peoples.¹⁷⁹⁰ A further inconsistency can be noted in the reasoning of the UK and Norwegian NCPs, which did not repeat their recommendation to respect the outcome of consultation processes in cases submitted after 2009 and 2011.¹⁷⁹¹

Third, the NCPs' reasoning and recommendations also appear largely in tune with the pertinent provisions of the OECD Guidelines. As indicated above, at times, NCPs have even adopted more far-reaching interpretations of the latter due to the OECD Guidelines' lack of clear elaboration on the content of the corporate responsibility to respect indigenous peoples' rights and FPIC – a shortcoming that the Norwegian NCP acknowledged regarding the 2000 OECD Guidelines.¹⁷⁹² Whether this lack of guidance is also the reason for NCPs' rather vague and tentative approach to the FPIC principle cannot be answered definitively. However, the lack of reference to the FPIC principle in the OECD

¹⁷⁸⁶ See above text to [Fn 1499-1529](#).

¹⁷⁸⁷ Doyle and Whitmore 101.

¹⁷⁸⁸ *ibid* 102-103.

¹⁷⁸⁹ See eg *Fredemi Coalition v Goldcorp Inc.*, NCP Canada (Final Statement, 3 May 2011).

¹⁷⁹⁰ See above at [Fn 1759](#).

¹⁷⁹¹ See above [Fn 1613](#).

¹⁷⁹² *Future In Our Hands (FIOH) v Intex Resources ASA*, NCP Norway (Final Statement, 30 November 2011) 5.

Guidelines surely is not helping quell the controversy surrounding FPIC. This controversy was acknowledged by the Swedish and Norwegian NCPs.¹⁷⁹³ The same may be said in relation to the NCPs' limited attention to the element of two-way communication in consultation processes and thus the inclusion of indigenous peoples in the design of consultation processes as such – although explicitly mentioned in the OECD Guidelines – and in terms of addressing other substantive rights in the same depth as the right to be consulted.

Fourth, although the OECD Guidelines are *the* standard applied by NCPs, they have referred to a range of other standards and instruments addressing corporations and indigenous peoples, including the IFC Performance Standards, the Akwé: Kon Voluntary Guidelines, the ICMM Position Paper, the UNGPs, the UNDRIP and ILO C 169, as well as to the work of the UN human rights treaty bodies, the IACtHR and the SRRIP. They have done so in a two-pronged way: first to inform their own assessment of the issues at hand and second by recommending corporate compliance with these standards.

For example, in the case concerning Intex, the Norwegian NCP examined and assessed Intex's environmental impact assessment and consultation activities against the requirements of the OECD Guidelines and the IFC Performance Standards. It identified deficiencies in the latter activities, *inter alia* noting that the lack of environmental and social information provided was 'contrary to the OECD and IFC obligations to provide "adequate and timely information"'.¹⁷⁹⁴ Regarding the environmental impact assessment, the NCP recommended that Intex correct these deficiencies using the IFC Performance Standards as guidance. Failing to do so would constitute non-compliance Chapter V of the 2000 OECD Guidelines on the environment. Hence, in this case, compliance with the IFC Performance Standards would suggest compliance with the OECD Guidelines. Conversely, non-compliance with the IFC Performance Standards would mean non-compliance with the OECD Guidelines. At times, NCPs have thus considered compliance with additional standards part of corporations' due diligence. In particular, corporations' compliance with the IFC Performance Standards and the Akwé: Kon Voluntary Guidelines has been recommended by NCPs regarding consultation and impact assessment studies. The same applies to the OECD RBC Guidance Documents.

In sum, NCPs have thus looked beyond the OECD Guidelines and engaged with other standards to inform their assessment and have advised and encouraged

¹⁷⁹³ *Jijnjevaerie Saami Village v Statkraft*, NCPs Norway/Sweden (Final Statement, 9 February 2016) 15.

¹⁷⁹⁴ *Future In Our Hands (FIOH) v Intex Resources ASA*, NCP Norway (Final Statement, 30 November 2011) 46.

corporations to do the same when conducting business on indigenous ground. This going beyond the OECD Guidelines is somewhat reminiscent of the evolutive and dynamic approach employed by the IACtHR.¹⁷⁹⁵

In a Nutshell The analysis of the above cases speaks to the value of NCPs' jurisprudence in further unpacking the corporate responsibility to respect indigenous peoples' rights and FPIC in terms of content and operationalization. NCPs have provided substantive guidance via their reasoning, recommendations, and their determinations regarding how to meet the expectations of the OECD Guidelines and at times of other standards such as the IFC Performance Standards. NCPs have provided useful considerations for corporations regarding how to engage with indigenous peoples and how to conduct impact assessment studies. Direction has also been given in terms of the use of leverage and the timing of and relationship between corporations' and states' duties in terms of stakeholder engagement. Some NCPs' good offices have resulted in agreements and spurred change in corporations' commitments.

NCPs' reasoning and recommendations, however, differ in terms of substantive direction and depth. While the Norwegian and UK NCPs have made some notable decisions and conducted in-depth analyses of these issues, the majority NCPs analysed have merely provided general recommendations without detailed specification. Hence, in line with previous scholarly work,¹⁷⁹⁶ the analysis of the NCP cases above also points to the untapped potential of NCPs to further clarify corporations' responsibility to respect human rights, including indigenous peoples' rights.

The differences among NCPs in terms of providing substantive direction and issuing determinations necessarily raise the issue of functional equivalence and the question of whether NCPs are fulfilling their function as sources of guidance and norms for responsible business conduct. In terms of the former, there is certainly a need and potential for NCPs to provide more coherence in terms of the depth substantive direction. As indicated above, from the content of their decisions in the different categories, NCPs are largely in tune with some exceptions. In terms of NCPs as sources of guidance for responsible business conduct and indigenous peoples, one must differentiate between individual NCPs and NCPs as a whole. A few specific NCPs have certainly served as sources of guidance. A definite answer in terms of NCPs as a whole as sources of guidance would require further research into both the exact para-

¹⁷⁹⁵ See above [Fn 352](#), text to [Fn 703-704](#).

¹⁷⁹⁶ See above text to [Fn 1401-1410](#).

meters to fulfil this function and, more importantly, in what sense and to what extent corporations are benefitting from NCPs' work and using it to change their behaviour.

Chapter 6: Conclusions and Way Forward

The preceding chapters have sought to further clarify corporations' responsibility to respect indigenous peoples' rights and FPIC from a legal perspective, analysing both the regulatory framework and the 'jurisprudence' of NCPs. The present chapter provides a summary of the key findings of the analysis in these chapters and, based on the findings, answers the last research question of this thesis, namely, What, from an international human rights perspective, are the shortcomings of the OECD Guidelines and the 'jurisprudence' of NCPs, and what recommendations can be developed from these findings? The approach taken to answer the third research question is both practical and normative in terms of suggestions to improve the implementation of indigenous peoples' rights and FPIC under the OECD Guidelines, the related role of NCPs and how the OECD Guidelines should read.¹⁷⁹⁷

I. Summary of the Findings

A. States as the Main Duty Bearers

The thesis has shown both the ILO's and the UN's commitment to protecting indigenous peoples and remediating the consequences of historical injustices. The two key instruments of these frameworks, ILO C 169 and the UNDRIP, emphasize the safeguard function of consultation and FPIC processes, impact assessment studies, mitigation measures and benefit sharing for the realization of indigenous peoples' social, economic, and cultural development and the protection of their rights. A particular focus of the key instruments is on indigenous peoples' land and resource rights due to the inextricable link of indigenous peoples' identity, customs, culture, and existence to the lands and territories that they traditionally occupy and use; another area of focus is their participatory rights.

As addressees of the key instruments, states have an obligation to protect indigenous peoples' rights against infringement by third actors, including corporations. The analysis has shown that states' compliance with the above safeguards is an indication of their fulfilment with their duty to protect. Furthermore, as the primary duty bearer in international human rights law, states

¹⁷⁹⁷ On the normative approach, see eg Jan M Smits, *The Mind and Method of the Legal Academic* (Edward Elgar 2012) 9.

retain an ultimate obligation to ensure that corporations comply with these safeguards where the safeguards' operationalization is delegated to them or where corporations directly engage with indigenous peoples. States must proactively create an environment that fosters corporate respect for human rights – ie, by legislating and implementing appropriate measures aimed at protecting indigenous peoples' individual and collective rights, such as the regularization of land titles or the operationalization of FPIC. This may further include legislating mandatory (human rights) due diligence or providing remediation and sanctions when indigenous peoples' rights are infringed upon by corporate conduct.

B. Politics of Interpretation

A close examination of the provisions of the two key instruments and the practices of pertinent bodies engaging with indigenous peoples' rights indicates alignment between the ILO and UN frameworks in terms of defining indigeneity based on objective and subjective criteria, the basis of indigenous peoples' land and resource rights lying in the traditional occupation and use of these lands, the general obligation to consult with indigenous peoples and the modalities of consultation and FPIC processes. However, the examination also illuminates the controversy within and among the frameworks surrounding the FPIC principle relating to its scope and the meaning of consent.

As illustrated in [Chapter 2](#), the ILO appears to take a less progressive stance towards FPIC than pertinent UN bodies and the IACtHR. While these institutions increasingly seem to advocate for a sliding scale approach to FPIC, the ILO is holding tight to a more restrictive approach according to which consent is the objective of consultation processes but not a requirement for the consultation process to be valid. Conversely, according to the sliding scale approach, the strength and the importance of FPIC depend on the circumstances and indigenous interests involved. Accordingly, FPIC is triggered and may progress from an objective to a required outcome as the impact on indigenous peoples becomes more severe. In the words of the SRRIP, 'A significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent'.¹⁷⁹⁸ In the determination of what constitutes a significant impact, indigenous peoples' view should have priority. Recent developments within the ILO do not indicate strong alignment of the frameworks

¹⁷⁹⁸ HRC, '2009 Report SRRIP' para 47.

but rather the continuation of the already longstanding controversy. In terms of relocation, the two frameworks appear the most aligned on FPIC, with ILO C 169 stipulating the only precise formulation of FPIC.

C. Corporate Responsibility to Respect Indigenous Peoples' Rights and FPIC: Governing Rules, Content, and Operationalization

Throughout this thesis, it has been shown that states are the primary duty bearers regarding indigenous peoples' rights in the context of development projects, but they are not the only actors. New realities, including economic development, corporate-related impacts and indigenous peoples' rights movements, have brought corporations and their responsibilities into sharper focus, spurring calls for more accountability in the realm of human rights generally and indigenous peoples' rights more specifically. The SRRIP has advocated for a new model for development projects that necessitates not only a broad and common understanding of indigenous peoples' rights but also compliance by states and corporations with their respective duties and responsibilities regarding these rights. In a nutshell, corporate respect for indigenous peoples' rights means conducting business in a manner that upholds their rights and does not interfere with states' indigenous peoples' rights obligations.¹⁷⁹⁹

In terms of what rules govern corporate responsibility to respect indigenous peoples' rights and FPIC, the analysis has revealed the following: First, corporations must comply with the rules adopted by states as a matter of binding domestic law; second, corporations are expected to consider and respect the rules enshrined in the international indigenous peoples' rights framework as laid out by the ILO and the UN regarding their own activities. They are expected to do so not as a matter of binding law – unless these rules are transposed into domestic law – but as a matter of global social expectations, orientation, and guidance independent of states' compliance with their own human rights obligations. This can be distilled from pertinent instruments directly addressing corporations as examined in [Chapter 3](#), from the work of pertinent UN bodies and the IACtHR as examined in [Chapter 2](#), and from the reasoning of the NCPs analysed in [Chapter 5](#). The NCPs' reasoning and the text of the OECD RBC Guidance Documents also speak to the importance of additional instruments, such as the procedures and principles of RSPO, the Akwé: Kon Voluntary Guidelines and particularly the IFC Performance Standards as

¹⁷⁹⁹ HRC, 'UNGPs' Commentary Principle 11; CESCR, 'GC No. 24' para 37. See also above text to [Fn 595-596](#), [1064-1071](#).

sources of reference and guidance for the corporate responsibility to respect indigenous peoples' rights and FPIC. The latter standards are referred to in the OECD RBC Guidance Documents and used by NCPs to inform their own assessments. NCPs have also acknowledged and recommended corporate compliance with these standards and instruments.

While the three key RBC instruments firmly acknowledge corporations' responsibility to respect human rights and detail how this responsibility is conceptualized and operationalized, they lack detailed elaboration on what the corporate responsibility to respect *indigenous peoples' rights and FPIC* entails. For instance, the provisions on stakeholder engagement provide little guidance on what meaningful stakeholder engagement or consultation with indigenous peoples entails. This void is somewhat mitigated both by the IFC Performance Standards, particularly Performance Standard 7 on indigenous peoples, and the subsequently adopted OECD RBC Guidance Documents. The latter standards and documents sharpened the contours of stakeholder engagement activities such as consultation and FPIC processes and provided insight on other key issues, including benefit sharing and impact assessment studies. In the RBC instruments, consultation and FPIC processes, impact assessment studies and benefit sharing are considered important safeguards to ensure corporations' respect for indigenous peoples' rights. This has also been affirmed by NCPs and pertinent UN bodies, including the SRRIP, CESCR and EMRIP. Constituting key elements of human rights due diligence, the latter measures are means to operationalize the corporate responsibility to respect indigenous peoples' rights and FPIC. When conducting consultation with indigenous peoples, the SRRIP has held that corporations must meet 'essentially the same international standards governing State consultations'.¹⁸⁰⁰ This has also been confirmed by NCPs. In examining consultation processes with indigenous peoples in more detail, NCPs have interpreted the terms 'free' 'prior' and 'informed' consistently with the standards and quality requirements in the ILO and UN frameworks.

The analysis in the above chapters has also provided insight regarding the content of the corporate responsibility to respect indigenous peoples' rights and FPIC – as in what substantive indigenous peoples' rights apply to corporations. Both the examination of pertinent instruments, including the IFC Performance Standards and the OECD RBC Guidance Documents, and the 'jurisprudence' of NCPs have most clearly revealed the applicability of indigenous peoples' right to be consulted to corporations – although this is a right to process and not

¹⁸⁰⁰ HRC, '2013 Report SRRIP' para 62.

a substantive right in *stricto sensu*.¹⁸⁰¹ The OECD RBC Guidance Documents and some NCPs have characterized consultation not merely as a key element of the process of human rights due diligence but as a right in and of itself and thus addressed the rights dimension of stakeholder engagement and consultation. In the case of Statkraft, the Swedish and Norwegian NCPs noted that the OECD Guidelines include the responsibility to respect indigenous peoples' right to be consulted, which undisputedly entails the responsibility of corporations to consult with indigenous peoples with a view to obtaining their FPIC. NCPs and the latter RBC instruments have further buttressed the importance of corporate respect for indigenous peoples' customary land tenure rights, customs, and cultures.

In terms of the FPIC principle, neither NCPs nor the OECD RBC Guidance Documents and the IFC Performance Standards refer to it as a right in and of itself. NCPs understand FPIC as the objective of a consultation process but not as a required outcome. A similar approach can be distilled from the OECD RBC Guidance Documents, which stipulate that corporations should anticipate that indigenous peoples may expect consultation seeking FPIC. Conversely, IFC Performance Standard 7 appears more progressive, providing a definition of FPIC and requiring IFC clients to obtain FPIC in different scenarios. However, ambiguities exist regarding what should happen if indigenous peoples' consent is not forthcoming in scenarios other than relocation. If FPIC is not granted in such circumstances, the IFC stipulates that the project should not proceed, an understanding that is also found in the OECD RBC Guidance Documents. The fact that relocation triggers a more stringent approach to FPIC and other references in the RBC instruments' text to the degree of impact on indigenous peoples allows for the conclusion that some traces of a sliding scale approach to FPIC can be found in IFC Performance Standard 7 and the OECD RBC Guidance Documents. The examination of NCPs' 'jurisprudence' has not revealed a similar result, however.

D. NCPs' Contribution

The in-depth examination of twenty-two selected NCP cases addressing indigenous peoples' issues has revealed NCPs' contribution in further unpacking the corporate responsibility to respect indigenous peoples' rights and FPIC, in terms of both content and operationalization. NCPs have applied indigenous peoples' right to be consulted to corporations and have emphasized the importance of respecting indigenous peoples' customary land tenure rights, cultural rights, and customs. They have provided guidance on impact assessment

¹⁸⁰¹ Åhrén 225. See also above text to [Fn 436](#).

studies and the modalities of consultation and FPIC processes. NCPs have affirmed that these processes should be conducted in a free, prior, informed and formal manner. They have advised corporations to adopt a clear and proactive stakeholder engagement strategy that allows for the identification and prioritization of indigenous peoples and may even go further than what is legally required. Furthermore, they have addressed and affirmed corporations' responsibility to conduct consultations independent of whether states fulfil their obligations to consult. Last, they have affirmed corporations' responsibility to leverage relationships with businesses and host governments with the aim of contributing to advancing the recognition and protection of indigenous peoples' rights. They have provided tailored recommendations in specific situation, and their good offices have resulted in corporate policy changes.

II. Shortcomings and the Way Forward

A. Shortcomings

The examination of the OECD Guidelines through both an indigenous peoples' rights lens and a comparative lens in [Chapter 3](#) and the analysis of the NCP mechanism and its dispute resolution in [Chapters 4](#) and [5](#) bring to light both substantive and procedural shortcomings of Part I and Part II of the OECD Guidelines. As shown below, shortcomings of the OECD Guidelines, by implication, affect the work of NCPs, which exist to further the effectiveness of the OECD Guidelines.¹⁸⁰²

1. Shortcomings of the OECD Guidelines

The most glaring substantive shortcoming is the complete absence of the FPIC principle from the OECD Guidelines. It is a substantive hole that calls into question the OECD Guidelines' suitability for the future and status as 'the world's most comprehensive multilateral agreement on business ethics'.¹⁸⁰³ This absence can hardly be justified in light of recent developments such as the increase in indigenous peoples' cases submitted to the NCPs, the increase in lawsuits against corporations in different jurisdictions filed by indigenous communities, the emerging trend of indigenous peoples' FPIC protocols, and the emerging recognition of the FPIC principle in different fora and by different actors, including corporations, as shown in the above NCP cases.

¹⁸⁰² OECD, '2011 Guidelines' 68 I, para 1.

¹⁸⁰³ Nieuwenkamp, 'CSR is Dead'. See also the recently published OECD, 'Stocktaking Report' 7, 12-13, 15-16, 48-49, 84.

The examination of the indigenous peoples' rights framework has revealed FPIC's central safeguard function in realizing and protecting indigenous peoples' substantive rights. Hence, any corporate engagement with indigenous peoples in some way or other prompts questions about FPIC and by implication the principle's scope, meaning and operationalization. Due to the inextricable link between FPIC and indigenous peoples' substantive rights, corporate knowledge and engagement with FPIC – as part of their responsibility to respect human rights – are thus indispensable. It is thus striking that from a corporate perspective, nothing can be distilled from the OECD Guidelines regarding the principle's scope, meaning and operationalization. The OECD Guidelines' provision on stakeholder engagement is framed too generally to provide useful information and guidance. In short, ensuring corporations' compliance with their responsibility to respect indigenous peoples' rights, a responsibility that is enshrined in the OECD Guidelines, requires a clear stance on the FPIC principle in the OECD Guidelines.

Certainly, one cannot deny the controversy surrounding the FPIC principle and its elements, but the complete absence of FPIC from the OECD Guidelines does not help demystify the principle, instead making it more complex or even spurring steps backwards rather than forward. For example, in the case of *FIDH et al v CRCC-Tongguan Investment Co., Ltd.*, submitted to the Canadian NCP in July 2013, the NCP rejected the complaint, inter alia noting that the OECD Guidelines did not contain a requirement of FPIC.¹⁸⁰⁴ Furthermore, as shown earlier, only a few NCPs thus far have addressed the FPIC principle and, if so, only in a tentative manner. Whether this can be traced to the absence of FPIC from and thus the lack of guidance provided by the OECD Guidelines cannot be answered conclusively, but it also cannot be ruled out altogether. The NCP case analysis above suggests that NCPs have relied heavily on other standards in addition to the OECD Guidelines, such as the IFC Performance Standards, to inform their own assessment and provide guidance on corporations' indigenous peoples' rights responsibilities. This development attests to the importance of the OECD Guidelines catching up with the IFC Performance Standards, not least due to the compelling need for international policy coherence.¹⁸⁰⁵

¹⁸⁰⁴ *FIDH et al v CRCC-Tongguan Investment (Canada) Co., Ltd.*, NCP Canada (Final Statement, 24 July 2014).

¹⁸⁰⁵ Such catching-up has inter alia been suggested by Seck 82; Nieuwenkamp, 'Staying Ahead'. On the importance of policy coherence, see eg EU, ILO and OECD 6.

Compliance with the FPIC principle also makes good business sense. Consultation and FPIC processes are means to obtain and maintain indigenous communities' support. Different studies have shown that a lack of such support may have serious negative consequences for businesses.¹⁸⁰⁶

A second substantive shortcoming lies in the lack of specific and explicit reference to indigenous peoples' rights in the OECD Guidelines' human rights chapter. Although they are not 'special rights', certain particularities exist, particularly in terms of indigenous peoples' collective rights, which require special attention from a corporate perspective.¹⁸⁰⁷ Both indigenous peoples' participatory rights and their land and resource rights form the cornerstone of the UNDRIP and ILO C 169 and are key to the realization of several other substantive rights. Without meaningful participation in decision-making processes affecting their interests, the realization of indigenous peoples' collective rights is illusive. Similarly, due to the basic and inextricable link between the lands and territories that they traditionally occupy and use and their identity, customs, culture, and existence, respect for their land and resource rights is essential. The absence of specific reference to and guidance regarding indigenous peoples' rights, particularly the latter rights, puts corporations at risk of 'not getting it right' from the beginning. For instance, they may fail to fully identify all indigenous communities affected or overlook the need to prioritize indigenous people and their rights in the process of human rights due diligence to avoid adverse impacts.

The particularities relating to indigenous peoples and their rights have been acknowledged in the OECD RBC Guidance Documents. These latter documents provide specific guidance *inter alia* on consulting and engaging with indigenous peoples, land tenure issues and different elements of the human rights due diligence process. Certainly, the OECD RBC Guidance Documents mitigate the lack of guidance in the OECD Guidelines to a certain extent, but being 'merely' guidance documents, they lack the same normative status as the OECD Guidelines. Hence, while they cannot fill the current substantive hole in terms of indigenous peoples' rights as such, they may serve as guidance in doing so. Last, the explicit inclusion of indigenous peoples' right to consultation would emphasize that consultation is a right in and of itself in addition to the notion of consultation as a form of engagement and a key element in the process of human rights due diligence.

¹⁸⁰⁶ See eg Anaya, 'Update' 3; Bağlayan and others.

¹⁸⁰⁷ Anaya, 'Update' 2-3. See also OECD, 'Stocktaking Report' 7, 12-13, 15-16, 40, 45, 47-49, 54, 84.

A third shortcoming relates to the procedural guidance in Part II of the OECD Guidelines and is more general in nature. As revealed in [Chapter 4](#), the NCP system is currently rather fragmented from a procedural point of view, with challenges that need to be addressed. One of these challenges relates to NCPs' diverging approaches to issuing determinations, which is currently entirely left to their discretion. Diverging approaches not only create uncertainty for corporations, touching upon the criterion of 'predictability', but may also spur different perceptions of a single NCP's functioning or lead to forum shopping by complainants. A clear provision in the procedural guidance on the issuance of determinations, including when determinations are mandatory and their scope and nature, would be beneficial to the role of NCPs in providing remedy and in serving as sources of guidance for responsible business conduct.¹⁸⁰⁸ Determinations of non-compliance with the OECD Guidelines would serve as a stick to the carrot in the voluntary procedures, thus addressing the long-standing criticism.

Furthermore, attention must be paid to the issue of NCP accessibility to indigenous communities and individuals. As revealed in [Chapter 5](#), a comparatively low number of complaints have been submitted by indigenous communities and individuals themselves. While the procedural guidance of the OECD Guidelines contains provisions on visibility, accessibility, and equitability, they are framed rather generally, lacking tailored guidance regarding marginalized and vulnerable groups, including indigenous peoples. Greater guidance on the latter criteria, such as how to promote and make the NCP mechanism more visible to nonliterate communities or communities living in remote areas, appears necessary. Furthermore, considering the widely documented barriers faced by indigenous peoples in seeking remedy – inter alia relating to language and financial barriers –¹⁸⁰⁹ an explicit provision on financial support such as for travel expenses and translation services appears warranted. Financial support could be allocated based on predefined eligibility criteria instead of being an act of courtesy and goodwill by NCPs.¹⁸¹⁰ Importantly, safeguards against reprisals – which are often directed towards indigenous peoples – should also be addressed. A recent study by OECD Watch provides recommendations and suggestions in this regard.¹⁸¹¹

¹⁸⁰⁸ See eg van't Foort and Lambooy 73.

¹⁸⁰⁹ See above [Fn 1449](#).

¹⁸¹⁰ *Fredemi Coalition v Goldcorp Inc.*, NCP Canada (Final Statement, 3 May 2011). See also OECD, 'Stocktaking Report' 79.

¹⁸¹¹ Ingrams and Zbona.

2. Shortcomings of NCPs' Indigenous Peoples' Rights 'Jurisprudence'

Throughout the analysis of the twenty-two cases, the following shortcomings can be noted. First, strikingly, among the seventeen NCPs, only one has referred to reasoning adopted by other NCPs. More cross-referencing could foster coherence in adopted reasoning and thus serve the overarching goal of functional equivalence.

A second shortcoming lies in the differences in the depth and level of detail of NCPs' final statements and recommendations. As shown in [Chapter 4](#), the more detailed the recommendations are, the greater the guidance effect for corporations is. The early cases of the Norwegian and UK NCPs can serve as a source of guidance for NCPs in this regard. These NCPs have adopted the most notable decisions on indigenous peoples' rights. On several occasions, however, NCPs' recommendations were rather general and abstract. For instance, in the case concerning Michelin, the French NCP recommended the creation of a formal stakeholder mechanism without detailing what this could entail and what is meant by 'formal'. Hence, in terms of providing guidance, there is room for improvement and certainly untapped potential.

A third shortcoming relates to the lack of engagement by NCPs with benefit sharing despite its importance in the indigenous peoples' rights framework and their limited attention to the inclusion of indigenous peoples in the design and implementation of consultation and FPIC processes. Furthermore, given the increasing popularity of a sliding scale approach to FPIC, a more progressive and less tentative approach to FPIC – for instance, by recommending that corporations respect the outcome of consultation processes as done in previous cases – would be desirable and timely. Similar considerations apply in terms of indigenous peoples' customary land tenure rights.

B. Suggestions and Recommendations

Based on the findings of this thesis and the shortcomings above, the following suggestions are made:

Adaptation of the 2011 OECD Guidelines

- The FPIC principle should be included in the human rights chapter of the OECD Guidelines using the IFC Performance Standards as the basis. This would entail including the IFC's scenarios requiring FPIC. However, due regard should be paid to the criticism of the IFC Performance Standards'

approach to FPIC.¹⁸¹² The OECD Guidelines should provide guidance on what should happen if FPIC is not forthcoming for all four scenarios. Furthermore, new developments on the sliding scale approach to FPIC and the emerging trend on FPIC protocols should be duly considered and followed.

- Explicit reference should be made to indigenous peoples' land and resource rights and participatory rights. In terms of the latter, due regard should be paid to including indigenous peoples in the design and implementation of engagement activities.
- Indigenous peoples and their representatives should be included in drafting and discussion concerning the adaptation of the OECD Guidelines.
- The possibility of financial support should be explicitly anchored in the OECD Guidelines' procedural guidance.
- The procedural guidance should include guidance on potential safeguards against reprisals.
- The procedural guidance should include guidance on the issuance of determinations.

Maximizing NCPs' Contribution to Improve the Implementation of Indigenous Peoples' Rights under the OECD Guidelines

- NCPs should address the issue of benefit sharing where indicated and provide more detailed guidance on land tenure and the inclusion of indigenous peoples in the design and implementation of engagement activities.
- NCPs should provide more detailed and progressive guidance on FPIC processes in line with the sliding scale approach to FPIC.
- NCPs should be aware of the particularities of direct engagement with indigenous peoples, paying due regard to language, form, and other potential barriers and to indigenous peoples' own institutions and representative structures. They should allow sufficient time for indigenous peoples to respond during NCP proceedings and ensure the inclusion of vulnerable groups within indigenous groups.
- NCPs should pay due regard to the issue of representation, while not adopting an overly restrictive approach resulting in the rejection of cases.

¹⁸¹² See above text to [Fn 1238](#)-1259. See also Kendyl Salcito, 'FPIC at the IFC: How Performance Standard 7 Could Better Protect Indigenous Peoples and Uphold Human Rights' (Nomogaia, 2020) <<http://nomogaia.org/wp-content/uploads/2020/11/PS7-at-the-IFC-Part-1-FPIC.pdf>> accessed 23 April 2022.

If challenges to or inaccuracy in representation arise in NCP proceedings, NCPs should engage in dialogue or aid to ensure the accuracy and inclusiveness of representation.

- NCPs should engage in greater cross-referencing.
- NCPs should engage in promotional activities adapted to the needs of indigenous peoples.

Future Research

- A similar analysis of the cases listed in groups three and four in the Annex of this thesis may provide further insight into NCPs' 'jurisprudence' in terms of stakeholder engagement and land-related issues.

III. Concluding Remarks

*Time is determined by the moon, not by capital.*¹⁸¹³

Representative of Putomayo Communities, Colombia.

As emphasized in the above statement and the statement by an indigenous leader initially referenced, engagement with indigenous peoples follows its own rules. This thesis has shown that the corporate responsibility to respect indigenous peoples' rights and FPIC requires understanding indigenous peoples' views, needs and rights and arranging for measures to include, meet and respect them. If corporations engage with indigenous peoples about their business operations, they should pay due regard not only on *what* questions they ask indigenous peoples but also on *when*, *how* and to *whom* they ask them. Consultation and FPIC processes are not merely listening exercises but are processes based on real knowledge, transparency, and shared decision-making.

¹⁸¹³ Citing Doyle and others, 'FPIC Protocols' 12.

Annex: NCP Case Study

2000 Edition of the OECD Guidelines for MNEs		2011 Edition of the OECD Guidelines for MNEs	
Chapter I: Chapter II: Chapter III: Chapter IV: Chapter V: Chapter VI: Chapter VII: Chapter VIII: Chapter IX: Chapter X:	Concepts and Principles General Policies Disclosure Employment and Industrial Relations Environment Combating Bribery Consumer Interests Science and Technology Competition Taxation	Chapter I: Chapter II: Chapter III: Chapter IV: Chapter V: Chapter VI: Chapter VII: Chapter VIII: Chapter IX: Chapter X: Chapter XI:	Concepts and Principles General Policies Disclosure Human Rights Employment and Industrial Relations Environment Combating Bribery, Bribe Solicitation and Extortion Consumer Interests Science and Technology Competition Taxation

Central OECD Guidelines Provisions Cited:

2000 Edition of the OECD Guidelines for MNEs		2011 Edition of the OECD Guidelines for MNEs	
Chapter II	Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should: <ol style="list-style-type: none"> 1. Contribute to economic, social and environmental progress with a view to achieving sustainable development. 2. Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments. 7. Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate. 	Chapter II	Enterprises should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard: <ol style="list-style-type: none"> 1. Contribute to economic, environmental and social progress with a view to achieving sustainable development. 2. Respect the internationally recognised human rights of those affected by their activities. 10. Carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation. 11. Avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur. 12. Seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly

		<p>linked to their operations, products or services by a business relationship. This is not intended to shift responsibility from the entity causing an adverse impact to the enterprise with which it has a business relationship.</p> <p>13. In addition to addressing adverse impacts in relation to matters covered by the Guidelines, encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the Guidelines.</p> <p>14. Engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.</p>
		<p>States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations:</p> <ol style="list-style-type: none"> 1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. 2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur. 3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts. 4. Have a policy commitment to respect human rights. 5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts. 6. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.
		<p>Chapter IV</p>

<p>Chapter V</p>	<p>Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development. In particular, enterprises should:</p> <ol style="list-style-type: none"> 1. Establish and maintain a system of environmental management appropriate to the enterprise, including: <ol style="list-style-type: none"> a) collection and evaluation of adequate and timely information regarding the environmental, health, and safety impacts of their activities; b) establishment of measurable objectives and, where appropriate, targets for improved environmental performance, including periodically reviewing the continuing relevance of these objectives; and c) regular monitoring and verification of progress toward environmental, health, and safety objectives or targets. 2. Taking into account concerns about cost, business confidentiality, and the protection of intellectual property rights: <ol style="list-style-type: none"> a) provide the public and employees with adequate and timely information on the potential environment, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance; and b) engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.
<p>Chapter VI</p>	<p>Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development. In particular, enterprises should:</p> <ol style="list-style-type: none"> 2. Taking into account concerns about cost, business confidentiality, and the protection of intellectual property rights: <ol style="list-style-type: none"> a) provide the public and workers with adequate, measurable and verifiable (where applicable) and timely information on the potential environment, health and safety impacts of the activities of the enterprise, which could include reporting on progress in improving environmental performance; and b) engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation.

NCP Case Group 1: (28 cases)¹

Keywords as found in the OECD and OECD Watch Databases²: case description: indigenous (peoples)

	NCP Case ²	Lead NCP ³	Case Status as per 1 st of March 2021 ⁴	Year of Submission ⁵	Notifier ⁶	Respondent Industry Sector ⁷	Country of Business Operation ⁸	OECD MNE Guidelines ⁹ : Chapter(s) Cited / Key Issue(s) Raised ⁹
1	<i>Amadiba Crisis Committee v MRC Ltd.</i>	Australia	rejected	February 2013	Community Organization	Mining and Quarrying	South Africa	<p><i>2011 Edition of the OECD Guidelines:</i></p> <p>Chapter II (2-3,5-8,10,12-14) Chapter III Chapter IV (3-4) Chapter V (4a) Chapter VI Chapter VII</p> <ul style="list-style-type: none"> - lack of information provided - lack of adequate due diligence - lack of consultation and communication with community - right to health

¹ The twenty-two NCP cases coloured in blue and green were used for the substantive analysis.

² Title of the NCP cases inspired by the OECD Watch Database <<https://www.oecdwatch.org/complaints-database/>> accessed 7 July 2021. The NCP cases are listed in alphabetical order by NCP that led the consideration of the said case.

³ Information retrieved from the OECD Database <<https://mneguidelines.oecd.org/database/>> accessed 7 July 2021.

⁴ This case study differentiates between three types of case status: 'pending', 'accepted' or 'rejected'. A case is 'pending' when the NCP is preparing its initial assessment to either accept or reject the case. A case is 'accepted' when the NCP decides that the case merits further consideration following the initial assessment. A case is 'rejected' when the NCP decides that a case does not merit further examination following the initial assessment. Information retrieved from the OECD Watch Database since it appears more up to date when compared to the OECD Database and NCP websites.

⁵ Information retrieved from the OECD Database.

⁶ Information retrieved from the OECD Database and NCP documents. The OECD differentiates between seven notifying parties: corporation, government, individual, (local) community (organization), NGO, trade union, and multi-stakeholder group (complaint submitted jointly by a combination of the following actors: NGO, trade union, community (organization), individual(s)).

⁷ Information retrieved from the OECD Database. Notably, only the main industry sector involved was listed, see respective footnotes. When a complaint addresses two or more corporations, the main industry sector in which these corporations are active are listed. The industry sectors are the following: accommodation and food service; activities of extraterritorial organizations and bodies; administrative and support service activities; agriculture, forestry and fishing; arts, entertainment and recreation; construction; education; electricity, gas, steam and air conditioning supply; financial and insurance activities; human health and social work activities; information and communication; manufacturing; mining and quarrying; other service activities; professional, scientific and technical activities; public administration and defence; real estate activities; transportation and storage; water supply, sewerage, waste management and remediation activities; wholesale and retail trade.

⁸ Information retrieved from the OECD Database.

⁹ Information retrieved from respective NCP documents (initial assessments and/or final statements). When latter documents were not accessible, information was retrieved from publicly accessible complaint documents or from the databases of the OECD and OECD Watch, see respective footnotes.

								<ul style="list-style-type: none"> - disregard of deep connection to ancestral lands - employment issues - disregard of environmental impacts - bribery - subverting opposition¹⁰
2	<i>Human Rights Law Centre v Rio Tinto</i>	Australia	accepted ¹¹	September 2020	NGO	Mining and Quarrying ¹²	Papua New Guinea	<p><i>2011 Edition of the OECD Guidelines:</i></p> <p>Chapter II (1-2,7,10-11) Chapter IV (1-3,5-6) Chapter VI (1a, 2a-b, 3,5)</p> <ul style="list-style-type: none"> - lack of adequate due diligence - adverse human rights impacts on the economic, social, and cultural rights of indigenous communities (right to life, right to food, water, health, housing and an adequate standard of living, cultural rights) - pollution of drinking water - destruction of sacred sites of cultural significance - destruction of agricultural land essential to their livelihoods - flooding causes displacement of villages¹³ <p><i>2000 Edition of the OECD Guidelines:</i></p> <p>Chapter II (1-2) Chapter III (1) Chapter V (1c)</p> <ul style="list-style-type: none"> - lack of environmental impact assessment - lack of addressing impacts of logging activities on indigenous peoples
3	<i>Proyecto Gato v Tractebel</i>	Belgium	accepted ¹⁴	April 2004	NGO	Electricity, Gas, Steam, Air Conditioning Supply	Lao People's Democratic Republic	

¹⁰ Information retrieved from the complaint document.

¹¹ Initial assessment as per 1st of March 2021 not accessible and thus excluded from the substantive analysis. See <<https://ausncp.gov.au/complaints/track-open-complaint>> accessed 6 April 2021.

¹² Other industry sectors mentioned: human health and social work activities; agriculture, forestry, and fishing; water supply, sewerage, waste management and remediation activities.

¹³ Information retrieved from the complaint document.

¹⁴ The Belgian NCP stated that no breaches of the OECD Guidelines could be attributed to Tractebel. The NCP's statement is neither accessible under the OECD and the OECD Watch Databases nor on the website of the Belgian NCP. Therefore, the case was excluded for the substantive analysis.

									<ul style="list-style-type: none"> - forced evictions resulting in adverse health, social and economic impacts¹⁵ <p><i>2011 Edition of the OECD Guidelines:</i></p> <p>Chapter II (10-12, 14) Chapter IV (1,2,6) Chapter VI (2a-b)</p> <ul style="list-style-type: none"> - lack of respect for the right of prior consultation of general population - lack of FPIC of indigenous population - inadequate environmental consultation - violation of the right to property, indigenous peoples' rights to lands and territories, the right not to be forcibly displaced, and the right to water - social division - repression and violence against opposition - risks to biodiversity - poor working conditions <p><i>2000 Edition of the OECD Guidelines:</i></p> <p>Chapter II (2,5,11)</p> <p><i>2011 Edition of the OECD Guidelines:</i></p> <p>Chapter IV (1,3,5,6) Chapter V Chapter VI Chapter VII Chapter XI</p> <ul style="list-style-type: none"> - lack of prior consultation - lack of FPIC - deprivation of means of livelihood - risks of water pollution posing risks to health
4	<i>FIDH et al v CRCC-Tongguan Investment (Canada) Co., Ltd.</i>	Canada	rejected	July 2013	Multi-stakeholder (NGO, Individuals)	Mining and Quarrying	Ecuador		
5	<i>CCFD et al v Michelin</i>	France	accepted	July 2012	Multi-stakeholder (NGO, Trade Union)	Manufacturing	India		

¹⁵ Information retrieved from the OECD Watch Database.

6	<i>Unión Hidalgo v EDF Group</i>	France	accepted	February 2018	Multi-stakeholder (NGO, Community Organization)	Electricity, Gas, Steam, Air Conditioning Supply	Mexico	<p><i>2011 Edition of the OECD Guidelines:</i></p> <p>Chapter II (1,2,5,10-12,14) Chapter III Chapter IV (1,2,5)</p> <ul style="list-style-type: none"> - lack of information, consultation and FPIC - land tenure rights - lack of adequate human rights due diligence <p><i>2011 Edition of the OECD Guidelines:</i></p> <p>Chapter II (2,10,14) Chapter III (2f-g) Chapter IV (1-2,5) Chapter VI (1,2a-b,3)</p> <ul style="list-style-type: none"> - destruction of vital source of water with spiritual and cultural significance - risks to ecosystem and habitat upon which community depends for subsistence and livelihoods - lack of transparency on project - lack of adequate human rights due diligence - lack of adequate stakeholder engagement including good faith and meaningful consultation - lack of consent - lack of conducting and disclosing comprehensive environmental impact assessment¹⁷ <p><i>2011 Edition of the OECD Guidelines:</i></p> <p>Chapter II (2,12,14) Chapter IV (1-3)</p> <ul style="list-style-type: none"> - right to self-determination - right to natural resources
7	<i>IDI & FIAN Germany v Heidelberg Cement</i> ¹⁶	Germany	pending	September 2020	NGO	Mining and Quarrying	Indonesia	
8	<i>GLAN v San Leon Energy</i> ¹⁸	Ireland	accepted ¹⁹	October 2018	NGO	Mining and Quarrying	Non-Self-Governing Territory of Western Sahara	

¹⁶ Information retrieved from the OECD Watch Database, since this information was not listed in the OECD Database as per 1st of March 2021.

¹⁷ Information retrieved from the complaint document.

¹⁸ Information retrieved from the OECD Watch Database, since this information was not listed in the OECD Database as per 1st of March 2021.

¹⁹ Initial assessment did not yield any substantive direction that would contribute to the purposes of this study.

									- lack of FPIC for exploration and exploitation activities
9	<i>Survival International v Salini Impregilo S.p.A.</i>	Italy	accepted	March 2016	NGO	Construction ²⁰	Ethiopia	<i>2000 Edition of the OECD Guidelines:</i> Chapter II (2) Chapter V (2b) <i>2011 Edition of the OECD Guidelines:</i> Chapter IV (1-5) Chapter VI (2b) - right to self-determination - right to development - right to free disposal of wealth and natural resources - lack of consultation and communication - lack of due diligence - loss of and risks to livelihoods / drinking water - lack of environmental and social impact assessment - inadequacy of artificial mitigation measures	
10	<i>Obelle Concern Citizens & FOCONE v Shell</i>	the Netherlands	accepted	January 2018	Multi-stakeholder (NGO, Community Organization)	Mining and Quarrying	Nigeria	<i>2011 Edition of the OECD Guidelines:</i> Chapter I (2) Chapter II (1-3, 4, 6, 11) Chapter III (1) Chapter IV (1-3, 5-6) Chapter V (1e) Chapter VI (1-3, 8) - gas and oil leaks impacted on Obelle peoples' land, natural resources, livelihoods, health, and food production - increased marginalization of the Obelle people - pollution of drinking water - loss of subsistence farming leading to high level of poverty and deprivation	

²⁰ Other industry sector mentioned: water supply, sewerage, waste management and remediation activities.

								<ul style="list-style-type: none"> - environmental impact assessment without consultation with and meaningful engagement of communities - lack of mitigation plans and remediation measures for impacts - non-compliance with domestic law, which foresees employment for indigenous peoples
11	<i>Peruvian Indigenous Federations et al v Pluspetrol</i> ²¹	the Netherlands	pending	March 2020	Multi-stakeholder (NGO, Community Organization)	Mining and Quarrying	Peru	<p>2011 Edition of the OECD Guidelines:</p> <p>Chapter II (10-11,14) Chapter III (1-3) Chapter IV (6) Chapter XI (1-2)</p> <ul style="list-style-type: none"> - lack of adequate due diligence to prevent adverse environmental and human rights impacts - adverse impacts on the rights of local indigenous population (right to self-determination, right to FPIC, lack of compensation for lands, lack of meaningful consultation, right to water, food, and health) - industrial oil extraction causing pollution and contamination of rivers and soils - tax avoidance - lack of disclosure of information²²
12	<i>Rights of Indigenous Peoples & Construction Company in New Zealand</i> ²³	New Zealand	pending ²⁴	April 2018	Multi-stakeholder (NGO, other interested parties)	Construction ²⁵	New Zealand	<ul style="list-style-type: none"> - human rights (cited Chapters not disclosed)
13	<i>Future In Our Hands (FTOH) v Intex Resources ASA</i>	Norway	accepted	January 2009	NGO	Mining and Quarrying	the Philippines	<p>2000 Edition of the OECD Guidelines:</p> <p>Chapter II (7) Chapter III (2) Chapter V Chapter VI (2)</p>

²¹ Information retrieved from the OECD Watch Database, since this information was not listed in the OECD Database as per 1st of March 2021.

²² Information retrieved from the complaint document.

²³ Information retrieved from the OECD Database. NCP case is neither listed in the OECD Watch Database nor on the website of the NCP of New Zealand as per 15th of April 2021.

²⁴ Details of ongoing procedures are currently unavailable (1st of March 2021).

²⁵ Other industry sector mentioned: real estate activities.

									<ul style="list-style-type: none"> - lack of adequate consultation - acquired FPIC is not representative - bribery regarding mining exploration permits - risks of environmental damage and lack of adequate communication related thereto - undermining opposition of indigenous peoples' organizations
14	<i>ForUM and Friends of the Earth Norway v Cermaq ASA</i>	Norway	accepted	May 2009	NGO	Agriculture, Forestry, Fishing	Canada/Chile	<p><i>2000 Edition of the OECD Guidelines:</i></p> <p>Chapter II (2,7) Chapter IV (1a,1d,4a-b) Chapter V (2-3)</p> <ul style="list-style-type: none"> - inadequate consideration of indigenous peoples' rights (inadequate routines of contact) - employment issues - inadequate communication and consultation with communities on environmental policy <p><i>2000 Edition of the OECD Guidelines:</i></p> <p>Chapter II (1-2)</p>	
15	<i>Jijnjevaerie Saami Village v Statkraft</i>	Norway ²⁶	accepted	October 2012	Community Organization	Electricity, Gas, Steam, Air Conditioning Supply	Sweden	<p><i>2011 Edition of the OECD Guidelines:</i></p> <p>Chapter II (1-2,14) Chapter IV (1-2,5) Chapter VI (2a-b)</p> <ul style="list-style-type: none"> - no adequate consultation - lack of FPIC - risks to cultural and economic survival - risks to cultural identity - risks of environmental damage 	
16	<i>Fivas v Norconsult AS</i>	Norway	accepted	August 2014	NGO	Construction	Malaysia	<p><i>2011 Edition of the OECD Guidelines:</i></p> <p>Chapter II (2,10-13) Chapter III (1.2f-g,3b-d) Chapter IV (1,3-5)</p>	

²⁶ *Jijnjevaerie Saami Village v Statkraft*, NCPs Norway/Sweden (Final Statement, 9 February 2016) 5.

									<ul style="list-style-type: none">- lack of adequate human rights due diligence- lack of transparency- lack of respect for the rights of indigenous peoples
17	<i>Quechua Indigenous Group v Marriott International</i>	Peru	rejected	December 2018	Individuals	Accommodation and Food Service	Peru	<i>2011 Edition of the OECD Guidelines:</i> Chapter II (2,10-12) Chapter IV (1-3) Chapter VII (1) <ul style="list-style-type: none">- demolition of indigenous cultural heritage- exhumation of human remains from an attached cemetery- excavation of archaeological site- human right to maintain culture and religious freedom- impact on religious practice- bribery	
18	<i>KTNC Watch et al v KEXIM / Daewoo E&C</i>	South Korea	rejected	October 2018	NGO	Financial and Insurance Activities / Construction ²⁷	the Philippines	<i>2011 Edition of the OECD Guidelines:</i> Chapter II (1-3,5,10-11,14, B2) Chapter IV (1-6) Chapter VI (1a,1c,2b) <ul style="list-style-type: none">- continuation of the project despite knowledge of violations of indigenous peoples' rights by the government- lack of consultation with local indigenous people²⁸	
19	<i>KTNC Watch et al v POSCO / NPS / KEXIM</i>	South Korea	accepted for POSCO/NPS rejected for KEXIM ²⁹	December 2019	NGO	Agriculture, Forestry, Fishing / 2x Financial and Insurance Activities ³⁰	Indonesia	<i>2011 Edition of the OECD Guidelines:</i> Chapter II Chapter IV Chapter VI	

²⁷ Respondent corporations linked to the implementation of the Jalaar River Multi-Purpose Project in the Philippines.

²⁸ Information retrieved from the complaint document and the OECD Database.

²⁹ Initial assessment did not yield any substantive direction that would contribute to the purposes of this study.

³⁰ The OECD Database refers to 'construction' as industry sector. However, given that the case concerns issues relating to a palm oil plantation the industry sector has been adapted to 'agriculture, forestry, and fishing' by the author.

									<ul style="list-style-type: none"> - loss of biodiversity and deforestation - degradation of water quality - lack of FPIC - right to water - inadequate corporate policy - lack of human rights due diligence <p><i>2011 Edition of the OECD Guidelines:</i></p> <p>Chapter II (2,10) Chapter VI</p> <ul style="list-style-type: none"> - lack of free, prior, and informed consultation - lack of cumulative environmental impact assessment - impacts on the way of life: access to water sources restricted with impacts on fishing practices / a particular water source has religious significance - right to health and life <p><i>2000 Edition of the OECD Guidelines:</i></p> <p>Chapter II</p> <ul style="list-style-type: none"> - wind power park will restrict reindeer herding - disrespect for indigenous peoples' rights - environmental sustainability <p><i>2011 Edition of the OECD Guidelines:</i></p> <p>Chapter IV (1-6) Chapter VI (2b)</p> <ul style="list-style-type: none"> - lack of human rights due diligence - inadequate human rights policy / procedures - lack of FPIC and consultation - denial of Baka peoples' rights to their lands and natural resources - violence against Baka people
20	<i>Alianza por la Solidaridad v Grupo ACS-COBRA</i>	Spain	accepted	November 2017	NGO	Construction ³¹	Guatemala		
21	<i>Saami Council v KfW IPEX-Bank</i>	Sweden	rejected	April 2010	NGO	Financial and Insurance Activities ³²	Sweden		
22	<i>Survival International v WWF</i>	Switzerland	accepted	February 2016	NGO	Agriculture, Forestry, Fishing	Cameroon		

³¹ Other industry sector mentioned: water supply, sewerage, waste management and remediation activities.

³² Respondent corporation linked to the implementation of a wind power park.

23	<i>Society for Threatened Peoples v Credit Suisse</i>	Switzerland	accepted		April 2017	NGO	Financial and Insurance Activities ³³	United States of America	<p><i>2011 Edition of the OECD Guidelines:</i></p> <p>Chapter II (10,13) Chapter IV (3,5) Chapter VI (3)</p> <ul style="list-style-type: none"> - coherence of internal corporate CSR policy with international standards (OECD Guidelines, UNGPs, UNDRIP, UN Global Compact) - issue of FPIC - lack of due diligence regarding business relationship - failing to influence business partners - failure to protect the environment, public health and to contribute to a wider goal of sustainable development - DAPL project poses risks to indigenous communities' drinking water source, destroys cultural sites - lack of adequate consultation and environmental impact assessment
24	<i>TuK Indonesia v Roundtable on Sustainable Palm Oil</i>	Switzerland	accepted		January 2018	NGO	Agriculture, Forestry, Fishing	Indonesia	<p><i>2011 Edition of the OECD Guidelines:</i></p> <p>Chapter IV (3,5)</p> <ul style="list-style-type: none"> - failure of compliance by RSPO with its own rules and procedures - complaint before RSPO alleges land conflict, exclusion of indigenous communities from traditional lands, loss of access to sacred sites, risks to cultural values
25	<i>Society for Threatened Peoples v BKW Energie AG</i>	Switzerland	accepted ³⁴		January 2020	NGO	Electricity, Gas, Steam, Air Conditioning Supply	Norway	<p><i>2011 Edition of the OECD Guidelines:</i></p> <p>Chapter II (10,13) Chapter IV (3,5)</p> <ul style="list-style-type: none"> - risks to cultural and economic survival - risks to traditional herding activities

³³ Respondent corporation involved via business relationship with corporations linked to the construction of the Dakota Access Pipeline in the United States of America.

³⁴ Initial assessment did not yield any substantive direction that would contribute to the purposes of this study.

									<ul style="list-style-type: none">- lack of due diligence- lack of adequate information and consultation- lack of FPIC
26	<i>Survival International v Vedanta Resources Plc.</i>	United Kingdom	accepted	December 2008	NGO	Mining and Quarrying	India	<i>2000 Edition of the OECD Guidelines:</i> Chapter II (2,7) Chapter V (2b) <ul style="list-style-type: none">- lack of consultation and information- traditional lands of cultural and spiritual importance	
27	<i>IAP and WDM v GCM Resources Plc.</i>	United Kingdom	accepted	December 2012	NGO	Mining and Quarrying	Bangladesh	<i>2000 Edition of the OECD Guidelines:</i> Chapter II (2,7) <i>2011 Edition of the OECD Guidelines:</i> Chapter II (2,7) Chapter III (2f) Chapter IV (1,2-3,5) <ul style="list-style-type: none">- risks of displacement of indigenous communities- risks of destruction of subsistence and livelihoods- risks to environment, food security, water supply	
28	<i>WECAN International DIP and IPLP v Credit Suisse</i> ³⁵	United States of America	pending	January 2020	NGO	Financial and Insurance Activities ³⁶	United States of America	<i>2011 Edition of the OECD Guidelines:</i> Chapter II (2,10-12,14) Chapter IV (2-3,5) <ul style="list-style-type: none">- adverse impacts on rights of indigenous peoples- driving climate crisis due to financing the fossil fuel industry- disrespect for FPIC³⁷	

³⁵ Information retrieved from the OECD Watch Database since this information was not listed in the OECD Database as per 1st of March 2021.

³⁶ Respondent corporation involved via business relationship with corporations linked to the construction of the Dakota Access Pipeline in the United States of America.

³⁷ Information retrieved from the complaint document and the OECD Watch Database.

NCP Case Group 2: (10 cases)

Keywords as found in the NCP documents, single or in combination: consultation (only in combination); FPIC; indigenous (peoples); tribal

	NCP Case	Lead NCP	Case Status as per 1 st of March 2021	Year of Sub-mission	Notifier	Respondent Industry Sector	Country of Business Operation	OECD MNE Guidelines' Chapter(s) Cited / Key Issue(s) Raised
29	<i>Fredemí Coalition v Goldcorp Inc.</i>	Canada	accepted	December 2009	NGO	Mining and Quarrying	Guatemala	<p><i>2000 Edition of the OECD Guidelines:</i></p> <p>Chapter II (2)</p> <ul style="list-style-type: none"> - adverse impacts on the rights to life, health, water, property, to be free from racial discrimination, and to free, prior, and informed consent due to: <ul style="list-style-type: none"> - land acquisition - water contamination and overconsumption - destruction of housing - retaliation
30	<i>Southeast Alaska Conservation Council v Seabridge Gold</i>	Canada	rejected	December 2016	NGO	Mining and Quarrying	Canada	<p><i>2011 Edition of the OECD Guidelines:</i></p> <p>Chapter II (10,14) Chapter III (1-2) Chapter IV (1-6) Chapter VI (1a-b,2b,5)</p> <ul style="list-style-type: none"> - lack of full disclosure of plans avoid and mitigate environmental concerns - lack of open, meaningful, and timely engagement - lack of adequate environmental and human rights due diligence
31	<i>Southeast Alaska Conservation Council v Imperial Metals</i>	Canada	accepted	December 2016	NGO	Mining and Quarrying	Canada	<p><i>2011 Edition of the OECD Guidelines:</i></p> <p>Chapter II (10) Chapter III Chapter IV (1-6) Chapter VI (1a,2a-b)</p> <ul style="list-style-type: none"> - lack of due diligence with respect to adverse human rights and environmental impacts,

32	<i>Sherpa et al v Socaplam / Bolloré SA/ Financière du Champ de Mars/ Socfin/ Socfinaf SA</i> ³⁸	France	accepted	December 2010	NGO	Agriculture, Forestry, Fishing / 4x Financial and Insurance Activities	Cameroon	<p>particularly effects on Alaskan ecosystems and fisheries (risks regarding clean water and customary use of natural resources)</p> <ul style="list-style-type: none"> - lack of consultation and disclosure of information to Southeast Alaska tribal representatives and other Alaskan communities - lack of risk assessment <p>2000 Edition of the OECD Guidelines:</p> <p>Chapter II (1-4,6-7,10)</p> <p>Chapter III (2-5)</p> <p>Chapter IV (1a,2,4b,5,8)</p> <p>Chapter V (1,2,3,6d,7,8)</p> <ul style="list-style-type: none"> - deterioration in living conditions – particularly for the indigenous Bagyeli Pygmies) - insufficient contribution to sustainable development - insufficient employment of local personnel - environmental damage - retaliation
33	<i>Sherpa et al v Socapalm/ Bolloré SA/ Financière du Champ de Mars/ Socfin/ Socfinaf SA</i>	Belgium ³⁹	accepted	December 2010	NGO	ibid case no. 32 ⁴⁰	Cameroon	ibid case no. 32 ⁴¹
34	<i>Lok Shakti Abhiyan et al v ABP/APG</i>	the Netherlands	accepted	October 2012	NGO	Financial and Insurance Activities ⁴²	India	<p>2011 Edition of the OECD Guidelines:</p> <p>Chapter II (12), Commentary (14,19,20,22)</p> <p>Chapter III</p> <p>Chapter IV (1.2.5)</p> <ul style="list-style-type: none"> - POSCO has failed to conduct comprehensive human rights due diligence and

³⁸ Socfinaf was renamed into Socfin and Intercultures into Socfinaf SA.

³⁹ Case was partly referred by the French NCP to the Belgian NCP to engage with the Socfin Group.

⁴⁰ The NCP cases numbered 32 and 33 are counted as separate cases in Figure 1-4, and Figure 6. However, since the complaint concerns the same corporations and the same issues raised, the industry sectors as well as the issues raised were only counted once for Figure 5 and Figure 7.

⁴¹ ibid.

⁴² Respondent corporation linked to the extractive sector.

35	<i>Lok Shakti Abhiyan et al v NBIM</i>	Norway	accepted		October 2012	NGO	Financial and Insurance Activities ⁴³	India	environmental due diligence / lack of meaningful consultation - displacement of individuals from Scheduled Tribes and Other Traditional Forest Dwellers - ABP and APG directly linked to POSCOs' activities via business relationship / responsibility to use their leverage ibid case no. 34 ⁴⁴
36	<i>Lok Shakti Abhiyan et al v POSCO</i>	South Korea	rejected		October 2012	NGO	Mining and Quarrying	India	ibid case no. 34
37	<i>Friends of the Earth et al v Rabobank</i>	the Netherlands	accepted		June 2014	NGO	Financial and Insurance Activities ⁴⁵	Indonesia	2011 Edition of the OECD Guidelines: Chapter II (10,12) Chapter IV (Commentary 45) - lack of appropriate steps to prevent or mitigate alleged negative impacts related to their activity through their business relationship with BGA, partially funded by Rabobank - improvement of corporate policy 2011 Edition of the OECD Guidelines:
38	<i>Norwegian Support Committee for Western Sahara v Sjøvik AS</i>	Norway	accepted		December 2011	NGO	Agriculture, Forestry, Fishing	Non-Self-Governing Territory of Western Sahara	Chapter IV (1) - failure to respect the Sahrawi right to self-determination, including the right to be consulted and consent about and benefit from the exploitation of natural resources

⁴³ Respondent corporation linked to the extractive sector.

⁴⁴ The NCP cases numbered 34, 35, 36 are counted as separate cases in Figure 1-6. However, since the complaint concerns the same issues raised, they were counted only once for Figure 7.

⁴⁵ Respondent corporation linked to the agricultural sector.

NCP Case Group 3: (28 cases)

Keywords as found in the OECD and OECD Watch Databases' descriptions, the complaint, and/or NCP documents:

- culture; cultural (heritage, site(s), right(s); indigenous (peoples/communities) (as mentioned in complaint documents); rural communities; self-determination; traditional (communities, lands, landowners, livelihoods)

Often, these keywords were displayed in conjunction with the following terms:

- community dialogue; consent (often displayed in complaint documents), consultation; displacement; expropriation; expulsion; (land) eviction; (forced) land acquisitions; loss of land; relocation; (involuntary) (re)settlements

	NCP Case	Lead NCP
39	<i>ACF et al v ANZ Bank</i>	Australia
40	<i>Colombian Communities v BHP Billiton</i>	Australia
41	<i>EC and IDI v Australia and New Zealand (ANZ) Banking Group</i>	Australia
42	<i>Finance & Trade Watch Austria et al v Andritz AG</i>	Austria
43	<i>Associação Fórum Suae Espaço Socioambiental et al v Van Oord / Complexo Industrial Portuário Eraldo Gueiros – Empresa Suae, Pernambuco</i>	Brazil
44	<i>Paracuta v Kinross Gold Corporation</i>	Brazil
45	<i>MiningWatch Canada et al v Barrick Gold Corporation</i>	Canada
46	<i>Miningwatch Canada et al v Centerra Gold</i>	Canada
47	<i>DECCOIN et al v Ascendant Copper Corporation</i>	Canada
48	<i>Canada Tibet Committee v China Gold International Resources</i>	Canada
49	<i>Bruno Manser Fund v Sakto Group</i>	Canada
50	<i>Save Teghut Civic Initiative et al v EKF</i>	Denmark
51	<i>Siemempiu Foundation et al v Pöyry Group</i>	Finland
52	<i>Gesellschaft für bedrohte Völker v Volkswagen</i>	Germany
53	<i>FIAN and Wake Up and Fight for Your Rights v NKG</i>	Germany
54	<i>Leaders of Paguyuban UKPWR v J-Power / Itochu</i>	Japan
55	<i>Associação Fórum Suae Espaço Socioambiental et al v Atradius Dutch State Business</i>	the Netherlands
56	<i>FIVAS et al v Bresser</i>	the Netherlands
57	<i>Milindefensie et al v ING</i>	the Netherlands
58	<i>Aminigboko Community of Abua/Odua L.G.A. v SPDC/Shell</i>	the Netherlands
59	<i>Green Party of New Zealand v ANZ Bank</i>	New Zealand
60	<i>Earth Rights International et al v Daewoo and KOGAS</i>	South Korea
61	<i>Takkom Jerry & LSD v Nykomb Synergetics Development AB</i>	Sweden
62	<i>ELSAM et al v PT Holcim Indonesia Tbk.</i>	Switzerland
63	<i>RAID v ENRC</i>	United Kingdom
64	<i>WWF v SOCO</i>	United Kingdom
65	<i>IDI, EC, and LICADHO v Bonsucro</i>	United Kingdom
66	<i>CNUTC v Usibelli Coal Mine and J-Power</i>	United States of America

NCP Case Group 4: (27 cases)

Keywords as found in the OECD and OECD Watch databases' descriptions, the complaint, and/or NCP documents:

- consultation; consent; (impact on) local communities; (impact on) affected communities; stakeholder engagement with local communities

Often, these keywords were displayed in conjunction with the following terms:

- community dialogue; consultation; displacement; expropriation; expulsion; (land) eviction; (forced) land acquisitions; lands; landowners; livelihoods; loss of land; relocation; (involuntary) (re)settlements

	NCP Case	Lead NCP
67	<i>FOCO and Friends of the Earth Argentina v Shell Capsa</i>	Argentina
68	<i>FOCO et al v Barrick Gold</i>	Argentina
69	<i>ACIDH et al v Compagnie Minière de Sud Katanga</i>	Belgium
70	<i>Oxfam Canada v First Quantum Mining</i>	Canada
71	<i>Dominic Withling et al v Nordex SE</i>	Germany
72	<i>Proyecto Gato et al v Electricité de France</i>	France
73	<i>CEDHA v Finmvera Oyj</i>	Finland
74	<i>CEDHA v Botnia S.A.</i>	Finland
75	<i>Pobal Chill Chomaim et al v Royal Dutch Shell / Statoil / Marathon Oil Corporation</i>	Ireland / the Netherlands
76	<i>Egbema Voice of Freedom et al v ENI</i>	Italy
77	<i>Friends of the Earth Japan and WALHI v Marubeni and JERA</i>	Japan
78	<i>Market Forces v SMBC / MUFG and Mizuho</i>	Japan
79	<i>Communal Landowners v Excellon Resources</i>	Mexico
80	<i>Hou Friesland Moot v NUON</i>	the Netherlands
81	<i>Fenceline Community et al v Royal Dutch Shell</i>	the Netherlands
82	<i>SEW and Strottel v Shell</i>	the Netherlands
83	<i>Norwegian Climate Network et al v Statoil</i>	Norway
84	<i>CopperAcción et al v Doe Run</i>	Peru
85	<i>CEDHA and Bellona v Nordea</i>	Sweden
86	<i>LSD et al v Tosyali Holding Ltd.</i>	Turkey
87	<i>Crude Accountability et al v British Gas</i>	United Kingdom
88	<i>Comer House et al v BP</i>	United Kingdom
89	<i>Cameroon Communities v Victoria Oil and Gas</i>	United Kingdom
90	<i>SEW and Strottel v Standard Chartered Bank / Barclays / Royal Bank of Scotland</i>	United Kingdom
91	<i>CLIC and ERI v American Sugar Refining Incorporated (ASR)</i>	United States of America
92	<i>Jamaa Resources Initiatives et al v US Company</i>	United States of America
93	<i>CED and RELUFA v SG Sustainable Oils Cameroon</i>	United States of America

Curriculum Vitae

Fanny Pulver studied law at the University of Zurich where she obtained both her Bachelor and Master of Law. As part of a Double Degree Programme of the University of Zurich, she also obtained a Master of Laws (LL.M.) in Human Rights from Maastricht University in the Netherlands. From 2015 to 2019, she was a research fellow to Prof. Dr. iur. Christine Kaufmann and from 2016 to 2021 a doctoral candidate at the Institute of International Law and Comparative Constitutional Law at the University of Zurich.

Corporations have become powerful actors exerting increasing influence on society and the living conditions of individuals worldwide, including indigenous peoples. While it is recognized that corporations have a responsibility to respect indigenous peoples' rights and the important safeguard concept of free, prior and informed consent (FPIC), it is rather unclear what such a corporate responsibility entails from a legal perspective. This doctoral thesis thoroughly analyses the regulatory framework pertaining to indigenous peoples and corporations as well as the 'case law' of the OECD National Contact Points (NCPs). Based on this analysis, the thesis identifies currently applied features of indigenous peoples' rights and FPIC in relation to corporate actors, determines shortcomings in the regulatory framework and the 'jurisprudence' of the NCPs, and makes suggestions for possible improvements.