The International Organisation of Employers (IOE) and the Asociación Nacional de Empresarios de Colombia (ANDI) welcome the realisation of the Regional Forum on Business and Human Rights for Latin America and the Caribbean. From the very beginning, the Employers have demanded that the UN Working Group on the issue of human rights and transnational corporations and other business enterprises should reach out to the regions to allow as many stakeholders as possible – especially small and medium sized companies – to participate in the process and to contribute to the work of the UN Working Group. There is no “one-size-fits-all” approach to the implementation of the UN Guiding Principles on Business and Human Rights. It is important that the members of the Working Group attain a proper understanding of the challenges on the ground of the implementation of the UN Guiding Principles for Business and Human Rights in different parts of the world. The Employers therefore greatly support the organisation of the Latin America regional forum on business and human rights.

I. On the UN Guiding Principles

The IOE and ANDI value the UN ‘protect, respect and remedy’ framework as well as the UN Guiding Principles as a conclusive concept for better implementation of human rights because it distinguishes clearly between the responsibilities of the various players and helps to clarify the complex interface between human rights and companies. IOE and ANDI are committed to work with the UN Working Group as well as with other stakeholders to advance the dissemination and implementation of the framework and the UN Guiding Principles.

The UN Guiding Principles have become a priority topic within the business community. Many companies have started to implement the UN Guiding Principles and are seeking to find the best approaches to conduct meaningful due diligence and remedy processes. A global pilot survey of companies on their implementation of UN Guiding Principles was conducted by the IOE jointly with the ICC, GBI, and the Human Rights Project of the University of Denver last autumn. Of the 117 companies that responded 83% of them have made a public commitment to respect human rights and 86% have signed up to voluntary initiatives that address the respect of human rights. When it comes to training on social issues and on the impacts of company activities with which their employees are involved, the figure reaches 80%, with 91% of companies operating feedback mechanisms, such as hotlines that allow employees to submit issues of concern to management. Employers’ federations on their part are increasingly providing services to their member companies on human rights and the implementation of the UN Guiding Principles. Employers’ federations provide training courses, webinars, guides as well as support and advice to individual companies.

Moreover, many efforts are being conducted by multilateral initiatives, political actors and international organisations to promote the implementation of the UN Guiding Principles. The strong uptake of the UN Guiding Principles is a positive development and shows the broad support they receive. However, it brings the challenge to ensure that policies for promoting and implementing the UN Guiding Principles are consistent with the UN “protect-respect-remedy” framework and the UN Guiding Principles themselves. The issue of coherence is
one of the main concerns for businesses. States need clarity with regard to their duty to protect and Business needs certainty with regard to its responsibility to respect. Their duties and responsibilities should not be reinterpreted or redefined by different international organisations and initiatives, governments or UN agencies. Business calls on all actors to ensure that their initiatives and projects are properly built on the UN Guiding Principles.

II. Key concerns of business with regard to the implementation of the UN Guiding Principles in the Latin America and the Caribbean region

The Latin America and the Caribbean region is a region with many opportunities, but it also has challenges with regard to the implementation of the UN Guiding Principles. Obviously, the region itself is highly diverse, with different framework conditions in each country vis-à-vis the implementation of the UN Guiding Principles. What applies to the UN Guiding Principles in general also counts for the Latin America and the Caribbean region in particular: there is no “one-size-fits-all approach”. Governments face different challenges with regard to their duty to protect human rights and companies follow different approaches to meet their responsibility to respect human rights, depending on the size and sector of the enterprise and the environment the company is operating in.

In general, however, a main concern for business in the region is that governments fulfill their duty to protect human rights better by not only implementing their international human rights obligations into national law, but also by enforcing these laws and improving the role of law, by strengthening the judicial systems, and by creating environments in which especially the right to life, liberty, and personal and property security are fully ensured, and which facilitate that companies meet their responsibility to respect human rights.

Indeed, the UN Guiding Principles clearly distinguish between the roles of States and business enterprises. The State duties to respect, protect and fulfill human rights are fundamentally different from the corporate responsibility to respect. Companies cannot and should not take on the role of States. Employers around the globe, however, are increasingly worried that the discussions on the implementation of the UN Guiding Principles are de facto only focusing on the second pillar, which details the companies’ responsibility to respect human rights, and that the role of the State is similarly focused only on business. This development is neither helpful nor correct. The Latin America regional forum on business and human rights must focus on the implementation and dissemination of all three pillars of the Guiding Principles and therefore fully consider how governments in the region can meet their obligations under the UN Guiding Principles as well as under the core human rights conventions.

The need for a stronger focus on the first pillar of the “protect-respect-remedy” framework is thereby especially important for small and medium sized enterprises (SMEs), which are the backbone of the economy in the Latin America and the Caribbean region. SMEs depend particularly on a business environment which is characterised by legal certainty and which facilitates and enables the SMEs to follow their “responsibility to respect”.

A particular challenge in the region is the size of the informal economy, which accounts for approximately half of the jobs in the region. As a result, the implementation of the UN Guiding Principles is especially challenging in the informal economy. Thus, business demands more efforts from governments to create an enabling business environment which facilitates the transitioning from the informal economy to the formal economy. This is not only a fundamental prerequisite with regard to the promotion and mainstreaming of the UN Guiding Principles, but it would also generate growth and income for the State to fulfill its function more effectively. According to Reuters for instance, 6 in 10 Mexican workers, or 30 million people, live in the informal economy, which results in the country losing 3 or 4 percentage GDP points every year because 60% of its workers do not generate any taxes.
The promotion of the UN Guiding Principles has to be seen in a broader context, which also includes general economic policies for more growth and jobs in the formal economy.

An important topic for the region is the rights of indigenous peoples. This is not a new issue for business. For a long time businesses have been aware that the rights of Indigenous Peoples warrant special consideration by companies in certain instances. Moreover, employers have been working closely with governments and workers within the ILO on relevant issues related to the rights of indigenous peoples, based on ILO Convention 169. The key concerns for business with regard to the work of the UN Working Group in this context are that its work builds on existing guidance, as for instance from IPIECA; that the UN Working Group closely coordinates with existing UN entities and procedures to avoid duplication of work; and that it takes a constructive approach, which focuses on creating win-win situations instead of assuming that there is a constant conflict of interest between the business community and indigenous populations.

Against this background, the IOE and ANDI make the following comments on the report of the UN Working Group on business-related activities on the rights of indigenous peoples:

- It is the task of governments to balance the rights of different groups and people in their territory. Companies have neither the societal and political mandate nor the capability to take over this task. The paper does not sufficiently elaborate on the challenge of competing rights of different groups and people and the key role the State has to play in settling these conflicts. It is also misleading that the paper asks companies to commit to respect ILO Convention 169 which is addressed to governments, not to companies, and which deals greatly with questions on balancing rights.

- The report takes a narrow approach to the State duty to protect by just focussing on implementation gaps and challenges with the State duty to protect against business-related human rights abuses. In the context of this report on the rights of indigenous peoples, the State itself can be the cause of the harm as seen in many developing countries.

- The report focuses very much on the concept of “free, prior and informed consent” (FPIC), based on the provision of the Declaration on the Rights of Indigenous Peoples, thereby completely ignoring the approach of ILO Convention 169 on the State obligation to consult. The rights to be consulted and to participate in decision-making constitute the cornerstone of Convention No. 169 and the basis for applying the broader set of rights enshrined in the Convention. Unlike UNDRIP, Convention 169 is legally binding for states which have ratified it. FPIC is therefore not an indicator whether the State duty to protect has been observed, but the supervisory machinery of the ILO determines this question with regard to Convention 169. In 2011, the Committee of Experts clarified the following with regard to the general obligation to consult under the Convention 169:

  1) Consultations must be formal, full and exercised in good faith; here must be a genuine dialogue between governments and indigenous and tribal peoples characterised by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord; 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;

  2) Consultations have to be undertaken through indigenous and tribal peoples’ representative institutions as regards legislative and administrative measures; Consultations have to be undertaken with the objective of reaching agreement or consent to the proposed measures.
3) Proforma consultations or mere information will 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 the consultations necessarily the reaching of agreement or consent. These points need to be clarified in the approach of the UN Working Group on indigenous people.

- Business agrees to the need of gender sensitive approaches when fulfilling its responsibility to respect the human rights. It has to be stressed that the description of indigenous women as “third class citizens” (para 2) must not be attributed to business. Business also shares the importance of respecting customary laws, traditions and practices of indigenous people. However, the paper falls short in dealing with situations in which these customary laws, traditions and practices are in contradiction to gender equality policies or even national law and jurisdiction. Where businesses are required to override local consent processes in order to promote gender equality, they could well ‘create division within communities in relation to a proposed activity’ (see page 11). Moreover, the statement on page 11 that, “the indigenous peoples affected should determine autonomously how they define and establish consent, while extra attention must be given to ensuring that women and other potentially disenfranchised groups are included in the process” is essentially self-contradictory and shows that more consideration needs to be given to this complex issue.

- The issue of extraterritorial activities and jurisdiction by the home state of companies has been a highly contentious issue and continues to be so. Without going into the details of the legal discussion, it can be summarised that extraterritorial jurisdiction cannot fill the void left by the absence of rule of law at the national level. On the contrary, it is to be feared that such extraterritorial judicial instruments would undermine efforts by host states to strengthen their responsibility for human rights. Moreover, recommendations on extraterritorial judicial instruments place a question mark over the entire “protect-respect-remedy” concept, since the duty to implement and enforce human rights would be moved back on to companies. Finally, experiences of extraterritorial court cases have shown not only the practical and administrative problems, but the fundamental legal challenges such issues involve.

- The paper refers to the views of some stakeholders, which “have suggested that NCPs should have further tools at their disposal to encourage companies to engage in mediation cases”. It is very unfortunate that the paper only refers to the view of some stakeholders (without mentioning who these stakeholders are) without also presenting the view and arguments of other stakeholders – including business and their representative organisations. Moreover, the OECD Guidelines for multinational enterprises were just revised in a lengthy and comprehensive process, which puts an even bigger question mark on para 40 of the paper. Finally, para 55i recommends that NCPs have knowledge of indigenous practices and traditions, thereby giving the impression that indigenous people are a homogenous group, which they are of course not. Traditions and practices are highly diverse around the world.

III. Efforts of the Colombian business community to respect human rights

Colombia has had to overcome many challenges to implement and put principles on human rights into practice. For these reasons, the strict observance of these principles is a fundamental issue in the country. The business sector has responded with great
determination, even considering the difficult circumstances in which business activities have had to develop. Colombian businesses have driven the fulfilment and promotion of the guiding principles in multiple and diverse ways. To cite a few examples: guides aimed at employers which provide orientation about how to respect human rights in daily operations have been sent out; reintegration programmes for ex-combatants into civilian life have been created, and security measures for the protection of staff and workers have been implemented. All of the aforementioned activities couple with the willing attitude of employers to maintain a constant and open debate with government representatives, civil society, interest groups and international organisations.

ANDI is convinced that the protection and respect for human rights, as well amends when those rights are violated, are first and foremost under the domain of political authorities by means of the implementation of appropriate legislations and efficient judicial measures.

Since August 2012, ANDI, by mandate of its General Assembly of Affiliates, has advanced in its commitment to respect Human Rights by participating actively in spaces and programmes that seek to provide training and improve the dissemination of human rights recommendations in business.

This commitment has translated into a continuous involvement in the adoption of instruments and programmes that evidence the respect and defence of human rights and which have been presented by businesses in different scenarios; involvement in the private sector for the design of public policy in this area; in the intense promotion for businesses to adhere to the UN Global Compact so that they can benefit from the tools available there; in the active participation of the Association and businesses, and in the realisation and support of national and international forums where human rights are discussed and promoted.

IV. The way forward

The Latin America and the Caribbean region has the advantage that with only two main languages (one of which is an official UN language), cross-border communication, the exchange of experiences within the region, joint awareness raising campaigns and studies are more easy to conduct than in more multi-linguistic regions of the world. This potential needs to be untapped. The IOE has already produced a considerable amount of guidance material in Spanish and will continue to broaden its services in this regard, as for instance through Spanish webinars on the implementation of the UN Guiding Principles. The UN Working Group jointly with governments from the region should establish processes to learn from each other how to better protect the human rights of its citizens, by conducting joint awareness raising campaigns and by developing joint strategies to promote the UN Guiding Principles in a more holistic manner. Initiatives of the UN Working Group, like the Global Corporate Community of Practice Initiative, should also have a regional focus by using the language predominantly spoken in the region to enable especially medium-sized companies to participate in the initiative and to learn from others’ experiences as well as to share their experiences. The Employers’ federations in the region are willing to cooperate in these processes and to help to reach out to the business community.

Employers and their representatives are therefore not only actors, but also right-holders, for instance with regard to freedom of association, freedom of expression and the right to property. The discussion must not be limited to the rights of certain groups, but must also take fully into account the rights of employers and their representatives.

There must be a proper follow-up to the regional forum. All stakeholders should use the momentum which comes from the regional forum to strengthen the efforts to promote the UN Guiding Principles in the region and also to provide stronger regional input to the work of the UN Working Group and other international initiatives. Governments should also consider
better financial support for the regional work of the UN Working Group and partner with business in this regard.

One lesson learned from the Business and Human rights Forum in Geneva last December is that a constructive approach is key for the successful promotion of the UN Guiding Principles. For the Latin America regional forum as well as for its follow-up, a constructive approach is key in order to achieve sustainable results.

ANDI and the IOE are looking forward to the first regional meeting and will do their best to make the forum and the follow-up a success.

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**About the International Organisation of Employers (IOE)**

The IOE is a membership organisation that promotes the interests of employers and their organisations from all over the world at the international level through representation, information and advice. The IOE provides leadership for the business community in all areas of social and labour policy and proactively participates in international policy development that seeks to create a framework that underpins enterprise creation and development. It provides an international forum that brings together national employers’ organisations and their members from across the world and facilitates the exchange and transfer of information, experience and good practice amongst the business community globally. The IOE was founded in 1920 and today represents 150 national members in 143 countries.

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**About the Asociación Nacional de Empresarios de Colombia (ANDI)**

The National Business Association of Colombia is a non-profit organisation whose main purpose is to expand and promote economic, social and political principles within a free enterprise system.

ANDI was created in the city of Medellin in September 11, 1944, and since then it has always been the most important private sector association. It groups more than 1100 companies that belong to different sectors of the economy: manufacturing, financial, food, mining, health, agriculture, services, among others and therefore represents a high percentage of Colombia's GDP and total employment.

The Association has its headquarters in Medellín, but also has branches in the cities of Bogotá, Barranquilla, Bucaramanga, Cali, Cartagena, Pereira, Manizales, Ibagué, and Santander de Quilichao.

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