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Forest Peoples Programmes' Feedback on the European Commission Proposal for a Directive on Corporate Sustainability Due Diligence

Forest Peoples Programme (FPP), an organisation that works together with indigenous and forest peoples across the tropical forest belt to support the realisation of their human rights, and in particular their land rights, welcomes the publication of the European Commission's proposal of a directive on Corporate Sustainability Due Diligence (CSDD).

This legislative initiative is a crucial step in the European Union's effort to tackle environmental and human rights violations affecting indigenous and forest peoples linked to corporate activities. It is also a necessary element for accomplishing the EU Action Plan on Human Rights and Democracy, the European Green Deal and the EU's commitments on the implementation of the UN Guiding Principles on Business and Human Rights (UNGPs).

Indigenous and forest peoples, civil society organisations and others have long called for effective laws and policies on global value chains to protect the most vulnerable rightsholders, including indigenous peoples and local communities, from corporate abuses. FPP welcomes the European Commission's efforts to respond to these calls. The proposal's holistic approach to environmental and human rights due diligence has the potential to bring positive impacts for indigenous and forest peoples worldwide, by putting concrete obligations on companies to address adverse impacts in their value chains and providing rightsholders with avenues to seek justice for violations, including ongoing violations, they face. However, this potential is undermined by major gaps in the proposal that threaten the effectiveness of the directive and the achievement of its goals.

The EU must not pass on this opportunity to tackle the widespread and systemic persecution of indigenous and forest peoples worldwide, and must, at the very least, develop a directive meeting the ambitions of the 2021 European Parliament recommendations on corporate due diligence and corporate accountability.

In order to provide constructive input and propose ways to improve the proposals potential to tackle the issues identified in last year's European Parliament's report on human rights and democracy in the world, FPP shares the following comments on the proposal:

Coverage of human rights impacts

The proposal requires companies to undertake due diligence in respect of a relatively limited list of human rights in Annex 1, Part A, Section 1. This list includes one right specific to indigenous peoples, notably their right to land, territories and resources. It also includes a broader list of some (but not all) international human rights instruments. Companies may sometimes need to undertake due diligence of rights which are outside the section 1 list but covered by instruments in section 2, but only in certain circumstances. This two-tiered approach (a list of priority rights and the qualified inclusion of rights under treaties that are not included in the list) is inconsistent with the requirements of the UNGPs, and risks leaving major holes in companies' due diligence. For example, many other critical rights of indigenous peoples (such as the right to self-determination, the right to

culture, the right to restitution and the right to give or withhold free, prior and informed consent are not explicitly included in the list). Other rights, such as the right to health, formulated in the list only in terms of environmental degradation, may not cover all the types of health impacts suffered by indigenous and forest peoples (for example, loss of access to traditional pharmacopeia). The list is also problematic in its limited recognition of the rights to lands, territories and resources of non-indigenous peoples and communities – conditioning such rights on their necessity for securing a livelihood – despite the fact that under international law, many non-indigenous groups have more expansive recognition of their rights.

We further note that while the list of international human rights instruments contained in section 2 of Part 1 of the Annex contains most of the major human rights instruments (including UNDRIP), there are some notable exclusions relevant to indigenous peoples including ILO Convention No. 169. Regional human rights instruments are also absent, yet these sometimes include additional rights that are not expressly included within other instruments, are important for compliance by companies in their respective regions and provide an important practical source for interpreting human rights obligations within specific regional contexts.

In order to ensure that the full range of human rights is protected by the directive, as required by the UNGPs, and that the EU keeps true to its commitments, FPP recommends that Section 1 of Part 1 of the Annex be removed, and that only section 2 of Part 1 of the Annex – the list of international instruments in their entirety – be kept to define the adverse human rights impacts companies must address in their due diligence process. FPP also recommends this list also be expended to include ILO Convention No. 169, the UN Declaration on Human Rights Defenders, the American Convention on Human Rights and the African Charter on Human and Peoples Rights, among other relevant instruments.

Coverage of environmental impacts and climate change due diligence

As with the coverage of human rights impacts, environmental impacts are defined in relation to specific articles in a list of international instruments. This approach is not appropriate for environmental impacts, as not all important areas of environmental impact have been the subject of international agreement. Hence, the list refers to biodiversity, use and disposal of chemicals and disposal of waste but leaves out many adverse environmental impacts such as water, air, soil and ocean pollution.

Instead, as recommended in a joint paper developed by civil society organisations, including FPP, in 2021, references to international legal instruments should be complemented by a non-exhaustive catalogue of (other) environmental impacts to which corporate behaviour can be linked, as well as any other important adverse impact arising in a particular case. The proposal also needs to be strengthened as regards climate change, which is already affecting, and will continue to disproportionately affect, indigenous and forest peoples.

Value chain scope

While at first sight the proposal may appear to have an ambitious value chain scope, in reality the due diligence obligations are significantly restricted because due diligence requirements for companies covered by the directive are limited to subsidiaries or to others in their value chain with whom they have an “established business relationship”. The definition of this term risks limiting the scope to suppliers one or two tiers away from the company conducting due diligence.

This is particularly bad news for indigenous and forest peoples, for whom one of the most frequent corporate impacts stems from land grabbing for agricultural, mining or infrastructure activities. While there are some instances where these impacts are directly linked to the operations of a European company or its subsidiary, in most cases – particularly in respect of agricultural supply chains – harms to indigenous and forest peoples are at the far upstream end of the value chain, and many EU-based traders and buyers may be many tiers away – and may therefore fall outside the due diligence requirements. Yet EU demand for products plays a crucial role in the continuation of land-grabbing behaviour by upstream companies (who may be headquartered in less regulated jurisdictions). If companies are not required to address these impacts because they are not based on an "established business relationship" with the direct agricultural producer, this will leave a huge loophole in the legislation for indigenous and forest peoples. Further, limiting due diligence requirements to "established business relationships" might incentivise companies to shift their operations towards short-term business relationships (for example, buying on the spot market), therefore avoiding their obligations, reducing their leverage to improve standards and having negative impacts on legitimate suppliers.

To ensure coverage of the full value chain in the directive, FPP recommends that companies be required to conduct due diligence on their full value chain, regardless of the existence of an "established business relationship".

Obligations to address impacts

Under article 7 of the proposal, companies are required to "prevent, or when prevention is not possible or not immediately possible, adequately mitigate potential human rights impacts". This formulation has two limitations: first, it does not seem to anticipate the possibility that some business activities should not go ahead *at all* if adverse impacts cannot be prevented. Secondly, it is unclear what the term "adequate mitigation" requires, and when the mitigation of impacts will be sufficient to enable it to go ahead. Moreover, this approach will not always be consistent with meeting the requirements of international human rights law, as some impacts cannot be mitigated. For example, where a company knows that an indigenous people has not given its free, prior and informed consent to an agricultural development on their lands, it is hard to see how undertaking or investing in that project could be adequately mitigated. The directive should state more clearly that when neither prevention nor adequate mitigation is possible, an activity should not go ahead. It should also consider providing more guidance on when mitigation is adequate, including at a minimum indicating that mitigation will not be adequate if the impact involves irreparable harm, or serious, repeated or ongoing harm, and that determination of whether mitigation is adequate should be made in consultation with those who rights may be affected.

Supervisory authorities and substantiated concerns

FPP welcomes the fact that the proposal includes provision for any person to raise a "substantiated concern" with member state authorities monitoring compliance with the directive, whose powers include ordering cessation of infringements and imposing pecuniary sanctions on non-compliant companies.

This mechanism is not only important for justice and accountability but also critical to effective enforcement, given the limited resources of many member state authorities and the global reach of

value chains that companies will be assessing. Indigenous and forest peoples are keen to use this mechanism as a tool to improve corporate behaviour that affects them. However, there are multiple practical barriers for indigenous and forest peoples in doing so. Determining the relevant member state, identifying the competent authority responsible for evaluating claims, navigating the national rules on submission of concerns and managing to submit a substantiated concern in the language of the authority (including where evidence and documents from the ground may not be available in that language) will create great obstacles for indigenous and forest peoples.

FPP recommends that the directive should develop a centralised system for receiving substantiated concerns, conducting preliminary assessment of them and distributing them to member states' competent authorities, including providing relevant translation and other support where necessary. This will not only facilitate access to justice for indigenous and forest peoples, it will also improve enforcement and consistency between the approaches of different member states. This function could be attached for example to the proposed European Network of Supervisory Authorities.

Civil liability

FPP congratulates the Commission for having included civil liability for harms caused by violations of companies' obligations in the proposed directive. Inclusion of right to remedy is an essential element of the UNGPs. However, the proposal refers to damages in civil liability claims (i.e. allowing claimants to seek compensation for the harms caused). FPP considers it should also explicitly require that courts be entitled to issue injunctive relief orders to prevent companies from engaging in or continuing harmful conduct. This is particularly important for indigenous and forest peoples, who often suffer irreparable harm when they are dispossessed from their lands and territories, and for whom dispossession is a continuing violation.

As with substantiated concerns, in practice indigenous and forest peoples are likely to face substantial barriers to accessing justice in member state courts, because of language barriers, lack of knowledge of (different) civil liability procedures in member states, legal and court costs, and many other factors. The directive needs to do more to facilitate real access to justice, particularly by vulnerable peoples abroad, such as indigenous and forest peoples. This could include through for example requiring member states to ensure group claims can be brought effectively, and that adverse cost risks or other cost rules do not prevent claims. The EU also has an important role to play in collating and providing accessible information about the civil liability systems in different member states.

There are also serious limitations on the scope of civil liability claims provided for by the directive. For a start, as mentioned above, companies need only carry out due diligence in relation to the activities of value chain actors that are subsidiaries or in an "established business relationship". In addition, companies will only be liable for harms caused by indirect partners if it was unreasonable in the circumstances to expect that actions they took would be adequate to prevent, mitigate, bring to an end or minimise the extent of the adverse impact. Positively, this defence requires companies to demonstrate not only what steps they have taken to put in place standards amongst their business partners (e.g. by contractual assurances), but also what steps they have taken to verify compliance. However, the steps for verifying compliance are based on the relatively limited requirements of Articles 7 and 8 of the directive. This may at least in some cases enable companies to mount a successful defence based on, for example, the use of verification schemes - whether based on so-

called “independent” auditors paid by the company, or industry certification schemes - despite the fact that many such schemes have been widely discredited.

To remedy these gaps and ensure efficient civil liability in the directive, FPP recommends broadening the civil liability provisions to cover the full value chain (not only limited to subsidiaries or partners with an established business relationship), requiring member states to provide for injunctive relief as well as monetary damages as remedies in these procedures, and revising the defence available to companies to ensure that companies are only entitled to a defence where they have taken genuine efforts to identify and address impacts. The burden of proof should also be reversed in relation to Article 22(1)a – whether a company has complied with its due diligence requirements. Where an adverse impact has in fact been caused that is linked to a company’s activities, the company should be required to demonstrate that it has complied with its due diligence obligations in order to avoid liability.

In addition, both the civil liability provisions, and the directive as a whole, should require companies to achieve continuous improvement over time. This means that where repeated, prolonged or ongoing impacts that can in fact be stopped (including by ceasing the activity in question), they cannot simply be “minimised” on an indefinite basis.

Scope of companies

While due diligence obligations may apply to both EU and non-EU companies operating in the EU, it unfortunately only applies to the largest companies, which will without a doubt undermine the potential positive impacts of the directive. According to estimates by the European Commission, only around 13,000 EU companies (less than 0.2% of EU companies) and 4000 non-EU companies will fall within the scope of the directive. This falls well short of the requirements of the UNGPs and the OECD Guidance on Responsible Business Conduct. It offers even less coverage than the proposed Corporate Sustainability Reporting Directive, which applies to all companies that are not SMEs, indicating a regression in the EU’s ambition to halt companies’ negative impacts on people and the environment.

This blanket exclusion of a large proportion of business entities also means it will not have the effect of levelling the playing field. Although some argue that impacts from smaller enterprises could still be captured in so far as they trade with larger companies covered by the directive, there is no guarantee that this will be the case, or that companies will not restructure their operations to fall out of scope. As the definition of a large company is based not only on turnover but also number of staff, large companies in sectors with a high turnover but that are not labour-intensive – such as commodity trading and financial services – will not be captured. Furthermore, regarding non-EU companies, the proposal fails to clarify how turnover should be calculated for corporate groups operating in the EU through multiple subsidiaries. Whether the turnover is calculated for all EU subsidiaries together or separately will drastically change the scope of the directive, and if the second option applies, companies could rearrange their presence in the EU, setting up multiple subsidiaries in multiple member states to fall out of scope. The proposal needs to be clarified to make sure large corporate groups are fully included.

FPP recommends that the directive extends its scope to all companies regardless of size, or at an absolute minimum include all large companies captured by the Corporate Sustainability Reporting

Directive, as well as high-risk small and medium enterprises. The directive should also clarify the approach for calculating EU turnover for non-EU companies, making sure all EU subsidiaries within a single corporate group report a consolidated turnover in the EU.

Stakeholder consultation

The proposal allows for consultation of affected stakeholders by companies when identifying adverse impacts and when developing preventive and corrective action plans as part of their due diligence process. This should be an integral part of any due diligence process to ensure an inclusive and efficient process. However, consultation does not constitute an absolute obligation in the proposal, as companies need only take these steps “where relevant”. This leaves too much discretion for companies to decide when and where they should undertake stakeholder consultation, and with whom they should consult. This is inconsistent with the UNGPs and the OECD Guidance on Responsible Business Conduct, which specifies that meaningful stakeholder engagement is important throughout the due diligence process. Refusing to recognise the absolute necessity of stakeholder consultation in human rights and environmental due diligence undermines the entire process. Stakeholders (or more accurately, rightsholders) such as indigenous peoples and many forest peoples, are the ones who hold and embody the knowledge of how corporate value chains impact their lives, livelihoods, cultures, rights, and priorities. Identifying potential and actual impacts, as well as how to prevent and address those can only genuinely be determined through proper consultation with these rightsholders.

FPP recommends strengthening the requirement for consultation with affected stakeholders, particularly indigenous and forest peoples, by making consultation an obligation for all companies and an integral part of all steps of the due diligence process.

Indeed, consultation alone is not always sufficient under international human rights law. For example, where companies through their due diligence are proposing a preventative or corrective action that affects indigenous peoples (and/or certain other collective rightsholders), mere consultation will often be insufficient and, instead, a free, prior and informed consent process should be undertaken. The proposal should make clear that additional obligations such as this will be required in some circumstances.