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### *Respecting and recognising Indigenous rights when challenged by commercial activities*

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#### **Abstract**

The *United Nations Declaration on the Rights of Indigenous Peoples* was hailed as a triumph among Indigenous peoples, signalling a long-awaited recognition of their fundamental human rights. Despite this, many violations of these basic rights continue, particularly in relation to extractive industries and business activities. In response, a business reference guide seeks to inform industries of their responsibilities. This article examines the tenuous relationship between Indigenous rights, state responsibilities and business expectations.

#### **Keywords**

Indigenous rights, extractive industries, free prior and informed consent

#### **Introduction**

The intrinsic relationship Indigenous peoples have with their lands, territories and natural resources underscores the importance of securing the right of free prior and informed consent (Articles 19, 32, *United Nations Declaration on the Rights of Indigenous Peoples*; United Nations General Assembly 2007) when a commercial venture seeks to extract resources on or near traditionally owned lands and territories (see O'Faircheallaigh & Ali 2008, for discussion on how Indigenous peoples have suffered and not benefited from extractive activities on their traditional lands). Unfortunately, this is not always obtained. Anaya (2011, para 57) noted that:

the implementation of natural resource extraction and other development projects on or near indigenous territories has become one of the foremost concerns of indigenous peoples worldwide, and possibly also the pervasive source of challenges to the full exercise of their rights.



The United Nations Global Compact (UNGC) has published a business reference guide to the *United Nations Declaration on the Rights of Indigenous Peoples* to “raise awareness among companies of indigenous peoples’ rights and to help business understand, respect, and support the rights of indigenous peoples by illustrating how these rights are relevant to business activities” (UNGC 2013, 4). In particular, the Guide highlights the corporate responsibility to respect these rights and provides practical suggestions on how companies can fulfill their human rights obligations.

This paper will analyse how the *United Nations Declaration on the Rights of Indigenous Peoples: Business Reference Guide* can assist companies to engage with Indigenous peoples, especially in relation to extractive projects on or near their traditional lands and territories. To examine this, Part One will revisit the concept of Indigenous peoples’ rights, focusing on the rights to lands, territories and resources. Part Two will address how these rights may intersect or collide with commercial rights and those of companies with a discussion of two documents: first, the United Nations’ (UN) *Guiding Principles on Business and Human Rights*; and, second, the *United Nations Declaration on the Rights of Indigenous Peoples: Business Reference Guide*. Finally, Part Three will discuss some remedies before providing some general conclusions and recommendations for moving forward.

### **Part One: Indigenous people’s rights—What are the underlying rights?**

Indigenous rights are intrinsic to Indigenous peoples. Often these rights are considered *sui generis*, as they are unique rights that exist outside the typical orthodox regime of rights because they are based on the customs and traditions of the peoples concerned, rather than established norms of positive law. However, as a *sui generis* right, the obligation and responsibility of states must be considered in the specific context of the rights involved (see Davis 2012, 26).

The *United Nations Declaration on the Rights of Indigenous Peoples* (“Declaration”) crystallises these fundamental human rights for Indigenous peoples. Despite the compromises made—for example, the article providing for the right of self-determination was progressively watered down during the text negotiations and for some Indigenous peoples this compromise was too great (see also Toki 2010)—it is the only international instrument that views human rights through an Indigenous lens (Anaya 2009, 63). Rather than creating new rights, the Declaration affirms existing human rights norms and contextualises them in light of the unique challenges faced by Indigenous peoples. Now that the four nation states (Australia, New Zealand, Canada and the United States of America) that initially voted against adopting the Declaration in September 2007 have all offered their support for the Declaration, arguably it now enjoys a more robust position, although Watson (2011, 629) notes: “The UNDRIP will do little more than provide an illusionary human rights protection while Aboriginal peoples remain trapped and contained within a matrix of colonising powers. This is because liberalism and neo-liberalism share constructs of property and reproduce 'rights' that in the long term are unsustainable and fail to secure Aboriginal relationships to land and the natural world.”

When considering the intersection between Indigenous rights and business or corporate responsibility, the key rights are that of self-determination, rights to land, territories and resources, and that of free, prior and informed consent. Additional rights include traditional knowledge and cultural heritage, which can be classified as a manifestation and form of self-determination. When the anticipated corporate activity is on and within Indigenous territories, recognition of these rights are paramount.

### *Right to Self-Determination*

The Right to Self-Determination is one of the cardinal principles of international human rights law. Article 3 of the Declaration confirms that:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Among the raft of international human rights instruments, Article 3 is expressed in almost identical terms to Common Article 1 of the two International Human Rights Covenants (Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights notes: “1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”). Yet it remains one of the most controversial articles of the Declaration. This controversy is, for the most part, based on a lack of understanding about the meaning and significance of the right to self-determination. Many states have resisted recognising the right to self-determination on the false assumption that it would give Indigenous peoples a right to secede from the state (in particular the “CANZUS” block; see Toki 2010, 251). This was a major concern of nation states during the drafting of the Declaration, resulting in the inclusion of Article 46, and movement and renaming of Article 31 from the previous drafts as Article 4. When Articles 3 and 4 are read together, it infers that autonomy and self-government are an expression of the right of self-determination, thereby limiting the scope of self-determination (Toki 2010, 254).

Although Karen Engle (2011, 147) claims that “external forms of self-determination are now off the table for Indigenous people”, Mauro Barelli (2011, 422) argues that “it is simply a reflection of existing international law in that subnational groups do not have a right to independence”. Article 3 is thus one supporting self-governance as opposed to succession or external self-determination.

While the Declaration does not define the right to self-determination, a number of provisions reflect specific aspects of that right. These include the right to lands, territories and resources (Article 26); the right to development (Article 23); and the right to free, prior and informed consent (Article 32). In this sense, the right to self-determination can be seen as a precondition for the enjoyment of all other rights, especially land rights.

### *Land rights*

Land rights are at the core of the Declaration. Articles 25–30 specifically refer to Indigenous peoples’ land rights, with references in several other articles as well. Article 26 is the key provision. It draws a distinction between rights to lands “presently” occupied by Indigenous peoples and rights to lands “traditionally” occupied by Indigenous peoples. Under paragraph 1, Indigenous peoples have the right to lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired; whereas under paragraph 2, they have the right to *own, use, develop and control* the lands, territories and resources that they *possess* by traditional ownership. Finally, the state has a duty to recognise Indigenous land rights with due respect to the customs, traditions and land tenure systems of the Indigenous peoples concerned.

At first glance, the nature of the right under paragraph 1 is somewhat ambiguous because it does not clarify whether it is a right to own, use, control or develop traditionally occupied

lands. However, this ambiguity is likely to be deliberate as it allows each state to determine what rights Indigenous peoples should have in relation to lands that they traditionally owned, but no longer occupy. For some Indigenous peoples, like Maori in New Zealand, although the legal title to land may have passed, the cultural or tikanga element of responsibility or caretaking remains.<sup>1</sup>

In this connection, Article 28 of the Declaration provides some guidance on how states should address historic violations of Indigenous peoples' land rights. It states that Indigenous peoples have the right to redress where their traditionally owned lands have been taken, used or otherwise damaged without their free, prior and informed consent.

Article 28 identifies restitution of land as the primary form of redress. Only where this is not possible should the right to restitution be substituted for the right to "fair, just and equitable compensation". The last sentence of Article 28 states that such compensation should be in the form of equivalent lands, monetary redress or other form of redress, unless otherwise agreed by the Indigenous peoples concerned. In this sense, Article 26 (1) and Article 28 work together to recognise and redress historic land grievances.

As noted above Article 26 (2) recognises that Indigenous peoples have the right to *own, use, develop and control* their lands, territories and resources that they *possess* by reason of traditional ownership. The right to "own, use, develop and control" is a significant development in this field because it rejects any narrow approach to land rights favoured by some states (see Allen & Xanthaki 2011, 297). This "bundle of property rights" affirms Indigenous peoples' ability to exert sovereignty over their lands and natural resources, thus linking the Declaration's land rights articles with the right to self-determination. However, the recognition of Indigenous peoples' right to own, use, develop and control lands is limited to present day occupation. This is made clear by the use of the term *possess*, which implies that the land must be presently occupied by the Indigenous peoples concerned. Only then will they be able to enjoy this full set of property rights. Despite this limitation, Article 26 of the Declaration marks a significant development in the field of Indigenous people's land rights.

### *Right to Free, Prior and Informed Consent*

The right to free, prior and informed consent (FPIC) is one of the most important elements of the Declaration (Colchester & Ferrari 2007, 8). In fact, the requirement for consent is affirmed in seven of its articles. Most importantly, Article 32 of the Declaration affirms this requirement in the context of Indigenous land rights:

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*. (emphasis added)

As stressed by the last sentence in Article 32, the concept of FPIC is especially important in relation to certain extractive projects. In essence, it requires the state to consult with Indigenous peoples prior to the approval of any major projects on their lands. This consultation process is essential because it gives Indigenous peoples the chance to express their ideas and concerns before making a final decision. Consultation is generally accepted as engaging in discussion to achieve advice or similar. The ILO notes that:

the concept of consulting the indigenous communities that could be affected by the exploration or exploitation of natural resources includes establishing a genuine dialogue between both parties characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord. A simple information meeting cannot be considered as complying with the provisions of the Convention.<sup>2</sup>

If adequate consultation is “not possible then business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society” (United Nations 2011, 20).

During the drafting of the Declaration, some states—including New Zealand—argued the concept of FPIC would create an unworkable right of veto (MacKay 2013). The concern was that Indigenous peoples would be able to hamper government-backed development projects or make unreasonable demands for compensation. Notwithstanding these concerns, a body of case law, scholarship and jurisprudence has clarified the scope of the right to FPIC and its application in the context of extractive industries (e.g. Colchester & Ferrari 2007).

It now appears that Indigenous peoples do not have an absolute right of veto over all activities within their traditional lands and territories. Rather, they have a right to withhold their consent for activities that have the potential to significantly impact on them or their lands and resources. Thus, if an Indigenous community decides to provide its consent for a particular project, it can impose certain conditions such as the right to receive a percentage of the project’s profits. In this regard, the right to FPIC gives Indigenous peoples the opportunity to derive a benefit from the commercial use of their lands, territories and natural resources (see McKay 2004).

*Example: The Pogera Mine in the Highlands of Papua New Guinea*

Notwithstanding the clear recognition of these rights, extractive activities on and within Indigenous territories often cause negative and even catastrophic impacts on the economic, social and cultural rights of Indigenous peoples. A paradigmatic example here would be the recent surge of mining activities in Papua New Guinea (Columbia Law School Human Rights Clinic [CLSHRC] and Harvard Law School International Human Rights Clinic [HLSIHRC] 2015).

The Pogera mine in the Highlands of Papua New Guinea produces thousands of pounds of gold each year. The mine is owned and operated by Barrick, a Canadian corporation that is now the largest mining company in the world. Despite generating income and jobs for the local Indigenous population, the mine has long been a source of controversy. In recent years, the mine has been widely condemned for releasing over six million tonnes of liquid tailings into a nearby river. Local Indigenous communities regard these destructive practices as a violation of their territorial, cultural and self-governance rights (Human Rights Watch 2010, 5). This has led to friction and grievances between Barrick and the Indigenous community.

The Declaration affords to Indigenous peoples rights to their lands, resources and territories together with the right of free, prior and informed consent. However, Papua New Guinea, which was absent during the vote to adopt the Declaration, has a weak rule of law, weak regulatory schemes, and weak governance and judicial systems. This provides fertile ground for transnational corporations such as Barrick to design their own system of remedies that limit their corporate legal liability and advance their human rights reputation

(CLSHRC and HLSIHRC 2015, 6). Nonetheless, this should not abdicate the corporate responsibility to minimise all adverse impacts, particularly environmental impacts, and engage meaningfully with the Indigenous peoples to address these violations. The CLSHRC and HLSIHRC (2015, 4) noted that:

... rights holder engagement is consultation and requires early, proactive and comprehensive engagement with all stakeholders, particularly rights holders. Typical consultation models can maintain the unequal power relationship between rights holders and companies. The interests of rights holders are best served when they co-create a remedy mechanism with companies ...

## **Part Two—How these rights may intersect or collide with commercial rights and those of companies**

Although there is a consensus from the international community that business enterprise must respect human rights and thus Indigenous rights, often state recognition of Indigenous peoples is absent; for example, China recognises “minorities” and not “Indigenous” peoples (see Hathaway 2016). This is problematic not only for Indigenous peoples but also for corporations who seek to extract resources on or near traditionally owned land and territories. Nonetheless, these fundamental rights exist irrespectively and independently of any formal international instrument. The UN General Assembly (2011) noted that:

[A] generally accepted principle of international human rights law holds that the existence of distinct ethnic, linguistic or religious groups, including Indigenous Peoples, can be established by objective criteria and cannot depend on a unilateral decision by a State.

In this regard, non-recognition by the state of these rights for Indigenous peoples cannot be an excuse for corporations not to apply the minimum standards (Anaya 2011, para 95).

Further, the principle of due diligence necessarily dictates that corporations must identify any adverse effects their activities may have on any affected peoples, including Indigenous peoples (Anaya 2011, para 95).

There is also a trend indicating that some states would prefer to distance themselves from adopting measures to safeguard the land rights of Indigenous peoples. This is especially true in the context of extractive activities where it is not uncommon for states to delegate their protective role to business enterprises, especially when the states’ regulatory frameworks are weak or non-existent. However, states cannot simply avoid their human rights obligations by passing them to third parties. Indeed, states have a tripartite obligation to respect, protect and fulfil Indigenous peoples’ land rights.

First, the obligation to respect Indigenous land rights requires states to refrain from interfering with the enjoyment of such rights. It also requires the state to effectively recognise Indigenous peoples’ right to participate in decisions affecting their lands and resources.

The next step is the obligation to protect Indigenous land rights. The state obligation to protect is of a positive nature and requires it to adopt protective measures to safeguard Indigenous land rights. This includes the development of specific laws and policies to ensure that private actors, such as companies, do not violate indigenous land rights.

The third category of state obligations concerning Indigenous land rights includes the obligation to fulfil, which requires states to ensure the availability, accessibility and affordability of Indigenous peoples' land (Cernic, 2012). This obligation is closely related to Article 28 of the Declaration as it requires the state to provide redress for lands taken without the Indigenous peoples' consent. It is also linked to the right to FPIC as it prohibits the state from approving extractive projects on Indigenous peoples' lands without first obtaining their consent. It follows that if the basic land rights of Indigenous peoples are to be fully honoured, the state must perform its tripartite obligations to respect, protect and fulfil those rights.

While international human rights law primarily imposes duties on states, an increasing number of international legal norms are being imposed on non-state actors, especially companies (Butzier & Stevenson 2014). Two recent initiatives by the UN Human Rights Council and the UN Global Compact have established guidelines that will hold companies responsible for the "human" impact of their activities.

### *UN Guiding Principles on Business and Human Rights*

In June 2011, the UN Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights as the first global standard for preventing and addressing the adverse human rights impacts of business activities (for a discussion of the relationship between the UN Guiding Principles and the UN Global Compact see explanatory note at <http://www.unglobalcompact.org>). This endorsement effectively established the Guide as "the authoritative global standard for addressing business related human rights challenges" (Human Rights Council 2012). The UN Guiding Principles set out a three-pronged "Protect, Respect and Remedy" framework (Human Rights Council 2011, para 6) and applies in all operational contexts, including those that have a bearing on Indigenous peoples (Human Rights Council 2011, para 23).

The first pillar confirms the state's duty to protect against human rights abuses by third parties, especially business enterprises (Human Rights Council 2011, para 26). Therefore, states are not *per se* responsible for the human rights abuses of third parties (United Nations 2013). However, states may breach their human rights obligations where such abuses can be attributed to them, or when they fail to take appropriate steps to prevent and redress corporate-related harm. Although corporations are not expected to be surrogate states, when states have a weak rule of law and provide inadequate services for Indigenous peoples, often corporations are perceived in this light (UNGC 2013, 6), thereby highlighting the need for states and corporations to work together to protect human and indigenous rights.

The second and most important pillar is the corporate responsibility to respect human rights (Human Rights Council 2011, para 27). It requires companies to ensure that they do not adversely impact on the rights of others and address such impacts when they do occur (Principle 11 of the UN Guiding Principles; see UNOHCHR 2012). The corporate responsibility to respect human rights is based on the notion that even though companies are not subjects of international human rights law, they nonetheless have a tremendous impact on the human rights and wellbeing of people around the globe (see Hilson 2012).

The Guiding Principles further recognise "the role of business enterprises as specialized organs of society performing specialized functions", and businesses are required to *respect* human rights throughout their operations. That is, businesses should avoid

infringing on the human rights of others, including Indigenous peoples, and should address adverse human rights impacts with which they are involved (Principle 11 of the UN Guiding Principles; see UNOHCHR 2012). In particular, under Principle 13 of the Guiding Principles businesses must:

avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; and

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.

However, Gilberthorpe and Banks (2012, 186) note that one of the weaknesses includes “ill-conceived and inappropriate development programmes that generate inequality, fragmentation, and social and economic insecurity”.

Finally, the third pillar encompasses both the state duty to provide an effective remedy and the corporate responsibility to address and remedy human rights impacts that they contribute to (see Human Rights Council 2011, para 28).

Importantly, the UN Guiding Principles do not create any new binding rules of international law or impose additional obligations on companies. Instead they build on existing rules of human rights law and clarify the respective roles of states and corporations.

When the Guiding Principles first appeared before the UN Human Rights Council in March 2011, there was no singular reference to the rights of Indigenous peoples. In June 2011, however, the Council directed the Working Group on Business and Human Rights to give special attention to persons living in vulnerable situations, including Indigenous peoples, and the UN Permanent Forum on Indigenous Issues is actively collaborating with this working group.

#### *Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples*

The UN Global Compact’s Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples reaffirms that “States have the primary responsibility for respecting, protecting and fulfilling human rights, through policy, legislation and regulation, and adjudication” and specifically outlines that “the State has a duty to protect human rights from abuse by businesses, based on the existing international obligations of States”. The Global Compact was established in 2000 to encourage businesses worldwide to adopt sustainable and socially responsible policies. It is a principle-based framework for business enterprises, stating ten key principles in the areas of human rights, labour, the environment and anti-corruption. Companies signed up to the Global Compact are required to develop their own policy statements on how they endeavour to respect human rights. In this connection, companies must submit an annual report on the steps taken to implement key human rights responsibilities during the course of their activities. The UN Global Compact also develops guidance materials to assist companies to understand a range of thematic and emerging human rights issues.

The Business Reference Guide aims to increase understanding among businesses of the rights of Indigenous peoples and to provide practical suggestions for respecting and supporting these rights. In particular, the guide identifies six actions that businesses should take to meet their responsibility to respect Indigenous rights (UNGC 2013, 11). These include:

- To adopt and implement a formal policy addressing indigenous rights
- Conduct human rights due diligence to assess actual and potential impacts on Indigenous rights
- Consult in good faith with Indigenous peoples
- Commit to obtain and maintain the free, prior and informed consent of Indigenous peoples
- Establish and cooperate through legitimate processes to remediate any adverse impacts on their rights
- Establish and cooperate in appropriate grievance systems.

### *Policy commitment*

The purpose of having an Indigenous rights-based policy statement (UNGC 2013, 12-15) adopted by a business enterprise is to establish clear guidelines that will inform the company's future actions in relation to Indigenous rights (UN Office of the High Commission of Human Rights 2013). This statement is endorsed across all levels of management and commits the business to certain actions in relation to Indigenous peoples (UNGC 2013, 12).

Business that may have adverse impacts on Indigenous peoples' rights, including those that operate within or near Indigenous territories, should develop a general Indigenous rights policy. At a minimum, the policy commitment should outline how the business enterprise will seek to consult and obtain the FPIC of Indigenous peoples, and how it will respect all the rights and obligations contained in the Declaration (Human Rights Council 2012). In particular, it should identify the minimum standards that the company will meet, even if national laws do not require it (Lehr 2014, 11). For example, businesses can adopt a policy to respect Indigenous peoples' right to FPIC even where national laws require some lesser standard such as mere consultation. Not only will such a policy promote transparency, but it will also improve the companies' social license to operate within Indigenous peoples' territories.

However, a policy statement only affirms the company's general commitment to respect Indigenous rights, not how that commitment will play out in practice. Indeed, it would be impossible for any company to anticipate how its future operations will impact on the specific rights of all Indigenous groups. For this reason, companies also have a responsibility to exercise due diligence.

### *Due diligence*

As the corporate responsibility to respect human rights exists independently of the state's willingness to fulfil its human rights obligations, business enterprises should not assume that compliance with state law equals compliance with international standards on Indigenous rights (Human Rights Council 2012, 53). Rather, businesses should conduct due diligence (see also UNGC 2013, 15-20) to ensure that their actions do not trample on the rights of Indigenous peoples.

The initial step is to identify relevant national laws and policies relating to Indigenous rights. In particular, companies should determine whether the government recognises collective ownership rights and the extent to which the Indigenous peoples have received a formal title.<sup>3</sup> This is a typical area of risk for companies, as some countries do not recognise collective land rights of Indigenous peoples, or only provide title for an area smaller than the groups have traditionally used or occupied (UNGC 2013, 16). This also

means that the domestic law might not require the state to consult with Indigenous peoples prior to granting concessions on their lands.

Due diligence can assist companies to recognise and address any gaps between the host country's domestic law and international law. Where these gaps are readily apparent, companies should consult experts with specialised knowledge in international human rights law, especially those relating to Indigenous peoples' rights. This will allow companies to not only identify areas where the host country's domestic law falls short, but also to better understand the nature and scope of Indigenous rights (see Anaya 2011, para 93).

Companies should also exercise due diligence to determine the potential impacts their projects may have on Indigenous rights. The idea is to understand the specific impacts on specific groups within the context of the companies' operations (see OECD 2017, which states that "the rationale for due diligence is when the 'proper mode of engagement is not identified an applied stakeholders perspectives may not be adequately integrated into project decisions and an enterprise may face liabilities [e.g. if it does not comply with relevant legal obligations regarding engagement such as an obligation to obtain consent]"). In this connection, companies should be aware that not all Indigenous groups are the same and that each has its own unique relationship with traditional lands, territories and resources. It is, of course, quite possible that a particular activity may not have an adverse impact on the rights of one Indigenous group, but may severely impact the rights of another group. Companies need to be aware and perform their due diligence in a manner that is respectful to the Indigenous group concerned.

With this in mind, companies should consider developing a joint impact statement with the Indigenous group. A joint impact statement will allow the company to identify potential risks as the Indigenous group will often have specialised knowledge on their lands, natural resources and culture. It will also assist to foster a relationship between the company and the Indigenous community, which in turn strengthens the company's social license to operate within their territories.

Once the due diligence process is complete, business should integrate the findings from their impact assessments and take appropriate actions. These findings should be made available to the affected Indigenous peoples in a manner and form that they can easily understand. It should also allow for input and suggestions from the affected Indigenous groups in accordance with their own customs, systems and decision-making processes. Effective integration also requires that the responsibility for addressing adverse human rights impacts be assigned to the appropriate level and function within the business.

Indigenous peoples should be able to participate in this process and ensure that the company is taking appropriate steps to address those impacts.

In assessing human rights impacts, businesses will need to look for both actual and potential adverse impacts, especially those that have been identified by the Indigenous community itself. Potential impacts should be prevented or at least mitigated across all parts of the business by drawing on the knowledge and recommendations of the Indigenous peoples concerned. Actual impacts, on the other hand, should be addressed immediately and be subject to remediation. Moreover, the company should also track and monitor the impact of its activities on the Indigenous community. This can be achieved through regular consultations and by inviting feedback from the Indigenous peoples.

In sum, due diligence requires companies to identify and address potential risks that their activities may have on the rights of Indigenous peoples. Indigenous peoples have a right to be consulted on those risks and to influence how those risks will be addressed.

### *Right to Consultation and Free Prior and Informed Consent (FPIC)*

The right to Consultation (see also UNGC 2013, 21-24) and Free, Prior and Informed Consent (FPIC; see also UNGC 2013, 25-29) are fundamental measures of the Declaration that ensure Indigenous peoples' substantive rights are fully respected. They underpin Indigenous peoples' right to self-determination, culture, and their traditional lands territories and resources.

Consultation and FPIC are closely related, but with slightly different concepts. Consultation refers to a procedural right enjoyed by all Indigenous peoples, the significance of which is derived from the protection of their substantive rights, such as traditional lands and resources (Butzier & Stevensen 2014, 312). On the other hand, FPIC implies a substantive right to accept, modify or reject a project or activity. While businesses should always engage in meaningful consultations with Indigenous peoples before commencing activities that impact on their rights, FPIC is legally required in certain circumstances (UNGC 2013, 25).

As mentioned in Part 1, the right to FPIC will arise whenever a project has the potential to severely impact on Indigenous people's lands, territories and resources. This is especially so for extractive activities, such as mining, which involve the removal of precious metals from the Indigenous peoples' land. According to Anaya (2011):

... given the invasive nature of industrial-scale extraction of natural resources, the enjoyment of these rights is invariably affected in one way or another when extractive activities occur within indigenous territories.

Thus, as a general rule, companies must obtain Indigenous peoples' FPIC before undertaking any extractive activities on their traditional territories.

Consultation, participation and effective engagement with Indigenous peoples form a crucial part of the corporate responsibility to respect FPIC. It is through these processes that businesses can work with Indigenous peoples to enhance FPIC practices. The exact process that companies follow to obtain Indigenous peoples' consent will vary depending on the traditional decision-making process of the Indigenous peoples with which they engage, as well as the nature and extent of the project (Lehr 2014, 12). In any event, the international community has proposed some general principles on how companies can fulfil their responsibility to respect Indigenous peoples' right to FPIC.

### *Prior*

To make the right to FPIC meaningful, consultations and agreement should take place with Indigenous peoples over an extractive project before the state authorises, or the company commits to any extractive activity on Indigenous territories (Human Rights Council 2011, 17).

The exact meaning of "Prior" is controversial as it implies that consent should be given before the government grants any concession over Indigenous territories, such as an exploration permit for oil and gas. As noted by Anaya (2011), there is a general attitude

among companies and states that consultations are not required for the exploration and that consent need not be obtained until a license for resource extraction has been granted. In Anaya's view, this position is simply incompatible with the principle of FPIC or with respect for the international standards of Indigenous rights (Anaya 2011).

Therefore, companies should, as early as possible, seek to engage with Indigenous communities on how to reach consensus at every stage of the project. Such an approach gives the whole community an opportunity to raise any ideas and concerns, and influence how the project takes shape. Early consultations also allow the company and the Indigenous group to identify potential or actual impacts on their rights that may not have otherwise been apparent. Such an approach is likely to produce long-term benefits for the company and the Indigenous peoples.

### *Informed decision making*

Indigenous communities should be informed of factors that enable them to understand the project and participate in decision making. Companies should provide information on the nature and extent of the project, the potential economic, environmental, social and health costs, and most importantly, how the project will impact on their collective rights (Anaya, 2011, para 97).

Throughout the consultation process, all relevant information must be provided to the Indigenous community in a manner and form that they are able to understand. Companies should ensure that Indigenous peoples have the opportunity to consult with outside experts so that they can fully understand the implications of the project and how it will affect their rights (Forest Peoples Programme, 2014). And to ensure that this right is made effective, companies should bear the reasonable costs for these services (UNGC, 2013, 26).

### *What is consent?*

Consultation and consent are closely related but distinct concepts (UNGC, 2013, 25). In order to obtain consent for a project, companies must engage in good faith consultations with the affected Indigenous peoples.<sup>4</sup> However, consent is much more than a right to mere consultation. It is best understood as a formal, documented agreement that gives the company a social, and indeed legal, license to operate within Indigenous territories.

Companies have a responsibility to obtain Indigenous peoples' consent in a manner that is free, prior and informed (Anaya, 2011, paras 94-95). This means that companies should identify and consult with Indigenous peoples' representative institutions in order to negotiate a process for obtaining their consent (Anaya, 2011, paras 94-95). A consent process that is respectful to the community's traditional decision-making structures is more likely to be seen as legitimate and receive the support of community members.

This was a critical point highlighted during the project addressing the human rights impacts of the gold-mining operations in Porgera. The report emphasised that companies should also ensure that marginalised groups, such as women and disabled peoples, are able to participate in the decision-making process and that the project has the general support of the community (CLSHRC & HLSIHRC 2015). This can be a difficult task, but companies should work with the community to develop mechanisms to consult with such groups and enable them to have input into the decision.

Once the consultation process has come to an end, the Indigenous community should have the right to grant or withhold its consent. If the community decides to give its consent, it may wish to impose certain conditions such as an undertaking by the company not to degrade the environment. Where consent has been granted, the terms of the agreement would need to be recorded and documented. The agreement should also outline the process for resolving disputes and be compatible with the community's own priorities, customs and decision-making process (see Declaration, Article 32 (3)).

In any event, companies should build on the existing community engagement practices, and ensure that consent, if obtained, is free, prior and informed.

### **Part Three—Remedies**

Even the best business practices cannot guarantee that Indigenous rights will be fully respected all of the time. Where a company identifies that it has caused or contributed to an adverse impact on Indigenous rights, it has a responsibility to remediate that impact through legitimate processes. This can be achieved in various ways; for example, by establishing operational-based grievance mechanisms or participating in the Indigenous communities' own dispute settlement process (see also United Nations Global Compact, 2013, 30-33). These processes should be informed by the relevant articles in the Declaration, particularly articles 1, 27, 28, 32 and 40.

In the first instance, companies need to ensure that any grievance mechanism is compatible with the Indigenous group's own customs, systems and decision-making processes. This is also an opportunity for the company to learn more about the Indigenous groups' culture and governance systems. A remediation process that is respectful of the rights of Indigenous groups is more likely to be accepted by all members of the community (Allen & Xanthaki 2011).

Second, companies and Indigenous communities should decide on the appropriate remediation process at the earliest stage possible. This will ensure that both parties are familiar with the ground rules and procedure, and build institutional capacity. It will also allow the parties to resolve disputes promptly and stop minor grievances from escalating.

Ideally, grievances should be settled through a non-adversarial process, such as mediation or negotiation, provided that such processes are compatible with the Indigenous groups' own system.

When human rights are violated, victims can seek a remedy against companies in domestic courts; for example, in New Zealand, when breaches of the Human Rights Act 1993 or NZ Bill of Rights Act 1990 occur. On many occasions, Indigenous peoples have used domestic courts to bring allegations of human rights abuses against companies. However, domestic courts may not always be accessible or appropriate for Indigenous peoples. Many Indigenous communities live in isolated areas, litigation can be expensive and lengthy, and formal court procedures may not be compatible with the Indigenous group's own customs and traditions. Subsequently, a domestic process that is accessible to Indigenous peoples is required.

At the international level, however, only the state can be held responsible for human rights violations. This is because international law does not currently provide enforcement mechanisms to hold companies responsible for their human rights abuses. To this end, stronger regulatory schemes and stronger consultation obligations should be encouraged.

Companies need to develop a greater understanding and an enhanced awareness of Indigenous rights, with a particular focus on the right of free prior and informed consent.

## **Conclusion**

Although the Declaration may not be incorporated into respective domestic legislation, the state has a duty to protect the rights of Indigenous people against adverse corporate behaviour. A company has a duty to act consistently with the Declaration and respect the rights contained within.

Failure by the state to recognise rights contained in the Declaration does not absolve a company of its personal responsibility towards Indigenous peoples. Corporate responsibility is an individual responsibility, so conformity to the UNDRIP is required. Adherence to domestic legislation does not absolve a corporation's individual responsibility to act in a manner consistent the UNDRIP.

In instances where property rights law has been established, such as the right to lands, territories and resources, the same standard attaches, such as the right to free prior and informed consent. Due to the nature of the right, a higher standard applies due to the cultural component when compared to a non-Indigenous property right. Furthermore, the right to self-determination of Indigenous peoples as defined in the Declaration should be upheld and protected against the business activities of non-Indigenous peoples.

Nonetheless, states and companies often fail to recognise these rights. Companies defer to this failure by the state and highlight the economic benefits of the project and emphasise the national advantages to justify the activities. However, economic benefit is often not a priority for Indigenous peoples, and many are sceptical of any benefit (Anaya, 2011, para 107).

Frequently, projects and activities are undertaken without Indigenous participation. What is required is a new model whereby the Indigenous right of self-determination is respected and the "protect, respect and remedy" framework articulated in the Guiding Principles on Business and Human Rights is applied in the same way as human rights are applied and the right of free prior and informed consent is applied (United Nations, 2011).

The Declaration builds on and manifests the long-standing common body of opinion of principles that recognise the rights of Indigenous peoples. Constitutional recognition of these fundamental rights—for instance, in Bolivia and Ecuador—would assist to provide clarity and certainty to Indigenous peoples, states and companies when corporate activities are undertaken on or near traditional lands.

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<sup>1</sup> For example, see *The Chief Executive of the Ministry of Agriculture and Forestry v Waikato Regional Council*, Environment Court, Hamilton, Decision No A 133/2006, 17 October 2006, where Judge Sheppard held that the weight attributed to the effect on Ngati Te Ata's relationship with their waahi tapu prevailed over the positive or beneficial effects on the environment of allowing the activity, at para 289. This case is significant for the way in which the Court establishes and recognises the nexus between culture and traditions and land even when that land may not be held by Maori.

<sup>2</sup> See UNGC (2013, 21) citing report of the committee set up to examine the representation alleging non-observance by Ecuador of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Confederación Ecuatoriana de Organizaciones Sindicales Libres (CEOSL). See GB.282/14/2, para 38.

<sup>3</sup> Many states will claim natural resources are "state owned", dispossessing Indigenous peoples of their lands, territories and resources. See Human Rights Council, paras 32-35, which highlight the importance of due diligence.

<sup>4</sup> See Watson (2011, 627) where she provides an example of the failure by the Australian government to engage in free prior and informed consent with "the proposal by the Commonwealth government to develop a nuclear waste dump on Aboriginal land at Muckaty in the Northern Territory. The negotiations over the siting of the nuclear waste dump occurred without the free and informed consent of all traditional owner groups associated with the region".