

# United Nations Declaration on the Rights of Indigenous Peoples

## A Business Reference Guide

### Second Exposure Draft

6 September 2013

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United Nations Global Compact

*Cláusula de exoneración: El CR/SP ni AECID se hacen responsables de las ideas, conceptos y criterios expresados por el autor del documento.*

## United Nations Global Compact

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The United Nations Global Compact (the “UN Global Compact”) is a call to companies everywhere to voluntarily align their operations and strategies with ten universally-accepted principles in the areas of human rights, labour, environment and anti-corruption, and to take action in support of United Nations (“UN”) goals, including the Millennium Development Goals. The UN Global Compact is a leadership platform for the development, implementation, and disclosure of responsible corporate policies and practices. Launched in 2000, it is the largest corporate responsibility initiative in the world, with over 10,000 signatories based in 140 countries. For more information visit [www.unglobalcompact.org](http://www.unglobalcompact.org).

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# How to Use this Guide

## Purpose

The objective of this guide (the “Guide”) is to help business respect and support the rights of indigenous peoples, by illustrating how these rights are relevant to a business’ activities and providing practical suggestions.

The guidance offered in this Guide is not prescriptive and a ‘one-size-fits-all’ approach is not possible. The diversity of issues and contexts, as well as a business’ size, sector, ownership and structure, means that the scale and complexity of the measures necessary to ensure respect for indigenous peoples’ rights and opportunities to support such rights will vary depending on a number of factors. These are likely to include the indigenous peoples involved and their particular cultures, histories and preferences regarding development, the business involved and its objectives, the proposed activities and the regulatory environment, and the severity of the business’ adverse impact, if any.

Recognizing the diversity of contexts in which businesses engage with indigenous peoples, this Guide encourages businesses to engage in meaningful consultation and partnership with indigenous peoples on a local level and to adapt the principles discussed and practices suggested in this Guide to their particular situations and contexts.

It is important to note that as this Guide specifically focuses on the interaction between businesses and indigenous peoples, it does not represent a self-contained or exclusive code that encapsulates all of the responsibilities that a business has towards indigenous people. Accordingly, the actions suggested in this Guide should be taken alongside a broader set of actions that businesses take to respect and support the human rights of all people.

## Structure and methodology

While encouraged to do so, readers do not necessarily need to read this Guide from start to end, but may instead go straight to the sections or rights of interest or relevance to their context. The introductory sections set the scene for business engagement with indigenous peoples. Part I of this Guide outlines key actions for businesses to take in relation to indigenous peoples’ rights, from making a policy commitment, to due diligence, consultation and consent-seeking, grievance mechanisms, mitigation and remediation. The steps an individual business will need to take will depend on the risk of their impacts on indigenous peoples’ rights. The more extensive and severe the potential impacts, the more a business will need to know and show that it respects indigenous peoples rights. Part II provides a description of each right in the UN Declaration on the Rights of Indigenous Peoples (the “UN Declaration”), suggests practical actions that businesses can take to respect and support each right, and examples to help illustrate those suggested actions. A number of the examples have been simplified from real examples; others are hypothetical.

Key international instruments and principles referred in this Guide include, but are not limited to, the following:

- The UN Declaration on the Rights of Indigenous Peoples (reproduced in Appendix A);
- The UN Global Compact’s Principles (reproduced in Appendix B); and
- The UN Guiding Principles on Business and Human Rights.

The International Labour Organization (ILO) also has a standard which directly addresses the rights of indigenous peoples – Indigenous and Tribal Peoples Convention, 1989 (No. 169).<sup>1</sup> Additional

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<sup>1</sup> The ILO has developed a detailed guide to this instrument, the Indigenous & Tribal People’s Rights in Practice – A Guide to ILO Convention No. 169, which is available in English, French and Spanish at: [http://www.wilo.org/indigenous/Resources/Guidelinesandmanuals/WCMS\\_106474/lang--en/index.htm](http://www.wilo.org/indigenous/Resources/Guidelinesandmanuals/WCMS_106474/lang--en/index.htm).

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international instruments, principles and resources, including further information corresponding to each of the forthcoming sections, can be found on the UN Global Compact's website [http://unglobalcompact.org/Issues/human\\_rights/indigenous\\_peoples\\_rights.html](http://unglobalcompact.org/Issues/human_rights/indigenous_peoples_rights.html). Businesses, indigenous peoples and others can also participate in an online forum at <http://human-rights.unglobalcompact.org/dilemmas/indigenous-peoples/>.

### Glossary and List of Acronyms

**Article** refers to an article in the UN Declaration, unless otherwise stated

**CBD** refers to the Convention on Biological Diversity

**FPIC** means free, prior and informed consent

**Guiding Principles** means the UN Guiding Principles on Business and Human Rights<sup>2</sup>

**IFC means International Finance Corporation**

**ILO** means the International Labour Organization

**ILO Convention 169** means Indigenous and Tribal Peoples Convention, 1989 (No. 169)

**Indigenous peoples** has no single definition; see the discussion on page 6

**IPVI** means Indigenous Peoples Living in Voluntary Isolation

**OHCHR** means the UN Office of the High Commissioner for Human Rights

**State** means country or, in practical terms, national government

**UN** means the United Nations

**UN Declaration** means the UN Declaration on the Rights of Indigenous Peoples

**UNPFII** means United Nations Permanent Forum on Indigenous Issues

**UN Working Group** means the Working Group on Human rights and transnational corporations and other business enterprises

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<sup>2</sup> For a discussion of the relationship between the Guiding Principles and the principles of the UN Global Compact, see the explanatory note available here: [http://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/Resources/GPs\\_GC%20note.pdf](http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/GPs_GC%20note.pdf)

### Introduction

The UN estimates that there are over 370 million indigenous peoples in the world, living in over 90 countries.<sup>3</sup> Indigenous peoples are responsible for a great deal of the world's linguistic and cultural diversity, and their traditional knowledge is an invaluable resource; it is estimated that indigenous peoples occupy approximately 20% of the world's land surface, yet steward 80% of the planet's biodiversity.<sup>4</sup> Combined with their unique cultural and spiritual ties to ancestral lands and territories, indigenous peoples are often fitting custodians of natural resources and ecological knowledge. These attributes may make indigenous peoples sought after as potential partners for business ventures in various industries.

At the same time, many indigenous peoples suffer from abuse, discrimination, and marginalization, both past and present. As a result, many indigenous peoples live in poverty and poor health and their cultures, languages and ways of life are threatened. Indigenous peoples comprise 5% of the world's population, yet they make up about a third of the world's 900 million extremely poor rural people, and in many areas their average life expectancy is shorter than non-indigenous people.<sup>5</sup> Facing these realities, indigenous peoples are often particularly vulnerable to the negative impacts of some business activities. Often, businesses have worked collaboratively with indigenous populations, and have successfully advanced their economic goals by utilizing local knowledge and cooperating with indigenous populations. However, in some cases businesses have failed to respect the rights of indigenous peoples who live in the areas in which the businesses operate. There may be a sense of distrust by indigenous peoples towards the business community and State actors as a result of historical treatment such as dispossession and degradation of land and various human rights abuses. In other instances, harm has occurred when indigenous peoples unwittingly become parties to an agreement without informed understanding of its full implications. Further, indigenous peoples and their cultures often lack full legal protection at the State level. Unfortunately, many private sector activities have, directly and indirectly, damaging effects on indigenous peoples, and in some cases such damage has been irreparable.

Despite these challenges, there are many opportunities for businesses and indigenous peoples to engage positively. Furthermore, engaging with the indigenous population may be economically advantageous to businesses. For example, indigenous peoples can significantly contribute to ecosystem services via their traditional knowledge and unique value systems, and to the success of resource development initiatives – from granting and maintaining social licenses to actively participating in business ventures as owners, contractors and employees.

**This Guide seeks to elaborate on ways business can engage respectfully and positively with indigenous peoples within the context of the UN Declaration, while recognizing that indigenous peoples have a unique and important place in the global community.**

### UN Declaration on the Rights of Indigenous Peoples

Indigenous peoples are entitled to all human rights established under international law. In recognition of indigenous peoples' status as culturally distinct and self-determining peoples, and the unique challenges they have historically faced, the global community developed the UN Declaration: an international instrument to elaborate indigenous peoples' individual and collective rights.

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<sup>3</sup> United Nations Department of Economic and Social Affairs, Division for Social Policy and Development, Secretariat of the Permanent Forum on Indigenous Issues, "State of the World's Indigenous Peoples," New York, 2009 (ST/ESA/328) (UN Sales No. 09.VI.13), [http://www.un.org/esa/socdev/unpfii/documents/SOWIP\\_web.pdf](http://www.un.org/esa/socdev/unpfii/documents/SOWIP_web.pdf).

<sup>4</sup> Sobrevilla, Claudia, 'The Role of Indigenous Peoples in Biodiversity Conservation' 2008.

<sup>5</sup> Secretariat of the Permanent Forum on Indigenous Issues, "State of the World's Indigenous Peoples," New York, 2009

The UN Declaration was negotiated between States and indigenous peoples for over twenty years before being adopted by the UN General Assembly in 2007<sup>6</sup>. The UN Declaration marked a significant achievement by indigenous peoples in obtaining international recognition of their key rights, including, but not limited to, self-determination and land and natural resource rights, and, according to Article 43 of the UN Declaration, set forth the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world. The UN Declaration was also significant in that indigenous peoples were its co-authors and intimately involved in its formulation.

The UN Declaration recognizes that indigenous peoples have suffered significant injustices throughout history, and it identifies a number of collective rights of indigenous peoples, as well as incorporating various elements that seek to provide remediation for violation of such rights. The UN Declaration also provides States with a framework to reduce inequality and disadvantage experienced by indigenous peoples as a result of their status.

There is some dispute in the international legal community as to the legal effect of the UN Declaration. While the role of this Guide is not to take a position on the legal effect of the UN Declaration, the Guide briefly describes the arguments regarding the legality of the UN Declaration. One argument put forth in this debate is that the UN Declaration is an aspirational document with no legal binding effect unless it has been adopted by a State. As a non-binding declaration, the UN Declaration may nevertheless provide legal context in interpreting domestic legislation<sup>7</sup>. However, according to the UN Office of Legal Affairs, “in United Nations practice, a ‘declaration’ is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected”<sup>8</sup>.

On the other end of the spectrum is the argument that the UN Declaration has become part of customary international law.<sup>9</sup> According to Professor James Anaya, the UN Special Rapporteur on the Rights of Indigenous Peoples “[i]t is one thing to argue that not all of the [UN Declaration’s] provisions reflect customary international law, which may be a reasonable position. It is quite another thing to sustain that none of them does, a manifestly untenable position.”<sup>10</sup> For example, Articles 26 and 28 of the UN Declaration, concerning land rights of indigenous peoples, have received support in the decisions of regional human rights bodies such as the Inter-American Court of Human Rights (e.g., the cases of the *Saramaka People v. Suriname* and the *Kichwa Indigenous People of Sarayaku v. Ecuador*) and the African Commission on Human and Peoples’ Rights (e.g., the case of *Endorois Welfare Council v. Kenya*). In addition, Bolivia has adopted the UN Declaration as national law and incorporated it into its constitution and Greenland has described its enhanced self-government arrangement with Denmark as de facto implementation of the UN Declaration.<sup>11</sup>

### What is the business responsibility in relation to indigenous peoples’ rights?

States have the primary duty to respect, protect and fulfil human rights, through policy, legislation and regulation, and adjudication. The *UN Guiding Principles on Business and Human Rights* (the “Guiding Principles”) specifically outline the **State duty to protect human rights** from abuse,

<sup>6</sup> G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (October 2, 2007). 147 countries have endorsed the UN Declaration. Each of the four countries that initially voted against the UN Declaration have since reversed their positions. .

<sup>7</sup> First Nations Child and Family Caring Society et al. v. Canada (Attorney General), “Memorandum of Fact and Law of the Respondent, the Attorney General of Canada”, Respondent’s Record. Vol. 5, Federal Court of Canada, Dockets T-578-11, T-630-11, T-638-11, 17 November 2011, para 71.

<sup>8</sup> *UN Declaration on the Rights of Indigenous Peoples: Not Merely “Aspirational”*, Paul Joffe, May 24, 2013, page 5.

<sup>9</sup> Anaya, J (2005). Indigenous peoples’ participatory rights in relation to decisions about natural resource extraction: The more fundamental issue of what rights indigenous peoples have in lands and resources. *Arizona Journal of International and Comparative Law*, 22(1), p.7 and re-emphasised by Paimaneh Hasteh in 2012, Economic and Social Council, Permanent Forum on Indigenous Issues, *An Analysis on the Duty of the State to Protect Indigenous Peoples Affected by Transnational Corporations and Other Business Enterprises* (May 2012). E/C.19/2012/3, para 8.

<sup>10</sup> Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya: Addendum: Cases examined by the Special Rapporteur (June 2009 – July 2010)*, UN Doc. A/HRC/15/37/Add.1 (15 September 2010 (Advance Version), para. 112.

<sup>11</sup> *UN Declaration on the Rights of Indigenous Peoples: Not Merely “Aspirational”*, Paul Joffe, May 24, 2013, page 4.

including by businesses, based on the existing international obligations of States. The duty to protect “implies that States must take measures to prevent or end infringement upon the enjoyment of a given human right caused by third parties” including businesses.<sup>12</sup>

The Guiding Principles further recognize “the role of business enterprises as specialized organs of society performing specialized functions” and that, **businesses are required to respect** human rights throughout their operations and business relationships. 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.<sup>13</sup> In particular, businesses must:<sup>14</sup>

- (a) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; and
- (b) 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.

For these purposes, a business’ activities include acts and omissions, and its business relationships include those with business partners, entities in the business’ value chain and any other State or non-State entity that is directly linked to the business’ operations, products or services.

There is growing pressure on businesses, and a drive from within businesses, to ensure that they respect human rights including the rights of indigenous peoples, and that they play a part in supporting and promoting such rights in order to maintain their social and legal license to operate and be more sustainable. Businesses are also reporting that positive engagement with indigenous peoples can bring a range of benefits – stronger relationships with communities and other stakeholders resulting in fewer conflicts and disputes, stronger government relationships (with attendant benefits), reputational benefits, employee engagement, boost in employee morale, recognition by investors, and the ability to partner with and learn from indigenous peoples’ unique knowledge (with consent and respect for such indigenous peoples’ intellectual property).

It is important to note that a business’ responsibility to respect human rights is a global standard of expected conduct wherever it operates. Such obligation “exists independently of State’s abilities and/or willingness to fulfil their own human rights obligations ... [a]nd it exists over and above compliance with national laws and regulations protecting human rights.”<sup>15</sup> As a result, each business has responsibilities, under applicable domestic law and in accordance with the international human rights legal framework, which it must observe in relation to any person, whether they are indigenous or not.

### **Recognise, Respect and Support indigenous peoples’ rights**

**THE CORPORATE RESPONSIBILITY TO RESPECT** as discussed in the introduction to this Guide, the Guiding Principles provides that *all* businesses have a responsibility to avoid causing or contributing to adverse human rights impacts through their own activities and addressing any such impacts when they occur. Business also has an affirmative duty to seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships and suppliers, even if they have not contributed to those impacts. This responsibility applies to all human rights, including the human rights of indigenous peoples. Part I

<sup>12</sup> General Assembly Report A/68/279. “Human rights and transnational corporations and other business enterprises.” August 6, 2013. At p. 7. While States are not per se responsible for abuse of indigenous rights by private actors, States risk breaching their duty to protect where they fail to take appropriate steps to investigate, punish or redress private actors’ abuse.

<sup>13</sup> Principle 11 of the Guiding Principles. For a discussion of this, see *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, UN Office of the High Commissioner for Human Rights (<http://www.business-humanrights.org/media/documents/corporate-responsibility-to-respect-interpretive-guide-nov-2011.pdf>)

<sup>14</sup> Principle 13 of the Guiding Principles, [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)

<sup>15</sup> Principle 11 of the Guiding Principles. For a discussion of this, see *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, UN Office of the High Commissioner for Human Rights (<http://www.business-humanrights.org/media/documents/corporate-responsibility-to-respect-interpretive-guide-nov-2011.pdf>)

of this Guide focuses on how to meet a business' corporate responsibility to respect indigenous peoples' rights.

**THE CORPORATE COMMITMENT TO SUPPORT** in addition to the corporate responsibility to respect, the UN Global Compact Principles encourage businesses to take additional voluntary actions that seek to promote and advance human rights, including indigenous peoples' rights, whether through core business activities, strategic social investments, philanthropy, advocacy and public policy engagement, and/or partnership and collective action. Voluntary actions to support and champion indigenous peoples' rights must be in addition to and not a substitute for actions taken to respect their rights (which is the minimum standard for all business enterprises). Such actions should be guided by the core principles of indigenous peoples' rights, including self-determination and FPIC, as well as full and effective participation of relevant indigenous peoples.

### Who are indigenous peoples?

The prevailing view in the international community is that no single definition of indigenous peoples is necessary and that a combination of subjective and objective criteria may be used in identifying indigenous peoples.

One criterion that underpins most definitions is self-identification. If a group of people defines themselves as indigenous, then, unless manifestly illegitimate, such designation should be respected. According to the Indigenous and Tribal Peoples Convention, 1989 (No. 169) ("ILO Convention 169"), "[s]elf-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply."

In addition to self-identification, it is useful to consider existing criteria set out in international norms and instruments, such as ILO Convention 169, which identifies indigenous and tribal peoples as follows:<sup>16</sup>

- (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 colonization 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.

In its report *State of the World's Indigenous Peoples* (2009), the UN Department of Economic and Social Affairs cites the following working definition from Martínez Cobo<sup>17</sup>:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.

Their historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:

- Occupation of ancestral lands, or at least of part of them;
- Common ancestry with the original occupants of these lands;

<sup>16</sup> Indigenous and Tribal Peoples Convention, 1989 (No. 169), Article 1

<sup>17</sup> Martínez Cobo, José (1986/7), 'Study of the Problem of Discrimination against Indigenous Populations', UN Doc. E/CN.4/Sub.2/1986/7 and Add. 1-4, paras. 379-382. Available online at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G86/104/62/PDF/G8610462.pdf?OpenElement>

- Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);
- Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
- Residence in certain parts of the country, or in certain regions of the world; and
- Other relevant factors.

On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).

This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.

The definitions provided by international organizations such as the IFC and the ILO may serve as useful references for companies in identifying Indigenous groups affected by their operations, but additional due diligence is often necessary. For example, the situation of Indigenous Peoples Living in Voluntary Isolation (“IPVIs”) are particularly difficult to address for companies and governments, as by their very nature, IPVIs do not self-identify as indigenous. These indigenous peoples are the most vulnerable politically and physically (for example, to disease).<sup>18</sup>

Indigenous identity is context-based and varies from country to country. In some countries indigenous peoples are commonly identified by their occupation and use of lands and territories prior to colonial invasion. However, in other countries, for example in the African context, other characteristics may be more relevant, such as special attachment to and use of ancestral lands, or marginalization based on ways of life or modes of production which differ from that of the national dominant model.<sup>19</sup> The UN Department of Economic and Social Affairs’ Resource Kit on Indigenous Peoples’ Issues<sup>20</sup> also suggests a number of practical questions to ask in seeking to identify indigenous peoples, including:

- Do the peoples self-identify as indigenous?
- Are there local terms that identify indigenous peoples?
- Are they recognized as indigenous in legislation?
- What is the group’s general situation compared with that of the dominant society?

While none of the questions above are decisive, they may be useful to consider in a company’s due diligence process, especially, for example, in cases where governments do not recognize indigenous peoples’ status. It is also advisable to (i) engage with the relevant peoples (with their consent) and (ii) consult existing treaties and other arrangements relating to such peoples (unless such treaties and/or arrangements are prejudicial to the rights of such peoples) when attempting to identify whether such group is indigenous (See Article 37 of the UN Declaration discussed in Part II of this Guide for a further discussion on treaties).

When reading this Guide, the reader should keep in mind that the use of the term “indigenous peoples” is inclusive of all members of an indigenous community. That is, it includes indigenous men, women and particularly vulnerable persons including children, the elderly and disabled. Article 44 of the UN Declaration specifically notes that all rights reference in the UN Declaration apply to men and women equally. In addition, the term “indigenous peoples” is intended to capture those peoples who, while indigenous, may not use such term in describing themselves. For example, in certain circumstances, indigenous peoples may be referred to or may prefer to be referred to by other descriptors, such as tribal or first peoples; some groups which may fall within

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<sup>18</sup> <sup>18</sup> For emerging guidance to address IPVIs, please see: Guidelines for the Protection of Indigenous Peoples in Voluntary Isolation and Initial Contact in the Amazon Region, the Gran Chaco and the Eastern Region of Paraguay, Office of the United Nations High Commissioner (OHCHR) and the Spanish Agency for International Cooperation and Development, May 2012.

<sup>19</sup> For more information on situation of indigenous peoples in Africa, see Report of the African Commission’s Working Group of Experts on Indigenous Populations/ Communities. 2005., p 92-3.

<sup>20</sup> Resource Kit on Indigenous Peoples’ Issues, UN Department of Economic and Social Affairs.  
[http://www.undg.org/docs/10162/resource\\_kit\\_indigenous\\_2008.pdf](http://www.undg.org/docs/10162/resource_kit_indigenous_2008.pdf), p. 9

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the general concept of indigenous peoples may prefer not to be separately identified in this way at all.

# **Part I: Key business actions**

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Part I of this Guide sets out the key actions that business should take to enable it to know and show that it respects indigenous peoples' rights. These key actions are foundational to respecting the rights set out in the UN Declaration (described in Part II). The actions should be proportional to the risk of adversely impacting indigenous peoples' rights. These same actions may also help identify opportunities to support indigenous peoples' rights.

All businesses should take the following fundamental actions in conjunction with local and state governments to meet their responsibility to respect indigenous peoples' rights:

- 1. Adopt and implement an indigenous rights policy (whether on a stand-alone basis or within a broader human rights policy) addressing indigenous peoples' rights and committing the business to respect and support indigenous peoples' rights. Reference the UN Declaration in this policy.**
- 2. Conduct human rights due diligence to identify actual or potential impacts on indigenous peoples' rights, integrate findings and take action, track and communicate externally on performance**
- 3. Consult with indigenous peoples in relation to matters that may affect them or their rights**
- 4. Obtain (and maintain) free, prior and informed consent in projects that affect indigenous peoples where called for by the UN Declaration**
- 5. Establish or cooperate with legitimate processes to remediate any adverse impacts on indigenous peoples' rights**
- 6. Establish or cooperate with an effective and culturally appropriate grievance mechanism**

These fundamental actions are important to ensure respect for the individual and collective rights of indigenous peoples. Each fundamental action, and suggested approaches for implementing it, is discussed in detail in the remainder of Part I.

**Note:** While some of these actions naturally follow from others, this list should not be seen as a flow chart or steps to be taken in the order provided above. For example, before developing a policy on indigenous peoples' rights, it is recommended that businesses engage with Impacted Indigenous Peoples in order to involve them in the policy development process. Many of these actions will also be ongoing.

As an initial step, business must recognize the principles underpinning indigenous peoples' rights. Indigenous peoples are entitled to enjoy all human rights and fundamental freedoms under international law, including those individual and collective rights that are set out in the UN Declaration. Two fundamental elements of indigenous peoples' rights, on which the ability to exercise and enjoy a number of other rights rest, are the **right to self-determination** (discussed on page 37) and **free, prior and informed consent** (discussed on page 23) which, among other things, require that business fully and meaningfully engage indigenous peoples in, and in certain cases obtain their free, prior and informed consent for, business activities that will affect them or their rights.

While all businesses, regardless of size, sector, operational context, ownership or structure, have a responsibility to respect indigenous peoples' rights, what is required in practice of a particular business in adopting these fundamental actions will depend on these factors. Most importantly, it will depend on the severity of the business' actual and potential adverse impacts on the rights of indigenous peoples<sup>21</sup>, taking into account the perspective of those who may be impacted, and the

<sup>21</sup> Principle 14 of the Guiding Principles. For a discussion of this, see *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, UN Office of the High Commissioner for Human Rights (<http://www.business-humanrights.org/media/documents/corporate-responsibility-to-respect-interpretive-guide-nov-2011.pdf>)

likelihood of such impacts occurring. Severity may be understood in relation to the scale (nature of the rights affected), scope (proportion of persons affected in a group) and irremediable nature of the impact<sup>22</sup>. In short, the management steps that a business should take to respect indigenous peoples' rights will be proportionate to the level of risk of adverse impacts on those rights.

# Policy commitment

**Action: Adopt and implement an indigenous rights policy (whether on a stand-alone basis or within a broader human rights policy), addressing indigenous peoples' rights and committing the business to respect and support indigenous peoples' rights**

An indigenous peoples' rights policy (which may be part of a broader human rights policy) is a public statement adopted by a business, endorsed and supported by the business' highest governing levels, committing the business to certain actions in relation to indigenous peoples' rights.<sup>23</sup>

Businesses that may have significant adverse impacts on indigenous peoples rights<sup>24</sup> should develop an indigenous peoples' rights policy, or include a specific section on indigenous peoples' rights in their existing human rights policy or overall code of conduct.<sup>25</sup> In either case, such policy should fully recognize the rights of indigenous peoples as set out in the UN Declaration, and commit the business to respect indigenous rights, and to actively support and advance indigenous peoples' rights where possible. The policy should also meet the requirements of Guiding Principle 16 and reference the UN Declaration and other relevant State-level and international law, legislation and regulation relating to human rights or, specifically, indigenous peoples' rights. In circumstances where specific provisions are required on the company's relationships with indigenous peoples, indigenous representatives and human rights experts should be involved in the development of the policy.

Establishing an indigenous peoples' rights policy will help businesses (i) understand and identify where their operations and business relationships pose a risk of adverse impacts on indigenous peoples' rights, and (ii) develop processes for mitigating risks and addressing any infringements of rights that do occur. Once a business has an indigenous peoples' rights policy, it is encouraged to require business partners (for example, sub-contractors and joint venture partners) to adhere to the policy, and support them in developing their own such policy.

Businesses benefit from developing an indigenous peoples' rights policy in the following ways:

- It publicly confirms the business' commitment to meeting its responsibility to respect the rights of indigenous peoples, and demonstrates good business practice;
- It provides a consistent and concrete global policy for all company managers and employees, irrespective of individual country managers that may change regularly;

"Given the level of NGO and media attention to the issue of indigenous peoples' rights and the introduction of laws and regulation in many countries, companies with strong commitments and effective engagement processes will undoubtedly benefit in an environment where access to land and resources is becoming increasingly restricted" EIRIS<sup>26</sup>

<sup>22</sup> See European Commission Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights [http://shiftproject.org/sites/default/files/ECHRSG.OG\\_.pdf](http://shiftproject.org/sites/default/files/ECHRSG.OG_.pdf)

<sup>23</sup> See Oxfam America's Community Consent Index: Oil, Gas, and Mining Company Public Positions on Free, Prior and Informed Consent for examples of company policy commitments on FPIC and community consent.

<sup>24</sup> Such businesses may include businesses with operations and/or business relationships in areas with indigenous populations.

<sup>25</sup> See Guiding Principle 15, which states that in order to meet their responsibility to protect human rights businesses should have in place policies and processes appropriate to their circumstances.

- It assists the business in identifying policy gaps and areas of risk;
- It can provide a differentiator for business, resulting in competitive advantage;
- It builds trust with external stakeholders, and can assist the business in understanding and meeting stakeholder expectations;
- It can provide reputational benefits, especially given the increasing level of stakeholder attention to the issue of community consent and indigenous peoples' rights<sup>26</sup>;
- It provides guidance for managers and employees in relation to matters that may impact the rights of indigenous peoples;
- It provides operational guidance and risk management in environments where the rights of indigenous peoples may not be well understood;
- It contributes to sustainable development;
- It provides good will and long-term economic benefits, especially for businesses seeking to develop lands and resources; and
- It helps companies to meet their commitments under the UN Global Compact (for participant businesses).

### How to develop an indigenous peoples' rights policy<sup>28</sup>

#### Getting started

- Assign senior management responsibility to drive, implement and review existing or any new policies.
- Map and study existing policies to identify existing coverage of indigenous peoples' rights and gaps (this may include, for example, policies relating to human rights, equal opportunity/diversity, occupational health and safety, environment, ethical conduct, procurement, community investment etc.).
- Involve all relevant parts of the business in the process of developing, implementing and reviewing the policy (including all parts of the core business as well as human resources, corporate affairs, legal, procurement and security).
- Involve internal and external stakeholders in the process. It is crucial that indigenous peoples with whom the business interacts and works are engaged in the process of developing, implementing and reviewing the policy. Indigenous peoples should be engaged early in the policy development process. Businesses should conduct pre-engagement analysis to understand the relevant indigenous peoples and develop an outreach and communication strategy for engaging with them (as discussed in the section 'Consultation').

#### Key inclusions

At a minimum, the policy should:

- Be approved at the most senior level of the business enterprise;
- Be informed by relevant internal and/or external expertise (including indigenous expertise);

<sup>26</sup> EIRIS, 'Investors urged to focus attention on rights of indigenous peoples', 2009, <http://www.eiris.org/files/press%20releases/indigenouspeoplesjun09.pdf>

<sup>28</sup> This section draws heavily on (i) Guiding Principle 16 and (ii) the UN Global Compact and Office of the High Commissioner for Human Rights, 2011, *Guide on How to Develop a Human Rights Policy*, [http://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/Resources/How\\_to\\_Develop\\_a\\_Human\\_Rights\\_Policy.pdf](http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/How_to_Develop_a_Human_Rights_Policy.pdf)

- Set out the business' requirements and expectations of personnel, business partners and other parties directly linked to the business' operations, products or services by a business relationship in relation to indigenous peoples' rights;
- Include an explicit commitment to respect indigenous peoples' rights, including their individual human rights and the collective rights, as set out in the UN Declaration. In connection therewith, Professor James Anaya, the UN Special Rapporteur on the Rights of Indigenous Peoples states<sup>29</sup>:

Any policy commitment made in relation to human rights and Indigenous peoples should include how the business enterprise will seek to obtain the free, prior and informed consent of Indigenous peoples, and respect, protect and fulfil all the rights and obligations contained in the UN Declaration on the Rights of Indigenous Peoples.

- Recognise that land rights and tenure can be the root of disputes between companies and indigenous peoples and identify ways in which such disputes will be prevented and resolved<sup>30</sup>.
- Require that information is conveyed to indigenous peoples in a manner than can be understood, and further is conveyed to both men and women<sup>31</sup>.
- Include provisions on fundamental labour rights as they relate to indigenous peoples (e.g., freedom from forced labour and child labour, equality, non-discrimination, freedom of association, collective bargaining rights, diversity and inclusion); and
- Include provisions on non-labour rights, which will depend on the nature and context of the business operations and its business relationships.

Businesses should also consider including the following in the policy:

- A commitment to working with business partners to encourage the adoption of indigenous peoples' rights policies;
- The process undertaken to develop the policy (including how indigenous peoples were consulted);
- References to voluntary standards and codes of conduct; and
- Legal jurisdiction issues (the business' approach to indigenous peoples' rights where State laws and regulations differ from indigenous peoples' rights under international instruments such as the UN Declaration as determined through the business' human rights assessment).

### **Embed policy throughout business operations**

Once the indigenous peoples' rights policy has been developed, implementing the policy and embedding it throughout the business operations will be crucial. To ensure the policy is effectively embedded, businesses should consider the following:

- Make sure the policy is communicated internally to all personnel, business partners and other relevant parties
- Build a work environment that is culturally aware, gender sensitive and inclusive<sup>32</sup>. Incorporate the policy into company and contractor training as appropriate, and consider whether specific training may be required for particular areas of the business;

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<sup>29</sup> Expert Mechanism on the Rights of Indigenous Peoples, 2012, *Comment on the Human Rights Council's Guiding Principles on Business and Human Rights as related to Indigenous Peoples and the Right to Participate in Decision-Making with a Focus on Extractive Industries*, [http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Session5/A-HRC-EMRIP-2012-CRP1\\_en.pdf](http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Session5/A-HRC-EMRIP-2012-CRP1_en.pdf)

<sup>30</sup> Report of the Working Group on Human rights and transnational corporations and other business enterprises to the 68<sup>th</sup> Session of the General Assembly [insert citation when available]

<sup>31</sup> Report of the Working Group on Human rights and transnational corporations and other business enterprises to the 68<sup>th</sup> Session of the General Assembly [insert citation when available]

- Make sure personnel, including at the executive level and contractors are accountable under the policy;
- Disclose on a regular basis certain performance data, such as number and resolution time of grievances, to communicate that the policy and related programs are operational and effective; and
- Engage in on-going consultation with indigenous peoples to build and strengthen relationships and improve implementation of the business' human rights and indigenous rights policies (see 'Consultation').

### **Communicate the policy to potentially affected indigenous groups**

- Ensure the policy is publically available and communicated to any actual or potentially affected indigenous persons, such as through outreach meetings and consultations;
- Translate the policy into appropriate languages; and
- Take into account differences in language of groups and literacy levels, as well as cultural preferences for the way information is transmitted and received<sup>33</sup>.

# Human Rights Due Diligence

**Action: Conduct human rights due diligence to identify actual or potential impacts on indigenous peoples' rights, integrate findings and take action, track and communicate externally on performance**

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## **Due diligence**

In order to meet their corporate responsibility to respect indigenous peoples' rights, businesses need to identify and understand the ways in which their activities may impact indigenous peoples' rights. Generic Environmental, Social and Health impact assessments may not identify the specific impacts that may be experienced by indigenous peoples in light of their specific collective rights under UNDRIP<sup>34</sup>. On-going human rights due diligence enables the businesses to identify, prevent, mitigate and account for how they address its impacts on the rights of indigenous peoples. Human rights due diligence is a key requirement under the Guiding Principles<sup>35</sup>. According to the Guiding Principles, the due diligence process should include:

- (a) assessing actual and potential impacts on indigenous peoples' rights (Guiding Principle 18);
- (b) integrating and acting upon the findings (Guiding Principle 19);
- (c) tracking responses (Guiding Principle 20); and
- (d) communicating externally how impacts are addressed (Guiding Principle 21).

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<sup>32</sup> Report of the Working Group on Human rights and transnational corporations and other business enterprises to the 68<sup>th</sup> Session of the General Assembly [insert citation when available]

<sup>33</sup> Report of the Working Group on Human rights and transnational corporations and other business enterprises to the 68<sup>th</sup> Session of the General Assembly [insert citation when available]

<sup>34</sup> Report of the Working Group on Human rights and transnational corporations and other business enterprises to the 68<sup>th</sup> Session of the General Assembly [insert citation when available].

<sup>35</sup> Guiding Principle 17

Human rights-focused due diligence will also help the business to implement and embed its indigenous peoples' rights policy throughout its operations. Indigenous peoples' rights must be considered specifically; businesses cannot simply rely on general human rights due diligence in relation to indigenous peoples' rights, for reasons including the following:<sup>36</sup>

- It is possible that a particular activity may not impact on the rights of non-indigenous peoples, but the same activity could adversely impact indigenous peoples' rights. For example, given the relationship indigenous peoples' often have with their lands, it could be that excavating the land has a far more significant impact on them than the same excavation or tourism would have on non-indigenous peoples.
- Indigenous peoples are culturally distinct and self-determining peoples, and under the UN Declaration they have individual and collective rights, each of which must be considered.
- The way a business engages with indigenous peoples may differ from the way the business engages with non-indigenous peoples in relation to the same project.
- In order to understand the rights of indigenous peoples, businesses should seek to understand the unique way of life of the indigenous group that will be impacted by the businesses activities. This means businesses should understand the ways in which the indigenous group makes decisions, governs itself, uses, values and owns land (for example, through communal ownership, or through traditional ownership of lands that are not clearly demarcated as indigenous), and which resources it consider most valuable.

**When:** Due diligence should be conducted initially to identify and assess any actual and potential adverse impacts on indigenous peoples, and should continue throughout the life cycle of business' engagement with such indigenous peoples. Businesses should also conduct due diligence or impact assessments (as discussed below) in relation to particular activities, including (i) prior to commencing or investing in a business activity; (ii) for the purposes of mergers and acquisitions activities; (iii) when entering a new country, region or location; (iv) when entering into arrangements with new business partners; or (v) when the context or circumstances of its engagement with or impact on indigenous peoples will change or has changed. It is important to note that due diligence before the commencement of a project or such other business activity should balance the costs and benefits of the project for the business as well as the affected indigenous peoples: often, economic benefit to indigenous groups will not justify infringements in other areas, such as property rights

**How:** Due diligence can encompass a range of elements: (i) the use of an internal or independent external human rights or indigenous peoples rights expert; (ii) desk research to identify government policies and reports and existing treaties and arrangements with such indigenous peoples<sup>37</sup> and existing baseline data about such indigenous peoples; (iii) engagement with indigenous organizations, government authorities where appropriate and other relevant civil society organizations, including those indigenous organizations that may be a federation or association of individual indigenous communities or function as a national body; (iv) visits to project sites; and (v) meaningful consultation and collaboration with local indigenous communities. The appropriate scope of due diligence for a particular business will depend on the business' size, structure and context and, most importantly, the severity of adverse impacts on indigenous peoples' rights, which should be judged by their scope, scale and irremediable character.<sup>38</sup> However, the key elements of due diligence – assessing, integrating and acting, tracking and communicating – together with processes for remediation (as discussed below) provide a framework applicable to all businesses.<sup>39</sup>

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<sup>36</sup> This issue is discussed at Right 2 Respect, 2011, *Human Rights Due Diligence and Indigenous Peoples: What is required?*, <http://www.right2respect.com/2011/08/human-rights-due-diligence-and-indigenous-peoples-what-is-required/>

<sup>37</sup> See the discussion of Article 37 of the UN Declaration provided in Part II of this Guide for a discussion on treaties.

<sup>38</sup> Guiding Principle 14.

<sup>39</sup> UN Office of the High Commissioner for Human Rights, 2011, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, p. 27, <http://www.business-humanrights.org/media/documents/corporate-responsibility-to-respect-interpretive-guide-nov-2011.pdf>

Furthermore, the Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, dated August 6, 2013, states that:

“Business enterprises should ensure that impact assessments are robust enough to detect differentiated impacts on possible vulnerable groups who may sustain greater adverse impacts from the same operation due to political, economic or social marginalization within the indigenous community.”<sup>40</sup>

**What:** Key factors to consider in conducting indigenous peoples’ rights due diligence include the following:

- For the due diligence process to be effective, potentially affected indigenous peoples should be engaged in meaningful consultation. (See the section ‘Consultation’ for guidance on engaging with indigenous peoples, including for the purpose of due diligence.)
- Businesses should specifically take account of the different impacts that the project may have on indigenous men, women, children and potentially marginalised groups *within* the relevant indigenous community. Further, due diligence should be conducted recognizing that women and certain other members of such community may bear a greater proportion of adverse impacts of development projects.
- The due diligence process should take account of actual and potential adverse impacts on indigenous peoples’ cultures and values, which are often poorly understood by businesses. Businesses should consider engaging an expert with ethno-development expertise to assist or conduct the due diligence if the business does not have the appropriate expertise in-house.

**Where:** Businesses must also integrate the results of their due diligence process into business operations and take appropriate action to address any impacts on indigenous peoples’ rights, and track the effectiveness of its response.<sup>41</sup> Businesses should also make the results of its due diligence and impact assessments available to the the relevant indigenous peoples in their native language in a culturally appropriate format (and respecting confidentiality considerations, including importantly any privacy or confidentiality considerations of indigenous peoples involved in the due diligence), and ensure that technical information is presented in an accessible format. The results should also be made available externally for transparency (again, respecting confidentiality considerations).

### Impact Assessments

While human rights due diligence is an on-going process that considers a business’ whole operations and its business relationships, businesses are often also required to prepare impact assessments in relation to specific proposed activities (in a number of countries, this is a regulatory requirement). Impact assessments should be conducted before the activity begins. The Inter-American Court of Human Rights’ decisions in the Saramaka and Sarayaku cases, provides that governments must ensure that where appropriate, social, environmental, spiritual and cultural assessments are conducted prior to giving a project concession to a company.

Impact assessment should also continue through the duration of the activity as necessary. Impact assessments not only provide the business with information on the project’s actual or potential impact on indigenous peoples and their rights, but also furnish affected indigenous peoples with information about human rights risks, so that they can meaningfully engage with the business concerning the proposed project. To be effective, such impact assessments should also specifically consider impacts on indigenous peoples and their rights. While the factors listed above in relation to due diligence apply equally to impact assessments, business should also consider the following:

<sup>40</sup> Report of the Working Group on Human rights and transnational corporations and other business enterprises to the 68<sup>th</sup> Session of the General Assembly, A/68/279, p. 23.

<sup>41</sup> Guiding Principle 19.

- Business should ensure that impact assessments take account of indigenous peoples' cultures and values. For example, a business should strive to understand not only actual and potential adverse impact on the environment but also in terms of indigenous peoples' spiritual values and any intangible cultural impacts.<sup>42</sup> Special efforts should be made to incorporate cultural heritage impacts into the business' due diligence and impact assessments.<sup>43</sup>
- Many impact assessments take place in accordance with legislative or regulatory processes, which, for various reasons, can hinder the ability of indigenous peoples to effectively participate:<sup>44</sup>
  - For example, the legislative or regulatory process may not expressly require the involvement of indigenous peoples, even where they are being impacted. In such case, the business should consider involving the relevant indigenous peoples regardless.
  - Businesses might also consider providing funding and other necessary support to indigenous peoples to ensure their full participation in impact assessments, including considering funding third party impact assessments. If applicable, third party assessments should be undertaken by an independent and technically capable entity and address the cumulative impact of existing and proposed projects.
  - Businesses should allow indigenous peoples sufficient time to participate (such level of participation to be determined by the indigenous peoples themselves) to allow effective participation.
- Impact assessments, particularly environmental impact assessments, should be undertaken using quantifiable measurements and clear methodology, so that performance can be tracked.

### Integrating Findings and Taking Action

Guiding Principle 19 also states that following their due diligence, businesses should take appropriate action, which will vary according to a variety of factors and individual circumstances, such as the relationship of the business to the impact and the extent of its leverage in addressing the impact. Businesses should consider the following when determining an appropriate course of action:

- A business that causes or may cause an adverse impact on indigenous rights should take necessary steps to cease or prevent the impact.
- If the business is one of multiple entities contributing to such a violation, Guiding Principle 19 encourages such a business to take necessary steps to cease or prevent its contribution and use available leverage to change wider business practices causing adverse impacts on indigenous rights.
- Where a business neither causes nor contributes to an adverse impact, but its operations, products, or services are directly linked to the impact through another entity in its value chain – for example, a supplier operating without community consent and degrading indigenous territories – unknown to the company and in violation of contractual terms – the business should consider the following questions in determining how to proceed:

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<sup>42</sup> For further guidance see the Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments 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, Secretariat of the Convention on Biological Diversity. 2004. <http://www.cbd.int/doc/publications/akwe-brochure-en.pdf>

<sup>43</sup> For an example of one company's approach to incorporating cultural heritage into management systems, see Why Cultural Heritage Matters: A resource guide for integrating cultural heritage management into Communities work at Rio Tinto. 2011. [http://www.riotinto.com/documents/ReportsPublications/Rio\\_Tinto\\_Cultural\\_Heritage\\_Guide.pdf](http://www.riotinto.com/documents/ReportsPublications/Rio_Tinto_Cultural_Heritage_Guide.pdf)

<sup>44</sup> O'Faircheallaigh, Ciaran, 1996, 'Making Social Impact Assessment Count: A Negotiation-based Approach for Indigenous Peoples' (Research Paper), <http://www.griffith.edu.au/business-government/griffith-business-school/pdf/research-paper-1996-making-social-impact-assessment.pdf>

- Does the business have sufficient leverage over the entity concerned to ensure that the impact ceases (or is prevented)? If so, this leverage should be utilised.
- If there is insufficient leverage, how crucial is the relationship to the business and how severe is the impact?
- Would terminating the business relationship have adverse human rights consequences?
- If the business relationship is maintained, is the business undertaking efforts to mitigate the impact? Is the business prepared to accept the reputational, financial or legal consequences of maintaining the relationship?

Businesses may benefit from independent expert advice in answering these questions and in particularly complex scenarios. The Global Compact has developed a flow chart to provide a visual representation of the requirements under Principle 19<sup>45</sup>.

### **What should a business do if a group identifies as indigenous but the government does not recognize them as such, or does not otherwise respect indigenous peoples' rights?**

In some countries, there are groups that identify as indigenous, but the government does not recognize them as such, due to concerns over the obligations that would follow such recognition, for example in relation to self-determination or land rights. There are also some countries that do not recognize the existence of indigenous peoples at all.

It is important to remember that a business has a responsibility to respect human rights independently of a State's willingness to fulfil their own human rights obligations. According to the commentary to Guiding Principle 12, this includes respecting the human rights of individuals belonging to specific groups or populations that require particular attention, such as indigenous peoples and indigenous peoples living in voluntary isolation (IPVIs). As a result, in such circumstances, a business should be careful that its failure to recognize such groups as indigenous/or and its subsequent activities do not cause or contribute to an adverse impact on such persons rights as indigenous peoples (either directly through their own activities or otherwise linked to their operations, products or services by their business relationships, including with governments).

The following suggestions may assist businesses facing this situation.

- Businesses are encouraged to undertake their own investigation into whether the group is indigenous, and respect groups' legitimate self-identification as indigenous.
- Where a group legitimately self-identifies as indigenous, proceed on this basis as if the group was formally recognized as such (for example, obtain FPIC as required by the UN Declaration, even if this takes place outside of, and is not required by, any government processes). In the case of IPVIs, businesses should have a procedure or protocol to be followed to assess the existence of IPVIs. And when in doubt the precautionary approach should prevail.<sup>46</sup>
- To the extent appropriate, consider engaging with the government to explore the possibility of recognition and protection of rights. Ensure, though, that this will not worsen the indigenous peoples' position or create additional risks to them or their rights.

<sup>45</sup> [http://www.unglobalcompact.org/docs/issues\\_doc/human\\_rights/Resources/Guiding\\_Principle\\_19\\_Flow\\_Chart.pdf](http://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/Guiding_Principle_19_Flow_Chart.pdf)

<sup>46</sup> For guidance to address IPVIs, please see: Guidelines for the Protection of Indigenous Peoples in Voluntary Isolation and Initial Contact in the Amazon Region, the Gran Chaco and the Eastern Region of Paraguay, Office of the United Nations High Commissioner (OHCHR) and the Spanish Agency for International Cooperation and Development, May 2012.

- Be cautious of entering into agreements with governments that do not respect the rights of indigenous peoples. Consider ways to encourage governments to fulfil their human rights obligations, and incorporate expectations as to protection of and respect for indigenous peoples' rights into agreements with governments where possible. This is where having a previously stated public policy can help
- If the business' proposed activities may cause or contribute to more negative impacts on indigenous peoples' rights than positive, then the business may need to withdraw from the relevant business activity or redefine its strategy after a professional evaluation by external consultants.

For further guidance on assessing risks and determining approaches to conducting business in contexts where human rights are not routinely respected (which is also relevant in relation to indigenous peoples' rights), see: *Decision Map: Doing Business in High-Risk Human Rights Environments*, Danish Institute for Human Rights.<sup>47</sup> Further human rights guidance material can be found on the Global Compact's website and companies can propose, explore and discuss human rights dilemmas and good practice for responsible business in emerging economies in the Global Compact's Human Rights and Business Dilemma's Forum<sup>48</sup>.

### Tracking and communicating externally on performance

It is possible for a business that implements best practices to still cause or contribute to an adverse impact on indigenous peoples rights; even the best intentioned of businesses may be unable to foresee a particular problematic issue or be inadequately prepared to address such an issue. Effective monitoring and reliable reporting on the impacts of business activities on indigenous rights are crucial to enabling a business to fulfil its responsibility to respect the rights of indigenous peoples. Partly for this reason, in addition to assessing their impact on human rights and taking appropriate action to prevent and address adverse impacts, the Guiding Principles require businesses to track adverse human rights impacts and their responses to such impacts and to communicate externally the effectiveness of their responses. When communicating the impact of business activities to investors, businesses should report as granular data as reasonable to provide investors with enough information to assess risk and quality of management. For example, businesses should consider reporting on their performance (e.g. the number of and types of communications and meetings held, complaints, complaints acted on, surveys taken) and their operational policies and management system (e.g. what are their commitments, how are responsibilities shared internally, what type of employee training is conducted).

Tracing performance ensures that the business enterprise is aware early on of any potential adverse impacts of its activities on indigenous rights so that it may adapt its operations as necessary to meet its corporate responsibility to respect indigenous peoples' rights under the UN Declaration.

Effective monitoring of the causes of and responses to adverse human rights impacts should be drawn from a broad base of internal sources, feedback of indigenous peoples and other stakeholders in order to generate appropriate qualitative and quantitative indicators of effectiveness. Care should be taken to ensure that data is gathered from a representative population of indigenous peoples (including women, elders, children and youth, persons with disabilities and other vulnerable groups). Businesses may consider training indigenous communities to monitor business activity in order to enhance the data gathering capacity of the business, while simultaneously building trust, open channels of communication and a sense of ownership for the project among indigenous communities. When evaluating tracking results, it may

<sup>47</sup> [http://www.humanrightsbusiness.org/files/Publications/doing\\_business\\_in\\_highrisk\\_human\\_rights\\_environments\\_\\_180210.pdf](http://www.humanrightsbusiness.org/files/Publications/doing_business_in_highrisk_human_rights_environments__180210.pdf)

<sup>48</sup> [http://unglobalcompact.org/Issues/human\\_rights/Tools\\_and\\_Guidance\\_Materials.html](http://unglobalcompact.org/Issues/human_rights/Tools_and_Guidance_Materials.html)

<http://human-rights-forum.maplecroft.com/forum.php>

be helpful for businesses to analyse the results of its monitoring using gender-disaggregated data where relevant.

The Guiding Principles require business communicate externally the information obtained by its monitoring of adverse human rights impacts and responses. Reporting provides transparency, building the confidence of external stakeholders and bringing reputational and relationship benefits. There is no one way to report on human rights (including indigenous peoples' rights) performance, and the Guiding Principles offer a variety of communication methods that may be appropriate in diverse contexts.<sup>49</sup> Among the ways a business may choose to report its human rights performance includes in-person meetings, online dialogues, consultation with affected stakeholders and formal reports. While reporting is encouraged as much as possible, the Guiding Principles expect formal reporting only in instances where a business' activities pose a severe risk of an adverse human rights impact (whether due to the nature of business operations or the operating environment). The legitimacy and transparency of a formal report may be enhanced by subjecting them to independent third-party audits. Such reports may be further enhanced, for greater credibility, if they are prepared by a committee with an indigenous person and an external expert.

Regardless of the method of a business' reporting, the Guiding Principles provide that such communications should in all instances be of a form and frequency that reflect the business' human rights impacts, be accessible to its intended audiences (particularly stakeholders such as indigenous peoples) and provide information sufficient to evaluate the adequacy of the business' response to a particular adverse effect. This may require businesses to be sensitive to certain factors such as literacy, language and oral and written means of communication when reporting externally to indigenous peoples. When tracking performance and communicating progress externally, businesses should be sensitive to restrictions or limitations on the freedom of the press in certain countries so as not to put indigenous peoples or business personnel at risk. Additionally, such reporting requirements do not mandate that businesses divulge legitimately commercially sensitive or confidential information.

Additional guidance and frameworks for reporting on human rights are available to companies, including the Global Reporting Initiative and UN Global Compact reporting tools and frameworks and the OHCHR *Interpretive Guide on the Corporate Responsibility to Respect Human Rights*.<sup>50</sup>

# Consultation

## **Action: Consult with indigenous peoples in relation to matters that may affect their rights**

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Consultation, participation and engagement with indigenous peoples form a crucial part of a business' responsibility to respect the rights of indigenous peoples. Consultation enables business to learn indigenous perspectives on matters that may affect indigenous peoples, and can foster development of more trusting, positive relationships between the business and the indigenous peoples.

As described in ILO Convention 169, "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." Notwithstanding the limited adoption of ILO Convention 169 by States, many experts hold that prior consultation is a

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<sup>49</sup> For guidance in diverse contexts, refer to [http://www.unglobalcompact.org/AboutTheGC/tools\\_resources/humanrights.html](http://www.unglobalcompact.org/AboutTheGC/tools_resources/humanrights.html).

<sup>50</sup> See <https://www.globalreporting.org/reporting/reporting-framework-overview/Pages/default.aspx>; <http://www.ohchr.org/EN/Issues/Business/Pages/Tools.aspx>; and <http://human-rights-and-business-learning-tool.unglobalcompact.org/>.

general principle of international law<sup>51</sup>. While this point is open to debate, the trend and its implications for good practice are clear.

Consultation can present implementation challenges based on local conditions. Accordingly, as an initial step prior to engaging with indigenous peoples, businesses should undertake pre-engagement analysis to understand the indigenous communities that may be affected by the relevant business activity, their culture, governance and decision-making structures (including both traditional and contemporary decision-making bodies) and methods of communication. Additionally businesses should also seek to understand the relationships between and within indigenous groups, and whether it is most effective to consult on a local community level, a regional level or both. With this understanding, businesses can then develop an outreach and communication strategy to support culturally respectful consultation and engagement.

For consultation to be meaningful and effective it should be consistent with the following points:

- It must be undertaken in good faith, with the objective of reaching an agreement. Such consultation should start as early in the business' consideration of the activity as possible. The requirement for 'good faith' consultation is central to the duty to consult.<sup>52</sup>
- Business must be sensitive to barriers – linguistic, cultural, gender or other – that indigenous peoples may face in speaking openly to representatives of a business.<sup>53</sup>
  - Businesses should communicate in a way that the relevant indigenous peoples understand. This may require using interpreters or translators or developing visual aids such as maps, animation and diagrams to assist with the explanation of technical concepts. Highly technical data (e.g., in relation to environmental matters) may need additional explanation and time to understand or develop. Face to face consultations are often more valuable and more culturally appropriate than written or telephonic consultations and visits to other operational sites can also show indigenous peoples what the project would involve.
  - Businesses must consider the perspectives of indigenous women. This may require additional targeted efforts to reach them, for example, by providing childcare or eldercare during meetings or holding separate meetings for women.
  - Businesses should also seek to understand traditional laws of the relevant indigenous peoples; an action's legality under State law may not necessarily be considered legal under traditional indigenous law.
- Businesses must identify and negotiate with legitimate representatives of the potentially affected indigenous community, and avoid working with imposed or self-appointed leaders not recognized by the community. These legitimate representatives should remain accountable to the community. Indigenous peoples should participate in decision-making as directly as possible without intermediaries. If the need for intermediaries is unavoidable (for example in the case of communities in extreme poverty or with high levels of internally displaced persons), companies should ensure their NGO partners have adequate representation of the indigenous peoples on their boards and staff, and are acting in the genuine interests of the communities they claim to represent, including by working to build indigenous peoples' own capacity to make decisions themselves.
- Business should be aware of the potential challenge when identifying legitimate representatives of balancing respect for customary governance structures (which in some cases may be

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<sup>51</sup> Anaya, J., *Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Land and Resources*, 22(1) ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 7 (2005); see also Haste, Paimenah, *An Analysis of the Duty of the State to Protect Indigenous Peoples Affected by Transnational Corporations and Other Business Enterprises*, para. 8, ECONOMIC AND SOCIAL COUNCIL, PERMANENT FORUM ON INDIGENOUS ISSUES, (May 2012) E/C 19/2012/3. See also the Inter-American Court of Human Rights Judgment in the case of the Kichwa Indigenous People of Sarayaku v. Ecuador (June 27, 2012), p. 45.

<sup>52</sup> See Article 19 and Article 32. Furthermore, Article 46 states that all provisions in the UN Declaration must be interpreted "in accordance with the principles of... good faith."

<sup>53</sup> The Corporate Responsibility to Respect Human Rights: An Interpretive Guide. OHCHR. p. 44

patriarchal and exclude women, for example) and ensuring consultations are inclusive of women and other potentially disenfranchised groups. Related to this, the UN Working Group advises business to:

“seek open and inclusive dialogue with attention to both men and women, including, where applicable, with national federations and umbrella organisations of indigenous peoples. When such an approach is taken, indigenous peoples will themselves identify their legitimate representatives.”<sup>54</sup>

My best advice on how to conduct yourself at a meeting is from a Nyoongar Elder (Australia) who said "There is a reason why we have two ears and only one mouth".  
-David Hircock, Natural Resource Advisor, Estee Lauder

- Businesses must focus on listening to indigenous peoples, rather than imposing their own perspectives or approaches.
- Businesses must not interfere in indigenous governance processes by politicizing a project, pressuring, or selectively offering special benefits to politically powerful groups or individual communities to gain support. Businesses should seek to understand, and mitigate, the ways in which their actions could create or fuel conflict among and within indigenous groups. Related to this concept, businesses should be mindful of perceptions of bribery when paying for travel, food and accommodations for indigenous representatives in the context of consultations.
- Businesses must allow sufficient time for consultation. Indigenous communities and their internal consultation and decision-making processes may well take longer than the business' own such processes.
- The consultation processes should be reviewed and agreed to by the parties during the consultation to ensure that they remain effective; they should be adjusted as the parties agree necessary.
- Engagement does not end if and when indigenous peoples give their consent to a project. Engagement and communication must continue throughout the duration of the project. If possible, businesses should try to retain the same consultation staff for the duration of the project, and make sure they are easily accessible to the relevant indigenous peoples.
- Certain groups of indigenous peoples live in voluntary isolation. Unless invited to make contact, businesses should not engage in any contact with such indigenous peoples, and consequently should avoid conducting any operations that may impact on these indigenous peoples or areas in which they live. Consequently, businesses should develop sufficient buffer zones to protect these indigenous peoples from accidental contact by their operations, including the use of airplanes and helicopters flying over these areas.

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<sup>54</sup> Report of the Working Group on Human rights and transnational corporations and other business enterprises to the 68<sup>th</sup> Session of the General Assembly, A/68/279, p. 11.

# Free, prior and informed consent

## **Action: Obtain (and maintain) free, prior and informed consent from indigenous peoples where appropriate<sup>55</sup>**

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The concept of free, prior and informed consent (“FPIC”) is fundamental to the UN Declaration as a measure to ensure that indigenous peoples’ rights are protected. The UN Special Rapporteur on the Rights of Indigenous Peoples, Professor James Anaya, states:<sup>56</sup>

[C]onsultation and free, prior and informed consent standards are best conceptualized as safeguards against measures that may affect indigenous peoples’ rights. Other such safeguards include but are not limited to carrying out prior impact assessments, the establishment of mitigation measures, benefit sharing and compensation for any impacts, in accordance with international standards.

FPIC is closely related to the concept of consultation described in the previous section. Consultation is the dialogue process between the company and community; FPIC is the decision made by the community following the consultation. While a business should always engage in consultation with indigenous peoples prior to starting a project or other instances where there are significant impacts on indigenous peoples’ rights, and during the project lifecycle, FPIC is only required in certain circumstances, as detailed below.

The concept of a States’ FPIC obligation is well enshrined in international law. The UN Declaration creates an expectation that governments will seek the FPIC of indigenous peoples for development projects.<sup>57</sup> In 2007, the Inter-American Court of Human Rights interpreted this to require that governments seek the FPIC of indigenous and tribal peoples before undertaking development projects with significant impacts.<sup>58</sup>

There are differences in how international instruments treat FPIC. For example, ILO Convention 169 establishes that States must undertake consultations, in good faith and in form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures. The UN Declaration requires States to obtain consent from indigenous peoples about any risks that may affect the enjoyment of their rights and any action that may affect the economic, social and cultural development that these people choose.

However, the concept of FPIC is still nascent at a State level. While States bear the primary obligation for carrying out FPIC, the practical role of government in ensuring compliance with FPIC varies by country, and many governments are still working out how to best comply with international FPIC standards. This may create an opportunity for business to collaborate with governments, working with indigenous peoples to craft and advance FPIC practices. On the other hand, the State should provide grievance mechanisms that comply with international standards, including any FPIC related disputes between businesses and indigenous peoples (as discussed below under ‘Grievance Mechanism’).

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<sup>55</sup> For further guidance on the Global Compact’s forthcoming Good Practice Note on Free Prior Informed Consent by Amy Lehr (September 2013).

<sup>56</sup> See J. Anaya, *supra* n. 7.

<sup>57</sup> U.N. Declaration on the Rights of Indigenous Peoples, U.N. General Assembly, Resolution adopted by the General Assembly, October 2, 2007, A/RES/61/295, Articles 32 (2), available at [www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf).

<sup>58</sup> Case of the Saramaka People v. Suriname, Judgment, IACHR, Series C.No. 172 (28 Nov. 2007).

**When:** FPIC should be obtained whenever there is an impact on indigenous peoples' substantive rights (including rights to culture, rights to land and right to cultural, economic and political self-determination).<sup>59</sup>

The UN Declaration expressly refers to FPIC in the following circumstances:

- removal and relocation of indigenous peoples (Article 10);
- taking of cultural, intellectual, religious or spiritual property (Article 11);
- adoption and implementation of legislative or administrative matters that may affect indigenous peoples (Article 19);
- confiscation, taking, occupation use or damage of indigenous people's lands or territories (Article 28);
- storage or disposal of hazardous materials on indigenous peoples' lands or territories (Article 29); and
- projects affecting indigenous peoples' lands, territories or other resources, particularly in connection with the development, use or exploitation of mineral, water or other resources (Article 32).

Taken together with indigenous peoples' right to self-determination, which means that indigenous peoples are entitled to decide their own paths of economic, political and cultural development, FPIC will be required in a broad range of situations.

FPIC is not a "one off" exercise but is an on-going process that should be maintained throughout the life cycle of planning, researching, developing, implementing, and executing a project. This will involve regular engagement with affected indigenous peoples.

In addition, FPIC applies to existing projects and agreements between businesses and indigenous peoples; to the extent a business is operating without FPIC, it should strive to obtain the consent of the indigenous peoples as soon as possible before continuing activities impacting indigenous peoples. In some circumstances, an indigenous community may be entitled to withdraw the consent that they have previously given (see the discussion of 'Consent' below). Further, businesses should determine the process for achieving FPIC in collaboration with the Relevant indigenous peoples, to ensure that it is appropriate and effective, even if State actors may be keen for projects to start and may not themselves have respected indigenous peoples' right to FPIC.

There is no simple checklist that a business can complete in order to assure that they have satisfied the FPIC requirement. Achieving FPIC is highly context dependent – that is, what a business will need to do in order to receive FPIC from the Relevant indigenous peoples (if indeed they are willing to provide their consent) will depend on all of the circumstances, including the situation and interests of the indigenous peoples and their cultures, the existing local laws regarding FPIC and the specifics of the proposed activity and its social and environmental impacts. That being said, businesses must be familiar with the components of FPIC, which are as follows:

**Free** – the consent of the indigenous peoples must be given *freely, without coercion, manipulation or undue influence or pressure*. Indigenous consent must be obtained without physical or psychological, direct or indirect, tactics including written, audio or any other method of communication.<sup>60</sup>

- Businesses must consider the broader context and political environment facing the Relevant indigenous peoples, including governmental processes that could affect their sense of freedom of decision. In some cases, indigenous peoples have provided consent when threatened with force or with the compulsory acquisition of their lands by State actors, or the withdrawal of State

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<sup>59</sup> Ibid

<sup>60</sup> International Workshop on Free, Prior and Informed Consent and Indigenous Peoples (January 2005), United Nations Department of Economic and Social Affairs, U.N. Doc. PFI/2005/WS.2/4, available at [http://www.un.org/esa/socdev/.../workshop\\_FPIC\\_ILO.doc](http://www.un.org/esa/socdev/.../workshop_FPIC_ILO.doc).

funding, if they did not come to some agreement with the relevant businesses. In such cases, consent will not be “free”.<sup>61</sup>

- Businesses must not take advantage of a power imbalance. In order to avoid this, Oxfam Australia suggests the following:<sup>62</sup>

[T]he process of obtaining consent must be structured. Meetings should be conducted under an agreed agenda. Interactions between company and government officials should be limited to meetings with the community as a whole and their freely chosen representatives and advisors, rather than ad hoc interactions with individuals who may be vulnerable to manipulation or undue pressure. The equal participation of women and men should be ensured. Meaningful consent also requires that communities have the right to obtain independent legal and other specialist representation and advice, and information regarding the project to be developed, if requested, because community capacity to engage these processes in their native language is fundamental.

- Indigenous peoples must be given sufficient time to consider their decision, and must not be pressured to agree to a plan. Unreasonable time pressures can affect the freedom of a decision. What is a reasonable amount of time will depend on the situation.

**Prior** – consent must be obtained before any part of the relevant activity starts.<sup>63</sup>

- The FPIC process often takes place at the same time as other processes (e.g., in relation to State approvals or licenses). In such situations, businesses must remember that FPIC is not a mere formality to be obtained. It must be obtained before the proposed activity starts (recognizing that the timeline for obtaining FPIC can interfere with government timelines for issuing licenses and approvals), and is only valid if obtained after all relevant information has been provided to indigenous peoples and they have had sufficient time to consider and make a decision. (See the discussion below, ‘Consultation, consent and the project development process’ for additional information).

**Informed** – indigenous peoples must be provided with all relevant information in relation to the proposed activity (this should include, without limitation, revenue projections and potential impacts and related mitigation measures to avoid, minimize or mitigate these impacts). The information must be provided in a way that the indigenous peoples can understand (e.g., must be available in their language), and access (e.g. hard copies should be available in addition to e-mail copies as appropriate) and they must be provided with sufficient time to consider the information. Sometimes an indigenous community will lack the institutional capacity to make an informed decision about a complex or technical project. In such cases, businesses may consider helping with capacity-building.<sup>64</sup>

- Businesses should consider how to convey information in a way that the relevant indigenous peoples can understand it. See — *Consultation*.
- Businesses should consider providing support (including financial support) to the relevant indigenous concerned for them to obtain their own independent advice on the project. See — *Consultation*.

<sup>61</sup> An example of this situation is discussed in O’Faircheallaigh, Ciaran & Twomey, Justine for the Kimberley Land Council, 2010, *Kimberley LNG Precinct Strategic Assessment – Indigenous Impacts Report Volume 2. Traditional Owner Consent and Indigenous Community Consultation: Final Report*, [http://www.dsd.wa.gov.au/documents/Appendix\\_E-2.pdf](http://www.dsd.wa.gov.au/documents/Appendix_E-2.pdf). See also the example of the judgment in *Kichwa Indigenous People of Sarayaku v. Ecuador (June 27, 2012)*, in which it was found that the Sarayaku people were threatened by army officials if they did not agree to oil development. [http://corteidh.or.cr/docs/casos/articulos/seriec\\_245\\_ing.pdf](http://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf).

<sup>62</sup> Oxfam Australia, 2011, *Free, prior and informed consent: a review of free, prior and informed consent in Australia*, [http://resources.oxfam.org.au/pages/view.php?ref=671&search=mining%2C%3A2011&order\\_by=relevance&sort=DESC&offset=0&archive=0&k=](http://resources.oxfam.org.au/pages/view.php?ref=671&search=mining%2C%3A2011&order_by=relevance&sort=DESC&offset=0&archive=0&k=)

<sup>63</sup> International Workshop on Free, Prior and Informed Consent and Indigenous Peoples, *supra* note 41.

<sup>64</sup> *Ibid*

**Consent** – Consultation and consent are separate but related concepts. Consent means agreement to a business activity, after that business has engaged in a meaningful, free and prior informed consultation with the affected peoples. Consent can be understood as a formal, documented social license to operate.<sup>65</sup>

- In order to formally obtain and document consent for a project, a business should:
  - Work with affected indigenous peoples to identify a negotiation process, including the stages of the project that the process will address;
  - Document the agreed-upon negotiation process; and
  - Document<sup>66</sup> the outcome of the negotiation process.<sup>67</sup>
- Although FPIC does not necessarily require unanimity within the indigenous group, it is important to identify the legitimate representatives of indigenous peoples.<sup>68</sup>
- Indigenous peoples are entitled to decide whether or not to provide consent, in accordance with their own decision-making processes and through their own representative institutions, while extra attention must be given to ensuring that potentially disenfranchised groups are included within the process.<sup>69</sup> *See — Consultation*
- Businesses should consider engaging an independent and culturally-sensitive facilitator to assist with negotiations between the business and the affected indigenous peoples, to help ensure a fair and inclusive agreement is reached.
- In some circumstances, indigenous peoples may revoke their consent. For example, if the business involved materially breaches its obligations to the indigenous peoples, or it becomes apparent that consent was given without the benefit of all relevant information within the business' knowledge, there may be a basis for revocation. Another circumstance is a change in leadership of the indigenous peoples concerned. A change in leadership should not change an underlying positive relationship between the community and the business, however business should understand that they might need to adapt to the new leadership.

Additional suggested actions for business in relation to FPIC include the following:

- Develop and implement a process for verifying the FPIC process and its results. This may include making arrangements for monitoring the FPIC process, ensuring all views of indigenous communities are acknowledged and using independent experts selected in consultation with indigenous communities.
- Consider providing support (e.g. financial, logistical, etc.) for the community's decision-making processes. Business should be mindful that if such support is not appropriately executed, such support may inadvertently, by customs of reciprocity, create pressure to consent that undermines its free character.

### **Being a Responsible Corporate Citizen**

Respecting international standards and local laws on human rights, labour, the environment and anti-corruption, as well as taking additional voluntary actions that go beyond respect of such standards to support UN goals that create shared values for the business and the community, build trust and confidence and increases the likelihood of obtaining FPIC.

<sup>65</sup> Ibid.

<sup>66</sup> IFC Performance Standard 7 suggests such an approach, as do a number of NGOs. IFC Performance Standard: Guidance Note 7: Indigenous Peoples.

<sup>67</sup> For examples on the outcomes of FPIC and agreement-making with indigenous peoples, please see the 'Agreements, Treaties and Negotiated Settlements' database at [www.atns.net.au](http://www.atns.net.au)

<sup>68</sup> Report of the Working Group on Human rights and transnational corporations and other business enterprises to the 68<sup>th</sup> Session of the General Assembly [insert citation when available].

<sup>69</sup> Ibid.

- Identify vulnerable group members, such as women, children and the elderly, and consider how to include them in the FPIC process. See — *Consultation*.

### Consultation, consent and the project development in extractive industries

Businesses can face a number of challenges in ensuring meaningful and valid consultation and consent throughout the life of a project. In the extractive industries, for example, the project development phase can be particularly challenging given its inherent uncertainties. Some experts see FPIC as being equally applicable to the earliest stages of a project including exploration.<sup>70</sup> On the other hand, companies may see this as unrealistic (e.g., because exploration rarely leads to production). One approach is that different project phases should be subject to different types or scopes of FPIC, where the more significant the potential impact of a project, the greater level of FPIC is required. , For example, the FPIC process may be “lighter” during the exploration phase, culminate with a memorandum of understanding signed with indigenous leadership, and “heavier” during the production phase, culminating with a referendum.<sup>71</sup>

In relation to these challenges, the following actions are suggested:

- Consider agreeing to a process for FPIC relating to project development with the indigenous communities during the exploration phase, so that this is already in place if the exploration results are positive. If a business obtains FPIC for exploration they will have established grounds for positive relations with the community that will greatly enhance the likelihood of FPIC for the development and exploration stages of a project
- In seeking consent for exploration, ensure that indigenous peoples are informed about what may be proposed if exploration results are positive, and that any new indigenous employment may end if exploration results are negative.
- Recognize that even though FPIC may have been obtained for exploration, the business will again be required to obtain FPIC before it starts project development or production.
- As exploration continues, ensure that indigenous peoples are kept up-to-date with all relevant information. The more up-to-date the business has kept the indigenous communities throughout the exploration process, the more efficient and effective the process of obtaining further FPIC is likely to be.
- Ensure that the business is familiar with the potentially affected indigenous peoples’ decision-making processes, and seek to understand the likely time period that they will require to provide FPIC. The business may need to delay lodging an application if it would start a legislative time frame that was too short to allow for the relevant FPIC and decision-making processes.

## Examples

### *Involvement of indigenous support*

In negotiating with indigenous Australians in relation to a project, a Canadian mining company involved indigenous Canadians in the negotiations to provide assistance, information and support to

<sup>70</sup> See commentary by Rebecca Adamson, of First Peoples Worldwide.

<sup>71</sup> See commentary by Steven Heim, of Boston Common Asset Management, LLC. See e.g. <http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/minerals-metals/files/pdf/mmssmm/abor-auto/pdf/agr-ent-10-eng.pdf>; [http://www.impactandbenefit.com/IBA\\_Database\\_List/](http://www.impactandbenefit.com/IBA_Database_List/). See as an example “Mining company Argex signed an MOU for exploration, then there was a referendum”; <http://www.newswire.ca/en/story/726099/argex-reiterates-strong-relationship-with-innu-of-pessamit>; <http://www.lapresse.ca/le-soleil/affaires/actualite-economique/201005/04/01-4277158-exploration-miniere-une-entente-exemplaire.php>.

the indigenous Australians. The company also flew a number of the indigenous Australians to Canada so that they could see first-hand an operating mine of that type, also on indigenous land.

### ***Facilitation of community decision-making***

An oil company moved into an area in Brazil, where an indigenous people were spread amongst 32 villages along a river. A number of environmental groups offered to help the indigenous community to drive out the company. However, the indigenous community did not know the approach that it collectively wanted to take. Indigenous NGO First Peoples Worldwide provided a small grant to the indigenous community, which allowed the purchase of petrol for boats and a communal meal at each village, to facilitate community discussion and decision-making. In the end, every village voted to engage with the company.

### ***Consent to Use Indigenous Cultural Heritage***

An indigenous community in Alaska used an Inuit-styled canoe to rescue a group of trapped travellers during the winter of 1951. A U.S. media company used this story to develop, stage and promote a theatre production with an album soundtrack. This activity occurred without the consent of the indigenous community and without their sharing in the proceeds from the unauthorized commercialization of their heritage. The community formed a core group of advisors to mediate with the media company and to regain control over their cultural heritage.

# Remediation

## **Action: Establish or cooperate with legitimate processes to remediate any adverse impacts on indigenous peoples' rights**

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Where a business identifies that it has caused or contributed to an adverse impact on human rights, it is obligated under Guiding Principles 19 and 22 and Article 40 of UNDRIP to provide or cooperate in remediation through legitimate processes, including effective operational level grievance mechanisms (discussed below) or judicial mechanisms, as appropriate. Remedy mechanisms should be sensitive to relevant indigenous cultures and accessible to all indigenous peoples (including women, elders, children, persons with disabilities, and other vulnerable groups, and those who represent their interests). The UN Working Group on Business and Human Rights recommends that remedy mechanisms

“afford due recognition to the role of to the role of indigenous peoples’ customary laws, traditions and practices and the authority of their of their governance institutions, both for substantive and for procedural reasons; while ensuring they respect the rights and freedoms of others.”<sup>72</sup>

Companies should acknowledge indigenous peoples’ own remediation mechanisms, and may decide, with the indigenous community, to utilise or empower such mechanisms to address violations in their traditional jurisdictions jurisdictions<sup>73</sup>. In all cases, the type of remediation process adopted should have the consent of the relevant indigenous peoples.

Participation in the remediation process allows a business to demonstrate its commitment to the rights of indigenous peoples. Businesses may find that participation in such processes also enables them to stay better informed of the impacts of their own activities and adapt their business operations to reduce potentially harmful impacts of future operations.

Whether a business approaches remediation from a state judicial mechanism, an operational level mechanism or an indigenous mechanism, the inclusion of indigenous peoples in the remediation process and the enhancement of local ownership of the process is one way that a business may be

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<sup>72</sup> Report of the Working Group on Human rights and transnational corporations and other business enterprises to the 68<sup>th</sup> Session of the General Assembly [insert citation when available].

<sup>73</sup> Ibid.

able to obtain broad acceptance for and secure the legitimacy of a remediation plan. Accordingly, businesses may find it useful to invite indigenous peoples to direct, or to advise on the direction of, the remediation process. Indigenous involvement in creating remediation measures may also enable businesses to develop remediation plans that best suit the needs of a particular indigenous community and encourages a shared interest in ensuring its success<sup>74</sup>.

Businesses may face difficult decisions in their remediation efforts, especially in situations where the available procedural rights and substantive remedies of indigenous peoples vary significantly depending upon whether indigenous, local, national or international remediation standards are applied. There are divergent views on how a business can best cope with this difficult situation: some international law experts argue that businesses are obligated to abide by international standards. Support for this position can be found in Guiding Principle 11, which states that the corporate responsibility to respect human rights exists independently of national laws and that compliance with international standards is an obligation over and above national laws. Alternatively, some industry experts emphasize that businesses are obligated to act in accordance with national and local laws because it is those laws that will ultimately be enforced, and thus the business' continued operation depends on adherence to them. The Guiding Principles, however, remind businesses that even in local or national contexts where government renders full compliance with international standards impossible, it is incumbent upon businesses to demonstrably seek and implement legal means of honouring indigenous rights to the greatest extent possible.

The Guiding Principles do not require a business to provide for remediation where its activity is directly linked to a violation of indigenous rights only by virtue of a business relationship, however it may take a role in doing so.

# Grievance mechanism

## **Action: Establish or cooperate with an effective and culturally appropriate grievance mechanism**

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Businesses should establish or cooperate with a legitimate, effective and culturally-sensitive operational-level grievance mechanism that is accessible to indigenous peoples (including women, elders, children and youth, persons with disabilities and other vulnerable groups, and those who represent their interests). The grievance mechanism provides legitimate non-judicial channels for indigenous peoples to report perceived infringements of their rights committed by employees or third parties working on behalf of the business.

Where such a grievance mechanism is in place and meets the criteria set out below, it provides one effective means of enabling remediation of adverse impacts. Grievance mechanisms can also provide significant benefits to businesses, by helping them identify and manage risks before they become significant, and develop stronger relationships with indigenous communities.

In accordance with Guiding Principle 31, for a non-judicial grievance mechanism to be effective, it should be:

- Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of the grievance process;
- Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;

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<sup>74</sup> Ibid.

- Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance mechanism on fair, informed and respectful terms;
- Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
- Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights; and
- A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be based on engagement and dialogue; that is, consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances. Indeed, development of the grievance mechanism is an integral part of the broader dialogue and engagement with indigenous communities<sup>75</sup>.

Additional considerations for a legitimate, effective and culturally sensitive grievance mechanism are as follows:

- The mechanisms should be developed in collaboration with the relevant indigenous community, and in a manner that is consistent with Articles 27, 28, 32 and 40 of the UNDRIP.<sup>76</sup>
- In developing the mechanism, consideration must be given to the indigenous community's traditional ways of resolving disputes (some may be direct, others indirect), community governance and decision-making structures, languages and sensitivities around particular issues. Indigenous communities may well require a grievance mechanism that is separate and different from the grievance mechanism available to the broader community. Further, a settlement based on customary laws, traditions and practices may increase the legitimacy of the resolution and lead to longer-lasting results<sup>77</sup>.
- Consideration must be given to vulnerable or marginalized members of the community (for example, women, children, elders or disabled people) and they must be able to raise concerns. Consider including multiple ways of being able to raise a concern (in person, by writing, by telephone, anonymous, etc.).
- The mechanism should be accessible. Ideally, it should be locally based, so that a complainant should not have to travel a long distance to report or adjudicate a dispute. Other barriers to access should be considered, and capacity building undertaken to develop the relevant legal knowledge and skills required for meaningful participation<sup>78</sup>. A complainant should be able to file a legitimate complaint with ease.
- The business should formalize and document the grievance mechanism, and accountability for the mechanism should be assigned.

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<sup>75</sup> Report of the Working Group on Human rights and transnational corporations and other business enterprises to the 68<sup>th</sup> Session of the General Assembly [insert citation when available].

<sup>76</sup> Expert Mechanism on the Rights of Indigenous Peoples, 2012, *Comment on the Human Rights Council's Guiding Principles on Business and Human Rights as related to Indigenous Peoples and the Right to Participate in Decision-Making with a Focus on Extractive Industries*, [http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Session5/A-HRC-EMRIP-2012-CRP1\\_en.pdf](http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Session5/A-HRC-EMRIP-2012-CRP1_en.pdf)

<sup>77</sup> Report of the Working Group on Human rights and transnational corporations and other business enterprises to the 68<sup>th</sup> Session of the General Assembly [insert citation when available].

<sup>78</sup> Ibid.

## SECOND EXPOSURE DRAFT

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- The business should make sure that the grievance mechanism is available for communities (through website(s), posters, leaflets, etc.) in a clear and easy-to-follow form. Businesses should also consider providing information or training sessions on grievance mechanisms and how to lodge a grievance.
- The business should monitor, either internally or externally, the grievances raised and severity, their resolutions, and the responsiveness of the mechanism. If no grievances have been raised, or grievances have only been raised by men, for example, these may be indications that the mechanism needs adjusting.
- Businesses should also report back to the community on a regular basis, and allow the community to provide feedback on the functioning of the mechanism.
- Business should review any grievances on a regular basis, in order to enhance internal education about indigenous rights and improve their own processes.
- The mechanism should have flexibility to allow the complainant a choice in how their grievance is addressed. For example, a minor grievance could be resolved promptly and efficiently, and potentially in an informal manner. A more serious grievance is likely to require a different approach. In some cases, depending on the magnitude of the problem, complaints can be collective or accompanied by assessors freely elected by the complainant.

# **Part II: UN Declaration Rights**

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# Foundational principles

# Articles 1 and 2

## Equality and freedom from discrimination

### The rights

Indigenous peoples are entitled to all human rights and fundamental freedoms that are enshrined in the Charter of the UN, the Universal Declaration of Human Rights and all international human rights standards. These include the rights to life, liberty, security of person, recognition as a person before the law, equality, nationality, ownership of property, freedom of thought, conscience and religion, freedom of opinion and expression, work, health and education, among others.

Article 1 affirms both individual and collective human rights for indigenous peoples. Other human rights instruments (including those expressly referred to in Article 1) emphasize an individualistic concept of human rights. However, indigenous peoples' individual identity is often not distinct from their identity as a member of their group or community. Accordingly, the UN Declaration recognizes collective rights in addition to individual rights; collective rights protect indigenous peoples on a collective basis and allow them to maintain their cultures, their right of self-determination and their survival as distinct social and cultural groups.

Article 2 affirms that indigenous peoples are entitled to be treated equally to all other people and not to be subjected to any form of discrimination. Indigenous peoples must be treated with respect and be able to exercise their fundamental human rights, including those based on their indigenous ancestry or identity.

Businesses have a responsibility to respect all human rights both under applicable domestic laws of the countries in which they operate and international standards. These rights are relevant to all parts of the business – from treating all customers equally regardless of indigenous or non-indigenous status, to ensuring that operations and business partners do not pollute indigenous peoples' water supplies, to respecting and transparently complying with regulatory processes (e.g., in relation to environmental approvals). Particular attention should be paid to the rights of indigenous women, elders, youth and children, persons with disabilities and other vulnerable groups, who may be marginalized within their own communities as a result of their status.

#### Related standards

***ILO Convention 169, Article 3*** also affirms that indigenous peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.

***Universal Declaration of Human Rights, Article 7*** declares the right of all humans to be free from discrimination and unjust treatment.

***International Covenant on Civil and Political Rights, Articles 20 and 26*** establish the right of all peoples to be free from discrimination and require States to make laws which prohibit discrimination and unjust treatment.

***International Convention on the Elimination of All Forms of Racial Discrimination, Article 5*** affirms the right of all peoples to live free of all forms racial discrimination.

### Suggested practical actions

#### Respect

- Conduct cultural awareness training to unpack cultural bias and identify unconscious bias, and to promote equality and avoid discrimination.
- Conduct human rights training, explicitly including the rights of indigenous peoples, to ensure that employees at all levels understand the company's commitment to indigenous peoples' rights and how this is relevant to their particular role. Where possible, involve indigenous peoples in developing and delivering the training.

- Develop an indigenous employment strategy, in collaboration with Relevant indigenous peoples, to reduce discrimination and promote equal opportunity and advancement in management positions for indigenous peoples. Businesses may also enhance employment prospects within indigenous communities by supporting small, local businesses and entrepreneurial ventures.
- Not entering into agreements with States or other business partners that violate indigenous peoples' rights.
- In supplier tender processes, include a requirement that suppliers be committed to respect and support the rights of indigenous peoples.

### **Support**

- Engage in public policy discussions in support of the human rights of indigenous peoples to encourage the development of policies, legislation and regulation that protect them from discrimination.
- Partner with indigenous organizations – this could involve contributions related to the company's core business (e.g., the provision of products, services or expertise), or be philanthropic.
- Publicly commit to specific, time-bound actions on indigenous peoples' rights, track and report on progress.
- In supplier tender processes, include a requirement that suppliers be committed to respect and support the rights of indigenous peoples.
- Explore opportunities to involve indigenous peoples in the value chain such as sourcing from indigenous owned businesses. Consider joint ventures with indigenous businesses.
- Become a UN Global Compact participant.

## **Examples**

### ***Reconciliation Action Plans***

Reconciliation Australia, a national organization that promotes reconciliation between indigenous and non-indigenous Australians, developed a voluntary initiative that involves businesses, NGOs, academic institutions and government agencies developing 'Reconciliation Action Plans' (or 'RAPs'). RAPs are business plans through which these organisations publicly commit actions in the areas of relationships, respect and opportunities. Over 300 organizations have so far developed RAPs.<sup>79</sup>

### ***Pro bono services, for example legal advice***

Many law firms provide pro bono legal assistance to indigenous peoples and indigenous organizations in matters related to their rights. Some law firms have taken this a step further, to actively promote an understanding in indigenous communities about their rights and how to access pro bono assistance. Pro bono legal assistance was instrumental in the development of this Guide.

### ***Innovation in products***

An energy company aware that some indigenous persons were being harmed due to petrol sniffing substances in their standard fuel removed the substance from their product sold in the vicinity of indigenous communities.

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<sup>79</sup> For more information on the program and to access examples of RAPs, see Reconciliation Australia, [www.reconciliation.org.au](http://www.reconciliation.org.au)

### Articles 3, 4, 5, 6 and 23

## Self-determination, self-governance and nationality

### The rights

Indigenous peoples have the right to self-determination (including in relation to development), autonomy, and to maintain their distinct political, legal, economic, social and cultural institutions. They are also entitled to a nationality. These rights give indigenous peoples control over their own lives and their futures, and their community's place in the world, free from outside coercion. These rights also cover indigenous peoples' freedom to govern their own local affairs. However, these rights do not exclude indigenous peoples from also participating in the political, economic, social and cultural life of their State.

The right to self-determination (Article 3) is a central pillar of the UN Declaration and is fundamental to the ability of indigenous peoples to preserve their unique identities and cultures, and to be in control of their own lives. The right to self-determination means that indigenous peoples are free to choose their political status and how they wish to pursue their economic, social and cultural development. They are also free to determine how (and if) to dispose of their lands and natural resources (discussed in relation to land and natural resources rights under Articles 25–29 and 32 below). Under Article 23, indigenous peoples are entitled to determine their own priorities and strategies for their communities' economic, social and cultural development in the face of outside development, and set their own development objectives, the pace at which their development occurs, and the degree to which their institutions are changed.

In exercising their right to self-determination, indigenous peoples also have the right to govern themselves in matters that relate to internal or local affairs, as well as how to finance their autonomous functions (Article 4). Indigenous peoples also have the right to maintain and develop their own distinct political, legal, economic, social and cultural institutions (Article 5). This does not in any way limit their ability to fully participate in the political, economic, social and cultural life of their State if they choose.

In many cases indigenous governance systems have been subjected to centuries of external influence. FPIC cannot be expected from a community that does not have adequate decision-making mechanisms in place, and in such cases companies may consider supporting communities to enhance their self-governance structures and build their negotiating capacities (if this is needed/desired by the community). Companies will need to ensure that such support does not affect the actual outcomes of decision-making processes, and may need to engage independent third parties,

Indigenous peoples also have the right to a nationality (Article 6), which protects their ability to be recognized both as a member of their indigenous community and as a citizen of the State where he or she lives. As citizens, indigenous peoples must be afforded the same rights as all other citizens, including for example the right to vote, access to basic services and education.

Businesses are at risk of infringing upon these rights if they undertake activities that may adversely affect indigenous peoples, their lands or their exercise or enjoyment of any of their rights without first properly consulting with them (and, where required, obtaining their free, prior and informed consent), and taking their perspectives into account in developing such activities. These rights may also restrict businesses from impacting on areas where indigenous communities are resistant to certain forms of development; that is, development cannot be forced on indigenous peoples. As stated in the Global Compact Human Rights and Business Dilemmas Forum.<sup>80</sup>

Corporate-led development initiatives require careful consideration because in some settings, it may not be appropriate to intercede with the aim of modernising the local economic dynamics thereby

<sup>80</sup> UN Global Compact, *Human Rights and Business Dilemmas Forum – Indigenous Peoples*, <http://human-rights.unglobalcompact.org/dilemmas/indigenous-peoples/>

potentially undermining local social cohesion. In addition, formulating a development plan that makes the targeted indigenous group too dependent upon the presence of the business will result in dissension upon the departure from the area.

As discussed in Part I of this Guide, businesses must not engage in an activity that causes or contributes to an adverse impact on the rights of indigenous peoples. To the extent a business's relationship with a third party, even if authorized by the relevant State authorities, adversely impacts the rights of indigenous peoples, then the business must take the appropriate steps set forth in the remediation section of Part I of this Guide to determine what leverage it may have to stop the adverse impacts and possibly even to cease such business relationship. Business relationships that may adversely impact the rights of indigenous peoples includes arrangements with State actors that do not respect indigenous peoples' rights (e.g., by providing licenses to businesses to exploit natural resources without the required prior consent of Relevant indigenous peoples).

As a result of increasing privatization in many countries, businesses are also increasingly contracted to provide services on behalf of State bodies. At a minimum, businesses should ensure that their action or inaction and relationships do not cause or contribute to adverse impacts on indigenous peoples' access to these services.

### Related standards

**ILO Convention 169, Article 7** enshrines the right of indigenous peoples 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.

**Universal Declaration of Human Rights, Article 15** affirms the right of all people to a nationality and protection from being deprived of that nationality.

**International Covenant on Civil and Political Rights and International Covenant on Economic, Cultural and Social Rights, Article 1** states that all peoples have the right to self-determination and to freely determine their political status and freely pursue their economic, social and cultural development.

## Suggested practical actions

### Respect

- Consult with indigenous peoples in relation to any proposed development-related activities (including the funding of community programmes) to ensure alignment with their own priorities and strategies for development.
- Understand and respect the perspective and objectives of the Relevant indigenous peoples, indigenous governance structures, indigenous customs and laws and dispute resolution practices, even when regional and national governments have not done so. Ensure company operations are legal under both formal and indigenous governance structures.
- Do not interfere in indigenous governance and decision-making processes during consultations, through bribery or persuasion of politically power groups or individuals, or by providing favours to individual indigenous communities that would pit them against each other
- Perform due diligence on whether or not a group is indigenous, with the understanding that substantial weight should be accorded to the indigenous community's determination of its own identity or group membership, even if the government does not give the community the same recognition.
- The fact that a government has not met its own duty to respect, protect and fulfil indigenous peoples' rights does not absolve a business from its own independent corporate responsibility to respect indigenous peoples' rights.

### Support

- Establish development plans in collaboration with indigenous peoples, under which the indigenous peoples themselves make the decisions as to what economic, social and cultural development will be undertaken (with the company's contribution e.g., monetary or physical resources, practical guidance or other support). Respect indigenous peoples' views on development. Development plans should also consider how projects or services may become self-sufficient if and when the business ends its operations.
- Encourage and provide support for indigenous peoples to gain independent legal, environmental, business and other advice, to inform their decisions.
- Encourage consultation with non-indigenous and other local indigenous communities regarding desired social and economic development to support strong relationships, identify collaboration opportunities and develop a positive legacy for the broader area.
- Engage in public policy advocacy to promote legitimacy of indigenous governance systems to regional and national governments.

### Examples

#### ***Indigenous agency in community services***

A national petroleum company helped to fund the expansion of a health clinic which was founded and is run by an indigenous group, empowering the indigenous community to exercise agency to administer its own community services.

#### ***Responsible financing***

Five Dutch banks that fund the palm oil industry in Southeast Asia have agreed to provide finance in ways that respect the rights and wishes of indigenous communities affected by oil palm planting. Specifically, the banks have agreed to avoid financing projects that would result in the clearing of forests with high conservation values.

#### ***Community Development Plan***

An extractives company in Russia has developed a community development plan that formalizes a partnership with local indigenous peoples, and focuses on the development of those communities. Under the plan, the company provides financial investment and the indigenous community decides, (with assistance and expertise from experts), projects to implement. Under the plan, over 400 projects have been implemented relating to traditional economic activities, capacity-building, education, healthcare and cultural heritage (including the preservation of indigenous culture and languages).

#### ***Involvement in policy development***

A global energy company developed a policy on relations with indigenous communities. The consultation process for this policy included joint workshops on community-corporate relationships, the creation of a working group involving stakeholders and representatives of the community, and final approval by the members of the indigenous groups.

#### ***Support for Indigenous Self Governance***

A global energy company allocated \$200,000 to support self-governance projects in indigenous communities throughout the Americas. Supporting strong self-governance systems enabled the business to acquire clearer responses and decisions in their dialogues with communities.

# **Life, liberty, security and cultural integrity**

## Article 7

### Life, liberty and security

#### The right

Article 7 protects indigenous peoples' right to live in freedom and be protected from degrading treatment, acts of violence and any other acts that could mentally or physically harm them. Indigenous peoples also have a collective right to live as a distinct group; this includes IPVIs, whom businesses should not contact at the risk of violating Article 7.

Relevant to this right are the rights to be free from forced labour and child labour. In some areas and sectors (such as agriculture and forestry), indigenous peoples are particularly vulnerable to being targeted for forced or child labour.<sup>81</sup> Indigenous peoples are also often more vulnerable to trafficking, including sex trafficking. Some international law jurists take the position that Article 7's recognition of indigenous peoples' right to security extends beyond physical security and includes a right to cultural<sup>82</sup>, food<sup>83</sup>, environmental<sup>84</sup>, human<sup>85</sup>, social<sup>86</sup> and territorial<sup>87</sup> security.

Businesses could find themselves complicit in abuses of these rights through their relationships (contractual or otherwise) with States, other businesses or other parties that are infringing upon these rights, including security forces, security companies or armed groups. Businesses must ensure that they do not cause or contribute to physical risks to the Relevant indigenous peoples. Unfortunately, there have been a number of instances in which indigenous peoples living near mining sites have been beaten or killed by mine workers or security personnel employed by or linked to protect the mine. Businesses could also contribute to a violation of these rights by detaining and then handing to authorities indigenous peoples who they think have broken the law

Indigenous women and children are particularly vulnerable to violence and forced labour. Give particular consideration to any risks that business activities pose to their rights to freedom and safety.

- <sup>81</sup> International Labour Organization, 2011, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_151556.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_151556.pdf)
- <sup>82</sup> See, e.g., *R. v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686, para. 33: "...the object is to provide cultural security and continuity for the particular aboriginal society". See also *Tsilhqot'in Nation v. British Columbia*, [2008] 1 C.N.L.R. 112 (B.C.S.C.), at para. 612: "From the perspective of a Tsilhqot'in person, this land provided their cultural security and continuity."
- <sup>83</sup> UN General Assembly, *Right to Food: Note by the Secretary-General, A/60/350*, September 2005 (Interim report of the Special Rapporteur of the Commission on Human Rights on the right to food, Jean Ziegler) at 20-21, para. 55 (f) (Recommendations): "All Governments should respect, protect and fulfil the right to food of their indigenous populations, including by recognizing their right to land, resources and traditional subsistence activities, their intellectual property rights over their genetic and knowledge resources and their right to appropriate development that does not result in further marginalization, exploitation, poverty or hunger."; see also UN General Assembly, *The right to food*, UN Doc. A/RES/63/187 (18 December 2008), para. 13: "Also stresses its commitments to promote and protect, without discrimination, the economic, social and cultural rights of indigenous peoples, in accordance with international human rights obligations and taking into account, as appropriate, the United Nations Declaration on the Rights of Indigenous Peoples ..."
- <sup>84</sup> International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: Int'l Development Research Centre, 2001) at para. 2.22.
- <sup>85</sup> John B. Henriksen, "Implementation of the Right of Self-Determination of Indigenous Peoples Within the Framework of Human Security", in M.C. van Walt van Praag & O. Serro, eds., *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention* (Barcelona: Centre UNESCO de Catalunya, 1999) 226, at 226: "indigenous peoples human security' ... encompasses many elements, inter alia physical, spiritual, health, religious, cultural, economic, environmental, social and political aspects. In my opinion, the desirable human security situation exists when the people concerned and its individual members have adequate legal and political guarantees for their fundamental rights and freedoms, including the right of self-determination."
- <sup>86</sup> See Committee on Economic, Social and Cultural Rights, General Comment No. 19, *The right to social security (art. 9)*, UN Doc. E/C.12/GC/19 (4 February 2008), para. 1: "The right to social security is of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realize their Covenant rights." And at para. 3: "Social security, through its redistributive character, plays an important role in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion."
- <sup>87</sup> E.-I. Daes, *Equality of Indigenous Peoples Under the Auspices of the United Nations - Draft Declaration on the Rights of Indigenous Peoples*, (1995) 7 St. Thomas L. Rev. 493 at 497: "...the principle of territorial security ... means that indigenous peoples have defined historical territories physically intact, environmentally sound and economically sustainable in their own ways." UNICEF Innocenti Research Centre, *Ensuring the Rights of Indigenous Children*, Innocenti Digest No. 11 (February 2004) at 17: "An indigenous community that lives in security (including land security), free from discrimination and persecution, and with a sustainable economic base has a solid foundation for ensuring the protection and harmonious development of its children."

(e.g., trespass, property damage), where those authorities are known to mistreat indigenous peoples or detainees generally.<sup>88</sup>

### Related standards

**ILO Convention 182 on worst forms of child labour and ILO Convention 29 on forced labour** provide for specific guarantees against child and forced labour.

**ILO Convention 169 on Indigenous and Tribal Peoples, Article 4** promotes special measures for safeguarding the persons, institutions, property, labour, cultures and environment of indigenous peoples.

**Universal Declaration of Human Rights, Article 3** recognizes the right of all people to life, liberty and security of person.

**International Covenant on Civil and Political Rights, Article 9** recognizes the right to life, liberty and security of person, as well as protection from arbitrary arrest or detention.

**Voluntary Principles on Security and Human Rights** recognizes the right to security and respect for human rights in the context of Company operations.

## Suggested practical actions

### Respect

- Require business partners, including key suppliers, to comply with the business' indigenous peoples' rights policy and respect indigenous peoples' rights by establishing expectations, engaging with business partners and monitoring and evaluating performance.<sup>89</sup>
- Observe international and local child and human trafficking and labour regulations and require compliance by suppliers and contract workers as part of the business relationship.
- If a business or its partner employs security personnel, or if the State requires the use of its armed forces for security, it should ensure that security personnel observe all relevant international human rights norms and standards and not unnecessarily threaten indigenous peoples.
- Train security staff to respect human rights, including children's and women's rights and to enforce protection measures for all vulnerable groups, including women and children, and establish and enforce strict rules against physical punishment or abuse
- Work with indigenous peoples regarding land access and other arrangements to reduce the likelihood of incidences of trespass and, as such, the need for security interactions. (For example, it may be beneficial to build a safe walkthrough at a site to allow indigenous peoples to travel easily through their communities; another example may be to work with indigenous leaders to identify activities that could lead to conflict between indigenous peoples and security personnel – for example, entry onto project sites – and ways to minimize the likelihood of such interactions). Or for example, for business operations in remote, environmentally sensitive areas, businesses should consider employing road-less operations in order to limit the incursion of outside people and companies into the lands of indigenous peoples.
- When operating in conflict territories, ensure company operations do not directly or indirectly agitate tensions related to wider socio-political issues.
- Where a State does not respect indigenous peoples' rights to life, liberty and security, if possible, do not conduct operations there. Make it known to the State why the company is not

<sup>88</sup> International Council on Mining and Metals, 2012, *Integrating human rights due diligence into corporate risk management processes*, <http://wp.cedha.net/wp-content/uploads/2012/06/Integrating-human-rights-due-diligence.pdf>

<sup>89</sup> For guidance on applying human rights expectations and other sustainability principles throughout the supply chain, see UN Global Compact and BSR, 2010, *Supply Chain Sustainability: A Practical Guide for Continuous Improvement*, [http://www.unglobalcompact.org/docs/issues\\_doc/supply\\_chain/SupplyChainRep\\_spread.pdf](http://www.unglobalcompact.org/docs/issues_doc/supply_chain/SupplyChainRep_spread.pdf)

doing so. If the company does proceed, make it known to the State the company's views on its violations of these rights and work with the indigenous peoples and State to improve conditions.

### **Support**

- Consider extending health programmes provided to employees to other members of local indigenous communities that may not otherwise have health services.
- When operating in conflict territories, ensure company operations do not directly or indirectly agitate tensions related to wider socio-political issues. This includes providing special benefits or payments to indigenous communities that favour a company's operations, versus those that are opposed.

### **Examples**

#### ***Indigenous-owned security firm***

An indigenous-owned security firm provides services to a number of organizations, including security training and background checks on people working with indigenous children.

#### ***Cessation of talks to protect security of indigenous peoples***

A multinational petroleum company engaged in talks with a regional indigenous government in relation to drilling in their territory. The central government of the relevant country, which does not recognize the legitimacy of the regional government, was angered by the talks, and so the company halted the talks so as not to jeopardize the safety of the regional community by encouraging further feuds between the two groups.

### Articles 9 and 33 Identity and group membership

#### The right

Just as modern States have established criteria for citizenship, indigenous peoples often have long established criteria for membership in their communities. Article 9 recognizes the right of an indigenous person to belong to an indigenous community, clan, tribe, nation or group, in accordance with that community's or group's traditions and customs. Article 33 is related and affirms the right of indigenous peoples to determine their own identity or group membership in accordance with their customs and traditions. These Articles also implicitly recognize a collective right for indigenous peoples to maintain and determine the membership of their own communities.

Businesses must not only recognize the identity of the indigenous peoples with whom they interact or who their activities could impact, but also ensure that any interactions respect the community structures and institutions that are in place. Appropriate due diligence in relation to various indigenous identity groups in the area and the effects a business action has on each group can help facilitate meaningful engagement, mutual positive outcomes and uniform impact on each indigenous group in the area. Businesses will infringe this right if they support the establishment of indigenous organizations or groups that are not legitimate in order to 'construct' consent.

#### Related standards

*ILO Convention 169, Articles 7, 8 and 9* provide for the protection of indigenous institutions and customs that preserve collective identity.

*International Covenant on Civil and Political Rights, Article 27* establishes the right of all communities and individuals to freely enjoy their culture, practice their religion and speak their language.

#### Suggested practical actions

##### Respect

- Learn about both traditional and current local social structures, to ensure that the business is engaging appropriately with indigenous peoples. Traditional social structures or norms in an indigenous community may have been affected by colonization, development or other external influences – e.g., the spread of missionaries in some areas has led to patriarchal social structures where traditionally there was joint decision-making. A business may inadvertently seek support for its activities through the wrong channels if it does not have a clear understanding of a community's social and governance structures, and thereby risks inadvertently supporting the embedding of illegitimate structures.
- Ensure that indigenous employees are not prevented from affirming their identity in the workplace. Ensure that human resource policies have sufficient flexibility to allow indigenous employees absences from work to attend traditional ceremonies, rites, etc.
- Ensure that the influx of outside populations (including business employees and contractors) does not disrupt the identity or ways of life of local indigenous peoples, or diminish the influence of indigenous peoples in their communities. For example, businesses could consider operating "closed" camps, where non-local workers are required to remain within the project site so that they do not enter or impinge on indigenous lands. As mentioned in the discussion of Article 7, road-less operations may be necessary to prevent the influx of outside populations.

##### Support

- Conduct cultural awareness training for employees (involve indigenous peoples in developing and facilitating the training).

- Establish mentoring or social groups in the workplace to support and promote indigenous identity.

### Examples

#### *Support for shared traditions*

A mining company works to protect the ancestral traditions of the indigenous peoples located near one of its mines by implementing artisanal crafts workshops and by supporting the community's creation of a book which recounts its shared traditions and emphasizes its collective identity. Businesses planning a similar undertaking should be aware of the potential preference for privacy among an indigenous community, and first ensure that the indigenous community considers such memorialization and publication of its traditions desirable.

### Article 10 Removal and relocation

#### The right

Indigenous peoples have been involuntarily removed and relocated, sometimes violently, from their lands and territories to make way for development projects, many of which involve the private sector (e.g., exploration, mining or other extractives projects, agriculture, forestry projects and infrastructure development). Removal of indigenous peoples from their land threatens their physical survival, as well as the survival of their economic structures, cultures and religions, particularly given the strong relationship that frequently exists between indigenous peoples and their lands and natural environments, and is among the most severe and irremediable violations of the rights of indigenous peoples.

Article 10 requires that indigenous peoples not be forcibly removed from their lands or territories under any circumstances, and that the free, prior and informed consent (“FPIC”) of the indigenous peoples concerned must be obtained before any relocation takes place (see discussion of FPIC in Part I). Likewise, compensation for removal or relocation does not supercede FPIC; only after FPIC requirements have been followed, can compensation be discussed. Implicit in this right is the notion that fully informed, meaningful and non-coercive negotiations will take place between indigenous peoples and the businesses or governments involved.

Article 10 also provides that indigenous peoples not be relocated without prior agreement on “just and fair” compensation (as determined by the indigenous peoples in consultation with the business and/or government entity involved) for any such relocation. Due to the close relationship between indigenous peoples’ culture and their land, a business is more likely to obtain FPIC for relocation if their compensation schemes account for social and cultural cohesion. For example, hunter/gatherer communities should be relocated to lands with equal or greater access to their traditional subsistence foods.

Finally, Article 10 requires that, where possible, indigenous peoples being relocated should be given the option of returning to their lands or territories.

To respect and support the rights in Article 10, businesses must ensure that they do not cause or contribute to the involuntary removal or relocation of indigenous peoples (including by State actors and other business partners and relationships which may be motivated to drive projects forward without regard for human rights). For example, the illegal seizure of indigenous lands for large-scale agriculture and other development projects, especially in Africa, is a growing concern.<sup>90</sup> Businesses must also ensure that any relocation that is proposed only occurs after the FPIC from affected indigenous peoples is obtained, with just and fair compensation for any agreed removal and relocation which must also be agreed. In some countries, indigenous peoples’ land rights are fully recognized by national law, while in others such rights are not protected by national law. In accordance with business’ responsibility to respect the human rights of indigenous peoples, businesses should recognize indigenous peoples’ rights to the lands or territories they use or inhabit even when such rights are not protected by national law.

#### Related standards

***ILO Convention 169, Article 16*** enshrines the right of indigenous peoples not to be removed from their lands as the principle. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. The Convention allows for involuntary removal in some (very extraordinary) circumstances; accordingly, where removal or relocation is

<sup>90</sup> Land Rights and the Rush for Land. The International Land Coalition. 2012., p. 23  
[http://www.landcoalition.org/sites/default/files/publication/1205/ILC%20GSR%20report\\_ENG.pdf](http://www.landcoalition.org/sites/default/files/publication/1205/ILC%20GSR%20report_ENG.pdf)

being considered, business enterprises should comply with the more stringent requirements in UN Declaration, Article 10 including in relation to obtaining FPIC.<sup>91</sup>

### Suggested practical actions

#### **Respect**

- As part of the due diligence and impact assessment processes, actively seek alternative approaches to the project that do not require the removal or relocation of indigenous peoples. Any alternative approaches must also be assessed for actual and potential impacts on indigenous peoples' rights. This assessment process should consider alternative measures to protect the waters, forests and wildlife that the indigenous peoples' traditional livelihoods depend. If those are harmed, they may be forced to relocate too. Only proceed with voluntary removal or relocation of indigenous peoples as a last resort. If the removal or relocation of indigenous peoples is considered unavoidable, ensure that their free, prior and informed consent (including in relation to the act of removal or relocation, the terms and pace of the relocation and the compensation to be awarded to the affected peoples) has been obtained.
- Consider negotiating benefit-sharing and other equity based agreements rather than lump sum payments so that indigenous peoples are properly compensated. Compensation should be paid both for the financial and non-financial impacts of relocation (for example, loss of culture). In relation to the cultural impacts of relocation, businesses should consider providing community compensation in addition to individual compensation.

#### **Support**

- Support indigenous peoples' (either directly or through partnerships with local indigenous organizations) access to independent legal and technical experts. This will allow them to obtain advice regarding their rights, the social and economic consequences of relocation, and the value of their land and its resources.
- Partner with or support indigenous peoples' organizations that promote governmental and corporate respect for indigenous land rights and the associated requirements of FPIC, agreement on compensation prior to relocation, and right of return. Support may also be provided to organizations that help educate indigenous communities about FPIC and help develop protocols for FPIC-based interactions with businesses.
- Collaborate with the government to ensure that FPIC is being obtained wherever a project might result in the relocation of indigenous peoples. Consider limiting operations where States do not follow FPIC guidance in connection with the relocation of indigenous peoples.

### Example

#### ***Taking on Additional Responsibility***

A mining company operating in West Africa discovered that its gold extraction activities would endanger the viability of three local villages. The company was not confident that its government Joint Venture partner would conduct relocation in accordance with international standards so it took on greater responsibility to partner with the government and actively participated in all aspects of resettling the villages. The company faced various challenges in the course of the resettlements, but its practice of open communication and continued consultation brought about a resettlement design that was consistent with international human rights norms, and managed to preserve the traditions and culture of the local population.

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<sup>91</sup> International Law Association, 2010, *Report of the Hague Conference (2010): Rights of Indigenous Peoples*, <http://www.ila-hq.org/en/committees/index.cfm/cid/1024>

# **Culture, language, spirituality**

### Articles 8, 11, 12, 13 and 15

## Maintenance and dignity of culture, language and spirituality

### The rights

Articles 8, 11, 12, 13 and 15 establish rights relating to indigenous peoples' cultures – i.e., rights to control and protect their heritage, their way of life and their legacies – which are fundamental to achieving cultural self-determination. These Articles also set out certain State obligations which, while not directly binding on the private sector, can provide guidance for businesses engaged with or conducting activities that could impact indigenous peoples, especially for businesses working with a State.

Article 8 contains the right of indigenous peoples not to be subjected to forced assimilation or cultural destruction. Forced assimilation can result from the involuntary relocation of indigenous peoples, or from unwelcome influxes of other people, and outside cultures and norms, into indigenous communities and areas traditionally owned or used by indigenous peoples. Forced assimilation includes acts of identity deprivation, dispossession of land and resources, displacement and negative propaganda. Loss of language, tradition, religion and knowledge are by-products of forced assimilation. Article 8 requires States to provide mechanisms to prevent and redress forced assimilation.

Businesses operating in regions with indigenous peoples must ensure that they do not take any actions that could cause, contribute to or encourage forced assimilation or cultural destruction (and should also ensure that business partners, including State actors, do not take any such actions that relate to the business' operations or areas on which they conduct activities). Business are encouraged to look for opportunities to proactively support indigenous peoples in their efforts to preserve their cultures.

Article 11 deals with indigenous peoples' right to practice and revitalize their cultural traditions and customs, including manifestations of their cultures such as important sites, significant objects and intellectual property of various forms. Under this Article, States must provide redress through effective mechanisms, including restitution. Businesses could find themselves in situations where their activities have adversely relevant indigenous peoples' cultural, intellectual, religious and spiritual property rights, and in such cases appropriate redress should be determined in consultation with the impacted peoples and in accordance with the principles of remediation outlined in Part I of this Guide.

"If we do not understand each other, if we do not know the culture or the history of each other, it is difficult to see the value and dignity of each other societies" - Chief Justice Yazzie, of the Navajo Nation Supreme Court<sup>62</sup>

Article 12 sets out indigenous peoples' rights to their spiritual traditions, including the right to practice and teach their religions as they see fit, to have access to their sacred places and to take possession of their ancestors' remains. This Article requires States to consult with indigenous peoples as appropriate to arrange for the repatriation of ceremonial objects and human remains. In circumstances where they are causing or contributing to impacts on traditional indigenous lands, businesses could also find themselves in possession of indigenous property in which case they should conduct similar processes to return it to its indigenous owners.

Article 13 focuses on indigenous peoples' rights to maintain their languages (in written and spoken form), which are important manifestations of their culture. Under this Article, States must ensure that indigenous peoples can use their own languages to understand and be understood in political, legal and administrative proceedings; business should also ensure that in all of its dealings with indigenous peoples, the indigenous peoples are able to communicate in their own languages if they wish, which may be facilitated by providing interpretative assistance.

<sup>62</sup> Quoted in Driscoll, Lisa, 1993, 'Tribal Courts: New Mexico's Third Judiciary', 32 *N.M.B. Bulletin*, 18 February 1993

Discrimination and other injustices against indigenous peoples are often based on prejudices and misconceptions, including in relation to their cultures, traditions, histories and aspirations. Article 15 aims to address discrimination and intolerance by affirming the right of indigenous peoples to the dignity and diversity of their cultures, traditions, histories and aspirations, and to have these accurately and appropriately reflected in educational curriculums and public information. Furthermore, States are required under Article 15 to work with indigenous peoples to not only combat prejudice and discrimination, but to also actively develop tools that “promote tolerance, understanding, and good relations among indigenous peoples and all other segments of society.”

Businesses will build significant trust with indigenous peoples by respecting this right and ensuring that any communication that relates to or refers to indigenous peoples is accurate, informed and respects indigenous peoples’ cultures and cultural diversity. Businesses also have an opportunity to promote understanding and relations between indigenous and non-indigenous peoples, by taking steps to create positive awareness of indigenous cultures and cultural diversity.

### Related standards

**Universal Declaration of Human Rights, Article 27** sets out the right of all people to participate in the cultural life of the community and to preserve customs and cultural diversity.

**ILO Convention 169, Article 2** promotes the full realization of the social, economic and cultural rights of indigenous peoples with respect for their social and cultural identity, their customs and traditions and their institutions;

**International Covenant on Civil and Political Rights, Articles 18 and 27** protect freedom of thought, conscience and religion, and the right of minority groups to enjoy their own culture, to profess and practice their own religion, or to use their own language.

**International Covenant on Economic, Cultural and Social Rights, Article 15** recognizes the right of everyone to take part in cultural life and to practice his or her own religion.

**UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Convention for the Safeguarding of the Intangible Cultural Heritage and Convention on the Protection of the Underwater Cultural Heritage** all contain provisions relating to the protection of cultural heritage.

## Suggested practical actions

### Respect

- As part of the due diligence process, ensure that projects and business partners do not cause, contribute to or encourage the forced assimilation of indigenous peoples, including by State bodies prior to the business arriving on site. Risk factors to look for include projects on land that is or has been occupied or used by indigenous peoples, where they are no longer present or will need to move from the land.
- Conduct cultural impact assessments to identify actual or potential adverse impacts on indigenous culture.
- Ensure communications between the business and indigenous peoples are in a language and medium that the indigenous peoples understand.
- Ensure that the business does not appropriate cultural or religious symbols for commercial purposes or use cultural depictions in an offensive manner. A business should also not use for commercial purposes stereotypical images or names that are offensive to indigenous peoples. A business should obtain consent before using sacred indigenous symbols or the names of indigenous peoples or their past leaders.
- Provide appropriate venues and allow adequate time for the indigenous peoples with whom the business is involved (including employees) to practice their religious customs and traditions, including both private religious expressions and public ceremonies.

- Partner with local indigenous peoples to understand their cultures and to ensure that any project description, press release or statement from the business does not depict or describe indigenous peoples in a derogatory or discriminatory manner or infringe on such indigenous peoples' right to dignity and respect their culture, tradition, history and aspirations.
- Partner with local indigenous peoples in order to avoid business operations that harm sacred places they deem vital to the culture of the indigenous peoples and the observation of their religion and spiritual practices. Consider using the CBD's Akwé: Kon Voluntary Guidelines.<sup>93</sup>
- Develop a process regarding the use of photographs and video footage of indigenous peoples; give particular consideration to the use of images of indigenous persons who are deceased, which is a sensitive issue in some indigenous cultures.
- Ensure that the influx of outside populations (including business employees and contractors) does not disrupt the culture, language and spirituality of local indigenous peoples, or diminish the influence of indigenous peoples in their communities. For example, businesses could consider operating "closed" camps, where non-local workers are required to remain within the project site so that they do not enter or impinge on indigenous lands or operate donations to carry out traditional celebrations of the indigenous people concerned.
- Develop a process to appropriately manage instances where an indigenous person may pass away on site (particularly relevant for fly-in, fly-out mining operations and similar businesses). Such situations must be managed with dignity and due regard for local indigenous culture.
- Encourage displays of indigenous flags and/or other cultural identifiers in the workplace where appropriate. Contributions should be made to support the local culture in accordance with international standards. Such contributions should not be merely financial but can vary according to the needs of the indigenous peoples concerned.

### **Support**

- Conduct cultural awareness training for employees (involve indigenous peoples in developing and facilitating the training). Organize events to celebrate indigenous culture. Ensure that these are not 'tokenistic'; they must be of a type and sufficient duration to provide real insights into the relevant indigenous cultures. Senior managers, decision-makers, and other specific employees may require more intensive training.
- Consider using some indigenous language/words in the business (for example, naming meeting rooms in an indigenous language), but ensure their use is not exploitative or derogatory, which is best done by seeking advice and guidance from local indigenous peoples.
- Support projects that celebrate and preserve indigenous cultural customs (e.g., the documentation and recording of a traditional language).
- Enable (where possible) employees to practice their religion (for example, through the provision of prayer rooms and flexibility with leave to enable participation in religious activities).
- Consider how to incorporate indigenous styles of learning and knowledge to strengthen business practice/approaches.
- Identify opportunities to remedy past socio-cultural and environmental damage, if any, (e.g., by restoring damaged cultural sites or vegetating disturbed areas) in consultation with indigenous peoples.

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<sup>93</sup> Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments 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, Secretariat of the Convention on Biological Diversity. 2004. <http://www.cbd.int/doc/publications/akwe-brochure-en.pdf>

- Provide financial or other support to indigenous organizations involved in the preservation of indigenous traditional knowledge and cultural heritage.

### Examples

#### ***Translation of important communications into local languages***

An extractives company provided financial and other support for the translation of the UN Declaration into the language of local indigenous peoples. Translation of important documents and communications into indigenous languages supports the survival not only of those languages, but of the related indigenous cultures, and can also support broader rights by ensuring that indigenous peoples fully understand the content of communications relevant to them. In this case, the translation helped the indigenous peoples to understand their rights.

#### ***Cultural awareness training***

Many companies who have operations in countries with indigenous peoples conduct cultural awareness training for their employees (often developed and run by indigenous peoples themselves). Such training promotes cultural awareness and understanding in both the workplace and broader community, which promotes indigenous peoples' rights more broadly. It is best practice to engaging indigenous peoples to develop and run the training. Not only does this give the training additional validity, but it can also support indigenous economic empowerment.

#### ***Tourism industry***

In conjunction with indigenous peoples, a hotel chain developed information for guests on local indigenous culture and heritage, which is made available in hotel lobbies and rooms. The information includes promotion of local indigenous tourism operators. The hotel also supports and promotes indigenous artists by purchasing and displaying indigenous art.

#### ***Employee and community cultural awareness***

An international mining company ran a workshop for its employees and the community in order to engage them in dialogue about the rights of indigenous peoples and to foster cross-cultural collaboration. The training involved information and activities designed to promote understanding of sacred land, kinship and the history of indigenous peoples in the region.

#### ***No investment in companies violating rights***

A global investment firm has pledged to avoid investing in companies that repeatedly engage in practices violating the rights of indigenous peoples. The firm also promotes a culture of tolerance by dialoguing with companies that manufacture or market products with labels and images offensive to indigenous peoples and their culture.

#### ***Welcome to Country***

In Australia, it is common to conduct "Welcome to Country" and "Acknowledgement of Country" ceremonies at appropriate events, which acknowledges the traditional owners of the land on which the event takes place. A number of businesses have developed protocols for such ceremonies.

# Education, information and employment

### Article 14 Education

#### The right

It is an unfortunate reality that in many areas, the education of indigenous peoples falls far short of that of non-indigenous peoples. This results from a number of factors, including social marginalization, remote geographic location and unique family and legal situations.

Article 14 seeks to address this by affirming indigenous peoples' right to establish and control their own educational systems and institutions, and to provide education in their own language and in a manner appropriate to their culture. Indigenous peoples also have the right to access State education without discrimination. States are required to take effective measures to ensure that indigenous peoples have access, when possible, to education in their own culture and language.

Businesses can promote the rights in Article 14 by supporting culturally-appropriate educational opportunities for indigenous children and adults.

#### Related standards

*Universal Declaration of Human Rights, Article 6* establishes the right of all people to an education, including access to elementary, technical, professional and higher education.

*ILO Convention 169, Part VI on Education and means of education* includes provisions on education programmes and services implemented in cooperation with indigenous peoples. The Convention also specifies in Articles 27, 28 and 29 the right of indigenous peoples to educate their children in their native language and about community customs.

*International Covenant on Civil and Political Rights, Article 18* sets out the right of guardians and communities to educate their children according to their own values and belief systems.

*International Covenant on Economic, Cultural and Social Rights, Article 13* states that all people have the right to a free and comprehensive education that promotes understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups.

#### Suggested practical actions

##### Respect

- As part of the due diligence or impact assessment process, ensure that company activities do not limit indigenous peoples' access to educational facilities. For example, heavy construction, infrastructure or other projects that cause significant physical disruption have the potential to limit access to educational facilities. In such cases, engage with the indigenous peoples concerned in order to determine how best to ensure continued access to schools and education facilities.

##### Support

- Support educational institutions where they exist (otherwise consider supporting the establishment of educational institutions of various kinds which can vary from the most formal classes to seminars so graduates can strengthen their communities). Collaborate with these institutions to develop curriculums enabling local indigenous youth to acquire skills that can lead to future employment with the business (or other opportunities), while still maintaining knowledge of their community's culture (for example in relation to traditional conservation, land and natural resource management and other culturally relative and valuable activities). Consider supporting and encouraging indigenous employees to share their experiences as an employee with indigenous classrooms. Also, consider providing internships or other pre-employment initiatives for indigenous peoples.

- Support and empower indigenous employees (short and long term) to gain further education to enhance their opportunities for future employment. Targeted initiatives (for example, scholarships) may assist in redressing historical inequality in access.
- Partner with indigenous organizations and companies with the goal of sharing knowledge, e.g., through the secondment of employees (mutual secondments could also be considered) and employment pathways.
- Partner with or support indigenous peoples' strategies, including public policy advocacy, to protect and promote indigenous peoples' right to education, including their right to culturally and linguistically sensitive education as part of the business' social responsibility programmes. In cases that merit, provide the necessary tools for influencing public policy for better access to education of indigenous communities.

### Examples

#### ***Funding for higher education***

A gold mining company signed a collaborative agreement with a number of indigenous peoples to establish a fund to assist members of the tribes to access higher education. The fund is linked directly to the revenues of the local mine.

#### ***Support for indigenous high school***

A number of companies support a high school that provides interactive, online education, to address the difficulties that the indigenous communities face in physically attending traditional schools.

#### ***Culturally and linguistically sensitive education***

A food company partnered with a civil society organization to develop a programme to provide bilingual and bicultural education to children in indigenous communities from which it sourced ingredients. The programme places particular emphasis on girls' education and bilingual instruction.

#### ***Support for the education of indigenous children and adults***

A retail corporation, which owns several major department stores, partnered with a local non-profit to support education for under-resourced children in the community, many of who are indigenous or of indigenous descent. The company has participated in adult literacy programmes and has donated to the cause in order to reduce poverty and illiteracy in the region.

#### ***Support for indigenous languages and culture***

An extractive company in Russia helped with the local indigenous population published an alphabet book for their language, as well as a series of books, including fairy tales for children, myths and folk songs in the indigenous language as well as a dictionary resource between the local language and Russian.

### Article 16 Media

#### The right

Article 16 provides that indigenous peoples have the right to establish their own media in their own languages, while retaining access to all forms of non-indigenous media without discrimination. Article 16 also requires States to take effective measures to ensure that State-owned media reflects indigenous cultural diversity, and also encourage privately-owned media to reflect the same.

The media is a powerful political tool in society, and indigenous peoples' ability to fully access and participate in existing media channels as well as establish and control their own media channels is crucial to supporting their exercise and enjoyment of their fundamental human rights, including freedom of expression, self-determination and right to information.<sup>94</sup> It also provides a channel for indigenous peoples to challenge discrimination and existing stereotypes and narratives about them, tell their stories in their own way, promote awareness of health issues affecting their communities, publicize contraventions of their rights, and influence broader political, economic, cultural and social agendas which have often marginalized indigenous voices.

Businesses, especially those in the media industry, should consider what action they can take to respect and support indigenous peoples' access to media and right to produce their own media.

#### Related standards

*Universal Declaration of Human Rights, Article 19* states that all people have the right to free speech and expression and the right to seek, receive and impart information through media.

*ILO Convention 169, Article 30* sets out the right of indigenous peoples to mass communication in their own languages.

*International Covenant on Civil and Political Rights, Article 19* sets out the right to freedom of expression and opinion and the right to access media and impart information publicly.

#### Suggested practical actions

##### Respect

- Media companies should ensure that their content reflects the cultural diversity, and avoids stereotypes, of indigenous peoples (indigenous peoples should be actively involved in developing such content) and should consider providing communication in indigenous peoples' own languages.
- Media channels should ensure that their content is not discriminatory or racist; indigenous voices should be included when indigenous issues are discussed.
- Develop a process regarding the use of photographs and video footage of indigenous peoples (give particular consideration to the use of images of indigenous persons who are deceased, which is a sensitive issue in some indigenous cultures).

##### Support

- Companies engaged in radio, television, film, printed or online media or any other similar form of communication should work to ensure that indigenous communities have access to their material.
- Media companies should look for opportunities to hire indigenous media professionals.

<sup>94</sup> International Law Association, 2010, *Report of the Hague Conference (2010): Rights of Indigenous Peoples*, <http://www.ila-hq.org/en/committees/index.cfm/cid/1024>

- Companies can support indigenous media outlets, such as radio stations, newspapers, and television stations through business ventures, philanthropy, the provision of physical resources, the provision of pro bono assistance, and/or the secondment of professionals. Companies can also support organizations that help fund the development of indigenous community owned media, such as local radio stations
- Companies should consider using indigenous methods of communication and media outlets when conducting projects that impact an indigenous community, to ensure that the indigenous communities are reached.
- Highlight with the media successful corporate engagement practices that may serve as examples to other companies.

### Examples

#### ***Radio services sponsorship***

An energy company sponsors a nationwide radio services organization in Australia. The organization provides programming and media marketing services for over one hundred indigenous community radio stations.

#### ***Film consulting***

A media company chose to feature an indigenous character in a major motion film. In preparation, the company hired an indigenous consultant and met with the tribe to which the character belonged to ensure that both the character and the nation were accurately represented and portrayed in the film.

### Article 17 Labour rights

#### The right

Indigenous peoples are often particularly vulnerable members of the workforce, as a result of a lack of understanding of their rights, underlying discriminatory attitudes in the workplace, higher rates of poverty and lower rates of education and training. A particular challenge facing indigenous peoples in relation to their labour rights is the ability to practice traditional occupations, often because this depends on indigenous peoples' ability to access traditional lands and natural resources.<sup>95</sup>

Article 17 affirms indigenous peoples' right to enjoy all labour rights under domestic and international law, including those set out in the ILO's fundamental conventions<sup>96</sup> such as the freedom of association and the right of collective bargaining, and to be free from economic exploitation, including through the provision of appropriate and adequate remuneration for services performed. Article 17 also aims to specifically protect indigenous children from dangerous work that is likely to threaten not only their health but their life potential through an adverse impact on participation in education or recreational activities.

Certain labour standards, such as the use of child labour and implementation of fair compensation policies, may not be regulated under the domestic laws of the country in which a business operates. Where domestic law is silent or sets lower requirements than international labour, businesses must as a minimum respect the rights contained in the relevant provisions in the Universal Declaration on Human Rights and the ILO fundamental conventions, as well as the right of indigenous peoples to be free from economic exploitation, as set out in Article 17 of the UN Declaration.

Businesses must remain committed to providing working conditions that meet or exceed national and international standards and ensure that they do not economically exploit indigenous peoples. Providing decent work which strengthen skills and empower indigenous peoples can make a significant contribution to their economic empowerment, and businesses should actively look for ways to involve indigenous peoples, including indigenous women and young persons of legal working age, in their workforce. Retaining a high degree of transparency in employment arrangements with indigenous peoples minimizes the potential for indigenous peoples to be bound to agreements which encroach upon or do not fully recognize their rights. As a part of achieving such transparency, businesses may consider making "Equal Opportunity Employment" reports available to the public if not already required by law. Businesses can also support indigenous peoples' labour rights through recognition of and support for their traditional occupations.

#### Related standards

The ILO Fundamental Conventions set out the fundamental labour rights of all workers: ILO Convention 29 on Forced Labour, ILO Convention 105 on Abolition of Forced Labour Convention, ILO Convention 138 on Minimum Age, ILO Convention 182 on Worst Forms of Child Labour, ILO Convention 87 on Freedom of Association and Protection of the Right to Organise, ILO Convention 98 on the Right to Organise and Collective Bargaining Convention, ILO Convention 100 on Equal Remuneration and ILO Convention 111 on Discrimination (Employment and Occupation).

***ILO Convention 169, Part III on Recruitment and Conditions of Employment*** encourages Governments to adopt, within the framework of national laws and regulations,

<sup>95</sup> International Labour Organization, 2007, *Eliminating Discrimination against Indigenous and Tribal Peoples in Employment and Occupation: A Guide to ILO Convention 111*, <http://pro169.org/res/materials/en/discrimination/Guide%20to%20ILO%20Convention%20No%20111%20on%20discrimination.pdf>

<sup>96</sup> A list of the ILO's eight fundamental conventions can be found on the ILO's website at <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang-en/index.htm>

and in cooperation with the indigenous peoples, special measures to promote decent conditions of work.

*Universal Declaration of Human Rights, Article 23* declares the right of all people to safe employment, as well as access to employment benefits, fair remuneration and freedom of association.

*International Covenant on Economic, Cultural and Social Rights, Articles 6, 7 and 8* recognize the right of all people to safe work, including the right to freely choose and accept work, the right to fair wages and safe working conditions and the right to join trade unions.

### Suggested practical actions

#### Respect

- Observe international and local child trafficking and labour regulations and require compliance by suppliers and contract workers as part of the business relationship.
- The use of child labour and implementation of fair compensation policies may not be regulated under the domestic laws of the country in which a business operates. Where domestic law is silent or sets lower requirements than international standards, apply relevant international standards (at a minimum, the Universal Declaration on Human Rights and the eight ILO fundamental conventions) throughout the workforce.
- Implement selection criteria for suppliers and contractors that require compliance with international standards, including on human rights and labour practices. This will help to ensure that indigenous peoples' labour rights are respected throughout the company's value chain.
- Ensure that hiring particularly vulnerable groups, such as indigenous women or persons with disabilities, does not result in their exploitation, economic or otherwise.

#### Support

- Engage with local indigenous peoples to determine whether they are interested in employment. If they are, actively and specifically recruit indigenous workers, and support their integration into business activities and culture by (i) assigning substantive, rather than nominal and responsibilities, (ii) offering long-term rather than contractual or otherwise limited employment and (iii) providing benefits and services (such as healthcare, childcare, elder care, job training, housing and education) for workers and their families. If applicable, create new areas that contribute to professionalization and strengthening of capacity building.
- Where work can be done by local indigenous workers, offer the work first to them before hiring outside the local community; advertise vacancies in accessible places (e.g. community bulletin) and utilize appropriate local methods of communication (such as radio).
- Include indigenous owned and operated businesses or ventures in the supply chain. Encourage joint ventures or the employment of local indigenous workers throughout the business' supply chain to contribute to a prosperous and vibrant indigenous business sector.
- Where possible, commit a percentage of management and board of director positions for employees from local indigenous communities. Ensure that these positions hold legitimate authority and are not 'token' roles, which is detrimental to morale and skills development.
- Hire directly without interference from States, local authorities or other third parties, which could introduce bias.
- Ensure that appropriate support is in place to help indigenous employees succeed in the workplace. Mentoring programmes, learning and family support, cross-cultural awareness and

other initiatives can help to retain indigenous employees. Provide indigenous employees with training so that they understand their rights in the workplace.

- Provide all workers with training on cultural awareness and discrimination.
- Where lay-offs are unavoidable, provide indigenous communities with adequate preparation, assistance and support to manage the impacts. Be particularly sensitive to the way that different cultural groups view employment loss. This should also include business operations that employ indigenous peoples for the exploration of natural resources in their territories
- Provide culturally appropriate employment conditions to enable indigenous workers to maintain their cultural obligations (e.g. indigenous holidays).
- Encourage relationships with community schools, where 'older' students participate on work experience schemes. Engage employed indigenous individuals to share their experiences as an employee for that business, inspiring the students and providing them with respectable role models.
- Provide other benefit-sharing options that are culturally sensitive. While companies frequently list job creation as a primary benefit to communities, the provision of jobs can also be detrimental to the social cohesion of communities, especially those that have not fully adopted cash economies. Communities may prefer multi income-generating opportunities – these can include environmental management, local business development, etc.

### Examples

#### *Engaging with experts*

A multi-national cosmetics company works with a team of anthropologists, social scientists, psychologists, economists, biologists and administrators to establish and maintain relationships with small farmers, many of whom are indigenous, who produce raw materials for the company's products.

#### *Indigenous employees*

An international mining company hires indigenous workers from local communities and has employee-support programmes designed to support indigenous workers, including pre-vocational training, culturally appropriate recruitment practices, and mentoring, among other services. Another company has established a policy at some of its mines that requires a certain percentage of jobs at the site go to individuals from the local indigenous community.

# **Participatory development, economic and social rights**

### Articles 18 and 19 Participation in decision-making

#### The rights

Article 18 recognizes that indigenous peoples have a right to participate in decisions that would affect their rights, individually, through representatives of their choosing or through their own decision-making institutions, which States and other third parties should recognize.

Article 19 requires States to consult and cooperate with indigenous peoples through their own representative institutions, and to obtain their FPIC before adopting or implementing legislative or administrative measures that may affect them. (Consultation and FPIC are discussed in further detail in Part I).

Articles 18 and 19 are closely tied to the concept of political self-determination, as enshrined in the UN Declaration and discussed above in relation to Article 3. The importance of indigenous peoples' involvement in matters that affect them, in particular with respect to land traditionally owned, occupied or used by indigenous peoples, is a recurring theme throughout the UN Declaration. Businesses should appropriately involve indigenous peoples and obtain their consent in any matters that could impact them, including philanthropic efforts. The way in which indigenous peoples participate in any decision-making or other engagement should also be determined together with the indigenous peoples concerned. The appropriate process will depend on the circumstances and the traditions and cultures of the indigenous peoples involved. If possible, indigenous peoples' own decision-making processes should be followed.

#### Related standards

*ILO Convention 169, Article 6* requires States to provide means by which indigenous peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision making in elective institutions and administrative and other bodies responsible for policies and programmes that concern them.

*International Covenant on Civil and Political Rights, Article 25* asserts the right of all people to take part in public affairs and decision-making, either directly or via freely chosen representatives.

#### Suggested practical actions

##### Respect

- Carry out consultations in line with the guidance discussed in “Consultation” Part I.
- Give indigenous peoples an acceptable and culturally appropriate amount of time to make decisions.
- Ensure that the decision-making process includes all community members, including members of communities who are outside of the immediate impacted region, but who would be indirectly impacted by the development. Hold community meetings in easily accessible places, and provide transportation when necessary.
- When decisions are being made by representatives of indigenous communities ensure these representatives were selected through indigenous decision-making processes, and that they remain accountable to community needs.
- When indigenous peoples decide to withhold their consent with regard to a business project, respect that decision.

- Businesses should refrain from lobbying state governments for laws and regulations that would favour their development projects to the detriment of indigenous peoples.

### ***Support***

- Establish and help fund development plans in collaboration with indigenous peoples, under which the indigenous peoples themselves make the decisions as to what development will be undertaken. The indigenous peoples should be fully informed with information provided by the business and independent sources, and with support from the business as appropriate and desired by the indigenous peoples concerned. Consider creating a trust or fund managed by a third party to implement this action.
- Notwithstanding the above, be sensitive to the perception of financial support as a form of bribery to obtain indigenous consent. In addition, be aware that financial support or other “gifts” may result in a situation in which the indigenous community feels compelled and/or obligated to support the business’ proposals due to cultural norms.

### **Examples**

#### ***Participation in working group***

A multinational oil company established a working group in a village near one of its operations sites that includes representatives from the community and from the company, as well as holding twice-yearly meetings to provide project updates to the entire community.

#### ***Participation in community development decision making***

A multinational utility company established a non-profit foundation to partner with indigenous communities living around one of its project sites to jointly decide and develop community investment projects, engaging the whole community in the decision-making process. The Board of the Foundation is comprised equally of business and indigenous members representing local communities.

### Articles 20 and 21 Development, political, economic and social activities

#### The rights

Article 20 affirms the right of indigenous peoples to their political, social and economic institutions and their own way of life and means of development, each of which is fundamental to the survival of indigenous cultures.

In addition to the rights of indigenous peoples to continue their way of life, Article 21 recognizes indigenous peoples' right to improve their social and economic conditions, including in relation to health, education, employment and training and housing. States must both allow indigenous peoples to pursue their own means of economic subsistence and development, and ensure that indigenous peoples are appropriately included in State development efforts.

Indigenous institutions can take many forms, and may be formal (such as physical institutions or legally constituted organizations) or informal (such as simply ways of doing things). In any case, when engaging with indigenous peoples, businesses should seek to understand and respect such institutions, and should consider participating in social and community activities with indigenous groups when invited. Businesses should seek to understand indigenous peoples' ways of life and ensure that they do not negatively impact them, particularly indigenous women, elders, youth and children and those with disabilities (discussed further under Article 22).

#### Related standards

*ILO Convention 169, Articles 7 and 23* declare the right of indigenous peoples to determine their own development path, including the right to practice traditional economic activities and to preserve political and social institutions that promote self-determination and self-governance.

*International Covenant on Civil and Political Rights and International Covenant on Economic, Cultural and Social Rights, Article 1* assert the right of all peoples to freely determine their economic, social and cultural development.

#### Suggested practical actions

##### Support

- Understand that joint venture partnerships with Indigenous-owned businesses promoting mutual economic benefits have equal, if not greater impact than philanthropic initiatives. Where possible, support existing development, political, economic and social institutions (rather than establishing new ones). Partner with or support existing indigenous peoples' projects.
- Establish development plans in collaboration with indigenous peoples, which allow for indigenous peoples themselves to make the decisions as to what development will be undertaken (with the business' guidance).
- Ensure that indigenous economies that are based around communal ownership or barter systems are not disrupted by an influx of cash from the business' presence. If applicable, consider providing or supporting money management education.
- Provide infrastructure and other development opportunities to indigenous peoples along with those introduced as part of the business activities. Ensure that the indigenous peoples consent to any such infrastructure or other development opportunities.
- Ensure that appropriate support is in place to help indigenous employees succeed in the workplace. Mentoring programmes, learning and family support, housing and education, cross-cultural awareness and other initiatives can help to retain indigenous employees.

- Partner with indigenous organizations – this could involve entering into mutually beneficial business ventures and/or contributions related to the indigenous company’s core business (e.g., the provision of products or services).
- Explore opportunities to involve indigenous peoples in the value chain such as sourcing from indigenous owned businesses.
- Be careful not to provide excessive financial aid, which could foster dependence and ultimately weaken indigenous communities.

### Examples

#### *Tourism industry*

An international private non-profit has teamed up with a local tourism board to develop eco- and agro-friendly tours and resources for visitors. The company has involved the affected indigenous communities in building sustainable infrastructure to support the high volume of tourists in the area.

#### *Supplier diversity*

An international computer hardware company helped found an advisory council devoted to the expanding supplier diversity practice in growth markets. The computer company has sourced from aboriginal suppliers in a number of countries in order to promote indigenous inclusion in the global economy.

An international mining company with a mine jointly owned by an indigenous company annually spends a large part of its budget on locally-acquired goods and services provided by the indigenous community. The company is also working on a consistent means of tracking and reporting on indigenous suppliers at its other operations.

# Articles 22 and 44

## Indigenous women, elders, youth, children and persons with disabilities

### The right

Within indigenous communities, women, the elderly, youth and children and persons with disabilities may be particularly vulnerable, and accordingly Article 22 requires that, in implementing the UN Declaration, these groups are afforded special consideration. States have a duty to protect these groups from harm, violence, discrimination and any other activities or lack of actions that could compromise their well-being. Article 44 states that all rights and freedoms recognized in the UN Declaration are equally guaranteed to male and female individuals.

Businesses should identify the vulnerabilities of these groups in their business due diligence process (this may require separate consultation with such groups). Examples of such vulnerabilities may include sexual violence and exploitation of women linked with increased business presence, or childhood malnutrition stemming from dispossessing indigenous peoples of their land.

#### Related standards

***ILO Convention 169, Article 3 states that*** the provisions of the Convention shall be applied without discrimination to male and female members of these peoples.

***International Covenant on Economic, Cultural and Social Rights, Article 2*** states that all people are entitled to enjoy the rights set out in the Covenant without discrimination as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

#### Women's Empowerment Principles

The Women's Empowerment Principles are a set of Principles for business offering guidance on how to empower women in the workplace, marketplace and community. For further information (including how to sign the CEO's Statement of Support for the Principles), see [www.weprinciples.org](http://www.weprinciples.org)

#### Children's Rights and Business Principles

The Children's Rights and Business Principles guide companies on the full range of actions they can take in the workplace, marketplace and community to respect and support children's rights. For further information, see [www.unglobalcompact.org/Issues/human\\_rights/childrens\\_principles.html](http://www.unglobalcompact.org/Issues/human_rights/childrens_principles.html)

### Suggested practical actions

#### Respect

- Promote equal opportunity employment of vulnerable groups from indigenous communities. Consider advertising jobs in indigenous languages. Also consider cultural considerations and other factors.
- Consider the needs of indigenous women when conducting consultations and meetings. For example, providing childcare may enable indigenous women to attend consultations they otherwise could not.

#### Support

- Support integration of indigenous workers into the business activities and culture, i.e., by providing health care services, childcare, elder care, job training and targeted education programmes sensitive to the different needs of groups within the indigenous community.
- Implement a mentoring programme for indigenous and non-indigenous peoples to role model, support and mentor indigenous women and indigenous people with disabilities entering the workforce.

- Support initiatives that help vulnerable indigenous peoples access education, training and employment.

### **Examples**

#### ***Indigenous youth***

An international mining company donates \$75,000 yearly to an employment programme that assists indigenous students living near one of its mines in finding long-term local employment opportunities.

An international extraction firm supports community programmes that provide education and vocational skills-training to indigenous youth in order to reduce the student drop-out rate.

An international mining company supports a local non-profit designed to develop young aboriginal leaders and empower them to create positive change in their communities.

#### ***Indigenous women***

An Australian mining company developed a programme that enhances employment opportunities and provides leadership development for indigenous women.

Another mining company established a capital fund, the interest on which is divided equally between men and women to support their respective cultural activities.

### Article 24 Health

#### The right

Article 24 provides that indigenous peoples have the right to maintain, control, protect and develop their traditional medicines and health practices, while retaining access to outside health services, so that they may enjoy the highest attainable standard of physical and mental health. This right allows indigenous peoples to conserve and protect their medicinal plants, animals and minerals (and their knowledge in relation to these); see also Article 31 in relation to traditional knowledge and genetic resources.

The health of indigenous peoples is often significantly poorer than that of the overall population. Reasons for this include lack of proximity to and affordability of health services, lack of language proficiency, poor nutrition, excessive alcohol consumption, higher rates of smoking and abuse of other drugs and substances than the general population, and the loss of their traditional food supply and livelihoods. Even more extreme is the disparity in health between the overall population and IPVI, who often lack immunity because of limited contacts with the outside world. For this reason, protecting indigenous peoples' right to all social and health services is crucial to the survival and development of their communities and cultures.

There are several ways businesses can respect and support the health of indigenous peoples. Businesses that manufacture pharmaceuticals have the unique ability to provide indigenous peoples with access to medicines they produce; businesses in the health industry or those that control distribution channels can enhance indigenous peoples' access to health services and products. Businesses that work in the areas with indigenous communities can also engage with them to assist in the preservation of their medicinal plants, animals and minerals, and ensure that their activities do not damage stocks, nor the overall health of the regional ecosystem necessary for their abundance. Businesses should ensure that they do not access indigenous medicinal resources without consent, and do not violate indigenous peoples' intellectual property rights through, for example, patenting their knowledge of traditional medicines without consent as discussed further in relation to indigenous peoples' rights to traditional knowledge under Article 31.

#### Related standards

*ILO Convention 169, Article 25* asserts the right of indigenous peoples to access adequate, community-based health services that are culturally and spiritually appropriate.

*Universal Declaration of Human Rights, Article 25 and International Covenant on Economic, Cultural and Social Rights, Article 11* declare the right of all people to an adequate standard of living and access to adequate healthcare.

*ICECSR, Article 12* recognizes the right of all people to enjoy the highest attainable standard of physical and mental health.

#### Suggested practical actions

##### Respect

- Ensure that the business' activities do not negatively impact indigenous peoples' health, for example by contaminating or polluting their air, drinking water or food supply, or otherwise adversely impacting their environment and culture in particular.
- Be sensitive to the fact that indigenous peoples living in voluntary isolation or in remote areas with limited outside contact (IPVI) may have heightened susceptibility to health risks and that bringing in workers from outside the community may introduce new diseases. Because IPVI lack immunity, exposure to common diseases could lead to their extinction due to epidemics. Take responsibility for such health impacts. Likewise, understand that business activity in an

indigenous region may have deleterious effects on a local population's health, for example by increasing alcoholism, prostitution, violence or drug use.

- Ensure that the influx of outside populations (including business employees and contractors) does not impact indigenous peoples' health. For example, businesses could consider operating "closed" camps, where non-local workers are required to remain within the project site so that they do not enter or impinge on indigenous communities.

### ***Support***

- Identify or create opportunities to support traditional indigenous food/medicine collection, growing, hunting, herding and manufacturing (i.e., traditional and socially useful natural resource management practices), including partnering with indigenous businesses.
- Where a company provides healthcare to employees, consider using a provider that has a specialty in indigenous health, that has indigenous practitioners and staff, and that can provide care in a culturally appropriate manner.
- Consider supporting initiatives to strengthen and develop indigenous peoples in health professions to increase indigenous access to healthcare.

## **Examples**

### ***Promoting eye health***

An international eye-wear and eye-care company established a programme of clinics in remote indigenous communities to improve access to optometry services and community awareness about eye health. The company also supports an indigenous scholarship to encourage indigenous students to pursue studies in optometry.

### ***Supporting indigenous students focused on health***

A multinational pharmaceutical company established a graduate fellowship for indigenous students who are studying or researching issues and topics in aboriginal health.

### ***Sporting Infrastructure***

A global manufacturer of sporting goods is working with a non-profit organization to deliver sporting equipment to remote indigenous communities in Australia. The partnership is an important part of the non-profit organization's plan to raise awareness of health topics in those communities.

### ***Combating illness in indigenous communities***

A pharmaceutical company partnered with local organizations to support programmes that address health disparities and improve access to care among indigenous communities in the U.S., establishing a Native American health initiative. In one Reservation, it consulted with the Tribal Council to develop tailored education programs, a wellness center, and a mobile medical unit to address better diabetes rates among American Indians, who are disproportionately affected by the disease.

# Land and natural resources

### Article 25 Land and natural resources – spiritual basis

#### The right

Article 25 affirms indigenous peoples' right to maintain and strengthen their spiritual relationship with the land and natural resources that they traditionally own, use or occupy (or owned, used or occupied in the past), and to uphold their responsibilities to future generations in this regard. Indigenous peoples often have strong spiritual ties to their ancestral lands and natural resources (e.g., water, coast, rocks, plants, animals, deserts, meadows, geological features, mountains and plains) on and around such lands. Further, indigenous peoples' individual and collective identity, healthcare systems, social and legal structures and cultures are often inextricably linked to these spiritual relationships not only in material form but also spiritually as well.

Article 25 affirms indigenous peoples' inherent, collective right to "maintain and strengthen" their spiritual relationship with their traditional lands and resources. As a practical matter, indigenous peoples' ability to enjoy this right depends on a range of factors, including access to and preservation of land and resources. Removal or relocation of indigenous peoples, environmental damage and removal of natural resources inhibits exercise of this right. Large development projects (e.g., extraction projects, dams for hydroelectric plants or infrastructure projects) are particularly likely to interfere with indigenous peoples' spiritual lives and cultures because they often necessitate physical displacement of indigenous peoples or substantial, long-term (often permanent) alteration of the environment and their everyday lives as well as in a collective, family and spiritual form. For example, such harm may include the blocking or destruction of traditional migration paths and pastures such as those of the Sami People for their reindeer.

"Territories and land have material, cultural and spiritual dimensions for indigenous communities and, through their deep understanding of and connection with the land, they have managed their environments sustainability for generations. In order to survive as distinct peoples, indigenous peoples and their communities need to be able to own, conserve and manage their territories, lands and resources on the basis of their collective rights" – UN Development Group, *Resource Kit on Indigenous Peoples' Issues*

The significance of natural resources to indigenous peoples (and the inter-relationship with lands) is perhaps best summed up by the Inter-American Court of Human Rights which has stated that the "the 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".<sup>97</sup> Perhaps most expansively, UN Special Rapporteur, Erica-Irene Daes noted that international law and human rights norms demonstrate that there exists a developed legal principle that indigenous peoples have a collective right to lands/territories they traditionally use and occupy, "including the right to use, own, manage and control the natural resources found within their lands and territories... [and that] these resources can include... timber, minerals, oil and gas...".<sup>98</sup> This expansive view is consistent with well accepted notions of use and control of traditional lands and natural resources (factoring, for example, the spiritual and cultural connection to land in its totality).

Not only does Article 25 protect indigenous peoples' right to maintain and strengthen their spiritual relationship with the land and natural resources, it requires that indigenous peoples be able to "uphold their responsibilities to future generations in this regard". To do this, indigenous peoples must maintain a degree of control over their ancestral land and resources, and their environment must not be significantly altered (in the short or long-term). Sacred sites, in particular, are important for indigenous peoples' transmission of spiritual and traditional beliefs to future generations and, thus, should be protected.

<sup>97</sup> Judgment of November 28, 2007 Series C No. 172, para 122.

<sup>98</sup> Indigenous Peoples' Permanent Sovereignty over Natural Resources. UN Doc E/CN.4/Sub.2/2004/30 (13 July 2004), paras 39 and 42.

In order to respect and support the rights in Article 25, businesses must first recognize that indigenous peoples' relationship to land and natural resources may not align with the non-indigenous concepts of property – that is, indigenous peoples' cultures may not recognize concepts of individual "ownership" of land, and they may have a spiritual connection to land that is not technically, under the law of the relevant country, considered to be a form of ownership. Lack of legal or traditional ownership does not in any way diminish the spiritual relationship. Indigenous peoples themselves can provide guidance on what activities may or may not impact this right, and their views in this regard should be sought and incorporated into impact assessments and project planning.<sup>99</sup>

### Related standards

**ILO Convention 169, Part II on lands** covers the total environment of the areas which indigenous peoples occupy or otherwise use. **Article 14** requires states to recognize the right of ownership and possession of indigenous peoples over their lands, and the need for adequate procedures to resolve their land claims.

## Suggested practical actions

### Respect

- Manage hazardous materials (including nuclear waste) with extreme care given their long-term or irreversible effects on land and resources. Obtaining free, prior and informed consent is particularly important in these cases given the potential severity and duration of the impacts. Businesses could also engage with indigenous peoples regarding the appropriate management of these substances, rather than just gaining consent for their use.
- In consulting indigenous peoples before decisions are made about lands or natural resources on or under them, also consider the potential impacts on children and youth.

### Support

- Partner with or support indigenous peoples' groups that work to promote governmental and corporate understanding of indigenous spiritual beliefs, specifically relating to the environment. Also, contribute appropriate and culturally accepted technologies for better management of national resources.
- Support research and development related to preservation of the environment, particularly in areas of spiritual significance to indigenous peoples when and where there is a demand expressed or felt by the indigenous communities.
- Develop voluntary, proactive and collaborative management plans that enable indigenous peoples to access company owned leases / lands for the purpose of practicing traditional economic, cultural and spiritual activity.

## Examples

### ***Cultural heritage training for indigenous peoples***

A mining company has established a programme to provide archaeological training to indigenous peoples, to help further develop their skills relevant to maintenance of cultural heritage sites.

### ***Cultural heritage awareness training***

A number of extractives companies engage local indigenous communities to provide cultural heritage awareness training to workers.

<sup>99</sup> For related guidance on conducting impact assessments, see the Convention on Biological Diversity's Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments 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. <http://www.cbd.int/doc/publications/akwe-brochure-en.pdf>

### ***Traditional land-use studies***

A national energy firm sponsors traditional land-use studies in conjunction with local tribes in order to preserve spiritually important places and maintain culture for future generations.

### Articles 26, 27, 28, 29 and 32

## Land and natural resources – ownership, use, development, exploitation and conservation

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### The rights

Articles 26, 27 and 28 set out broad land rights for indigenous peoples, including rights to own, use, develop and control the lands, territories, and resources that they have traditionally owned, occupied, used or otherwise acquired. These Articles also provide a process for redress where lands have been taken, occupied, or used without consent. Further, indigenous peoples must be involved in the control, implementation and benefits of any development on or affecting their lands.

It is a State's duty to give legal recognition and protection to indigenous peoples' land rights and to establish and implement appropriate redress procedures; however, businesses must also understand and respect these rights.

Article 26 provides that indigenous peoples have the right to own, use, develop and control the lands, territories and resources they have traditionally owned, occupied, used, or acquired, or possess by reason of traditional ownership (including those they do not currently own or occupy, but have in the past). One challenge businesses face is that governments provide inconsistent legal protections for indigenous lands, territories and resources. Many governments around the world do not recognize indigenous lands and territories. Some countries have mechanisms for awarding land tenure (including Australia, Canada, US, New Zealand, Philippines, and most countries in South America), but these mechanisms typically retain state control of natural resources on tenured land. Since the corporate responsibility to respect human rights is independent of the State duty to protect human rights, companies cannot necessarily rely on governments for accurate identification of indigenous lands, territories and resources, and should also take additional measures to obtain this information from the relevant indigenous peoples themselves.

Article 26 also requires States to affirmatively give legal recognition and protection to these lands, territories and resources, in a way that is consistent with indigenous peoples' use of, and relationship with, the land and resources. These rights will allow the development of indigenous peoples' traditional lands in accordance with their own needs and best interests and will help them maintain and grow their own cultural institutions.

Article 27 requires States to establish a fair and open process to recognize and adjudicate the rights of indigenous peoples relating to their lands, territories, and resources, which takes into account the relevant indigenous peoples' laws, traditions, customs, and land tenure system. Furthermore, indigenous peoples have the right to be involved in establishing the process, and to participate in it.

In the case of *Endorois Welfare Council v Kenya*, the African Commission on Human and Peoples' Rights concluded that: "Articles 26 and 27 of the UN Declaration use the term 'occupied or otherwise used'. This is to stress that indigenous peoples have a recognized claim to ownership to ancestral land under international law, even in the absence of official title deeds."<sup>100</sup>

Article 28 details indigenous peoples' right to redress where lands, territories, or resources that they have traditionally owned, occupied, or used have been confiscated, taken, occupied, used, or damaged without their free, prior, and informed consent. In such cases, indigenous peoples are entitled to redress, preferably by restitution, but otherwise by just, fair, and equitable compensation. Article 28 indicates that unless otherwise freely agreed by the concerned peoples, compensation should take the form of lands, territories, or resources equivalent to those taken.

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<sup>100</sup> The African Commission on Human and Peoples' Rights, 2003, 276 / 2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, para.207, [http://www.hrw.org/sites/default/files/related\\_material/2010\\_africa\\_commission\\_ruling\\_0.pdf](http://www.hrw.org/sites/default/files/related_material/2010_africa_commission_ruling_0.pdf)

Article 29 provides that indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands and resources. This Article requires that States establish and implement assistance programmes for indigenous peoples for such conservation and protection. Article 29 also requires States to take effective measures to ensure that hazardous materials are not stored or disposed of on indigenous peoples' lands or territories without their free, prior and informed consent. States should also take effective measures, as needed, to ensure that programmes are implemented to monitor, maintain and restore the health of indigenous peoples affected by any such materials.

The rights set out in Article 29 recognize the often inextricable link between environmental protection and the physical and cultural security of indigenous peoples; that is, exposure to environmental contamination can seriously threaten the health and cultures of indigenous peoples. In certain instances, indigenous peoples have been forced to comply with government policies and business practices that invaded or disrupted the fragile environments of the areas in which they live. State and industry development can also result in the relocation of indigenous peoples, or the damage or decimation of the lands on which they depend.

Article 32 provides that indigenous peoples are entitled to decide their own priorities and strategies for the use or development of their lands, territories and other resources. This ensures that indigenous peoples can benefit from the development and exploitation of their lands if they so choose. In addition, Article 32 requires States to consult and cooperate with indigenous peoples to obtain their FPIC before approving any project that would affect their lands, territories or other resources, and to provide mechanisms for redressing any adverse impact as a result of such projects.

### Related standards

*Universal Declaration of Human Rights, Article 17* declares that all people have the right to own property, and to not be arbitrarily deprived of that property.

*International Covenant on Civil and Political Rights and International Covenant on Economic, Cultural and Social Rights, Article 1* states that all peoples may, for their own ends, freely dispose of their natural wealth and resources.

## Suggested practical actions

### Respect

- Practice the Respect actions relating to indigenous land, discussed under Article 25 above.
- Adopt a “precautionary approach” where there are potential threats of serious or irreparable environmental impact on indigenous peoples' land, territories or resources. Where there is a suspicion of harm, focus on prevention, rather than remediation after the harm has occurred.
- Keep up-to-date records of any lands, territories, or resources of indigenous peoples that have been granted legal recognition or protection by States, proximate to the areas in which the company plans to conduct its business. Consult with the affected indigenous groups before conducting business that may impact any listed land, territory, or resource to ensure the affected community has granted FPIC to the activity. Consider using the CBD's Akwé: Kon Voluntary Guidelines.
- Where States have established and implemented a land adjudicatory process as discussed in Article 27, respect its decisions and recommendations.
- Respect any decisions granting redress for the confiscation, occupation, use or damage of indigenous' peoples lands or territories.
- Ensure that compensation for land and resources extends not only to landowners but also to indigenous peoples who occupy or use the land, or are otherwise affected by the activity.

## SECOND EXPOSURE DRAFT

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- Observe standards of transparency in benefit sharing with indigenous peoples. Do not provide financial or other benefits to indigenous peoples in exchange for investment rights without first acquiring FPIC. When indigenous peoples consent to activities on their land, base payments or benefit sharing arrangements on regular, annual reviews of the activity and profitability.
- Ensure that population increases caused by business activity do not strain natural resources, and do not otherwise disrupt the way of indigenous peoples-- access to food, water, medicinal plants, animals, and other resources must be guaranteed to indigenous communities.
- Do not conduct any business activities or provide support to the State's activities that violate indigenous peoples' lands or resources.
- Seek to cooperatively manage the environmental impact of activities with local indigenous communities. Indigenous peoples are likely to have traditional knowledge that can be incorporated into environmental management plans to improve environmental outcomes.
- Adhere to industry sustainability standards (e.g., Global Reporting Initiative, Roundtable on Sustainable Palm Oil, International Finance Corporation Performance Standards, etc.).
- Provide compensation and restitution for damages inflicted upon the land, territory and resources of indigenous peoples and the rehabilitation of degraded environments caused by any existing or historic activities that did not obtain FPIC. Ensure that the allocated budget from activities cover all costs associated with closure and restoration and include sufficient funds to provide for potential future liabilities.

### **Support**

- Practice the Support actions relating to indigenous land, discussed under Article 25 above.
- Involve indigenous peoples in developing and monitoring environmental management plans. Given their traditional knowledge of the land and resources, indigenous peoples are likely to be more sensitive to any harm occurring and therefore able to identify issues at an earlier stage.
- In any property development on land that has been traditionally owned or used by indigenous peoples, consider ways to protect and celebrate cultural heritage within the site.
- Acknowledge the historical ownership and use of land (even in urban areas, if relevant).
- Identify ways to positively improve the environment on and near a project site, or in another area traditionally owned by, or of cultural significance to indigenous peoples (e.g., consider whether the company can help to clear waterways, clear rubbish and re-establish vegetation).
- Support the development of indigenous peoples' capacity to enact culturally encoded land, wildlife and natural resource management practices. Partner with or support learning networks and projects to train indigenous peoples in resource management, technology, and money markets to increase understanding of the impact of development and integrate traditional and foreign management techniques in an optimal fashion.
- Support initiatives that record and build the body of local traditional ecological knowledge so this knowledge can be integrated into existing ecological and conservation initiatives.
- Support communities in developing maps and other resources that identify their land claims.

### **Examples**

#### ***Mapping Indigenous Territories***

An international technology company worked with an indigenous tribe in the Brazilian Amazon to create a publicly-available and interactive cultural map in order to capture, share and preserve the

natural and cultural richness of the tribe's ancestral lands and territories. This interactive map also tracked instances of illegal logging to protect the environmental integrity of their land.

### ***Mining industry***

Many mining companies cooperatively manage environmental impacts with local indigenous communities.

As a specific example, a diamond company has a mine in a region with a significant number of heritage sites of importance to local indigenous peoples. After several years of negotiation, the company entered into a land use agreement with the indigenous peoples. Under the agreement, the indigenous peoples are recognized as the traditional owners and custodians of the land, and at the end of the mine's life the lease will be transferred to them at which time the company has agreed to support their claim for full legal title to the lands under national law. In the interim, the company provides financial benefits to the traditional owners, which are indexed to the company's profits and put into trusts for long-term employment, education, business development and community development initiatives in the region. A relationship committee manages the agreement and the relationship between the company and indigenous peoples.

### ***Investment in the surrounding community***

A mining company entered into an agreement with local indigenous peoples to create a trust for profit sharing with the community, prioritizing training and employment of indigenous workers and promoted the use of indigenous businesses in mine-related contracts. The agreement also set up a dispute resolution forum and environmental management rules for the mine and adjacent lands.

### ***Conservation training***

One mining company has established an indigenous cadetship programme at one of its sites, after local indigenous peoples asked to become more involved in the management of the land and resources. The programme provides conservation training and work experience to local indigenous peoples.

### ***Supply chain compliance***

An international manufacturer has pledged to only source wood and wood pulp from sustainable and responsible suppliers who are held to a code of conduct that requires ecologically sustainable harvesting practices and prohibits infringement upon the land and forest access rights of indigenous peoples.

### ***Preservation of biodiversity***

An international cosmetics company works with suppliers and buyers to maintain biodiversity in the Amazon rainforest, home to many of the region's indigenous communities.

### ***Tourism industry***

A global cruise line has pledged its commitment to promoting sustainable tourism at its destination ports. The company trains employees and educates passengers on ways to be environmentally and socially conscious in the communities where its ships dock, including in indigenous communities. The company particularly emphasizes protection of natural life and of biodiversity in these areas, in order to promote sustainable development and community health and sustenance.

### ***Benefit sharing***

As part of its land-use agreement with an Alaskan tribe to maintain a natural gas pipeline through its territory, a transnational fuel company provides gas to the community at no charge, which dramatically lowers heating costs for residents while reducing the community's on-going GHG emissions.

### Article 30 Military activities

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#### The right

Article 30 sets out a general prohibition on military activities taking place on indigenous peoples' lands or territories without their consent, or unless justified in the public interest. States are obligated to undertake "effective consultations" with the indigenous peoples concerned prior to using their lands or territories for military activities. Read in conjunction with Article 46 of the UN Declaration, such consultations must be conducted in a manner and context consistent with principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith so that any human rights violations can be avoided.

Businesses are often involved in military activities (commonly through military contracting as suppliers of goods and services), and in such instances have a clear role to play in respecting and supporting the right set out in Article 30. States may also require that oil and gas companies use their national army to provide security services, including paying for their troops and logistics expenses. In some cases, governments use military force to move indigenous peoples from their land to make way for business activities; there have also been certain instances of businesses hiring forces to clear indigenous peoples' from their land (the right of indigenous peoples not to be removed from their lands involuntarily is discussed in greater detail under Article 10). Businesses must respect and support the rights of indigenous peoples' not to have unwelcomed military activities take place on their lands, and ensure that it is not directly or indirectly involved in or supportive of such activities. A business should also make it known to the State that it will not support the use of force to gain access to indigenous territories.

#### Suggested practical actions

##### *Respect*

- In cases where a State has violated or may violate the rights in Article 30, do not contract with the State to provide goods or services that would support military activities on indigenous lands. Make it known to the State why the business is not contracting with it.
- When operating in conflict territories, ensure company operations do not directly or indirectly agitate tensions related to wider socio-political issues.
- Where business works with States that conduct military activities on indigenous lands, consult with indigenous peoples to ensure that the group freely agreed to or requested the activities. A business should avoid benefitting from military activities that discriminate against indigenous communities opposed to resource development, such as blocking their river access.

##### *Support*

- Include peaceful and constructive conflict management in business operating procedures, and adhere to it in addressing any conflict that directly or indirectly affects the business.

### Article 31: Cultural heritage and traditional knowledge

#### The right

Article 31 grants indigenous peoples the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions (sometimes referred to as “cultural and intellectual property”). This right protects a broad range of matters, including expressions of traditional culture (e.g., writings, oral traditions, games, sports and artworks) and inherited scientific knowledge, technology and natural resources (e.g., human remains, artefacts, landscapes and ecosystems, traditional medicines and other knowledge of plants and animals).

The breadth of concepts included in this right means that existing, mainstream forms of legal protection of intellectual property, such as copyright and patents, are not only inadequate for the protection of this right but can be inherently unsuitable. For example, current intellectual property laws require specification of knowledge in sophisticated scientific terms, into which traditional indigenous knowledge is not always easily translated.

Unfortunately, there have been many instances of “bio-piracy” (akin to theft of indigenous peoples’ intellectual property) – where companies commercialize products developed from natural resources, often based on indigenous knowledge but without the consent of, or benefits flowing back to, the affected indigenous peoples.

Business respect for this right (even where national law provides no equivalent) is critical to preserving indigenous peoples’ cultural heritage and traditional knowledge. In addition, businesses should consider working with indigenous peoples to develop such knowledge to the mutual benefit of all parties involved.

The **Convention on Biological Diversity (CBD)** is an international, legally binding treaty aimed at conserving biodiversity, ensuring its sustainable use, and fair and equitable sharing of benefits arising from biodiversity resources. The CBD Global Platform on Business and Biodiversity provides various tools, guidance and case studies for business to support biodiversity, some of which also relate to working with indigenous peoples. For further information see [www.cbd.int](http://www.cbd.int) and [www.cbd.int/en/business/](http://www.cbd.int/en/business/)

The **World Intellectual Property Organization** also recognizes traditional knowledge, genetic resources and traditional cultural expressions as important assets of indigenous peoples. For WIPO resources on this topic, see <http://www.wipo.int/tk/en/>

#### Related standards

**Universal Declaration of Human Rights, Article 27** states that all people have the right to the protection of the moral and material interests of products of which he or she is the author.

**UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Convention for the Safeguarding of the Intangible Cultural Heritage and Convention on the Protection of the Underwater Cultural Heritage** all contain provisions relating to the protection of cultural heritage.

**Convention on Biological Diversity, Article 8(j)** affirms indigenous peoples’ rights to their own traditional knowledge and has led to continued protective efforts in this forum.

#### Suggested practical actions

##### Respect

- Obtain consent before using any cultural or intellectual property of indigenous peoples. Do not apply for patents or assert copyright based on indigenous heritage materials without such consent. Ensure that any arrangements with indigenous peoples that relate to the use of their

cultural or intellectual property grant them an equitable interest in the products ultimately produced that provides fair benefits (e.g., through compensation or royalties). Such intellectual property agreements should be based on international and relevant domestic norms so as to ensure the greatest possible protection for indigenous communities.

- Obtain consent before using images or names of indigenous peoples or the names of past indigenous leaders as part of logos, trademarks, trade names or in other company materials – do not use images or names that may be interpreted as disparaging or that promote stereotypes.
- For manufacturers of consumer items, refrain from manufacturing items wholly appropriating native motifs and themes or replicas of native products, out of context and without permission. Indigenous communities reserve the right to claim and pursue recovery of damages associated with use of images, hieroglyphs, numerals, and other cultural symbols that exceed the scope of any consent.
- For pharmaceutical or technology companies, develop cooperative arrangements for knowledge transfer that grant them an equitable interest, including compensation or royalties, in the products ultimately produced. Where businesses implement cooperative agreements, indigenous peoples must authorize the fair and equitable distribution of the benefits and there should be plans, programs and projects in place to restore the environment.

### **Support**

- Partner with or support indigenous peoples' projects to protect and promote their cultural heritage as part of the business' social responsibility programmes (e.g., databases or "native" trademark initiatives and preservation of artefacts). If no such projects exist in the relevant area, consider ways to build the capacity of indigenous peoples to protect and develop their cultural heritage and traditional knowledge.
- Support indigenous communities to establish programmes (for example, research partnerships) to share and preserve traditional ecological, cultural and heritage knowledge.

## **Examples**

### ***Respecting Ecological Knowledge in the Arctic***

A global energy company painted all of their vessels blue instead of red or orange because indigenous leaders informed the company that red and orange agitates sea life.

### ***Pharmaceutical Industry***

Rather than engage in bio-piracy, some pharmaceutical companies have employed equitable benefit sharing arrangements with indigenous peoples that both promote the progress of science for the general public and respect the heritage of indigenous peoples.

One particular company works with a number of indigenous communities, who share their traditional knowledge of rainforest plants' health benefits and provide plants to the company, from which it develops herbal supplements, skin care and other products. In return, a percentage of profits is returned to indigenous communities including through education and scholarships, medical supplies, boats, communication and other equipment. The company also supports the communities with commercializing and trading their handicrafts. Further, the company supports the communities with legal claims in relation to, and efforts to protect, the rainforest.

### ***Film Industry and Respect for Sacred Places***

A film director wanted to use footage of a mountain that was so sacred to local indigenous peoples that some community members refrained from drawing or even looking at its peak. The director engaged with the indigenous peoples to understand their position, and agreed to film the mountain from adjacent land and then used CGI special effects to make it unrecognizable.

### ***Traditional Knowledge Workshops***

A mining company conducts 'traditional knowledge workshops' at which indigenous peoples demonstrate and share knowledge about traditional practices and arts. The company has hired film crews and photographers to create a documentary, with the aim of promoting and preserving the traditional knowledge for the future and benefit of the indigenous community.

### ***Protecting Native and Regional Intellectual Property***

A U.S. based intellectual property law firm created the first ever pro bono practice that uses patent and copyright law to assist indigenous groups in protecting and leveraging their right to native or regional intellectual property. Indigenous communities in developing countries are generally unable or unaware of their ability to challenge foreign companies benefiting from products and processes so ingrained in native culture that they had never been thought to patent. The small but growing practice is influenced by a novel concept that the economic right to one's creations is a human right.

# **Identity, institutions and relations**

### Articles 34 and 35

## Development and maintenance of institutional structures and customs

### The right

Article 34 sets out the right of indigenous peoples to promote, develop and maintain their own institutional structures, customs, traditions, spirituality, procedures and practices, and systems of cultural expression. Article 34 also establishes the right of indigenous peoples to promote, develop and maintain their laws and legal systems, in accordance with international human rights standards.

The survival of indigenous customs are at risk without coherent and informed state and private policies towards indigenous peoples generally, and indigenous practices and structures in particular. Loss of territories, destruction of ecosystems, restrictions on nomadic ways of life, discriminatory policies, lack of respect for indigenous peoples living in voluntary isolation and a lack of recognition of indigenous customs and institutions have all threatened the protection of indigenous knowledge and practices, and even have been responsible for the loss of local culture.<sup>101</sup>

The rights set out in Article 35 also recognize and support the notion that respect for indigenous structures and practices contributes to the sustainable and equitable management of the environment and the promotion of diversity and richness of civilizations. Since indigenous peoples are the primary source of information about their cultures and how they are best preserved and promoted, it is vital that they take a lead role in identifying, and developing processes for protecting, important cultural places, structures and values.

#### Related standards

*ILO Convention 169, Articles 1, 8 and 9* declares the right of indigenous peoples to maintain and develop their political, economic and social institutions, and to protect their traditions and customs. The Convention also declares that the customs of indigenous peoples in regard to penal matters shall be taken into consideration by the authorities and courts.

### Suggested practical actions

#### Respect

- Develop a cultural awareness and cultural competency education programme for local employees working with indigenous peoples or in areas traditionally owned, occupied or used by indigenous peoples.
- Allow indigenous peoples access to places for ceremonies or other practices, and to traditional resources including plants and waters so that they may maintain cultural activities.
- Avoid developing on sacred places that will infringe the rights of indigenous peoples to their spiritual institutions. Consider using the CBD's Akwé: Kon Voluntary Guidelines<sup>102</sup>.

<sup>101</sup> UN Department of Economic and Social Affairs, 2009, *State of the World's Indigenous Peoples*, [http://www.un.org/esa/socdev/unpfii/documents/SOWIP\\_web.pdf](http://www.un.org/esa/socdev/unpfii/documents/SOWIP_web.pdf)

<sup>102</sup> Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments 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, Secretariat of the Convention on Biological Diversity. 2004. <http://www.cbd.int/doc/publications/akwe-brochure-en.pdf>

### ***Support***

- Where possible, support existing development, political, economic, cultural, and social institutions (rather than establishing new ones).
- Offer to safely remove and store cultural material from the project site until the project is completed, at which time return it to the indigenous peoples, or other measures depending on the indigenous community concerned. Do not proceed without the express consent of indigenous peoples.
- Repair or restore historic structures and territories with the guidance of indigenous peoples.
- Develop voluntary, proactive and collaborative management approaches that enable indigenous peoples to access resource sector owned leases / lands for the purpose of practicing economic, cultural and spiritual activity and to maintain cultural heritage.

### **Examples**

#### ***Preservation of customary subsistence practices***

An international petroleum company developed a programme in partnership with indigenous communities at one of its drilling sites to protect native marine life in the case of an oil spill, with the aim of preserving the customary subsistence practices and economic institutions of the communities.

#### ***Mining industry***

Some mining companies develop Land Use and Participation Agreements where a portion of revenues (or a payment per unit of output) are put into trusts for long-term employment, education and business development in the region and to fund more immediate community development initiatives. Relationship Committees are also established between the indigenous peoples and company representatives to monitor and implement the Agreement and to review the management of land rights, land management, indigenous peoples' site protection, income generation, and employment opportunities.

### Articles 36 and 37

#### International relations: borders and treaties

##### The rights

Articles 36 and 37 set out indigenous peoples' rights regarding international relations, both within their communities and in their communities' relationships with governments.

Article 36 recognizes that indigenous communities may not live entirely within the boundaries of a single modern day State, but instead may live across borders. Article 36 affirms that indigenous peoples, in particular those divided by international borders, have the right to maintain and develop cross-border contact with their own peoples and with other peoples, which is critical to the ability to maintain their communities and cultures. States have a positive duty to take effective measures to facilitate this right, in consultation with the indigenous peoples. Businesses operating on or impacting territories occupied by indigenous peoples who may be divided by international borders must ensure that their activities do not impact the indigenous peoples' ability to carry out any cross-border contact, relations and cooperation (e.g., because the location of activities interferes with the routes used by indigenous peoples).

Article 37 requires States to honour and respect treaties, agreements, and arrangements entered into with indigenous peoples. Unfortunately there are many instances where States have entered into treaties with indigenous peoples and not honoured their obligations; Article 37 affirms the right of indigenous peoples to recognition, observance, and enforcement of treaties, agreements, and arrangements concluded with States and their successors. Business should conduct due diligence to identify whether its activities may be contrary to a treaty or other agreement or arrangement between indigenous peoples and government; for example, a government may grant a license or permit to undertake activity in contravention of a treaty obligation that the government has to indigenous peoples. Furthermore, a State may have entered into a treaty or other arrangement with indigenous peoples that is prejudicial towards such indigenous peoples' rights or the terms of which were forced upon such indigenous peoples. As a result, the indigenous peoples concerned may not recognize the legitimacy of such treaty and may wish to operate outside the scope of such treaty and/or arrangements. In such a situation, businesses should seek expert assistance in determining how it should proceed so that its activities do not have any adverse impacts on the rights of the indigenous peoples concerned and/or exacerbate tensions with the State.

##### Related standards

*ILO Convention 169, Article 32* also requires governments to take appropriate measures to facilitate cross-border contact and cooperation between indigenous and tribal peoples.

##### Suggested practical actions

###### Respect

- Ensure domestic and international projects do not interfere with indigenous peoples' right to maintain and develop contacts across international borders, both with their own members and with other peoples. Where a project could interfere with a group's contacts and communications, consult and work with the group to establish alternatives for the duration of the project and use the best international and national safeguards to protect indigenous rights.
- Respect all treaties, agreements, and other arrangements indigenous peoples have entered into with States. Consider these treaties, agreements, and arrangements to have the full force of law as any other international treaty or agreement so long as they are not manifestly prejudicial or grossly inconsistent with the indigenous peoples' human rights.
- When entering into an agreement with a foreign host-government (such as a contract relating to an investment or a business agreement with that government), consult with any indigenous

groups that may be affected by that business or agreement. Seek the group's consent and enter into a parallel agreement with the indigenous groups.

- Where a State is not recognizing, observing, or enforcing a treaty, agreement, or other arrangement with indigenous peoples, do not conduct business or support activities that may in anyway further the State's disregard for the treaty, agreement, or arrangement. Make it known to the government why the business is not proceeding with the proposed activities.

# Implementing the UN Declaration

### Article 38 States' obligation to implement the UN Declaration

#### The right

Article 38 requires States to take appropriate measures in consultation and cooperation with indigenous peoples, to achieve the aims of the UN Declaration.

States have a key role to play in achieving the ends of the UN Declaration, including in relation to the regulation of businesses. State actions to safeguard indigenous peoples' rights can include enacting legislation, publishing guidelines for development cooperation and engagement with indigenous populations to avoid exploitation and foster mutually beneficial relationships.

As stated in the preamble to the UN Declaration, States are encouraged "to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned." This highlights the mutually reinforcing nature of the UN Declaration and other existing international instruments, including ILO Convention 169.

Consistent with the Guiding Principles, businesses have an obligation to respect the human rights of indigenous peoples throughout their operations. To achieve this end, businesses are encouraged to take the key business actions specified in Part I of this Guide. In furtherance of these actions, businesses can promote States' compliance with the UN Declaration. This may include engaging in and sponsoring public policy discussions with State leaders and indigenous leader and conditioning certain projects upon greater adherence by the relevant State with the UN Declaration and other human rights standards.

#### Related standards

*ILO Convention 169, Article 2* puts States under an international obligation to take actions for the full realization of the social, economic and cultural rights of indigenous peoples with respect for their social and cultural identity, their customs and traditions and their institutions. *Article 4* requires States to adopt special measures to protect the persons, institutions, property, labour, cultures and environment of indigenous peoples.

#### Suggested practical actions

##### Respect

- Familiarize employees and business partners with the international standards and existing domestic legal framework that applies to engaging with indigenous peoples, and adhere to such standards and ask business partners to do the same.

##### Support

- Engage in public policy discussions in relation to the human rights of indigenous peoples to encourage the development of policies, legislation and regulation that protect and advance these rights.

### Articles 39 and 40 Adjudication of conflicts and access to assistance

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#### The rights

Indigenous peoples are often vulnerable members of society and therefore often do not have access to the resources, financial or otherwise, to protect or enforce their rights. Under Article 39, indigenous peoples have a right to receive from States the financial and technical support they need to understand, promote and achieve the rights set out in the UN Declaration. To the extent States are not fulfilling such obligation, businesses should consider providing such assistance to indigenous peoples, especially if such assistance will give the business certainty that it is meeting its other obligations under the UN Declaration (e.g., FPIC).

Article 40 affirms the right of indigenous peoples to due process, just and fair procedures, prompt decisions and effective remedies in any conflict or dispute with States or other parties. The decision must give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned, as well as to international human rights. Where legitimate, impartial State sponsored judicial mechanisms do not exist, businesses should set up grievance mechanisms for its projects in line with the guidance set forth in 'Grievance Mechanisms' in Part I of this Guide.

#### Related standards

*Universal Declaration of Human Rights, Article 8* declares the right of all people to an effective remedy for any acts that violate the fundamental rights granted by the constitution or by law.

#### Suggested practical actions

##### Support

- Support indigenous peoples to gain independent financial and technical assistance and advice to enable them to understand, promote and enforce their rights.

#### Examples

##### *Translating International Human Rights Standards into Indigenous Languages*

An extractive company in partnered with the local national office of the UN High Commissioner for Human Rights to publish the UN Universal Declaration of Human Rights and the UN Declaration on the Rights of Indigenous Peoples into local indigenous languages.

### Articles 41 and 42 Promotion of the rights

#### The rights

Articles 41 and 42 are a “call to action” for States, intergovernmental organizations and UN agencies to contribute to the realization of the provisions of the UN Declaration and to promote and apply respect for the rights set out in the UN Declaration.

Businesses may partner with UN agencies, inter-governmental or governmental organizations in efforts which facilitate implementation of the aims of the UN Declaration. Businesses can also partner with indigenous representative bodies. Businesses can also reference and incorporate the principles of the UN Declaration into their human rights and/or indigenous peoples’ policies as a strong signal of their commitment to the UN Declaration.

#### Suggested practical actions

##### Support

- Engage in public policy discussions in relation to the human rights of indigenous peoples to encourage the development of policies, legislation and regulation that protects and advances the rights of indigenous peoples.
- Participate in, organize or otherwise encourage discussions (e.g. forums, conferences, etc.) to promote indigenous peoples’ rights and share progress and different approaches to the implementation of the UN Declaration. Consider closely involving indigenous representatives and concerned UN agencies, inter-governmental or governmental organizations and others in such discussions to enhance the effectiveness of such mutual learning platforms.
- Become a signatory to the UN Global Compact and take immediate practical actions to implement its principles with respect to human rights (including indigenous peoples’ rights), labour, environment and anti-corruption. Submit to means of public accountability and transparency by making such actions public through annual submissions of the “Communication on Progress” as required for participation.
- Provide financial support to UN or other initiatives focused on the implementation of the UN Declaration at the country level, including for example the United Nations Indigenous Peoples Partnership (UNIPP) established by the ILO, OHCHR, UNDP, UNICEF and UNFPA.

#### Examples

##### *United Nations Indigenous Peoples’ Partnership (“UNIPP”)*

UNIPP seeks to facilitate the implementation of international standards on indigenous peoples, in particular the UN Declaration and ILO Convention 169. The initiative seeks to enable dialogue and understanding between indigenous peoples, governments, civil society and business through partnership. UNIPP has established a multi-partner trust fund to mobilize and manage resources to implement its strategic policies.<sup>103</sup>

<sup>103</sup> For further information, see [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_186285.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_186285.pdf) and <http://mptf.undp.org/factsheet/fund/IPP00>

### **Article 43**

#### **The UN Declaration as minimum standards**

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#### **The right**

Article 43 provides that the rights recognized in the UN Declaration are the minimum standards required for indigenous peoples' survival, dignity and well-being. This provision recognizes that there are many circumstances in which higher standards are required. In their engagement with indigenous peoples, businesses should ensure that they respect the rights set out in the UN Declaration, and consider whether further action is required to ensure the well-being of the relevant indigenous peoples. Businesses are also encouraged to take voluntary actions to promote and advance indigenous peoples' rights, including through core business activities, strategic social investments, philanthropy, advocacy and public policy engagement, and partnership and collective action. Such activities should be undertaken in collaboration with indigenous peoples.

#### **Suggested practical actions**

##### ***Support***

- Engage in public policy discussions in relation to the human rights of indigenous peoples to encourage the development of policies, legislation and regulation that protect and advance the rights.
- Participate in, organize or otherwise encourage discussions (e.g. forums, conferences, etc.) to promote indigenous peoples' rights and share progress and different approaches to the implementation of the UN Declaration. Consider closely involving indigenous representatives and concerned UN agencies, inter-governmental or governmental organizations and others in such discussions to enhance the effectiveness of such mutual learning platforms.
- Become a signatory to the UN Global Compact and take immediate practical actions to implement its principles with respect to human rights (including indigenous peoples' rights), labour, environment and anti-corruption.

### Articles 45 and 46 Interpretative Guidance

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Articles 45 and 46 do not set forth any rights per se; instead, they provide guidance on how to interpret the provisions, and resulting rights and obligations, of the UN Declaration. These Articles should not be forgotten or pushed to the side, but should be read in conjunction with each other Article of the UN Declaration. Articles 45 and 46 are the prisms through which each Article of the UN Declaration should be read.

Article 45 provides that the UN Declaration may not be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future. This means that the UN Declaration cannot be used to invalidate or limit any existing rights that indigenous peoples may have that are not reflected in the UN Declaration. In addition, the UN Declaration may not be used to limit other rights, or the interpretation of existing rights, that may arise with the passage of time. The international human rights framework is a fluid body that may change over time; a human rights declaration entered into at a given time should not be viewed as an exhaustive list of rights for future generations.

Article 46 is divided into three parts which provides as follows:

- Article 46(1) provides assurance that the UN Declaration will not be read in a way that conflicts with the Charter of the UN and that the UN Declaration, in its elaboration of the rights of indigenous peoples, does not advocate the dismemberment of a State's territorial integrity and does not infringe upon the sovereignty of States.
- Article 46(2) further recognizes that, in certain exceptional circumstances, the exercise of the rights set forth in the UN Declaration may be limited by a government; however, such limitations must be promulgated and applied in accordance with international human rights obligations and in a non-discriminatory matter and as strictly necessary solely for the purposes of avoiding the violation of rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society. This provides that any limitations on the UN Declaration applied by a State will be implemented in a manner that is consistent with the international human rights framework and the spirit of the UN Declaration.
- Finally, and perhaps most importantly, Article 46(3) establishes that each provision in the UN Declaration must be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith. This standard applies to all provisions in the UN Declaration, including the preceding discussion on limitations, and ensures that action taken in respect of the UN Declaration is sincere and not mere lip-service.

Businesses should be mindful of these Articles when determining its obligations under the UN Declaration in any given situation.

# Appendices

## Appendix A: UN Declaration on the Rights of Indigenous Peoples

The General Assembly,

*Guided* by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

*Affirming* that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

*Affirming also* that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

*Affirming further* that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

*Reaffirming* that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

*Concerned* that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

*Recognizing* the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

*Recognizing also* the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

*Welcoming* the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

*Convinced* that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

*Recognizing* that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

*Emphasizing* the contribution of the demilitarization of the lands and territories of indigenous peoples to peace,

economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

*Recognizing in particular* the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

*Considering* that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

*Considering also* that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

*Acknowledging* that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights<sup>2</sup> and the International Covenant on Civil and Political Rights,<sup>2</sup> as well as the Vienna Declaration and Programme of Action,<sup>3</sup> affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

*Bearing in mind* that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

*Convinced* that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

*Encouraging* States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

*Emphasizing* that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

*Believing* that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

*Recognizing and reaffirming* that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

*Recognizing* that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

*Solemnly proclaims* the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

### **Article 1**

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights<sup>4</sup> and international human rights law.

### **Article 2**

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

### **Article 3**

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.

### **Article 4**

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

### **Article 5**

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

### **Article 6**

Every indigenous individual has the right to a nationality.

### **Article 7**

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

### **Article 8**

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of forced assimilation or integration;

(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

### **Article 9**

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

### **Article 10**

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

### **Article 11**

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

### **Article 12**

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

### **Article 13**

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems

and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

### **Article 14**

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

### **Article 15**

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

### **Article 16**

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

### **Article 17**

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

### **Article 18**

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

### **Article 19**

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.

### **Article 20**

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

### **Article 21**

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

### **Article 22**

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

### **Article 23**

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

### **Article 24**

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

### **Article 25**

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.

### **Article 26**

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

### **Article 27**

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

### **Article 28**

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

### **Article 29**

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

### **Article 30**

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

### **Article 31**

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

### **Article 32**

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. 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.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

### **Article 33**

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

### **Article 34**

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

### **Article 35**

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

### **Article 36**

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

### **Article 37**

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

### **Article 38**

States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

### **Article 39**

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

### **Article 40**

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all

infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

### **Article 41**

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

### **Article 42**

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

### **Article 43**

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

### **Article 44**

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

### **Article 45**

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

### **Article 46**

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. 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.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

# Appendix B:

## The Principles of the UN Global Compact

The UN Global Compact calls on business leaders to embrace and enact the following set of universal principles within their sphere of influence.

### ***HUMAN RIGHTS***

- Principle 1 Businesses should support and respect the protection of internationally proclaimed human rights; and  
Principle 2 make sure that they are not complicit in human rights abuses.

### ***LABOUR***

- Principle 3 Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;  
Principle 4 the elimination of all forms of forced and compulsory labour;  
Principle 5 the effective abolition of child labour; and  
Principle 6 the elimination of discrimination in respect of employment and occupation.

### ***ENVIRONMENT***

- Principle 7 Businesses are asked to support a precautionary approach to environmental challenges;  
Principle 8 undertake initiatives to promote greater environmental responsibility; and  
Principle 9 encourage the development and diffusion of environmentally friendly technologies.

### ***ANTI-CORRUPTION***

- Principle 10 Businesses should work against corruption in all its forms, including extortion and bribery.