

**LAWS 532: Comparative Indigenous Law**

**Implementing Indigenous Rights' Concerns in Corporate Activity**

Research Paper

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## *Introduction: Corporations, Sustainability and Indigenous Peoples*

### *A Sustainability and Corporations: An Obvious Linkage*

Today, we hear a lot about the companies that need to be more “sustainable” or “responsible”. “Sustainability”: a word that is often pronounced in a lot of different contexts but what does it exactly mean? Is it a ground-breaking and crucial theme of the 21st century or is it merely a fad that will vanish in a few years?

In this regard, it is worth noting that there is no universally agreed definition of the word “sustainability”, which seems to be a new “catch-all” phrase. It can mean something entirely different to every person with whom you speak, with meaning going from ‘environmental effort’ to ‘a combination of business efficiency for a better world’. Nevertheless, there seems to be a consensus on the following definition that defines sustainability as a “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.<sup>1</sup> Broadly speaking, it is about finding the balance between economic profit and responsible behaviour in order to leave a viable world to our children and grandchildren.

Sustainability may be implemented within businesses through are three pillars: economic, environmental, and social. These three aspects are interdependent and not mutually exclusive and need to be considered as a whole.



The three aspects of sustainability<sup>2</sup> (all of them have an impact on indigenous communities as we will see later).

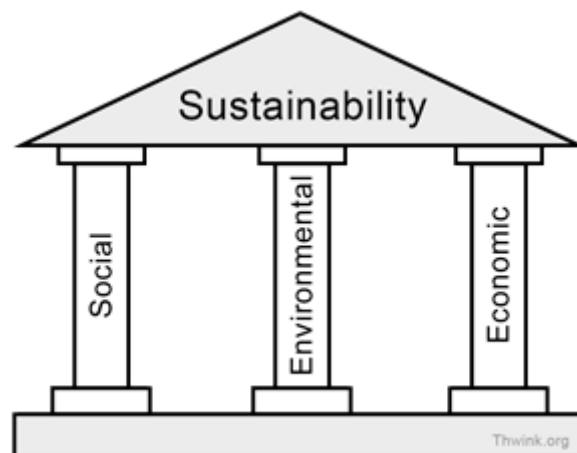
<sup>1</sup> World Commission on Environment and Development (WCED) – *Brundtland Commission Report of the World Commission on Environment and Development: Our Common Future* (1987).

<sup>2</sup> “The Three Pillars of Sustainability”, FutureLearn <<https://www.futurelearn.com/courses/sustainability-society-and-you/0/steps/4618>>.

In short, **environmental sustainability** refers to the protection of the environment (greenhouse emissions and carbon footprints, protection of natural resources, management of waste), **social sustainability** deals with the wellbeing of the society at large (communities including indigenous peoples, employees' welfare) and **economic sustainability** emphasizes a viable and ethical economy (effective corporate governance, transparency and fight against the corruption).

The question is: why should businesses care about sustainability? The common purpose of corporations is to make profit and not to take social and environmental issues into account. In fact, businesses should feel concerned by these aspects because sustainability is “the lifeblood of long-term business prosperity, growth and ultimately survival”.<sup>3</sup> Indeed, sustainability affects various stakeholders of the society including communities, regulators, customers and shareholders. Our society currently faces numerous global challenges including environmental degradation, social scandals, and economic crisis. The solution of these problems are interlinked and companies have a part to play as they impact various levels of the society: the global economy, community relations and the ecosystem. It is therefore incumbent on the businesses to take these issues into account.<sup>4</sup>

To sum up, sustainability rests on these three pillars (environmental, social, and economic). If one pillar is weak, the rest collapses. Organisations then should not focus on one pillar at the time and should rather consider them all.



That being said, what is the linkage between sustainability and indigenous peoples? When we think of “sustainability”, we think of environmental initiatives such as automobile companies trying to reduce their carbon footprint. We think of philanthropy such as these large oil and gas

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<sup>3</sup> “Lifeblood Sustainability” (February 28, 2018), MinterEllison <<https://minterellison.co.nz/our-view/lifeblood-sustainability>>

<sup>4</sup> European Commission *Green paper – Promoting a European framework for corporate social responsibility* (COM/2001/0366 final) (Celex No. 501DC0366 European Union Preparatory Acts)

firms attempting to regain public trust by building up a school or a hospital in a third-world country. Do we think of efforts towards indigenous groups? Not that much although we should.

## *B Sustainability and Indigenous Peoples: A Crucial Linkage*

### *1 Social Sustainability: The Most Relevant Pillar of Sustainability*

Indigenous concerns are in fact an integral part of sustainability. Sustainability is about making companies more aware and responsible of the economic, environmental and social impact of their activities. It notably deals with the wellbeing of the society at large, including indigenous groups. It also covers the environmental impact of corporate activity and very often, indigenous groups have a deep spiritual connection to their lands. Therefore, sustainability is relevant to indigenous issues. And yet, these aspects are too often ignored in spite of the dramatic impact of corporate activity on indigenous communities.

Why? Because sustainability is not clearly understood by companies. In particular, the social pillar of sustainability (which might be the most relevant regarding indigenous peoples) tends to be underestimated (or even overlooked) by businesses that do not seem to agree on its meaning. Thus, it is necessary to study the social pillar of sustainability, which definitely encompasses wellbeing of indigenous communities.

Social sustainability is defined as:

*“a process for creating sustainable successful places that promote wellbeing, by understanding what people need from the places they live and work. Social sustainability combines design of the physical realm with design of the social world – infrastructure to support social and cultural life, social amenities, systems for citizen engagement, and space for people and places to evolve.”<sup>5</sup>*

In other terms, social sustainability deals with people, their basic needs, their livelihoods, their cultures and their wellbeing. From a business standpoint, social sustainability aims to understand the consequences of corporate activity on people and society. Corporate policies related to social sustainability are about identifying and managing business impacts, both positive and negative, on people.<sup>6</sup> These social sustainability policies cover the promotion of numerous issues such as human rights, labour practices, quality of life, health and safety (both physical and mental), diversity, equity, and participation. Some of these aspects deserve a deeper assessment.

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<sup>5</sup> Saffron Woodcraft “Social Sustainability and New Communities: Moving from Concept to Practice in UK” *Procedia - Social and Behavioral Sciences* 68 (2012) 29 – 42

<sup>6</sup> “Social Sustainability”, UN Global Compact <<https://www.unglobalcompact.org/what-is-gc/our-work/social>>

## *2 Deconstructing Social Sustainability*

The different components of social sustainability are all related to human issues.

The “quality of life” aspect means that corporations should ensure that basic needs of communities affected by their activities are met. They should guarantee a good quality of life for all members of these communities (including employment, housing, health and safety).

The “diversity” concept means that companies should promote and encourage any kind of diversity in its company (notably gender, ethnic, cultural and background diversity in the governance of the firm).

The “equity” principle means that companies should provide for equitable opportunities and outcomes for all communities, especially the poorest and most vulnerable members of the said communities. In corporate policy words, it refers to the equitable and fair distribution of goods, services, and life chances to the members of the communities affected by corporate activity. Equitable and fair distribution implies that all peoples, regardless of gender, ethnic and cultural origin, should have an equal opportunity to survive but also fulfil their development potentials. Equitable redistribution covers various issues such as the provision of clean water, nutrition, employment, education, shelter, essential medicines, and an unpolluted environment to access to social networks. It also includes the guarantee of freedom from based on race, gender, religion or cultural origins.

Lastly, the “participation” aspect refers to the objective of including as many different social groups as possible in decision-making process. From a business perspective, this implies the involvement of communities that may be affected by corporate projects.

What is striking behind all these aspects is that they are directly related to the challenges faced by indigenous peoples nowadays. They are all applicable to indigenous rights concerns.

## *3 The Importance of Social Sustainability for Indigenous Peoples*

First question, why is social sustainability so important to companies? There is the human aspect that is important to society of course but it is worth thinking about why it would be important to businesses (that aim to make money – even though such statement might seem a bit cynical).

In fact, social sustainability policies may help businesses to obtain social license to operate. The Social License to Operate (SLO), or simply social license, refers to the ongoing acceptance of a company or industry's standard business practices and operating procedures by its employees, stakeholders and the general public. The concept of social license is closely related to sustainability because it relies on communities and their understanding and acceptance of corporate activity (which depends greatly on the sustainability efforts of the concerned company, including social and environmental initiatives). Social license to operate is created and maintained slowly over time as the actions of a company build trust with the community it

operates in and other stakeholders. A company that is regarded as taking care of its employees and the communities affected by its activities will appear as a “good corporate citizen”.<sup>7</sup> Such image will confer the company a licence to operate.

Secondly, why would sustainability “fit” indigenous concerns? The relevance of indigenous communities to the concept of sustainability has been recognised by the United Nations. Indeed, the 2030 Agenda and the Sustainable Development Goals (SDGs) refer to indigenous communities.<sup>8</sup> The SDGs refer to a series of 17 objectives that need to be achieved by United Nations Members by 2030. Such objectives are related to the protection of the environment, the fight against corruption and the wellbeing of all communities. Although all of the 17 goals are relevant for Indigenous Peoples (as they might be either victim of environmental disasters, corruption or poverty), only 4 out of 230 indicators specifically refer to indigenous peoples.<sup>9</sup> These indicators are the following:

*“Goal 2. End hunger, achieve food security and improved nutrition and promote sustainable agriculture*

*Indicator 2.3: By 2030, double the agricultural productivity and incomes of small-scale food producers, in particular women, **indigenous peoples**, [...] including through secure and equal access to land, other productive resources and inputs, knowledge, financial services, markets and opportunities [...]*

*Indicator 2.3.2: Average income of small-scale food producers, by sex and **indigenous** status.*

*Goal 4. Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all*

*Indicator 4.5: By 2030, eliminate gender disparities in education and ensure equal access to all levels of education and vocational training for the vulnerable, including persons with disabilities, **indigenous peoples** and children in vulnerable situations*

*Indicator 4.5.1: Parity indices (female/male, rural/urban, bottom/top wealth quintile and others such as disability status, **indigenous peoples** and conflict affected, as data become available) for all education indicators on this list that can be disaggregated.”*

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<sup>7</sup> “Social Licence (SLO)”, Investopedia <<https://www.investopedia.com/terms/s/social-license-slo.asp>>

<sup>8</sup> “Indigenous Peoples and the 2030 Agenda”, UN Global Compact <<https://www.un.org/development/desa/indigenouspeoples/focus-areas/post-2015-agenda/the-sustainable-development-goals-sdgs-and-indigenous.html>>

<sup>9</sup> “What Do the Sustainable Development Goals Mean for Indigenous Peoples?” (July 18, 2017), Cultural Survival <<https://www.culturalsurvival.org/news/what-do-sustainable-development-goals-mean-indigenous-peoples>>

Therefore, indigenous wellbeing is a part of a sustainability approach, which aims to achieve the balance between economic, social and environmental concerns. The question is: how?

The purpose of this paper is to point out how companies, through sustainability policies, could implement indigenous concerns in the way they manage their businesses. The first part will focus on the difficulties encountered by indigenous peoples when it comes to corporate activity while the second part will tentatively suggest possible improvements.

## *I The Challenges Faced by Indigenous Peoples*

### *A The Vulnerability of Indigenous Communities to Corporate Activity*

#### *1 The Variety of Corporate Impacts on Indigenous Groups*

The consequences of business operations on indigenous peoples are various and mainly depend on the activity. First, expropriation of lands for agricultural business, water privatization and appropriation in other activities represent a significant **human impact** for these communities. Then, mining, oil drilling, damming, deforestation, use of toxic pesticides have important **environmental consequences** such as the pollution of the soils and waterways hindering agriculture and harvesting (and thus jeopardizing indigenous peoples to satisfy their means of subsistence). Lastly, violation of indigenous laws, desecration of sacred places, disturbances of traditional livelihoods imply a notable **cultural impact** as indigenous peoples often have a spiritual connection to their lands.

Oil and gas activity, mining, damming, deforestation, chemical pesticides, water privatization and appropriation: all these activities carried out on or near indigenous peoples' territories have devastating consequences. Material consequences as they often violate sacred places, undermine food sovereignty and traditional livelihoods, and jeopardize community, but also legal consequences as these activities might violate peoples' rights.<sup>10</sup>

As a matter of fact, indigenous peoples are, sadly, more likely to experience infringements on their rights due to corporate projects both because they typically have a spiritual and symbiotic relationship with their lands and because they often suffer from discrimination and lack of representation in their home states.

In this regard, it was declared during the United Nations Global Consultation on the Right to Development that “indigenous peoples have been, in fact, victims of development policies which deprive them of their economic base - land and resources, and they are almost never the

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<sup>10</sup> Andrea Carmen “Corporations and the Rights of Indigenous Peoples: Advancing the Struggle for Protection, Recognition and Redress at the Third UN Forum on Business and Human Rights” (March 2015), Cultural Survival Quarterly Magazine <<https://www.culturalsurvival.org/publications/cultural-survival-quarterly/corporations-and-rights-indigenous-peoples-advancing>>.

beneficiaries.”<sup>11</sup> In other words, development strategies (in this context, business projects) are a direct threat to the survival of indigenous peoples.

*2 An Example of Corporate Impact: The “Kichwa Indigenous Peoples of Sarayaku v. Ecuador” Case (2012)*

The “Kichwa Indigenous Peoples of Sarayaku v. Ecuador” case (henceforth, the “Sarayaku case”) is a step forward for several reasons. Above all, it represents a great victory of indigenous communities to oil companies. Then, it is a significant application of the Indigenous and Tribal Convention, 1989 (known as the International Labour Organization Convention 169 or ILO Convention 169). This convention guarantees a certain number of indigenous rights including social, cultural and other human rights (the content of the ILO Convention 169 will be further explored). The most remarkable aspect of this convention is that it one of the only binding instrument when it comes to indigenous rights: this simple fact makes it one of the most operative international instrument. Nonetheless, it is noteworthy that the ILO Convention 169 has been ratified by only 23 countries (mainly Latin-American countries<sup>12</sup>), which is few considering that indigenous peoples are present in 90 countries worldwide<sup>13</sup>, that the Convention is supposedly entered into force on September 5<sup>th</sup>, 1991, and that the International Labour Organization has 187 Member States.

Let us go back to the Sarayaku case. In the 1990s, the State of Ecuador granted a permit to private oil company to operate oil exploration and exploitation within indigenous peoples’ territory (the Kichwa Indigenous Peoples of Sarayaku). This permit had been granted without any prior consultation with the Sarayaku peoples and, obviously, without their free, prior and informed consent. Thus, the private corporation operated its activities as usual and jeopardised the indigenous livelihood. Indeed, by exploring and exploiting the indigenous area, the company used high-powered explosives “thereby creating an alleged situation of risk for the population because, for a time, this prevented them from seeking means of subsistence and limited their rights to freedom of movement and to cultural expression.” In this case, the consequences on indigenous peoples were various (and dramatic). There was a human impact (the indigenous peoples’ survival was directly threatened as their means of subsistence were disturbed), an environmental impact (the use of explosives caused huge pollution) and a cultural impact (the corporate activity was disrespectful toward the spiritual attachment of the indigenous group to their land).

In 2010, this case was brought up to the attention of the Inter-American Commission on Human Rights, which had then identified four human rights’ violations: right of private property; right

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<sup>11</sup> *Global Consultation on the Right to Development as a Human Right – Report prepared by the Secretary-General pursuant to Commission on Human Rights resolution 1989/45*, E/CN.4/1990/9/Rev.1 (26 September 1990) at [104] and [105].

<sup>12</sup> “Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)”, International Labour Organization  
<[https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312314:NO](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO)>.

<sup>13</sup> “Issues”, Cultural Survival <<https://www.culturalsurvival.org/issues>>.



to life, judicial guarantees and judicial protection; right to freedom of movement and residence; and right to personal integrity.

In a 2012 decision, the Inter-American Court on Human Rights deemed that the State of Ecuador was liable for the violation of the rights to consultation, to indigenous communal property, and to cultural identity to the detriment of the Sarayaku Indigenous Peoples. The State was also judged responsible for jeopardizing the rights to life and personal integrity of the indigenous group. As a result, the State of Ecuador was obliged to remove all explosives from the territory of the Sarayaku peoples. Once done, the State of Ecuador must consult with Sarayaku peoples:

*“in a prior, adequate and effective manner, and in full compliance with the relevant international standards applicable, in the event that it seeks to carry out any activity or project for the extraction of natural resources on its territory, or any investment or development plan of any other type that could involve a potential impact on their territory.”*

Indeed, the Court estimated that the actions of Ecuador to contact and reach an agreement with Sarayaku peoples had been clearly insufficient, if non-existent. Besides, the use of the army to support the oil exploration by providing safety to the employees of the oil company did not help to install “a climate of trust and mutual respect in order to reach a consensus between the parties.”<sup>14</sup>

This decision is revolutionary for certain reasons. From a normative point of view, the Inter-American Court on Human Rights establishes criteria for prior and informed consultation that may be used in other cases of violations of indigenous peoples’ rights due to corporate projects in Latin America. It also recognizes indigenous communities themselves as subjects of collective rights under international law and symbolically represents the resistance of indigenous communities against large industrial companies.<sup>15</sup>

We cannot help noticing a minor (major) downside. Who was punished in the end? The State of Ecuador that authorised the oil activity but the oiling company such as still carries on executing it: the corporate activity has not been stopped because this case only concerned one block of indigenous territory. Therefore, even though such decision is ground-breaking, it does not make companies directly liable for their actions (even though we may assume that the State of Ecuador asked for remedies to the concerned corporation). In other words, the States pay but the companies (that ask the States for the authorisation to operate their activities) are still free of charges to a certain extent (although they lost their investment): they do not seem that concerned to indigenous issues.

Today, from a communication (and marketing) perspective, companies considered that it was good to recall the public that they are committed to respect human rights (everyone already saw a “fair trade” or other “responsible” label on coffee boxes). In spite of these good

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<sup>14</sup> Inter-American Court on Human Rights – Case of the Kichwa Indigenous People of Sarayaku v. Ecuador (Judgement of June 27, 2012) at [193].

<sup>15</sup> “Pueblo Indígena Kichwa de Sarayaku vs. Ecuador”, ESCR-Net <<https://www.escr-net.org/caselaw/2012/pueblo-indigena-kichwa-sarayaku-vs-ecuador>>

intentions, it is still rather rare to see companies that tackle the indigenous peoples' aspect. This is even more striking as international norms with respect indigenous rights have developed in the recent years.

### *B The Existence of International Norms*

We could refer to several international texts but the most relevant ones are definitely the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which was adopted in 2007, as well as the ILO Convention 169. These two texts appear as the most complete and the most substantial to the extent a certain number of their provisions might be taken into account by businesses while operating their activities. These provisions deal with indigenous rights to self-governance and participation.

#### *1 The Content of the UNDRIP That Might Influence Corporate Activity*

##### *a) The Rights to Self-Governance of the UNDRIP*

The most conspicuous principle is the right to self-determination, which is the right of indigenous peoples to freely determine their sovereignty without influence from outside. Concretely, this enables indigenous peoples to “freely pursue their economic, social and cultural development”.<sup>16</sup> In the context of corporate activity, such provision might be construed as the right of indigenous peoples to participate in the decision-making of corporate projects that affect their rights, lands or communities. This position is reinforced by article 18 of the UNDRIP, which states that indigenous peoples have the right “to take part in the decision-making in all matter affecting them” through self-appointed representatives.<sup>17</sup>

The second major self-governance prerogative is the right of indigenous peoples “to set their own priorities and directions for development of their communities”.<sup>18</sup> Thus, indigenous groups are entitled to determine their own strategies for their communities' economic, social and cultural development in consideration of outside development. They may set their own development objectives, the pace at which their development occurs, and the degree to which their institutions would be changed.<sup>19</sup> In the case of indigenous peoples living in voluntary isolation, they may be entitled to choose to remain in isolation as it would be an expression of their right of self-determination.<sup>20</sup>

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<sup>16</sup> United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), article 3.

<sup>17</sup> UNDRIP, article 18.

<sup>18</sup> UNDRIP, article 23.

<sup>19</sup> Elena L. Pasquini “4 ways to involve indigenous communities in development projects” (16 March 2015), Devex <<https://www.devex.com/news/4-ways-to-involve-indigenous-communities-in-development-projects-85696>>.

<sup>20</sup> Amy K. Lehr “Indigenous Peoples' Rights and the Role of Free, Prior and Informed Consent” (20 February 2014), United Nations Global Compact <<https://www.unglobalcompact.org/library/931>>.

Further self-governance rights include article 4 (right for indigenous peoples to govern themselves “in matters relating to their internal or local affairs” as well as how to finance “their autonomous functions”), article 5 (“right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions”), article 36 (“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”), and article 39 (right to involve in matters impacting them at an international level). This list could be even more exhaustive but the key point is to realise that all these rights may entitle indigenous communities to oppose corporate projects that may affect them.

*b) The Rights to Participation of the UNDRIP*

The first major provision related to indigenous peoples’ participation is the “right to participate in decisions that would affect their rights, individually, through representatives of their choosing and through their own decision-making institutions.”<sup>21</sup> This provision enables indigenous peoples to involve in corporate projects through their own traditional institutions.

The second, and crucial, provision deals with the Free, Prior and Informed Consent (FPIC), which requires States

*“to consult and cooperate with indigenous peoples through their own representative institutions, and to obtain their free, prior and informed consent before adopting or implementing legislative or administrative measures that may affect them, including, for example, the issuance of licences or concessions of indigenous lands to business.”*<sup>22</sup>

Concretely, indigenous peoples may give or withhold their consent for the use of their lands, resources or traditional knowledge.

Other rights to participation include article 20 (right “to maintain and develop their political, economic and social systems or institutions” as well as “their own means of subsistence and development” and “to engage freely in all their other traditional and economic activities.”) and article 21 (right to improve their economic and social conditions).

In the context of corporate activity, when engaging with indigenous peoples, businesses should examine indigenous peoples’ ways of life and ensure that they do not negatively impact them. But above all, businesses should involve indigenous peoples and obtain their consent in any subjects that could impact them. Unfortunately, despite the substantial content of the UNDRIP, this declaration does not seem to be that effective.

*2 The Content of the ILO Convention 169 That Might Influence Corporate Activity*

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<sup>21</sup> UNDRIP, article 18.

<sup>22</sup> UNDRIP, article 19.

a) *The Rights to Self-Governance of the ILO Convention 169*

Contrary to the UNDRIP, the ILO Convention 169 does not use the terms “right to self-determination” but still has provisions related to the rights of indigenous peoples “to enhance control over their destinies”<sup>23</sup>. Instead, the ILO Convention 169 uses the words “self-identification”<sup>24</sup> and “self-reliance”<sup>25</sup>

First, indigenous peoples may:

*“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 which concern them.”*<sup>26</sup>

In other terms, indigenous peoples can choose the members of public bodies that take decisions that may affect them. From a business perspective, it might imply that indigenous peoples may elect the members of committees that authorise corporate projects.

The ILO Convention 169 goes even further when it comes to the indigenous rights of self-development and management. Indeed, article 7.1 states that indigenous peoples:

*“have the right 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.”*

This article encompasses social, cultural and spiritual aspects. Indigenous peoples have the right to intervene in developments that may affect their livelihoods (“lives”), their religions (“beliefs”), their governance (“institutions”) and their cultural wellbeing and connection to their lands. From a corporate perspective, such article might be construed as a hindrance to disturb indigenous peoples’ lives and wellbeing in general.

The ILO Convention 169 also directly tackles the right of indigenous peoples to maintain their own economy. Article 23.1 sets out that:

*“Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.”*

In other terms, indigenous peoples have the right to develop and maintain their own independent economy in order to remain self-sufficient. The States themselves must ensure

<sup>23</sup> Sedfrey M. Candelaria “Comparative Analysis on the ILO Indigenous and Tribal Peoples Convention No. 169, UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and the Indigenous Peoples’ Rights Act (IPRA) of the Philippines” (June 2012), ILO.org <[https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-manila/documents/publication/wcms\\_171406.pdf](https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-manila/documents/publication/wcms_171406.pdf)>

<sup>24</sup> ILO Convention 169, article 1

<sup>25</sup> ILO Convention 169, article 23.1

<sup>26</sup> ILO Convention 169, article 6-1-b

that this indigenous economy is strengthened and therefore not jeopardized by non-indigenous activities bearing in mind “the importance of sustainable and equitable development”<sup>27</sup>. From a business standpoint, such provision might enable indigenous communities to oppose any corporate project that may disturb their economy or their sustainable development.

*b) The Rights to Participation of the ILO Convention 169*

The ILO Convention 169 also recognises indigenous peoples’ rights to participate at all levels of development processes. Indeed, host States must ensure that indigenous groups are in a position to take initiatives and to participate in the decision-making of projects that may affect them.

Article 6.1(b) obliges States to:

*“establish means by which these 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 which concern them”.*

The ILO Convention 169 also has a Free, Prior and Informed Consent provision. States need to “consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly”. The Convention then specifies that “the consultations carried [...] shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.” From a corporate perspective, it means that companies need to consult with indigenous peoples for all matters that may affect them or their rights. This consultation should aim to reach an agreement to business activity. However, it is worth noting that the consultation is mandatory but not the agreement: thus, this does not mean that if there is no agreement, no corporate activity will be done.

Lastly, article 7.1 recognises the right of indigenous peoples to “participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly”.

*C The Insufficiencies of International Norms*

Even though we might not have sufficient hindsight to assess the effectiveness of the international conventions related to indigenous peoples’ rights, these conventions do not seem to be that efficient in their purpose of protecting the said indigenous peoples.

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<sup>27</sup> ILO Convention 169, article 23.2

Regarding the UNDRIP, the most obvious argument in this regard would be that the UNDRIP is not legally binding, making it overall ineffective because it is unenforceable. Nonetheless, such statement is not compelling. For instance, the International Labour Organisation (ILO) Convention 169 sets up a duty for States to consult with indigenous peoples concerning development projects, and to obtain their consent<sup>28</sup>, but it has not been proven to be successful from a corporate perspective although this Convention is legally binding.

### *1 The Absence of Reference to Companies*

In fact, the main weakness of these international norms in general is that they tend to address the role of State governments, not companies, when engaging with indigenous peoples. Obviously, companies might try to avoid complicity in violations of indigenous rights but the texts do not specifically refer to them. In this situation, companies are simply not subjected to obligations regarding indigenous peoples.

Fortunately, this aspect has been pointed out by the United Nations Special Rapporteur on the Rights of Indigenous Peoples who noted that it is “evident...that the rights that corporations should respect include the rights of indigenous peoples as set forth in the U.N. Declaration on the Rights of Indigenous Peoples and in other sources [such as the ILO Convention 169].”<sup>29</sup> Besides, the U.N. Working Group on the issues of human rights and transnational corporations stated 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>30</sup>

The message is clear: companies, we do not refer to you but do not think that you are free of obligations. Especially since the impact of corporate activity on indigenous peoples is significant in a lot of ways.

Moreover, it is worth noting that very often when it comes to projects affecting indigenous peoples, the involvement of the host State is needed. Thus, companies are necessarily required to partner with governments (especially in case of FPIC practices). The States (provided that they are members of the United Nations or signatories of the ILO Convention 169) are subject to indigenous peoples’ rights obligations: by partnering the State, the companies become subject to the international conventions to a certain extent. Of course, it only works with development projects that require the State’s approval. And this is a problem because “development project” is a rather vague term.

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<sup>28</sup> ILO Convention 169, article 16

<sup>29</sup> U.N. Special Rapporteur on the Rights of Indigenous Peoples, U.N. Human Rights Council, 21st session, A/HRC/21/47, 6 July 2012, at [59].

<sup>30</sup> U.N. Working Group on the issue of human rights and transnational corporations and other business enterprises, U.N. Human Rights Council, 21st session, A/68/279 (1-5 October 2018 A/68/279, p. 23.

## *2 The Lack of Concrete Scope*

The UNDRIP and the ILO Convention 169 constantly refer to “development projects”, a term that is not defined but that definitely narrows the scope of indigenous rights. Development projects seem to be seen as plans related to natural resources but indeed nobody seems to know what it is. They seem to be initiated by the host States but does it cover the projects that are purely managed by the corporation themselves?

The UNDRIP refers to “developments affecting them and their lands, territories and resources”<sup>31</sup> and in particular “in connection with the development, utilization or exploitation of mineral, water or other resources”<sup>32</sup>.

The ILO Convention 169 is even more vague. Sometimes it refers to “legislative or administrative measures which may affect [indigenous peoples] directly”<sup>33</sup>, or some other times to “plans and programmes for national and regional development which may affect them directly”<sup>34</sup> or even to “plans for the overall economic development”<sup>35</sup>.

Of course, some might argue that it is sufficiently clear but the fact is that...it is not. All these terms may basically mean anything and everything. Yes, there seems to be a consensus that any project related to the utilisation and exploitation of natural resources within an indigenous territory is a “development project” and is thus subject to the international conventions on indigenous peoples’ rights. However, what if the project does not deal with natural resources and is not executed specifically on an indigenous territory but nearby? The conventions say “projects that affect indigenous peoples” but what are the criteria to assess the disturbance? As long as the scope of intervention of these international instruments will not be more specific, companies might try to run away from these obligations.

Therefore, the legal framework related to indigenous rights seems rather weak and incomplete when it comes to oblige corporations to integrate indigenous concerns in the way they manage their operations. However, this legal framework may serve as a basis for companies.

## *II The Possibility of Improvements*

### *A The Shift of Corporations’ Business Models*

At this stage, this paper has been rather pessimistic: that is why I would like to tackle positive aspects as some improvements are both possible and feasible. The common problem with sustainability in general, and indigenous concerns in particular, is that everyone agrees on

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<sup>31</sup> UNDRIP, preamble.

<sup>32</sup> UNDRIP, article 32.2.

<sup>33</sup> ILO Convention 169, article 6.1(b)

<sup>34</sup> ILO Convention 169, article 7.1

<sup>35</sup> ILO Convention 169, article 7.2

adopting a sustainable approach but nobody has a clue about making sustainability operational. To operate sustainably, a company should act in a way that is consistent with and supports the well-being of indigenous peoples and economies of the location they operate. The international texts about indigenous rights do not tell companies how to do this: they are not adapted to the economic reality.

### *1 The Variety of Propositions to Encourage Businesses to Consider Indigenous Concerns*

We could mention many frameworks that urge companies to be more aware of the impact of their activity on indigenous peoples.

For instance, the International Finance Corporation (IFC) Performance Standards tackle the indigenous aspect. In short, these standards aim to provide companies for a framework and resources in order to enhance their environmental, social and corporate governance (ESG) practices.<sup>36</sup> The companies that adhere to the programme should make their best efforts to commit to eight environmental and social standards. Most notably, IFC Performances Standard 7 precisely targets indigenous peoples.<sup>37</sup> Recognising the vulnerability and marginalisation of indigenous groups, the standard establishes a brief, but still quite substantial, business plan for companies to integrate indigenous concerns. For example, companies should carry out due diligence in order to identify, “through an environmental and social risks and impacts assessment process, all communities of Indigenous Peoples within the project area of influence who may be affected by the project”.<sup>38</sup> In particular, the companies should evaluate “the nature and degree of the expected direct and indirect economic, social, cultural (including cultural heritage), and environmental impacts on them”. Also, the IFC Performance Standard 7 includes a requirement of FPIC for certain projects affecting indigenous peoples that is project affecting lands owned by indigenous groups or “under customary use”, which is even in the case indigenous peoples do not possess any legal title to the land as long as indigenous groups use these lands, whether it be seasonal or cyclical use, “for their livelihoods, or cultural, ceremonial, and spiritual purposes”.

Other organisations tackling the impact of corporations on indigenous peoples include the European Bank of Reconstruction and Development (ERBD) and the Inter-American Development Bank. The ERBD is an international institution offering project financing for banks, industries and businesses.<sup>39</sup> The ERBD considers sustainable aspects when it assesses requests for financing and established 10 requirements in regard. Performance Requirement 7

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<sup>36</sup> “The Business Case for Sustainability”, International Finance Corporation (IFC) <[https://www.ifc.org/wps/wcm/connect/Topics\\_Ext\\_Content/IFC\\_External\\_Corporate\\_Site/Sustainability-At-IFC/Business-Case/](https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Business-Case/)>

<sup>37</sup> “Performance Standard 7 – Indigenous Peoples”, IFC <[https://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/sustainability-at-ifc/policies-standards/performance-standards/ps7](https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/performance-standards/ps7)>

<sup>38</sup> “Performance Standard 7 – Indigenous Peoples”, IFC <[https://www.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7\\_English\\_2012.pdf?MOD=AJPERES](https://www.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES)>

<sup>39</sup> “Who We Are?”, ERBD <<https://www.ebrd.com/who-we-are.html>>



deals with indigenous peoples and requires FPIC implementation plans.<sup>40</sup> Loans for financing might be refused when companies have not sufficient plans regarding indigenous peoples. Likewise, the Inter-American Development Bank is a source of financing for Latin America and Caribbean businesses and targeted the indigenous peoples' aspect by developing "operational policies on indigenous peoples".<sup>41</sup>

Lastly, industrial organisations tackle the indigenous peoples' aspect. The International Council on Mining and Metals (ICMM) issued an "Indigenous Peoples and Mining Good Practice Guide".<sup>42</sup> This guide is rather remarkable as it provides for a toolkit to implement indigenous concerns including the management of the corporate impact and some guidance to deal with grievance. For example, the ICMM Guide encourages companies to implement the FPIC while "ensuring that engagement is consistent with Indigenous Peoples' decision-making processes". Similarly, the Roundtable on Sustainable Palm Oil and Forest Stewardship<sup>43</sup> (that gathered companies and governments) highlighted businesses' codes of conduct that include the FPIC.

The only flipside is that these guides deal with a specific sector and not with all scopes of works. Even though indigenous peoples are mainly affected by industrial activities, some other sectors such as tourism might deeply impact them. A global business plan is therefore needed.

## *2 The Most Compelling Solution: The United Nations Global Compact*

The United Nations Global Compact might be the most relevant solution as its scope is "global" and thus enables consistency and alignment between practices regardless of the scope of activity. Broadly speaking, the U.N. Global Compact is a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten principles in the areas of human rights, labour, environment, and anti-corruption.<sup>44</sup> In other words, by joining the Global Compact, companies undertake to integrate sustainable concerns into their business model. It provides companies for an operational business plan.

The U.N. Global Compact Guiding Principles stipulate that enterprises need to have in place certain policies and processes to demonstrate that they are respecting human rights. These include a policy commitment to respect human rights, a human rights due diligence process, and processes to enable the remediation of adverse human rights impacts. Such approach is the basis for all human rights-related good business practices. Indeed, the U.N. Global Compact Guiding Principles specify that the corporate responsibility to respect human rights refers to all

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<sup>40</sup> "Performance Requirements", ERBD <<https://www.ebrd.com/who-we-are/our-values/environmental-and-social-policy/performance-requirements.html>>

<sup>41</sup> "Flagship Projects with Indigenous Peoples", IADB <<https://www.iadb.org/en/topics/gender-indigenous-peoples-and-african-descendants/flagship-projects-with-indigenous-peoples%2C17823.html>>

<sup>42</sup> "Indigenous Peoples and mining good practice guide", ICMM <<https://www.icmm.com/en-gb/publications/mining-and-communities/indigenous-peoples-and-mining-good-practice-guide>>

<sup>43</sup> Roundtable on Sustainable Palm Oil <[https://www.rspo.org/file/RSPO\\_factsheet\\_120705\\_25july.pdf](https://www.rspo.org/file/RSPO_factsheet_120705_25july.pdf)>

<sup>44</sup> "The Ten Principles of the UN Global Compact", United Nations Global Compact <<https://www.unglobalcompact.org/what-is-gc/mission/principles>>.

internationally recognized human rights, which enables to include the rights of indigenous peoples.

Principle 1 of the Global Compact calls upon companies to respect and support the protection of internationally proclaimed human rights<sup>45</sup> while Principle 2 calls upon them to ensure that they are not complicit in human rights abuses.<sup>46</sup> To put it simply, the Global Compact does not tackle indigenous issues such as but indigenous aspects stem from these two human rights principles.<sup>47</sup>

Speaking of which, the U.N. Global Compact has released a 96-pages guide about the implementation of indigenous peoples' rights' considerations in corporate activity.<sup>48</sup> The purpose of this guide is "is to help business understand, respect, and support the rights of indigenous peoples by illustrating how these rights are relevant to business activities". The main difference with the guides previously mentioned is that any kind of business might be concerned.

This guide tries to encourage business to carry out consultations and partnerships directly with indigenous peoples "on a local level". It focuses on the interaction between business and indigenous peoples and suggest a broad set of initiatives business may take to respect and support the human rights of indigenous peoples. The measures preconized include due diligence processes, grievance mechanisms and a detailed analysis of the UNDRIP and its impact on business.

### *B The Business Implementation of Indigenous Rights: The Case of the FPIC*

We could discuss about the implementation of indigenous rights in corporate activity for hours but the most comprehensive illustration comes from the Free, Prior and Informed Consent (FPIC). The implementation of this sole right would be a great victory for indigenous peoples. In an ideal world, companies that launch a project affecting indigenous communities should ask for the consent of the latest in order to obtain a social license to operate.

Obviously, companies will not act by themselves if they do not have an economic purpose. Any corporate policy or strategy aims to achieve advantage for the company that is economic growth. Companies need to understand that integrating indigenous peoples' concerns in general, and the FPIC in particular, should be regarded as an opportunity and might be beneficial for their business (and possibly help them to obtain a competitive advantage notably regarding the reputational risk). Therefore, why should companies adopt the FPIC principle?

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<sup>45</sup> "Principle One: Human Rights", United Nations Global Compact <<https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-1>>.

<sup>46</sup> "Principle Two: Human Rights", United Nations Global Compact <<https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-2>>.

<sup>47</sup> "Indigenous Peoples", United Nations Global Compact <<https://www.unglobalcompact.org/what-is-gc/our-work/social/indigenous-people>>.

<sup>48</sup> "The Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples", United Nations Global Compact <<https://www.unglobalcompact.org/library/541>>.

Let us speak business and give the answer that businesses expect: to save money! Obtaining the consent of indigenous communities merely reduces both financial and legal risks. Financial because indigenous peoples might oppose the business project, causing operational delays that may cost a large amount of money. Legal because indigenous peoples are more and more aware of their rights and a successful trial might oblige companies to abandon the project, paying remedies, and losing all the invested money. From this perspective, that might help companies to seriously consider the implementation of the FPIC. The question is: how could we make the FPIC operational from a business standpoint? In other words, what action plan?

It all starts with due diligence with respect to indigenous communities potentially affected by the development project: such inquiry should include the indigenous culture but also the indigenous decision-making.<sup>49</sup> In this process, companies should actually involve indigenous peoples themselves: indeed, who could better speak about their cultural traditions (e.g. sacred sites)?

Due diligence should also be legal. There are around 370 million indigenous peoples in over 90 countries in the world. That represents a significant amount of different legal systems. It is definitely worth looking at the legal system of the host country, its international commitments concerning indigenous communities, the jurisprudence in this regard, etc. In short, it is about identifying the legal practices with respect to indigenous peoples in the host territory.

Once it is done, the consultation may begin: this milestone might almost be perceived as a negotiation as it consists of exchanging information and giving opinions and expertise. Very much like any commercial negotiation, every party should have enough time to assess the project and the companies better not wait for the last minute to speak about it to indigenous peoples. This is the common mistake: invest lots of money in the project and ask indigenous peoples in the last place. During this negotiation, indigenous peoples should be provided for all the relevant information concerning the project, including known and likely impacts.

Once this consultation has been carried out, the consent process may begin. The trickiest part is to determine how the consent should be given. The U.N. Global Compact recommends to use indigenous decision-making.<sup>50</sup> Companies should work with indigenous communities in order to identify representative structures and follow the adequate process. Of course, a question arises: what if this process infringes other human rights such as women's rights? There is no solution at this point. In any case, companies should ensure that indigenous peoples have input into the final decision. The consent should be formalised in an agreement and here we go. Besides, every significant modification in the project (variation in the scope of work, etc.) should require a new consent process.

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<sup>49</sup> Amy K. Lehr "Indigenous Peoples' Rights and the Role of Free, Prior and Informed Consent" (20 February 2014) United Nations Global Compact <<https://www.unglobalcompact.org/library/931>>.

<sup>50</sup> "Practical Supplement to the Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples", United Nations Global Compact <<https://www.unglobalcompact.org/library/1451>>.

*C An Example of Good Practice: the Right to Directly Participate in the Decision-Making*

First question: how different is this part from the previous paragraph? When we speak about the FPIC, indigenous peoples are not part of the company. Their consent is required afterwards but the development project has been initiated without their involvement. What if companies adopted an indigenous committee in their corporate governance? At this stage, there is no such example but a Crown agency in New Zealand might act as a role model: the Environmental Protection Authority (EPA).

To sum up, the EPA is New Zealand's environmental regulator and notably makes decisions regarding industrial activities in offshore waters and allows companies to import hazardous substances or new organisms. Such decisions have significant environmental impact. For example, the importation of an explosive, toxic or flammable new substance might have dramatic consequences on contact with air or water. Similarly, marine consents often deal with petroleum or mineral activities and have significant impact on indigenous peoples.

What is truly ground-breaking is that the EPA incorporates Maori perspectives into decision making as it has a Maori Advisory Committee (named “Ngā Kaihautū Tikanga Taiao”).<sup>51</sup> This Committee provides for advice to the EPA to ensure Maori perspectives are taken into account. It reviews the EPA's strategies and recommends processes for ensuring that Maori perspectives are incorporated in decision making. It advises on and monitors the EPA's activities, including statutory decision making. In short, it gives a broad overview of Maori interests and perspectives. There is a caveat though: their recommendations are not binding, which might hinder them to have an actual impact.

On a broader scale, the EPA adopted a policy called the “He Whetū Mārama” that is the commitment of the EPA to consider, in all decision-makings, the unique relationship of Maori to the environment.<sup>52</sup> Such policy is guided by the principles of the Treaty of Waitangi including partnership (which requires that “the EPA acts reasonably, honourably, and in good faith to ensure the making of informed decisions on matters affecting the interests of Māori”), protection (which means that the EPA must “take positive steps to ensure that Māori interests, knowledge, and experience are valued in its decision making and activities”) and participation (that is that the EPA procedures must enable “the effective engagement and input of Māori”). The EPA policy also adds a fourth principle, which is potential (that “recognises that EPA decision making and activities have impacts on the direction for future growth and development in a Māori cultural and economic setting”). Such policy appears as substantial and exhaustive as it covers cultural, social and environmental aspects.

Nonetheless, in spite of these remarkable policies, it is worth noting that the EPA is a Crown entity of 160 employees. This is nowhere comparable to large companies but it could still provide them for some guidance.

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<sup>51</sup> “Incorporating Maori Perspectives into Decision Making”, The Environmental Protection Authority <<https://www.epa.govt.nz/assets/Uploads/Documents/Te-Hautu/EPA-Maori-Perspectives.pdf>>.

<sup>52</sup> “He Whetū Marama”, The Environmental Protection Authority <<https://www.epa.govt.nz/assets/Uploads/Documents/Te-Hautu/EPA-He-Whetu-Marama-English-poster.pdf>>

### *Conclusion: Companies Have a Long Way to Go*

International norms with respect to indigenous rights do not address corporate activity, which is problematic: they do not provide for guidelines about how to make these provisions operational for businesses. Therefore, it is incumbent on companies to develop such policies. But a voluntary approach quickly encounters some limits as companies might not act by themselves if there is no economic interest. Thus, there should be some mandatory guidelines.

For the record, my point has not been to be harsh on companies but to suggest a collaboration between companies and indigenous peoples. I am deeply convinced that such collaboration may exist. For instance, what if companies concluded directly with indigenous peoples? This happens in Russia, whose constitution gives indigenous groups the right to sign direct agreements with oil companies (which are prohibited from drilling without the permission of the ancestral community holding the rights to the use of lands). Indigenous communities in Russia also have the possibility to take disputes with a corporation to a court of arbitration.<sup>53</sup> Therefore, a direct collaboration between companies and indigenous groups is not unrealistic.

This aspect could have been more developed in this paper as Russia represents a unique framework but the collaboration between Russian companies and indigenous peoples is apparently not that satisfying. Even though companies reaffirm their commitments towards indigenous peoples<sup>54</sup>, recent reports indicate that Russian indigenous communities are not “benefitting equally” from partnerships with companies<sup>55</sup>, the latest privileging “noisy confrontation”<sup>56</sup>. Therefore, the U.N. Global Compact appeared as a more concrete and operational approach rather than saying that “companies must conclude with indigenous peoples” (without providing any guidance).

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<sup>54</sup> “Engaging with the Russian Far North”, GazProm Neft <<http://www.gazprom-neft.com/social/indigenous-people/>>

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<sup>56</sup> “The Delicate Subject in Northern Russia of Indigenous Rights” (April 11, 2017), News Deeply <<https://www.newsdeeply.com/arctic/articles/2017/04/11/the-delicate-subject-in-northern-russia-of-indigenous-rights-2>>

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