Indigenous Peoples' Rights to Sacred Sites and Traditional Cultural Properties and the Role of Consultation and Free, Prior and Informed Consent

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Sacred sites and traditional cultural properties are crucial to the preservation of indigenous peoples' culture and society, and are increasingly recognised by international and state law and non-governmental entities. This article explores the various legal and non-legal documents addressing sacred sites and traditional cultural properties, and the duties and responsibilities imposed on businesses involved in the resource extraction industries: conducting consultation with affected indigenous peoples and obtaining, at times, their free, prior and informed consent for the project. While by no means exhaustive, this broad survey encompasses laws and court decisions from international bodies, the United States and examples from other countries, international guidelines, industry standards and laws of indigenous peoples. It concludes

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that conducting good faith, socially appropriate and respectful consultation with indigenous peoples prior to conducting extraction activities that will or may affect sacred sites and traditional cultural properties is required not only by the law, but by good business practice. Consultation, obtaining free, prior and informed consent, and reaching formalised agreements result in the avoidance of protracted public litigation, and an improved business reputation when commencing future development projects on indigenous lands.

Introduction

For indigenous peoples[1] around the globe, sacred sites and other traditional cultural properties (TCP)[2] are of extreme importance to the preservation of their culture and society. Often, sacred sites are part of the natural landscape; and often, in whole or in part, are the site of mineral wealth and locus of development projects by extractive industries, and those industries devoted to removal and processing of oil, gas, coal and minerals. Historically, businesses have often proceeded with development projects without due consideration to the importance sacred sites have to affected indigenous peoples, and as a result have caused damage, at times irreparable. In recent years, however, international law, including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),[3] and domestic laws in States[4] around the world recognise an indigenous right to access, use and protect sacred sites. Several international law sources, including industry standards, suggest or compel that States and business entities, corporations and multinational enterprises (MNEs) conduct consultation or obtain the free, prior and informed consent (FPIC) of affected indigenous peoples prior to commencement of and during development projects that affect sacred sites. While the care and diligence prompted by these developments pose economic and operational challenges, respecting and reasonably protecting sacred sites and cultural resources, in cooperation with indigenous peoples and regardless of governmental involvement, should result in decreased

1 There is no universally accepted definition of the term 'indigenous peoples', see World Bank Operational Policy 4.10, para 3 (stating that 'Indigenous Peoples may be referred to in different countries by such terms as "indigenous ethnic minorities", "aboriginals", "hill tribes", "minority nationalities", "scheduled tribes", or "tribal groups"'), and for that reason we choose not to capitalise the term in this article except when quoting sources that have done so.

2 For convenience, when this article discusses sacred sites and TCPs generally, the term 'sacred sites' is inclusive of both terms.

3 GA Res 61/295, UN Doc A/Res/61/295 (13 September 2007).

4 The use of the capitalised term 'States' refers to countries generally, whereas 'states' refers to the individual states making up a country.

uncertainties and litigation costs, improved global image and reputation, better community relations and preservation of sacred sites and TCPs for the benefit of indigenous peoples concerned and humankind.

Indigenous peoples' rights to sacred sites, like indigenous peoples' rights generally, are considered part of international human rights law. Indigenous rights, however, are *sui generis* because they are based in the customs and traditions of the peoples concerned, rather than an established corpus of positive law.[5] As *sui generis* rights, the duties and responsibilities on States and non-State actors to protect and respect those rights must be considered in the specific context of the rights involved. 'Protect, respect, remedy' is the United Nations' current framework concerning business and human rights, and provides a useful shorthand description of the outlook corporations should take with regard to sacred sites.[6] While international human rights law primarily imposes duties on States, an increasing number of international legal norms are being imposed on individuals and corporations, including those in the extractive industries whose business affects sacred sites. Corporations may be sued in civil lawsuits for violation of indigenous rights, and face barriers to doing business, including licence or contract revocations, as well as reputation-based challenges, when they do not ensure compliance with indigenous rights.

This article focuses on the rights of indigenous peoples to sacred sites, and how the duty imposed by international and domestic law, as well as other sources, on States and corporations to consult and to seek FPIC is used to protect those rights.[7] The second part provides an overview of the right to sacred sites established in international law, the law of the United States and examples from the laws of other countries. The third part reviews legal requirements or voluntary standards to conduct consultation or seek FPIC when rights to sacred sites are concerned. The fourth part discusses the various forums in which indigenous peoples may seek to protect their rights to sacred sites when those rights have been violated without consultation or FPIC. The fifth part summarises the difficulties presented by requirements to conduct consultation and seek FPIC when land considered a sacred site or TCP is targeted for development, and offers ideas for successfully analysing, negotiating and working with indigenous populations who will be affected by extractive development projects.

5 See *Cal v Attorney General*, Claim Nos 171 & 172 of 2007, para [101] (Supreme Court, Belize).

6 Adopted by the Human Rights Council, A/HRC/RES/17/4 (6 July 2011).

7 This article does not purport to be an exhaustive review.

Rights of indigenous peoples to access, use and protect their sacred sites

This section discusses the rights of indigenous peoples to their sacred sites, reviewing a non-exhaustive body of international covenants and treaties, non-binding international declarations, State laws and non-binding guidelines. This discussion necessarily includes mention of indigenous rights to land or territory, as sacred sites are often associated with what may be termed a 'cultural landscape'.

What is a sacred site or traditional cultural property?

There is no precise definition of 'sacred site' or 'TCP'. Both may be identified as cultural resources or cultural heritage, may be tangible or intangible and may include geographical locations. Their legal recognition and protection are related to the right of indigenous peoples to self-determination.[8] The Akwé: Kon Guidelines state 'sacred site' 'may refer to a site, object, structure, area or natural feature or area, held by national Governments or indigenous communities to be of particular importance in accordance with the customs of an indigenous or local community because of its religious and/or spiritual significance'.[9] The World Bank defines 'physical cultural resources' as 'movable or immovable objects, sites, structures, groups of structures, and natural features and landscapes that have archaeological, paleontological, historical, architectural, religious, aesthetic, or other cultural significance'.[10]

The term 'traditional cultural property' is related, and is primarily used in US laws. A TCP is a property 'eligible for inclusion in the National Register[11] because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history and (b) are important in maintaining the continuing cultural identity of the community'.[12] It is difficult, if not impossible, to identify a sacred site without

8 Valentina S Vadi, 'When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law' (2011) 42 Colum Hum Rts L Rev 797, 818.

9 Secretariat of the Convention on Biological Diversity, Akwé: Kon Guidelines para 6(g) (2004). The Akwé: Kon Guidelines were drafted as a result of the 2004 Convention on Biological Diversity.

10 The World Bank, Operational Manual, OP 4.11, para 1 (July 2006).

11 The National Register is an official register of federal government documents in the United States.

12 See National Park Service, *National Register Bulletin 38*, Guidelines for Evaluating and Documenting Traditional Cultural Properties 1 (1990); Sandra B Zellmer, *Cultural and Historic Resources Sacred Sites, and Land Management in the West*, Sp Inst on Pub L, Reg and Mgt, Paper No 3, 3–4 (Rocky Mt Min L Inst 2003).

consulting the peoples who may consider a site sacred; even then, the site may be so sacred that it cannot be specifically identified. Additionally, it is important to consider that sacred sites may have certain restrictions on access, or specific protocols that must be followed.

International law

In binding international conventions, non-binding declarations and guidelines, international law recognises the right of indigenous peoples to protection of and access to their sacred sites. Documents developed by the United Nations provide the broadest support for this right. The Universal Declaration of Human Rights (UDHR), a founding document of human rights law, requires universal respect for human rights.[13] Although the UDHR does not expressly protect sacred sites, its protection of property rights (Article 17), religion (Article 18) and community culture (Article 27) lays the groundwork for recognition of an indigenous right to sacred sites. Two United Nations covenants provide indirect protection for sacred sites based primarily on the right to self-determination. The International Covenant on Civil and Political Rights (ICCPR)[14] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[15] share Article 1, providing that '[a]ll peoples have the right of self-determination' and the right to 'freely dispose of their natural wealth and resources'. The ICCPR, which enjoys much greater State adherence, protects freedom of religion (Article 18) and the rights of minorities 'to enjoy their own culture, to profess and practice their own religion, or to use their own language' (Article 27). Article 27 may be violated by State permission of development on indigenous peoples' land.[16] The International Convention on the Elimination of All Forms of Racial Discrimination prohibits discrimination based on race,[17] and the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage protects cultural knowledge and practices that may be associated with particular landscapes.[18]

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13 GA Res 217A (III), UN Doc A/810 (1948) (prologue requires 'every organ of society' to respect and work towards the realisation of human rights).

14 Opened for signature 19 Dec 1966, 999 UNTS 171, 6 ILM 368.

15 Opened for signature 19 Dec 1966, 993 UNTS 3, 6 ILM 360.

16 See *Lubicon Lake Band v Canada*, UN Human Rights Committee Comm No 167/1984 (1990); *Länsman v Finland*, UN Human Rights Committee Comm No 511-1992 (1994).

17 Opened for signature 21 Dec 1965, 660 UNTS 195.

18 Opened for signature 17 Oct 2003, Art 1.

UNDRIP, a non-binding declaration,[19] most strongly asserts and protects the rights of indigenous peoples to their traditional lands and sacred sites. Cultural traditions and customs, including archaeological and historical sites, are protected in Article 11(1). Article 12(1) protects spiritual and religious rights, including 'the right to maintain, protect, and have access in privacy to their religious and cultural sites'. Article 24(1) protects the conservation of traditional medicinal sources. Article 25 provides 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'. Article 26 recognises rights to lands traditionally used or occupied. Article 29(1) recites the right to 'the conservation and protection of the environment and the productive capacity of their lands or territories and resources'. Article 32(1) provides the right 'to determine and develop priorities and strategies for the development or use of their lands or territories or other resources'.

The International Labour Organization's Indigenous and Tribal Peoples Convention 169 (ILO 169)[20] is legally binding on its ratifying countries. Article 13(1) requires governments to respect 'the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories… which they occupy or otherwise use, and in particular the collective aspects of this relationship'. Article 14(1) requires States to protect the right of indigenous peoples to access lands they have traditionally used.

Regional governmental organisations provide protection for sacred sites in their human rights documents. The European Convention for the Protection of Human Rights and Fundamental Freedoms[21] includes protection of private and family life (Article 8), protection of religion (Article 9) and guarantee of non-discrimination (Article 14). The African (Banjul) Charter on Human

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19 The United Nations Special Rapporteur on the rights of indigenous peoples, James Anaya, describes UNDRIP thus: 'Although not a treaty, the Declaration represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law.' Report, A/HRC/21/47 (6 July 2012).

20 International Labour Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, ILO Official Bull 59 (entered into force 5 September 1991); see also UN Human Rights Committee, Concluding observations on the fourth report of the United States of America (adopted March 2014), para 25 ('The State party should adopt measures to effectively protect sacred areas of indigenous peoples against desecration, contamination and destruction and ensure that consultations are held with the communities that might adversely be affected by State party's development projects and exploitation of natural resources with a view to obtaining their free, prior and informed consent for the potential project activities').

21 Opened for signature 11 April 1950, 213 UNTS 221, ETS No 5.

and Peoples' Rights[22] protects the free practice of religion (Article 8), the right to property (Article 14), the right to cultural life (Article 17.2), the right to 'freely dispose of… wealth and natural resources' (Article 21.1) and the right to 'economic, social and cultural development' (Article 22.1). These rights, however, are limited by the rights of others, and the rights of the States to engage in development. The Asian Human Rights Charter[23] protects the environment and requires development to be sustainable, 'in a manner consistent with our obligation to future generations' (Article 2.9). Article 6 protects rights to cultural identity and to religion. Article 15.2b states '[t]he promotion and enforcement of rights is the responsibility of all groups in society, although the primary responsibility is that of the state'.

The American Convention on Human Rights (American Convention) is ratified by the majority of countries in the Organization of American States (OAS)[24] (but not the United States or Canada). Article 21(1) provides for 'the right to the use and enjoyment of property' that may be overcome by the exercise of other rights. Article 21(2) prohibits depriving individuals of their property 'except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law'. The Inter-American Court of Human Rights, in *Kichiwa Indigenous People of Sarayaku v Ecuador* (*Sarayaku*), interpreted Article 21 of the American Convention, in conjunction with other human rights, to provide that '[u]nder international law, indigenous people cannot be denied the right to enjoy their own culture, which consists of way of life strongly associated with the land and the use of its natural resources'.[25]

US laws

US laws on sacred sites and TCPs discussed in this section are relatively robust and therefore may be instructive on issues encountered by other States, or in the ongoing development of international law in this area.[26]

22 27 June 1981,1520 UNTS 217, 21 ILM 58.

23 17 May 1998, available at: www.unhcr.org/refworld/docid/452678304.html.

24 22 November 1969, 1144 UNTS 123, 9 ILM 673.

25 Inter-Am Ct HR (27 June 2012) para 171; see also *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-Am Court HR (Ser C) No 79 (31 August 2001), para 164 (indigenous right to territory includes right to 'delimination, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores').

26 The authors do not intend to suggest that the United States provides the best substantive or procedural protections of indigenous rights, or even that its laws fully comport with international law.

US AUTHORITIES ON SACRED SITES AND TRADITIONAL CULTURAL PROPERTIES

First Amendment

The First Amendment of the United States Constitution provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'.[27] The first part of the First Amendment, known as the Establishment Clause, provides 'Congress shall make no law respecting an establishment of religion'.[28] This clause is used in relation to sacred sites in arguments that government agencies have afforded protections to religious practices in violation of the Establishment Clause's goal of disentangling religion from affairs of the State. A notable recent example involved a challenge to an action taken by the Forest Service prohibiting rock climbing at Cave Rock in an area sacred to the Washoe Tribe on National Forest lands.[29] The Ninth Circuit Court of Appeals held that the Forest Service's prohibitions on rock climbing at Cave Rock did not violate the Establishment Clause as the action was found to be sufficiently motivated by secular purposes of protecting Cave Rock's cultural, historical and archaeological attributes.[30] The second clause of the First Amendment, known as the Free Exercise Clause, was advanced as a basis to protect lands sacred to the religions and ongoing religious practices of three tribes in northern California from the US Forest Service's construction of a paved log road on federal public lands within the Six Rivers National Forest.[31] The Supreme Court rejected the challenge, however, reasoning that the Free Exercise Clause could not be used to divest the government of its right to use its land.[32]

National Historic Preservation Act

The National Historic Preservation Act (NHPA) 'represents the cornerstone of federal historic and cultural preservation policy'.[33] The NHPA is a comprehensive programme to identify, evaluate and preserve historic properties through listings of properties on the National Register of Historic Properties, including '[p]roperties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization'.[34] Under section 106 of the NHPA, federal agencies are required to analyse the effect

27 US Const amend I.

28 *Ibid.*

29 *Access Fund v US Dept of Agriculture*, 499 F3d 1036 (9th Cir 2007).

30 *Ibid* 1042–1046.

31 *Lyng v Northwest Indian Cemetary Protective Assoc*, 485 US 439 (1988).

32 *Ibid* 453.

33 Walter E Stern, Cultural Resources Management-Tribal Rights, Roles, Consultation, and Other Interests (A Developer's Perspective), Sp Inst on Reg of Cultural Res, Wildlife and Waters of the US, Paper No 3, p 5 (Rocky Mt Min L Inst 2012).

34 16 USC ss 470w(5); 16 USC s 470a(d)(6).

of proposed developments on eligible properties.[35] A key document guiding agencies in carrying out the 'reasonable and good faith effort' required in the section 106 consultation process is *National Register Bulletin 38*, which categorises properties of traditional importance to tribes as 'traditional cultural properties'.[36] *Bulletin 38* makes a TCP eligible for listing 'because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community'. A failure to follow the guidance of *Bulletin 38* after being told TCPs existed was a violation of the 'reasonable and good faith effort' standard by the US Forest Service, one of the United States' agencies (along with the Bureau of Land Management, among others) managing federal public lands.[37]

New Mexico's TCP process and Mount Taylor listing litigation

In addition to the federal NHPA, state cultural property laws allow for listings of properties on state registries. An example is the New Mexico Cultural Property Act (CPA).[38] The CPA spawned litigation when, on an emergency basis in 2008 and permanently in 2009, five tribes successfully nominated as a state TCP approximately 800 square miles (2,072 square kilometres) encompassing the entirety of Mount Taylor, a volcanic mountain located in western New Mexico, and its surrounding mesas.[39] The tribes argued an emergency listing was necessary owing to their concerns over impacts to sacred sites and cultural resources from renewed interest of uranium companies in a historic mining district that overlapped with the TCP.

A number of private, public and Spanish land grant community[40] landowners within the TCP appealed the listing on several grounds, including:

1. that the listing exceeded implicit size limitations under CPA provisions that required listed properties to be regularly inspected and maintained;
2. that owners of dominant mineral interests in split-estate lands were denied due process because they were never notified of the public processes leading to the listing; and
3. that the state acted unlawfully in counting as part of the TCP common lands of a Spanish land grant.

35 16 USC s 470f.

36 *Bulletin 38*, n 12 above.

37 *Pueblo of Sandia v United States*, 50 F3d 856, 860–862 (10th Cir 1995); see *Muckleshoot Indian Tribe v US Forest Service*, 177 F3d 800 (9th Cir 1999).

38 NM Stat Ann ss 18-6-1 to -23 (1978).

39 See *Rayellen Resources, Inc v NM Cultural Prop Rev Committee*, No CV2009-812 (NM Dist Ct 2011).

40 Certain Spanish and Mexican land grant communities were created by grants of land by the Spanish or Mexican governments when portions of the southwestern United States were governed by Spain or Mexico, respectively.

On appeal, the New Mexico Supreme Court upheld the permanent designation of Mount Taylor as a TCP.[41] The court reduced the listing by the area comprised on the common lands of the Cebolleta Land Grant, a Mexican land grant-merced the private rights to which were confirmed by the United States under the Treaty of Guadalupe Hidalgo.[42] The ruling gives the State Historic Preservation Officer (SHPO) and tribes greater input into state approval processes for activities proposed on lands comprising the TCP or on nearby lands where proposed activities may affect the cultural values recognised by the TCP, but leaves several uncertainties in its wake, including whether and to what extent proposed projects might have an impact on historic and cultural values sought to be preserved by the designation, whether plan adjustments must be made if they will better promote those values and whether uses of lands that are near but not within the TCP will trigger the same level of consultation and accommodation expectations as the TCP lands themselves.

Religious Freedom Restoration Act

Congress adopted the Religious Freedom Restoration Act (RFRA)[43] in 1993 to attempt to re-establish the 'compelling governmental interest' test under the Establishment Clause. The United States Supreme Court has held the RFRA unconstitutional as applied to the states under the Fourteenth Amendment,[44] but it has yet to determine its constitutionality as applied to the federal government in the sacred sites context under the Establishment Clause of the First Amendment, or exactly how it might be reconciled with existing case law thereunder.[45] The Ninth Circuit Court of Appeals analysed the RFRA in the course of rejecting a claim that the statute was violated by a ski resort's proposed use of treated, but still contaminated, wastewater to make artificial snow.[46] The court applied a two-part test to determine, first, whether the activities burdened by the government were an exercise of religion, and if so, whether there was a substantial burden to that exercise.[47] The court held that the tribes' activities did constitute the exercise of religion, but rejected the RFRA claim because the composition of snow made out of

41 *Rayellen Res, Inc v NM Cultural Properties Review Comm*, 2014-NMSC-006.

42 See Treaty of Peace, Friendship, Limits & Settlement, US-Mex, Art VIII, 2 February 1848, 9 Stat 922, TS 207.

43 42 USC s 2000bb to 2000bb-4.

44 See *City of Boerne v Flores*, 521 US 507, 536 (1997).

45 See generally Sara Brucker, 'Navajo Nation v United States Forest Service: Defining the Scope of Native American Freedom of Religious Exercise on Public Lands' (2007) 31 Environs: Envtl L and Policy J.

46 *Navajo Nation v United States Forest Serv*, 535 F3d 1058 (9th Cir 2008) (en banc).

47 *Ibid* 1068.

the partially treated wastewater did not constitute a substantial burden on the tribe's exercises of religion. According to the court, since no plants, springs, shrines or other items of religious significance would be 'physically affected' by the artificial snow depositions, the sole effect is on the tribe's 'subjective spiritual experience', and the fact that it was offensive to their religion was not enough to state a RFRA violation.[48]

American Indian Religious Freedom Act

The American Indian Religious Freedom Act of 1994 (AIRFA) states an official 'policy' of the United States 'to protect and preserve for American Indians [and Eskimo, Aluet and Native Hawaiians] their inherent right of freedom to believe, express, and exercise [their] traditional religions... , including but not limited to access to site, use and possession of sacred objects and the freedom to worship through ceremonial and religious rites'.[49] The United States Supreme Court has relegated the AIRFA to relatively little significance beyond a policy statement, as a result of two aspects of the log road case discussed above involving the Helkau District of Six Rivers National Forest. First, the Court held that the AIRFA essentially adds no procedural or substantive rights beyond the rights afforded by the Free Exercise Clause and National Environmental Policy Act (NEPA).[50] Secondly, the Court stated that '[n]owhere in the statute is there so much as a hint of any intent to create a cause of action or any judicially enforceable rights'.[51] A federal district court, however, interpreted the AIRFA as requiring federal agencies to evaluate their policies and consult with tribes on such issues as access to sacred lands for the performance of religious ceremonies.[52] Under the circumstances of the particular case, the court found that the Havasupai tribe had been provided regular opportunities to participate in the Forest Service's evaluation of a mining company's project on federal land, but did not identify any sites of religious significance.

Executive Order No 13007 on Indian Sacred Sites

In 1996, President Clinton issued an Executive Order to protect and preserve Indian religious practices.[53] Executive Order 13007 imposed on federal land management agencies two basic obligations to be undertaken 'to the extent

48 *Ibid* 1063–1064, 1070.

49 42 USC s 1996.

50 *Lyng*, 485 US at 455.

51 *Ibid.*

52 *Havasupai Tribe v United States*, 752 F Supp 1471, 1488 (D Ariz 1990).

53 Executive Order No 13007 (24 May 1996), is codified in the US Code Annotated with AIFRA, 42 USC s 1996.

practicable, permitted by law, and not clearly inconsistent with essential agency functions'. The obligations are '(1) accommodate access to and ceremonial use of Indian sacred sites by Indian Religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites'.[54] The Order contains procedures and timelines for effectuating the obligations.[55]

2012 Interagency Memorandum of Understanding and 2013 Action Plan

In December 2012, the Secretaries of the United States Departments of the Interior, Agriculture, Energy and Defense, and the Chairman of the Advisory Council on Historic Preservation, entered into a Memorandum of Understanding (MOU) Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites.[56] The MOU recites that federal land management agencies 'hold in public trust a great diversity of landscapes and sites, including many culturally important sites held sacred by Indian Tribes', and acknowledges that '[a]ll Federal agencies are responsible for assessing the potential effects of undertakings they carry out, fund, or permit on historic properties of traditional cultural and religious importance to tribes'. The MOU relies on and expands the protections for sacred sites in Executive Order 13007. The MOU requires the participating agencies to determine whether any inter-agency measures may be warranted to better protect sacred sites.

Other examples of state laws

While the United States arguably has the most developed positive law on the issue of sacred sites, other countries also have statutory, treaty or judge-made law protecting indigenous' peoples' rights to sacred sites. For example, in New Zealand, Maori sacred sites are protected by the treaty with the Maori, the Treaty of Waitangi.[57] The Treaty of Waitangi guarantees Maori control over their *taonga*, or treasures, which includes cultural

54 *Ibid* s 1(a). Sacred sites were defined in Executive Order 13007 to mean any 'specific, discrete, narrowly delineated location of established religious significance or ceremonial use': 61 Fed Reg 26771 (24 May 1996). Compare guidelines discussed at n 10 above and accompanying text.

55 *Ibid* s 2.

56 Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites (effective 4 December 2012). The MOU remains in effect until 31 December 2017. An agency participating in the MOU also may opt out by providing a 60-day written notice to the other signatories.

57 Treaty of Waitangi, UK-Maori, 6 February 1840; see also Claire Charters, 'Do Maori Rights Racially Discriminate Against Non-Maori?' (2009–2010) 40 Victoria U Wellington L Rev 649, 650.

resources and sacred sites. The Liberian Community Rights Law with Respect to the Forest Lands Act requires commercial contracts for projects on community forest lands to protect 'cultural norms and practices, such as sacred sites, medicinal plant sites, and animal sanctuaries'.[58] Vanuatu law requires protection of sacred sites prior to granting timber concessions.[59] The Republic of Congo's Indigenous Rights Law protects sacred sites and cultural and spiritual objects.[60]

Industry guidelines

A number of industry standards address corporate respect of indigenous rights to sacred sites. The World Bank's Operational Manual policies governing the World Bank's operations used to review World Bank-financed projects includes an Operational Procedure (OP) on physical cultural resources, impacts on which must be assessed in an environmental assessment (EA) conducted prior to receiving Bank financing, and must include public consultations with project-affected groups.[61] The International Finance Corporation (IFC)'s Performance Standards on Environmental and Social Sustainability (Performance Standards) apply to all of the IFC's investment and advisory clients for the purpose of avoiding and managing environmental and social risks development projects.[62] When proposed projects will be located on lands used for 'cultural, ceremonial, and spiritual purposes', the Performance Standards require certain steps to minimise or mitigate the detrimental effect of the project.

The right to sacred sites and TCPs as customary international law

The sources discussed in the preceding sections recognise rights of indigenous peoples to their sacred sites, but none is universally applicable. This section explores whether the right to sacred sites has evolved into a norm of customary international law, thereby making it binding on a far greater number of actors.

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58 An Act to Establish Community Rights Law of 2008 with Respect to Forest Lands (2009), s 6.6.

59 Forestry Act (Cap 276) (2006).

60 Law No 5-2011 on the Promotion and Protection of the Rights of Indigenous Peoples (2011), s 16.

61 World Bank Manual, n 10 above, Operating Procedure 4.11, paras 3, 4, 6 and 11.

62 International Finance Corporation, Performance Standards on Environmental and Social Sustainability (2012).

Customary international law is not a constant, but evolves with international political and policy changes. A customary international law norm is developed when widespread state practice and opinion juris, a sense of legal obligation, exist.[63] It is one source of law listed in Article 38 of the Statute of the International Court of Justice, and is determined by consulting international conventions and customs, 'general principles of law recognized by civilized nations' and judicial decisions and scholarly publications.[64]

While international declarations or widespread industry standards are not positive statements of international law, they are considered evidence of opinion juris based on their formation, application and interpretation by States.[65]

Customary international law requires State protection of lands traditionally owned and occupied by indigenous peoples.[66] Indigenous rights to use, control and occupy their traditional lands have been identified as a human right, rooted in broader principles of rights to property, culture and non-discrimination.[67] The right to land is recognised as related to the right to engage in traditional cultural and spiritual practices that necessarily occur or are based upon specific geographic locations or landscapes.[68] The International Law Association (ILA), in a comprehensive report on the rights of indigenous peoples, defines the land right recognised in customary international law 'as a prerogative with a primarily spiritual, *i.e.* cultural purpose. … [T]he right in point is functional to the safeguarding—through ensuring the maintenance of the special link between indigenous peoples and their traditional lands—of the very distinct cultural identity of indigenous peoples as well as of their survival and flourishing as *different*

63 Sigfried Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges' (2011) 22 Eur J Int L 121, 130; Restatement (3d) of Foreign Relations Law of the United States s 102; see also Vadi, n 8 above, 845 (discussing the persistent objector doctrine as a defence to the application of customary international law).

64 Statute of the International Court of Justice, Art 38(1), 26 June 1945, 59 Stat 1055, 1060, TS No 993; see also *The Paquete Habana*, 175 US 677, 700 (1900) ('International law is part of our law… where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators').

65 Jonathan I Charney, 'Universal International Law' (1993) 87 Am J Int'l L 529, 543.

66 See generally Tiernan Mennen and Cynthia Morel, 'From *M'Intosh* to *Endorois*: Creation of an International Indigenous Right to Land' (2012) 21 Tulane J Int'l & Comp L 37.

67 International Law Association, Sofia Conference, *Rights of Indigenous Peoples*, Final Report (2012), 23; Sarah M Stevenson, 'Indigenous Land Rights and the Declaration on the Rights of Indigenous Peoples: Implications for Maori Land Claims in New Zealand' (2008) 32 Fordham Int'l LJ 298, 319–23 (citing authorities).

68 See Wiessner, n 63 above, 129.

human communities'.[69] The ILA defines the content of the indigenous right to traditional lands to include a prohibition on the deprivation of traditional use or relocation without FPIC and compensation, the right to enjoy traditional land rights, including a prohibition on interference by non-State actors 'to the extent that such interferences may prejudice the spiritual relationship of indigenous peoples with their traditional lands' and the requirement that land illegally taken be returned.[70]

A specific right to sacred sites, although not explicitly protected to the same extent as is the right to lands or territories, is developing into a customary international law norm.[71] Customary international law norms are not static, and demonstrate a trend of expanding to protect indigenous cultural heritage, including sacred sites.[72] The protection of sacred sites provided by State laws, the binding and non-binding international and regional instruments, as well as voluntary adherence to industry guidelines and CSR policies by MNEs, demonstrate a growing acceptance and recognition of a legal right to sacred sites. It is important to note that the right does not have agreed-upon contours, and concepts of other rights must be consulted to demonstrate its confines. For example, the right to land includes traditional access and use; where the sacred site is a geographical location or cultural landscape, the right to sacred sites should include the identical limitations. As will be discussed below, while this right may be established in international law, the question of whether indigenous peoples have a remedy for violation of that right is not settled law.[73]

Requirements to consult and gain FPIC when rights to a sacred site or TCP may be affected by an extractive project

The right to sacred sites is protected by sources requiring or encouraging consultation with indigenous populations, as well as with officials charged with preservation of historic and cultural properties, including the laws, treaties, declarations and other instruments applicable on voluntary or mandatory bases.[74] This section reviews consultation and FPIC with special attention to the duties and rights of the extractive industry.

69 International Law Association, n 67 above, 27–28.

70 *Ibid* 27–28; see also *ibid* at 23 (discussing indigenous peoples' right to cultural heritage as recognised in customary international law).

71 See Wiessner, n 63 above, 134.

72 Vadi, n 8 above, 859.

73 This raises the concept of *ubi jus ibi remedium*: may there be a right without a remedy?

74 An interesting question that is outside the scope of this article is the question of the applicability to indigenous peoples' governments. For discussion, see Wenoma T Singel, 'Indian Tribes and Human Rights Accountability' (2012) 44 San Diego L Rev 567.

Consultation and FPIC are duties imposed on States and/or non-State actors, and may be considered procedural rights of indigenous peoples, the significance of which is derived from the protection of substantive rights, such as sacred sites. Professor Anaya, in his most recent annual report as Special Rapporteur, states that 'the specific requirement of the duty to consult and the objective of obtaining consent, in any given situation in which extractive operations are proposed, are a function of the rights implicated and the potential impacts upon them'.[75] This understanding is consistent with the definition of consultation in ILO 169, Article 6(2): '[t]he consultations carried out in application of this Convention 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.'

There is no uniform definition of consultation or consent, as explored in the following sections. Companies and indigenous peoples often have different perceptions of the actions that constitute adequate consultation or FPIC.[76] Generally, consultation is the process in which the State individually, or in conjunction with the enterprise seeking to use the land, discusses a development project with affected indigenous peoples. The United Nation's Expert Mechanism on the Rights of Indigenous Peoples defines FPIC as a State duty that 'entitles indigenous peoples to effectively determine the outcome of decision-making that affects them, not merely a right to be involved in the process'.[77] Consultation must be culturally appropriate, and consent should include agreed-upon terms.[78] Consent is the agreement by the affected peoples to permit a project to continue. Good faith and mutual respect are essential.[79]

International law

Sources of international law recognise a State duty to conduct consultation and obtain FPIC. The 'C' may be consent *or* consultation, depending on the source. UNDRIP addresses the concept of consultation and consent in

75 Anaya 2012, n 19 above, para 64.

76 Robert Alan Hershey, *Globalization and Its Special and Significant Impacts on Indigenous Communities,* Ariz Legal Studies, Discussion Paper No 12-19, 34 (May 2012) ('Industry and government initiatives to consult with Indigenous communities often result from economic and legal necessity, involve tight timelines, and tend to be issue-specific; in contrast, Indigenous representatives often express a desire to establish longer-term partnerships that address specific issues but within broader historical contexts').

77 Expert Mechanism on Rights of Indigenous Peoples, Advice No 2 (2011), *Indigenous Peoples and the right to participate in decision making,* A/HRC/18/42, para 21.

78 Anaya 2012, n 19 above, paras 66–68.

79 *Ibid* para 23.

various articles related to indigenous peoples' rights to land and territory, including: relocation (Article 10); cultural, intellectual, religious and spiritual property (Article 11); adoption or implementation of legislative or administrative measures (Article 19); confiscation, taking, occupation, use or damage of lands or territories (Article 28); storage or disposal of hazardous waste materials on indigenous peoples' lands (Article 29); and development projects affecting lands, territories and resources (Article 32). Additionally, consultation is required to establish a process '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' (Article 27); to establish mechanisms to access or repatriate ceremonial objects and human remains (Article 12).

ILO 169 requires consultation prior to legislative or administrative decisions affecting indigenous peoples (Article 6(1)(a)), and prior to exploitation of mineral resources (Article 15(2)). FPIC is required prior to removal of indigenous populations from their lands (Article 16). Other procedural requirements include pre-development studies (Article 7(3)), cooperation to 'protect and preserve the environment' (Article 7(4)) and the right 'to participate in the use, management and conservation of [the] resources' (Article 15(1)).

The American Convention, in Article 21(2), prohibits depriving individuals of their property 'except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law'. The Inter-American Court of Human Rights, in *Saramaka People v Suriname*,[80] ruled that Article 21's right to property was violated by the State when it authorised construction of a damn that would destroy indigenous people's property, and that the State was required to 'delimit, demarcate, and grant collective title over the territory of the Saramaka people, in accordance with their customary laws, and through previous, effective, and fully informed consultations'. The State and third parties were prohibited from 'affect[ing] the existence, value, use or enjoyment of the territory to which the members of the Saramaka people are entitled, unless the State obtains the free, informed and prior consent'.

The rights to consultation and FPIC, as related to the rights established in ILO 169, the American Convention and UNDRIP, have recently been analysed by the Inter-American Court of Human Rights in the case of the *Kichiwa Indigenous People of Sarayaku v Ecuador,* a case challenging the government's grant of concessions to a foreign oil company without first conducting consultation or gaining the consent of the indigenous peoples

80 Judgment, Inter-Am Ct HR, 28 November 2007.

on whose traditional lands the concessions were granted.[81] The court concluded that '[r]espect for the right to consultation of indigenous and tribal communities and peoples is precisely recognition of their rights to their own culture or cultural identity'.[82] Consultation that complies with international human rights standards and international law must include the 'effective participation' of the State, indigenous peoples and representatives of developers or investors. It includes 'the obligation to consult the said community in an active and informed manner, in accordance with its customs and traditions' and a good-faith, culturally appropriate procedure.

US laws

SOURCES OF CONSULTATION AND CONSENT REQUIREMENTS IN US AUTHORITIES

National Historic Preservation Act

Under section 106 of NHPA, federal agencies having direct or indirect jurisdiction over a proposed 'undertaking' are required, before granting a licence or permit, to 'take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Registry'.[83] The Advisory Council on Historic Preservation, which is the agency charged with implementing the section 106 process, states in its regulations that agency officials must make 'reasonable and good faith efforts' to identify Indian tribes to be consulted in the section 106 process, and that consultation 'should commence early in the planning process'.[84] The regulations also state that when Indian tribes 'attach religious and cultural significance to historic properties off tribal lands', the agency officials must consult with the tribes with an awareness that 'frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes' and 'should consider that when complying' with their consultation obligations.[85]

National Environmental Policy Act

NEPA[86] is another federal statute that requires tribal consultation and consideration of cultural resources. NEPA and the NHPA may be applied simultaneously,[87] but meeting the tribal consultation requirements of one

81 Inter-Am Ct HR (27 June 2012).
82 *Ibid* para 159.
83 16 USC s 470f.
84 36 CFR s 800.2(c)(2)(A).
85 36 CFR s 800.2(c)(2)(D).
86 See 42 USC s 4321, et seq.
87 *Morris County Trust for Historic Preservation v Pierce*, 714 F2d 271, 282 (3d Cir 1983).

statute does not necessarily satisfy the requirements of the other.[88] The Council on Environmental Quality has adopted regulations implementing NEPA, and one regulation places an obligation on the federal agency leading NEPA review to seek comments from Indian tribes once an Environmental Impact Statement (EIS) has been prepared in draft 'when the *effects* may be on an Indian reservation'.[89]

An important case addressing compliance with NEPA's tribal consultation requirements involved a tribal challenge to agency approval of snowmaking facilities that would use recycled wastewater at a proposed expansion of a ski area at San Francisco Peaks in Arizona.[90] The tribal plaintiffs contended that the proposed facility would 'spiritually contaminate the entire mountain and devalue their religious exercises'.[91] The Ninth Circuit found it was 'difficult to be precise in the analysis of the impact… on the cultural and religious systems on the Peaks, as much of the information stems from oral histories and a deep, underlying belief system of the indigenous peoples involved'.[92]

While the San Francisco Peaks example may demonstrate the extent of a federal agency's tribal consultation and consideration that will survive a NEPA challenge, it has been noted that the real goal should be 'meaningful consultation with tribal interests to identify interests and concerns, and determine whether those concerns can be addressed in some fashion as project planning proceeds'.[93] Another commentator similarly characterises the US' general standard for indigenous participation in extractive industries as 'meaningful consultation', but views it as a 'minimal international standard' that falls short of 'an emerging international understanding that different levels of consultation are appropriate or different types of projects affecting indigenous peoples'.[94]

88 For a fuller discussion of this point, see Stern, n 33 above, 7.

89 40 CFR s 1503.1(a)(2) (emphasis added). This regulation is not limited to *activities* on reservations; *effects* may result from off-reservation activities.

90 *Navajo Nation v United States Forest Service*, 479 F3d 1024 (9th Cir 2007).

91 *Ibid* 1063.

92 *Ibid* 1059. Related litigation is proceeding in the Arizona state courts, by the Hopi Tribe against the city of Flagstaff, Arizona, for selling the wastewater to the ski resort. See *Hopi Tribe v City of Flagstaff*, 1 CA-CV 12-0370, 2013 WL 1789859 (Ariz Ct App 25 Apr 2013), review denied (7 January 2014). See also *Te-Moak Tribe of Western Shoshone Indians of Nev, et al v US Dept of the Interior, et al*, DC No 3:08-cv-00616-LRH-WGC (9th Cir 27 March 2014) (unpublished opinion rejecting challenge to BLM approval of mine dewatering because 'Tribes did not identify religious uses of any particular springs or seeps within the Project area').

93 Stern, n 33 above, 3.

94 Akila Jenga Kinnison, 'Indigenous Consent: Rethinking US Consultation Policies In Light of the UN Declaration on the Rights of Indigenous Peoples' (2011) 53 Ariz L Rev 1301, 1304–1305 (citing President Clinton's 2000 Executive Order 13175 entitled 'Consultation and Coordination with Indian Tribal Governments' (at 65 Fed Reg 67,249, and President Obama's November 2009 Memorandum on Tribal Consultation implementing EO 13175, available at www.epa.gov/tp/pdf/tribal-consultation-memorandum-09.pdf).

Native American Graves Protection and Repatriation Act

Another federal statute giving rise to tribal consultation obligations, the Native American Graves Protection and Repatriation Act (NAGPRA), differs considerably from the NHPA and NEPA in that it applies specifically to four classes of Native American cultural items associated with graves and defined in the statute: 'human remains', 'funerary objects', 'sacred objects' and 'objects of cultural patrimony'.[95] NAGPRA provides the means by which a federal agency must determine the 'ownership or control' of any such items that are excavated or discovered, whether inadvertently or intentionally, on federal or tribal lands.[96] The items may only be excavated or removed 'after consultation with or, in the case of tribal lands, consent of the appropriate (if any) Indian tribe or Native Hawaiian organization'.[97] Further, 'proof of consultation or consent… must be shown'.[98]

Executive Order on Tribal Consultation

In 2000, President Clinton issued Executive Order 13175 'in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications'.[99] Although the Order does not mention sacred sites or TCPs, it does provide that the United States 'recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination'.[100] Nine years later, President Obama reaffirmed Executive Order 13175 and further acknowledged that '[h]istory has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient'.[101] Both President Clinton's Executive Order and President Obama's Memorandum recite that their statements are not intended to create substantive or procedural rights enforceable against the United States.

95 25 USC s 3001(3)(A)–(D).

96 25 USC s 3002.

97 25 USC s 3002(c)(2).

98 25 USC s 3002(c)(4).

99 Executive Order 13175 – *Consultation and Coordination with Indian Tribal Governments* (6 Nov 2000).

100 *Ibid* s 2(c).

101 Memorandum for the Heads of Executive Departments and Agencies Regarding Tribal Consultation (5 November 2009).

Other examples of state laws

A growing number of State laws require consultation, accommodation or FPIC for legislation, administration and projects that affect indigenous peoples or their lands. For example, Peruvian law requires consultation with indigenous peoples prior to development projects commencing on their territories, but the consultations are not binding, and the Peruvian Government retains the final say.[102] The Bolivian Constitution requires the State to conduct consultation prior to taking administrative or legislative measures that affect indigenous peoples, and respect and guarantee the right to consultation with respect to exploitation of non-renewable natural resources in their territory.[103] Mexico's National Commission for Development of Indigenous Peoples establishes a consultation system, but does not incorporate FPIC.[104] Papua New Guinea's Motu Koita Assembly Act requires prior and informed consent before a licence may be granted to conduct projects on indigenous lands, and further authorises the creation of a registry of consultants to assist villages and landowners to participate in the consultation process.[105] In New Zealand, consultation and consent requirements imposed on the government derive from the Treaty of Waitangi.[106] The Treaty of Waitangi establishes a partnership between the government and the Maori, which is enforced through consultation and consent before any State action is taken that affects the Maori. Ecuador, on the other hand, failed to pass a draft Law on Consultation and Participation.[107]

In the Philippines, the Indigenous Peoples' Rights Act[108] incorporates an FPIC language and defines 'indigenous peoples' in terms of groups that have continuously occupied communal lands under claims of ownership since time immemorial.[109] The State's Mining Act requires the State to promote mineral development in a way to protect the rights of affected communities, and implementing rules promote 'community based and community oriented development consistent with the principles of people empowerment and grassroots development'.[110]

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102 Ley 29785 del Derecho a la Consulta Previa a los Pueblos Indígenas y Originiarios Reconocido en el Convenio 169 de la Organización Internacional del Trabajo (OIT) of 8 Aug 2011; see also Peru Const Art 89 (stating that 'rural and native communities… are autonomous in their… usage and free disposal of their lands') (translation by author).

103 Bolivia Const Art 30(15) (2009).

104 See CERD/C/MEX/Q/16-17 (2012), para 17.

105 Motu Koita Assembly Act 2007, para 50-51.

106 Treaty of Waitangi, n 57, above.

107 See CERD/ECU/CO/20-22 (2012), para 17.

108 Indigenous Peoples' Rights Act, Republic Act No 8371 (29 Oct 1997); cited in James F Cress and Ma Cecilia G Dalupan, 'Sustainable Development and Mining Laws: Is a "Mine Veto" Needed?' Nat Res & Env (Winter 2003).

109 See Cress and Dalupan, n 109 above, 167.

110 *Ibid* 202–204.

Colombia's Constitutional Court has ruled that consultation with indigenous peoples is a fundamental right that must be complied with prior to conducting development projects on indigenous lands, and suspended projects commenced in the absence of consultation.[111] The Court faulted the Ministry of Transportation for failing to conduct consultation or obtain the required environmental study prior to permitting road construction; and a corporation for entering indigenous lands without consent, and halted a mining project that had commenced in the absence of consultation, reversing a lower court decision that 'progress' outweighed consultation requirements.

Australia's Native Title Act, passed after the High Court recognised the concept of native title,[112] established the Native Title Tribunal, vested the Australian federal courts with authority to consider native title claims and requires, for acts affecting indigenous peoples, an Indigenous Land Use Agreement (ILUA). ILUAs may be entered into between native title holders, or individuals asserting native title that has not been determined, and parties intending to conduct business or development. Companies in the extractive industries are entering into ILUAs with Native title holders to lands where development projects will be conducted; terms of ILUAs, negotiated between parties prior to the commencement of a project, address financial benefits, environmental issues and 'long-term outcomes for indigenous communities through creation of employment and training opportunities, business development and promotion of social well-being'.[113]

Canadian laws affecting indigenous (First Nation) lands have undergone recent change. The Indian Act was changed to permit approval of surrender of land based on the majority of members voting (not the majority of members of affected peoples).[114] The Navigation Protection Act increased the amount of development permitted on and around waterways.[115] The Environmental Assessment Act[116] imposes no requirement to conduct consultation with indigenous peoples. Canada's judicial branch is more protective of indigenous peoples' rights. The Canada Supreme Court

111 *Oscar Carupia Domicó et al v Minister of Transportation et al*, T-129/11 (2011); see also Cultural Survival, 'Colombian Court Confirms Indigenous Peoples' Right to Free, Prior, and Informed Consent' (10 May 2011), available at www.culturalsurvival.org/news/colombia/colombian-court-confirms-indigenous-peoples-right-free-prior-and-informed-consent.

112 Native Title Act of 1993, as amended C2012C00780; *Mabo v Queensland (No 2)*, 1992 HCA 23.

113 George K Foster, 'Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium between Economic Development and Indigenous Rights' (2012) 33 Mich J Int'l L 627, 646; see also Register of Indigenous Land Use Agreements, available at www.nntt.gov.au/Indigenous-Land-Use-Agreements/Search-Registered-ILUAs/Pages/Search.aspx.

114 C-45, s 206 et seq (2012).

115 *Ibid* s 316 et seq.

116 C-38, s 52 et seq (2012).

concluded that the government has a legal duty to conduct consultations with indigenous peoples prior to making decisions that affect land to which they claim title, even if that title has not been adjudicated.[117] 'Good faith consultation may in turn lead to an obligation to accommodate[,]' and the consultation 'must be meaningful[,]' but '[t]here is no duty to reach an agreement'. Furthermore, the duties cannot be delegated to the company who seeks to conduct activities on indigenous lands. The Supreme Court has stated that consent may be required, such as when hunting or fishing regulations are enacted governing indigenous lands.[118] Only the government is required to conduct consultation, and is response for the consultative process, but third parties may be delegated certain aspects as related to specific development projects.[119] Additionally, a number of extractive industries projects are operated pursuant to a voluntary Impact and Benefit Agreement (IBA) between companies and indigenous peoples, a contract that sets forth the rights and relationship of the parties.[120]

International guidelines and industry standards

Numerous sets of guidelines regarding consultation and FPIC have been developed under the auspices of the United Nations.[121] The United Nations' Guiding Principles on Business and Human Rights, developed under the 'Protect, Respect and Remedy' framework, recommend a corporation have a corporate policy commitment, conduct due diligence regarding human rights and develop a process to address and remediate any adverse human rights impacts.[122] They also recommend that corporations should conduct 'meaningful consultation with potentially affected groups and other relevant stakeholders' as part of due diligence.[123]

117 *Council of the Haida Nation and Guujaaw v Minister of Forests and Attorney General of British Colombia*, 2004 3 RCS 511, 520.

118 *Ibid* 531 (citing *Delgamuukw v British Colombia*, 1997 3 SCR 1010).

119 *Ibid* 537; see also *Mikisew Cree First Nation v Minister of Canadian Heritage*, 2005 SCC 69 (concluding a plan to build a road through land that affects indigenous hunting, fishing and trapping rights requires consultation, but not necessarily accommodation as the rights affected were minor).

120 For more information, see IBA Research Network, www.impactandbenefit.com/home; see generally Sandra Gogal, Richard Riegert and JoAnn Jamieson, 'Aboriginal Impact and Benefit Agreements: Practical Considerations' (2005–2006) 43 Atla L Rev 129.

121 Anaya 2012, n 19 above, para 86; see Hershey, n 77 above, 38 ('At present there exists a lack of minimum common ground for understanding the key issues by all actors, and there remains ample examples of the eruption and escalation of conflicts and a continued radicalization of positions').

122 HR/PUB/11/04; originally attached to Final Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31 (21 Mar 2011), endorsed by the Human Rights Committee, Res 17/4 (2011).

123 *Ibid.*

The UN Global Compact, to which over 10,000 corporations have indicated support, serves as a framework for the development of specific principles applicable to indigenous rights vis-à-vis corporations. Principles 1 and 2 of the Global Compact address human rights, stating that '[b]usinesses should support and respect the protection of internationally proclaimed human rights; and make sure that they are not complicit in human rights abuses'. Agenda 21, a product of the United Nations Conference on Environment and Development in 1992, addresses indigenous rights within the context of stated sustainable development goals.[124]

The UNDRIP 'Business Reference Guide' expands on the UNDRIP and the Guiding Principles and provides direction for compliance therewith.[125] The Guide defines the elements of FPIC, and specifically states that consent must be granted, and may be revoked in the event of a breach of an agreement. With respect to cultural resources, the Guide underscores the importance of consultation, stating, '[i]t will be indigenous peoples themselves who 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'.

International and regional banks have promulgated guidelines that require consultation and FPIC. The Asian Development Bank requires the development of an 'indigenous peoples plan' for projects that will have significant or limited impacts on indigenous peoples, and its Safeguard Policy Statement (SPS)[126] requires 'meaningful consultations', and consent for projects affecting indigenous peoples' land rights. The Inter-American Development Bank has an Operational Policy on Indigenous Peoples and Strategy for Indigenous Development.[127] The policy includes a commitment to strengthening governmental processes for good faith consultation processes that 'take into account the general principle' of FPIC and requires the development of a local grievance mechanism.[128] The European Bank for Reconstruction and Development likewise has a policy on indigenous peoples, and Performance Requirement 7 specifically addresses the need for private sector projects to respect indigenous peoples' rights: citing the UNDRIP, it requires FPIC for activities including projects with impacts on traditional or customary lands.[129]

124 Agenda 21: The UN Program of Action From Rio, UN Sales No E.93.I-11 (1993).

125 The Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples (2013) available at www.unglobalcompact.org/resources/541.

126 Asian Development Bank Policy Paper, Safeguard Policy Statement (June 2009).

127 Inter-American Development Bank (July 2006).

128 *Ibid* 34.

129 European Bank for Reconstruction and Development, Environmental and Social Policy (2008), 50.

The World Bank and the IFC require consultation for projects that affect indigenous peoples. The World Bank's Operational Policy requires free, prior and informed consultation for Bank-financed projects that affect indigenous peoples.[130] A developer whose project will affect lands or natural resources must address 'the cultural and spiritual values that the Indigenous Peoples attribute to such lands and resources' and prepare an Indigenous Peoples Plan to set forth the developer's intended actions with regard to the affected indigenous peoples.[131] The IFC Performance Standards require a corporation to develop an Environmental and Social Assessment and Management System, after engagement with relevant stakeholders, including representatives of communities to be affected by a proposed project. Performance Standard 7 requires the disclosure of information about the project and consultation for all projects affecting indigenous peoples, which can be satisfied by compensation if continued use and access of traditional lands is not feasible. Performance Standard 8 requires consultation where cultural heritage will be affected by a project. Good faith negotiations are required for all consultations.[132] The Equator Principles, industry benchmarks for project finance voluntarily adopted by financial institutions, require borrowers to consult with 'project affected communities in a structured and culturally appropriate manner'.[133]

The OECD Guidelines for Multinational Enterprises (OECD Guidelines)[134] direct MNEs to respect human rights, including preventing or mitigating human rights violations. While not requiring FPIC, the OECD Guidelines request MNEs to conduct human rights due diligence. The OECD Guidelines establish a National Contact Point (NCP) in each party country, to which requests for review may be made. For example, a request was submitted to the Canadian NCP regarding Barrick Gold Corp's operation of the

130 World Bank Manuel, n 10 above, Operational Policy 4.10, para 10. According to a World Bank review, in a three-year period from 2005 to 2008, 12 per cent (132 projects) of World Bank projects were required to apply OP 4.10; only three per cent, or four projects, were in the energy and mining sector. OPCS Working Paper, Implementation of the World Bank's Indigenous Peoples Policy, A Learning Review (FY2006-2008), paras 3, 30 (August 2011).

131 *Ibid.*

132 IFC Performance Standard Guidance Note 7, GN 25, 38.

133 Equator Principles, Principle 5, n 5.

134 The OECD Guidelines are part of the OECD Declaration on International Investment and Multinational Enterprises, and 'provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards'. OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing.

Porgera Joint Venture Mine in Papua New Guinea.[135] While the specifics of the settlement agreement were confidential to the parties, they included sustainable development, health topics, violence against women and the development of a dispute resolution process. Barrick Gold accepted the NCP's recommendations.[136]

The International Bar Association's Model Mining Development Agreement (MMDA)[137] requires a Social Impact Assessment and Action Plan, to address the effect of a mining project on surrounding communities, and requires consultation in the case of displacement. It requires the creation of a Community Development Agreement, developed in conjunction with the affected community, and for the corporation to submit to local jurisdiction for dispute resolution. The International Council on Mining and Metals (ICMM) has developed a Good Practice Guide on Indigenous Peoples and Mining, which recommends mining companies enter into negotiated agreements with indigenous communities in the areas in which mines will be operated.[138]

Additionally, common among MNEs are corporate social responsibility (CSR) codes. CSR codes permit corporations to self-regulate their treatment of human rights, and such self-regulation – particularly when doing so results in project-specific agreements with affected indigenous peoples – reduces transaction costs while encouraging greater realisation of human rights. CSR policies provide the basis for MNEs to promote, respect and protect human rights within a 'sphere of influence', including its supply chain and local partners.[139] CSR and other initiatives are risk management tools for businesses: they can limit the damage of bad press or boycotts, and can serve as a barrier to legal action and further regulation. While CSR policies are currently voluntary, this may not hold true in the future. For example, the European Commission has published a CSR policy to promote the use of CSR policies for a number of purposes, and its agenda includes developing and promoting market rewards for CSR.[140]

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135 Report of the National Contact Points to the Investment Committee (2012), available at www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/report2012-rapport2012.aspx?lang=eng&view=d; Final Statement of the Canadian National Contact Point on the Notification dated 1 March 2011, concerning the Porgera Joint Venture Mine in Papua New Guinea, pursuant to the OECD Guidelines for Multinational Enterprises (2013), available at www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-declaration.aspx.

136 Press Release (December 2013), available at www.barrick.com/files/porgera/Barrick-accepts-Canadian-National-Contact-Point-recommendations-on-Porgera-Joint-Venture.pdf.

137 Available at www.mmdaproject.org.

138 Available at www.icmm.com/library/indigenouspeoplesguide.

139 Karin Buhmann, 'A Poverty Perspective on Human Rights and Business', in Solomon, Tostensen and Vandenhole (eds), *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Intersentia 2007), 245–263, 252.

140 European Commission, A renewed EU strategy for 2011–14 for Corporate Social Responsibility, COM (2011) 681 (Brussels, 25 October 2011).

Two sets of guidelines that discuss indigenous peoples have been issued under the Convention on Biological Diversity. The Akwé: Kon Guidelines recommend a multi-stage assessment process, including consultation and establishment of a review process. The Tkarihwaié:ri. Code of Ethical Conduct[141] sets forth ethical principles, to be followed by researchers and others working with indigenous communities, including respect for existing settlements, non-discrimination, advance disclosure to indigenous communities 'about the nature, scope and purpose' of proposed activities that may involve indigenous knowledge and practices related to biodiversity, occurring on or likely to impact on, sacred sites and on lands and water traditionally occupied or used[.]' FPIC 'and/or approval and involvement' is required prior to activities on sacred sites or indigenous lands.

Laws and guidelines promulgated by indigenous peoples

An increasing number of indigenous peoples, through their governments or community organisations, have promulgated guidelines for consultation, particularly with regard to the extractive industries. Examples include the Navajo Nation's Cultural Properties Act, Policy to Protect Traditional Cultural Properties and Guidelines for the Treatment of Historic, Modern, and Contemporary Abandoned Sites;[142] and the Nunavut Impact Review Board's Proponent's Guide to Conducting Public Consultation for the NIRB Environmental Assessment Process.[143] Special Rapporteur Anaya recommends that indigenous peoples develop the natural resources on their lands as a way to ensure that rights recognised in the UNDRIP are protected.[144]

Is consultation or obtaining FPIC by non-state actors required by law?

While sources discussed herein, under international and domestic law, require consultation and/or FPIC before development projects begin and while they are ongoing, the legal duty to consult is on States. UNDRIP, while it does state that indigenous peoples have the right, in certain circumstances, to FPIC or consultation, applies to States; it is not binding on private actors,

141 Available at www.cbd.int/traditional/code/ethicalconduct-brochure-en.pdf (2011).

142 Navajo Code CMY-19-88.

143 Available at http://ftp.nirb.ca/04-GUIDES/NIRB-F-Guide%206b-A%20Proponents%20Guide%20to%20Conducting%20Public%20Consultation%20for%20the%20NIRB%20EA%20Process-OT3E.pdf.

144 Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples, 1 July 2013, A/HRC/24/41, para 8.

nor does it create a vested right in indigenous peoples.[145] Consultation and consent, however, appear to be developing into precepts of international common law, which may be binding on non-State actors. As stated by Professor Anaya, 'a focus on the rights implicated… is an indispensable starting point for devising appropriate consultation and consent procedures. The particular indigenous peoples or communities that are to be consulted are those that are the bearers of the potentially affected rights, the consultation procedures are to be devised to identify and address the potential impacts on the rights, and consent is to be sought for those impacts under terms that are protective and respectful of the rights'.[146] Indigenous peoples' rights to their sacred sites and cultural resources, particularly when such are located on their traditional lands or territory, require a significant level of consultation or FPIC.

Even where the duty is not imposed on MNEs, coordinating and cooperating with relevant State actors should prevent subsequent challenges based on a lack of consultation. As discussed in the following section, even if the corporation has no *legal* duty to conduct consultation or gain FPIC with an affected indigenous group, the failure to do so may disrupt an ongoing project or result in liability based on a violation of an indigenous right to sacred sites.

Forums to assert violations of rights to sacred sites

When indigenous peoples' rights to sacred sites are violated by the failure of a State or corporation to conduct consultation or garner FPIC, indigenous peoples may seek to remedy that violation. International law requires States to provide remedies for human rights violations.[147] To assert violations of substantive rights, indigenous peoples may assert a claim against a State, and, in certain circumstances, against corporations or officers. This section reviews the forums in which such rights may be asserted against States, State actors and MNEs. It is significant to note that, while some claims may only be viable against States, the result of a ruling or order against a State may be the withdrawal or loss of an MNE's right to proceed with development activities.

States should ensure access to forums to address human rights abuses by corporations. Potential forums include domestic judicial mechanisms,[148]

145 Foster, n 113 above, 668 (2012).

146 Anaya (2012), n 19 above, para 64; *ibid* para 65 (noting that other safeguards such as necessity, proportionality, and public purpose requirements provide protection even where consent is not required).

147 ICCPR, Art 2(3).

148 Guiding Principles, n 122 above, Principle 26.

State-based non-judicial grievance mechanisms,[149] non-State based grievance mechanisms, such as corporation, industry, or stakeholder-administered mechanisms, and human rights bodies,[150] and operational-level mechanisms for affected individuals and communities.[151] The number of possible forums has been criticised because they may be able to 'be invoked simultaneously or one after another, in the absence of any coordination among them, this situation might result in multiplicity of proceedings against companies and consequent uncertainty'.[152]

International and regional forums

No treaty body exists to consider complaints made by indigenous peoples against corporations for violation of indigenous rights, human rights or environmental rights law. There are various forums, however, that exist under international and regional human rights bodies that can consider complaints of rights violations. Under the UN, a number of mechanisms or processes exist, including the Special Rapporteur on the Rights of Indigenous Peoples, the Permanent Forum on Indigenous Issues, the Human Rights Council, the Expert Mechanism of the Rights of Indigenous Peoples, the Universal Periodic Review process, the Working Group on Indigenous Populations and bodies established to consider compliance with varies treaties, such as Committee on the Elimination of Racial Discrimination.

Regional human rights bodies provide forums for consideration of indigenous rights. The American Declaration established two bodies to protect human rights in signatory states: the Inter-American Commission on Human Rights, and the Inter-American Court on Human Rights. The Inter-American Commission has the authority to entertain petitions from '[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states… containing denunciations or complaints of violation of this Convention by a State Party'.[153] Once a dispute has been considered by the Commission, it may be appealed, by a State or the Commission only, to the Inter-American Court.[154]

149 *Ibid* Principle 27.

150 *Ibid* Principle 28.

151 *Ibid* Principle 29; see also *ibid* Principle 31 (stating that non-judicial grievance mechanisms should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, flexible, and that operational-level mechanisms should also be developed and conducted in consultation with affected stakeholders).

152 Surya Deva, 'Guiding Principles on Business and Human Rights: Implications for Companies' (2012) 9(2) European Company Law 101, 108.

153 American Convention, Arts 44–51.

154 *Ibid* Art 61(1).

A recent decision of the Inter-American Court, *Sarayaku v Ecuador*,[155] held that Ecuador violated the indigenous rights of communal property and cultural identity in the absence of FPIC, guaranteed by the American Declaration. *Sarayaku* relied on UNDRIP and ILO 169, as well as Ecuador's domestic law, to conclude that Ecuador violated myriad rights of the indigenous Sarayaku peoples by authorising a corporation to conduct oil exploration and exploitation activities in the Sarayaku's territory 'without previously consulting them and without obtaining their consent'. The court concluded that consultation is a right that is directly related to other human rights protected by international law, and 'the State had the obligation to guarantee the right to prior consultation of the Sarayaku People, in relation to their right to communal property and cultural identity'. The court ruled that the rights of the Sarayaku were violated by the lack of prior consultation, the fact that the State partially and inappropriately delegated its obligation to consult to a private company', and 'discouraged a climate of respect' between indigenous communities and the oil company.

The *Sarayaku* Court also reviewed the right to consultation in regards to cultural identity. Finding that 'the right to cultural identity is a fundamental right', the Court concluded that 'States have an obligation to ensure that indigenous peoples are properly consulted on matters that affect or could affect their cultural and social life'. Because the Sarayaku were not consulted before their sacred sites and other places of cultural significance were destroyed, the Court concluded 'that the failure to consult the Sarayaku People affected their cultural identity'. The State was ultimately ordered to pay $90,000 in pecuniary damages and $1.25m in punitive damages to the Sarayaku, as well repair, to the extent possible, the damage caused by the oil company, and ordered to conduct consultation for future projects.

The African Commission on Human and People's Rights receives complaints for violations of rights protected by the African (Banjul) Charter. In *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*, the Commission considered a complaint, filed by non-governmental organisations, that the indigenous Endorois community had been displaced from their ancestral and sacred lands after a mining company was granted a concession, violating their rights to religion and culture.[156] The Commission concluded the forced eviction violated the rights to practise religion and access cultural sites. Stating that 'protecting human rights goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their religious and cultural heritage essential to their group identity', the Commission found that the right to culture had been denied by removal from their indigenous lands.

155 Inter-Am Court H (27 June 2012).

156 No 276/003, para 1; see Mennen and Morel, n 66 above, 38.

US courts

Courts in the United States are often looked to as forums to remedy human rights violations that occur in other countries. This section reviews both international law and US law claims.

International human rights in US courts

UNDRIP and other international instruments protecting rights to sacred sites and cultural resources do not provide a private right of action that can be enforced in courts in the US.[157] Rights guaranteed by international common law, however, are US law, and may be enforced in US courts.[158] The Alien Tort Statute (ATS)[159] provides US federal courts with jurisdiction over common law causes of action under international law.[160] Claims brought under the ATS, however, are limited to those that 'rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms', piracy, violating rights of ambassadors and safe conduct,[161] and have a factual connection to the United States.[162] Customary international law norms that may be asserted under the ATS include torture,[163] genocide,[164] war crimes,[165] extrajudicial killing, prolonged arbitrary detention[166] and medical experimentation on human subjects without their consent.[167] Aiding and abetting liability – including by a corporation – is recognised by customary international law.[168] Claims rejected

157 See *Prophet v United States*, 106 Fed Cl 456, 464 (Fed Cl 2012); *Joyner-El v Giammarella*, 09 CIV 3731 (NRB), 2010 WL 1685957, *3 n 4 (SDNY 15 Apr 2010).

158 *The Paquete Habana*, 175 US at 700 ('International law is part of our law').

159 28 USC s 1350.

160 *Sosa*, 542 US at 724.

161 *Ibid* 725.

162 *Kiobel v Royal Dutch Petroleum Co*, 133 S Ct 1659 (2013); *Daimler AG v Bauman*, 134 S Ct 746 (2014).

163 *Filartiga v Pena-Irala*, 630 F2d 876, 890 (2d Cir 1980).

164 *Sarei v Rio Tinto, PLC*, 671 F3d 736, 760 (9th Cir 2011), overruled on other grounds by *Kiobel*.

165 *Ibid* 765.

166 *Doe v Exxon Mobile Corp*, 654 F3d 11 (DC Cir 2011).

167 *Abdullahi v Pfizer, Inc*, 562 F3d 163, 187 (2d Cir 2009).

168 Compare *Presbyterian Church of Sudan v Talisman Energy, Inc*, 582 F3d 244, 259 (2d Cir 2009) (in the context of a claim brought against a corporation, concluding aiding and abetting liability for the purposeful aid and abet of a violation of international law exists); *Aziz v Alcolac, Inc*, 648 F3d 388, 398 (4th Cir 2011); with *Doe v Exxon Mobile Corp*, 654 F3d 11, 32 (DC Cir 2011) (determining a knowledge mens rea standard is consistent with customary international law); cf *Mohamad v Palestinian Authority*, 132 S Ct 1702, 1705 (2012) (holding the Torture Victims Protection Act's, 106 Stat 73, note following 28 USC s 1350 (1992), imposition of liability on 'individuals' did not extend to non-natural persons such as corporations).

as insufficient include the rights to health and life, and against pollution,[169] environmental abuses[170] and cultural genocide.[171] It is important to recall that customary international law is not static, and as norms develop, claims formerly not available may be viable under the ATS.

ATS claims may be brought against non-state actors. The United States Supreme Court has said that 'certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals'.[172] Claims of torture, genocide, and war crimes (including murder, rape, torture and arbitrary detention of civilians, committed during war) may be brought against non-state actors under the ATS.[173] The Supreme Court recently ruled, however, that the ATS does not apply extraterritorially, and plaintiffs cannot seek relief in US courts 'for violations of the law of nations occurring outside the United States'.[174]

In *Kiobel v Royal Dutch Petroleum Co*, the defendant Dutch, British and Nigerian corporations had corporate offices in the US. The Supreme Court ruled that 'Corporations are often present in many countries, and it would reach too far to say that mere corporate presence' is sufficient to overcome a presumption against extraterritorial application of US law.[175] This holding was affirmed in *Daimler AG v Bauman*, in which the United States Supreme Court held that a German parent corporation was not subject to suit in federal court in the US 'for claims involving only foreign plaintiffs and conduct occurring entirely abroad'.[176]

Domestic US claims regarding sacred sites

Indigenous peoples in the US may seek relief for violations of their rights to sacred sites and TCPs in a number of forums, including administrative agencies, federal court review of agency action, state courts and tribal courts. Typically, the claim would be brought against the governmental agency that had failed to satisfy its duty to conduct consultation with the affected

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169 *Flores v S Peru Copper Corp*, 414 F3d 233 (2d Cir 2003).

170 *Beanal v Freeport-McMoran, Inc*, 197 F3d 161, 167 (5th Cir 1999).

171 *Ibid* 168.

172 *Kadic v Karadzic*, 70 F3d 232, 239 (2d Cir 1995); see Restatement (Third) of Foreign Relations Law s 404 (1987).

173 *Kadic*, 70 F3d at 242; see also Restatement (Third) of Foreign Relations s 702 ('A state violates international law if, as a matter of state policy, it practices, encourages, or condones: (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights').

174 *Kiobel*, 133 S Ct at 1669.

175 *Ibid*.

176 *Daimler AG*, 134 S Ct at 753.

indigenous peoples, as demonstrated in the case involving the Mount Taylor TCP discussed above. Cases against the federal government may proceed under the Administrative Procedures Act, which permits court review of agency action,[177] or under the Federal Tort Claims Act, which permits claims directly against the government.[178] Because US law imposes consultation requirements on governments, government bodies are typically the primary defendant in cases asserting violation of rights to sacred sites; corporations, however, may be added as parties. Additionally, many tribes have tribal courts in which claims for violation of tribal law may be brought.[179]

State forums

Courts in countries around the world consider, and to varying degrees protect, the rights of their indigenous populations. This section discusses specific examples as a starting point.

Canadian courts will review claims asserted against the State for failure to conduct consultation. Because Canadian law does not impose a duty on corporations to conduct consultation with indigenous peoples, they cannot be sued for such in Canadian courts; but corporations may be 'legally liable' for negligence, breach of contract or dishonest dealing based on their relationship with indigenous peoples.[180] Canada's judiciary takes a restrictive view to claims for human rights abuses committed abroad, requiring a 'real and substantial connection' of the parties and action to Canada.[181] In a recent case, a claim brought by the family members of individuals killed in the Democratic Republic of Congo (DRC) by the army against Anvil Mining Limited was dismissed. The Quebec Court of Appeals concluded that Anvil, an Australian company, conducted no business in Canada related to the claims arising out of the DRC, and therefore the Canadian courts could not exercise jurisdiction over Anvil.[182] It has been noted, however, that this test appears to permit claims in Canadian courts for legal violations by Canadian companies committed abroad, although the extent to which human rights claims are viable remains to be seen.[183]

177 See *Access Fund v US Dept of Agric*, 499 F3d 1036 (9th Cir 2007).

178 See *Quechan Indian Tribe v United States*, 535 FSupp2d 1072 (SD Cal 2008).

179 For more information, refer to, eg, Neil G Westesen, *From* Montana *to* Plains Commerce Bank *and Beyond: The Supreme Court's View of Tribal Jurisdiction Over Non-Members*, RMMLF (Mar 2011).

180 *Council of the Haida Nation and Guujaaw v Minister of Forests and Attorney General of British Colombia*, 2004 3 RCS 511, 539.

181 *Club Resorts Ltd v Van Breda*, 2012 SCC 17.

182 *Anvil Mining Ltd v Assoc canadienne contre l'impunité*, 2012 QCCA 117 (CanLII); appeal dismissed, [2012] 1 SCR 572.

183 See Bruce Broomhall, *Extraterritorial Civil Jurisdiction: Obstacles and Openings in Canada* (1 May 2012), available at www.ejiltalk.org/extraterritorial-civil-jurisdiction-obstacles-and-openings-in-canada.

New Zealand courts consider and apply international law, and are required to construe domestic law to be consistent with international law.[184] In the recent case of *Greenpeace of New Zealand, Inc v Minister of Energy and Resources*,[185] the High Court of New Zealand affirmed the decision of the Minister of Energy and Resources to grant an oil exploration permit to Petrobras International Braspetro BV to explore an offshore basin. Although the Minister had not consulted at the permit stage, the court concluded that consultation had occurred when the law permitting offshore exploration was developed, and when the request for permits was made. Significantly, the court found it important that the Maori groups affected by the drilling had a duty to inform the Minister of specific concerns, so that the Minister could take them into account.[186] The court did not reverse the issuance of the permits. Petrobras, however, has returned the permits voluntarily in a withdrawal from New Zealand.

The Chilean Supreme Court has issued a number of opinions recently in cases brought by the Huilliche-Mapuche peoples, challenging the violation of their rights to sacred sites without consultation as required by ILO 169. In March 2012, the court halted Ecopower from building wind turbines in a protected national park, after the Huilliche community argued that ceremonial sites would be affected and the Regional Environmental Commission had not conducted consultation. The court ordered an EIA be conducted, and consultation with the affected community as required in ILO 169.[187] Months later, the court ruled against the Huilliche-Mapuche, and held that there was no right to access sacred sites when located on private property (on which a hydroelectric project was being constructed).[188]

An ongoing case in Belize concerns the government's grant of mining concessions and corporate mining activities on indigenous lands. The affected indigenous Mayan population first filed a lawsuit in the Belize courts and then petitioned the Inter-American Commission on Human Rights, which issued a ruling on the merits, which the Belize Government challenged. A second suit in Belize's courts was filed. In the ruling in *Cal v*

184 See *NZ Maori Council v Attorney General* [1989] 2 NZLR 142 (CA) para [142]; Stevenson, n 67 above, 330–31.

185 [2012] NZHC 1422.

186 *Ibid* para [139]; *ibid* para [141] (UNDRIP 'does not create binding legal obligations').

187 Ryan Seelau, 'Chile's Supreme Court Halts Wind Farm Projects and Orders Consultation with Mapuche People', Indigenous News.org (25 Mar 2012), available at http://indigenousnews.org/2012/03/25/chiles-supreme-court-halts-wind-farm-project-and-orders-consultation-with-mapuche-people accessed 27 February 2013.

188 Ryan Seelau, 'Chilean Supreme Court Rejects Mapuche Claim to Access a Sacred Site', Indigenous News.org (25 Sept 2012), available at http://indigenousnews.org/2012/09/25/chilean-supreme-court-rejects-mapuche-claim-to-access-a-sacred-site accessed 27 February 2013 (contains link to opinion).

Attorney General of Belize, the Supreme Court of Belize was the first high court to rely on UNDRIP in ordering the government to recognise the rights of the Mayan peoples to certain traditional lands, to demarcate their titles and to cease granting concessions or leases to those lands in the absence of Mayan consent.[189] The Belize Government has not implemented the Court's ruling in *Cal*. The Mayans filed a second lawsuit, in which the holding in *Cal* was affirmed and applied to all Mayan villages in the region.[190] Throughout the various challenges by the indigenous population, development – including petroleum exploration – has been ongoing, by US Capital Energy, Inc, and its Belize subsidiary. On 15 March 2013, the Human Rights Committee considered Belize's actions under the ICCPR in the absence of a report by Belize. The Human Rights Committee's advance concluding observations notes regret that the State has not implemented the court rulings, and that concessions continue to be granted, and states: '[t]he State party should desist from issuing new concessions for logging, parceling for private leasing, oil drilling, seismic surveys and road infrastructure projects in Mayan territories without the free, prior, and informed consent of the relevant Mayan community.'[191]

In Kenya in 2001, the High Court at Mombasa enjoined Tiomin Kenya, Ltd from titanium mining based on a claim asserting harm to the environment, including cultural and sacred sites, and insufficient consultation with affected populations.[192] Tiomin Kenya had not submitted the required EIA report prior to commencing mining activities that would cause harm to the environment. The injunction was later repealed, but litigation ensued regarding forced displacement and compensation therefore. Tiomin later withdrew from the mining project and transferred its mining rights. The Kenya Government, however, has cancelled a number of mining licences while it considers reforms to its mining laws, including required local ownership.[193]

Other potential forums to remedy violations of rights

Requirements to consult and receive FPIC have a tremendous advantage for corporations: by entering into an agreement, based on good faith

189 Claim Nos 171 and 172 of 2007, Belize Supreme Court (2007).

190 *The Maya Leaders Alliance et al v Attorney General*, Claim No 366 of 2008 (2010). This case is currently on appeal.

191 UN Hum Rt Comm, Advance Unedited Version, Concluding Observations, CCPR/C/AGO/CO/1 (undated).

192 *Nzioka v Tiomin Kenya, Ltd*, Civil Case No 97 (Kenya High Court, 2001).

193 See John Muchira, 'Licenses cancelled in latest snag to hit Kenya titanium industry' *Mining Weekly* (25 January 2013) www.miningweekly.com/article/licences-cancelled-in-latest-snag-to-hit-kenya-titanium-project-2013-01-25.

consultation, with indigenous peoples affected by a project, the corporation can create or identify the dispute resolution mechanism where claims against the corporation for human rights violations may be lodged. Such may include an internal mechanism, submission to local court jurisdiction, identification of an arbitral forum and choice of forum and choice of law provisions.

For example, the MMDA requires companies to establish a grievance mechanism, developed in consultation with the communities affected by the mining project, and is not to be exclusive of other forums. Additionally, the MMDA requires the company to consent to local jurisdiction for claims regarding the project. Similarly, the IFC Performance Standards and Equator Principles require companies to establish grievance mechanisms, which are not exclusive of administrative or judicial remedies.[194]

Arbitration may be an available forum in certain cases. An idea that has been proposed is for governments or international financial institutions to make consent to arbitration with indigenous peoples a condition of granting mining licences or concessions.[195] When an MNE challenges a State law requiring FPIC or consultation, it may be forced to arbitrate such a claim.[196]

Some communities have used community referenda to assert a community's right to FPIC. For example, the people of Sipacapa, Guatemala, held a municipal referendum that resulted in a vote opposing the continued development and operation of a mine that allegedly caused contamination to the local water supply. The Constitutional Court of Guatemala held that the referendum vote, while demonstrating the community's position on the mine, was not binding on the national government, who had ultimate authority to regulate mines.[197] The court's decision was appealed to the Inter-American Commission on Human Rights, which granted precautionary measures requesting Guatemala to halt the mining project until such time as environmental concerns were addressed, and to remediate water contamination and negative health issues caused by the mine.[198] As of this writing, no opinion on the merits – including the legal effect of the referendum – has been issued.

Of potential importance in coming years, for MNEs headquartered in countries around the world, is the concept of home state regulation.

194 IFC Performance Standard 1, para 35; Equator Principles, Principle 6.

195 Foster, n 113 above, 676–77.

196 See generally Margaret Clare Ryan, 'Glamis Gold, Ltd v The United States and the Fair and Equitable Treatment Standard' (2011) 56 McGill L J 919.

197 See Brent McGee, 'The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development' (2009) 27 Berkley J Int'l L 570, 625–26.

198 Inter-Am Comm on HR, PM 260-07, Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacán Municipalities in the Department of San Marcos, Guatemala (20 May 2010).

Under home state regulation, MNEs' extraterritorial activities would be regulated for human rights and environmental compliance under the laws of their home state.[199] For example, the United Nations Committee on the Elimination of Racial Discrimination has requested Norway to hold MNEs domiciled in Norway liable for extraterritorial human rights violations.[200] The Committee has also noted Canada's CSR strategy does not include measures regarding MNE liability.[201]

Consultation and FPIC are means to honouring indigenous peoples' rights to sacred sites

Legal requirements imposed on States and business entities to conduct consultation and seek FPIC cannot be considered in a vacuum, but must be determined in reference to the substantive right of the indigenous peoples affected by a development project. Indigenous peoples' rights to sacred sites are recognised and respected as rights significant to their continued social and cultural existence. The primacy of these rights, connected as they are to indigenous rights to lands traditionally used, owned and occupied, result in a heightened duty to conduct consultation, accommodate indigenous peoples' concerns, and seek FPIC at each stage of a project.

The failure of corporations to respect indigenous peoples' right to access, use and protect their sacred sites may result in legal liability, a lengthy lawsuit, loss of permits, licences or concessions, or a harmed reputation. Complying with duties to conduct consultation and gain FPIC prior to commencing a development project that affects the sacred site right, whether the corporation does so out of legal obligation or a good business practice, will reduce or eliminate each of these risks. The authors advocate genuine and diligent efforts to seek affected indigenous peoples' actual consent – and to the extent feasible, developing a partnership with the indigenous peoples for the project at issue – prior to conducting any activity affecting indigenous rights to sacred sites. Consultation and the FPIC process can be used to develop contracts, with mediation or arbitration provisions, or choice of law/forum provisions, that could protect legal rights of both indigenous peoples and corporations working on their lands. Doing so undoubtedly affirms a corporation's duty to respect human rights.

Conducting good faith, socially appropriate and respectful consultation is required not only by the law, but by good business practice. Consultation,

199 See generally Sara L Seck, 'Home State Responsibility and Local Communities: The Case of Global Mining' (2008) 11 Yale Hum Rts & Dev LJ 177.

200 CERD/C/NOR/CO/19-20 (2012), para 17.

201 CERD/CAN/CO/19-20 (2012), para 14.

FPIC and reaching formalised agreements result in the avoidance of protracted public litigation,[202] and an improved business reputation when commencing future development projects on indigenous lands.[203] As noted by Professor Anaya, however, consultation and FPIC alone are insufficient to fully protect indigenous peoples' rights, including rights to sacred sites and cultural resources. '[A]dditional safeguards include but are not limited to the undertaking of prior impact assessments that provide adequate attention to the full range of indigenous peoples' rights, the establishment of mitigation measures to avoid or minimize impacts on the exercise of those rights, benefit-sharing and compensation for impacts in accordance with relevant international standards.'[204] Each of these 'safeguards' and other measures (such as employment programmes) are consistent with genuine motives to 'protect, respect and remedy', and will improve the prospects for achieving consent if addressed by companies in agreements made with affected indigenous peoples prior to commencing development activities.

Whether international or relevant State law requires formal consultation or actual consent, corporations are advised to conduct meaningful, open, honest, fair and timely consultation with indigenous peoples, to obtain their consent, and, if possible, to develop partnerships to minimise subsequent project costs arising from disputes – legal and political – and protect the MNE's reputation. In most, if not all, cases involving indigenous rights to sacred sites or TCPs, consent is needed practically even in circumstances where it may not be required legally.

In the final analysis, perhaps the most effective investment a company can make is to devote the time resources necessary to study and learn from the mistakes of the past and identify and emulate those who have succeeded in instilling a culture of respect for indigenous rights and policies of inclusion and vision sharing such that respect is also earned and becomes mutual. In most cases this will involve not only fully appreciating legal concepts surrounding consultation and FPIC, but looking beyond them to the intangible attributes of meaningful human relations imbued with dignity.

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202 Judicial forums may be all or mostly avoided, however, by entering into a thorough agreement as part of consultation and FPIC that establishes a dispute resolution mechanism.

203 See generally John W Miller and Alistair MacDonald, 'Indigenous Peoples Get Last Word on Mines' *Wall Street Journal* (26 March 2012) ('Companies successful at gaining aboriginal peoples' approval can avoid the court fights over drilling without consultation and alleged environmental degradation that have been rippling throughout Canada in the past decade – and cement reputations as community builders when bidding for future projects').

204 Anaya (2012), n 19 above, para 52.