

**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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I. Introduction

For indigenous peoples¹ 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 and TCPs 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. Historically, corporations have proceeded with development projects without due consideration to the importance to affected indigenous peoples of sacred sites, 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 States⁴ around the world recognize an indigenous right to sacred sites. Along with recognition of

¹ There is no universally accepted definition of the term “indigenous peoples,” *see* World Bank Operational Policy 4.10, ¶ 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 capitalize the term in this paper except when quoting sources which have done so. Professor Wiessner provides the following definition: “Their essential characteristics are not only those of a heteronomously defined collectivity of human beings, discriminated against over time, but also of an autonomous, self-defined community with specific ways of life and a view of the world characterized by their strong, often spiritual relationship with the land the outside world regards them as the original inhabitants of.” Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, EJIL (2011), Vol. 22, No. 1, 121, 126-27. The World Bank uses the term “Indigenous Peoples” “to refer to a distinct, vulnerable, social and cultural group” that self-identifies as indigenous, has geographically distinct habitats or territories, and a connection to the natural resources therein, has customary institutions distinct from the dominant society, and an indigenous language. World Bank Operational Policy 4.10, ¶ 4.

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

³ G.A. Res. 61/295, U.N. Doc. A/Res/61/295 (Sept. 13, 2007). Although the Australia, Canada, New Zealand, and the United States initially voted against UNDRIP, each has changed position and now supports it.

⁴ The use of the capitalized term “States” refers to countries generally, whereas “states” refers to the individual states making up the United States of America.

that right has come sources, including industry standards, requiring States and corporations⁵ to 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 or TCPs. 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 uncertainties and litigation costs, improved global image and reputation, better community relations, and preservation of sacred sites for the benefit of indigenous peoples concerned and humankind.

Indigenous peoples’ rights to sacred sites and TCPs, like indigenous peoples rights generally, are considered part of international human rights law. Indigenous rights, however, may be considered *sui generis* because they are based in the customs and traditions of the peoples concerned, rather than an established corpus of positive law.⁶ 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.⁷ 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 indigenous sacred sites. Corporations may be sued in civil lawsuits for violation of indigenous rights, and face barriers to doing business, including license or contract revocations, as well as reputation-based challenges,⁸ when they do not ensure compliance with indigenous rights.

This paper focuses on the rights of indigenous peoples to sacred sites and TCPs, and how the duty imposed by international and domestic law, as well as other sources, of States and corporations to consult and to seek FPIC is used to protect those rights.⁹ Part II of this paper provides an overview of the right to sacred sites established in international law, the law of the United States, and examples from laws of other countries. Part III reviews legal requirements or voluntary standards to conduct consultation or seek FPIC when rights to sacred sites are concerned. Part IV 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. In Part V we summarize the difficulties presented by requirements to conduct

⁵ This paper refers to business entities to whom the responsibilities discussed herein apply as “corporations” or multinational enterprises (“MNE”).

⁶ See *Cal v. Attorney General*, Claim Nos. 171 & 172 of 2007, ¶ 101 (Supreme Court, Belize).

⁷ Adopted by the Human Rights Council, A/HRC/RES/17/4 (July 6, 2011).

⁸ In a recent forum convened in Tucson, Arizona, United States, by S. James Anaya, the United Nations’ Special Rapporteur on the Rights of Indigenous Peoples, some participants advocated that governmental decision makers favor companies with a track record of respecting indigenous rights over those without such record, in the granting of mining concessions, leases, and licenses. *Mining and Indigenous Peoples: A Dialogue to Advance Common Understanding of Indigenous Peoples’ Rights in the Context of Mining* (Nov. 13, 2012).

⁹ Although the rights of indigenous peoples have only been formally recognized by international law in the last decade, they have quickly become the subject of much litigation, scholarship, and industry and non-governmental organization (“NGO”) standards. This paper does not purport to be an exhaustive review, but, particularly in conjunction with other papers presented at this conference, is part of an ongoing conversation regarding the relationship between indigenous peoples and MNEs in the extractive industries.

consultation and seek FPIC when land considered a sacred site or TCP is targeted for development, and offers ideas for successfully analyzing, negotiating, and working with indigenous populations who will be affected by extractive industries development projects.

II. The 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 various non-binding guidelines. This discussion necessarily includes mention of indigenous rights to land or territory, as sacred sites often are associated with what may be termed a “cultural landscape.”

A. What is a sacred site or traditional cultural property?

International law does not precisely define “sacred site” or “TCP.” Both may be identified as cultural resources or cultural heritage, which may be tangible or intangible, and may include geographic locations. Their legal recognition and protection is related to the right of indigenous peoples to self-determination.¹⁰ Certain global instruments attempt to define sacred site. The Akwé: Kon Guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities (“Akwé: Kon Guidelines”), promulgated under the Convention for Biological Diversity, states “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.”¹¹ The International Union for Conservation of Nature defines “sacred site” as “[a]n area of special spiritual significance to peoples and communities.”¹² 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.”¹³

The term “traditional cultural property” is related, and is primarily used in U.S. law. A TCP is defined as a property “eligible for inclusion in the National Register 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.”¹⁴

¹⁰ Valentina S. Vadi, *When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law*, 42 Colum. Hum. Rts. L. Rev. 797, 818 (2011).

¹¹ Secretariat of the Convention on Biological Diversity, Akwé: Kon Guidelines ¶6(g) (2004).

¹² Wild, R. and McLeod, C. (Eds.), *Sacred Natural Sites: Guidelines for Protected Area Managers* (Gland, Switzerland: IUCN, 2008).

¹³ The World Bank, Operational Manual, OP 4.11, ¶ 1 (July 2006).

¹⁴ See National Park Service, National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties 1 (1990). A concise reference to TCP in 1992 amendments to the National Historic Preservation Act refers explicitly to “properties of traditional religious and cultural importance to [Native American Tribes]. See 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, p. 3-4 (Rocky Mt. Min. L. Inst. 2003).

Implicit in each of these definitions is the acknowledgment that a corporation or State cannot unilaterally define an indigenous community's sacred site. Of utmost importance in determining whether a site is sacred, or a resource is significantly important to a peoples' culture, is consultation and conversation with the indigenous peoples who may, or may not, have a relationship with specific land or territory, including specific sites or a landscape. It is difficult if not impossible to identify a sacred site without 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.

B. International Law

In binding international conventions, non-binding declarations, and guidelines, international law recognizes 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.¹⁵ Although the UDHR does not expressly protect sacred sites, its protection of property rights, Art. 17, religion, Art. 18, and community culture, Art. 27, lay 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")¹⁶ and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR")¹⁷ 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, Art. 18, and the rights of minorities "to enjoy their own culture, to profess and practise their own religion, or to use their own language," Art. 27. Article 27 may be violated by State permission of development on indigenous peoples land.¹⁸ The International Convention on the Elimination of All Forms of Racial Discrimination prohibits discrimination based on race,¹⁹ and the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage protects cultural knowledge and practices that may be associated with particular landscapes.²⁰

UNDRIP, a non-binding declaration,²¹ most strongly asserts and protects the rights of indigenous peoples to their traditional lands and sacred sites. Cultural traditions and customs,

¹⁵ G.A. Res. 217A (III), U.N. Doc. A/810 (1948) (prologue requires "every organ of society" to respect and work towards the realization of human rights).

¹⁶ *Opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

¹⁷ *Opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360.

¹⁸ *See Lubicon Lake Band v. Canada*, U.N. Human Rights Committee Comm. No. 167/1984 (1990); *Länsman v. Finland*, U.N. Human Rights Committee Comm. No. 511-1992 (1994).

¹⁹ *Opened for signature* Dec. 21, 1965, 660 UNTS 195.

²⁰ *Opened for signature* Oct. 17, 2003, Art. 1.

²¹ The United Nations Special Rapporteur on the rights of indigenous peoples, James Anaya, describes UNDRIP thusly: "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).

including archeological 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 recognizes 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 Labor Organization’s Indigenous and Tribal Peoples Convention 169 (“ILO 169”),²² 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 organizations provide protection for sacred sites in their human rights documents. The European Convention for the Protection of Human Rights and Fundamental Freedoms²³ includes protection of private and family life, Art. 8, protection of religion, Art. 9, and guarantee of non-discrimination, Art. 14. The African (Banjul) Charter on Human and Peoples Rights²⁴ protects the free practice of religion, Art. 8, the right to property, Art. 14, the right to cultural life, Art. 17.2, the right to “freely dispose of . . . wealth and natural resources,” Art. 21.1, and the right to “economic, social and cultural development,” Art. 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 Charter²⁵ protects the environment and requires development to be sustainable, “in a manner consistent with our obligation to future generations,” Art. 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”)²⁶ (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 *Kichijwa Indigenous People of Sarayaku v. Ecuador* (“*Sarayaku*”), interpreted Article 21 of the American Convention, in conjunction with other

²² International Labour Organisation, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, ILO Official Bull. 59 (entered into force Sept. 5, 1991).

²³ *Opened for signature* Apr. 11, 1950, 213 U.N.T.S. 221, E.T.S. No. 5.

²⁴ June 27, 1981, 1520 U.N.T.S. 217, 21 I.L.M. 58.

²⁵ May 17, 1998, available at: <http://www.unhcr.org/refworld/docid/452678304.html>.

²⁶ Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673.

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.”²⁷ Additionally, the OAS is negotiating a Draft American Declaration on the Rights of Indigenous Peoples,²⁸ proposed language of which would provide strong protection of indigenous rights to sacred sites. It would recognize the right of indigenous peoples to control their land, territory, and natural resources, Art.VI(2); to cultural identity and heritage, Art. XII(1); to spirituality, including sacred sites, Art. XV; access to sacred and ceremonial sites, Art. XIX(2); right to spiritual, cultural, and material relationship to lands, Art. XXIV; right to cultural heritage and intellectual property, Art. XXVIII.

C. United States Laws

U. S. 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. The authors do not intend to suggest that the U.S. provides the best substantive or procedural protections of indigenous rights, nor even that its laws fully comport with international law.

1. Background Considerations

Before discussing the numerous laws, regulations, and policies in the United States (“U.S.”) on the subject of sacred sites and traditional cultural properties, a few contextual points are worth briefly highlighting. Including these points serves the dual purpose of providing context, as well as briefly introducing food for thought relative to certain interdepartmental working groups that have been formed under a March 5, 2013 Action Plan implementing a December 2012 Memorandum of Understanding on sacred sites among the U.S. Departments of the Interior, Agriculture, Energy and Defense.

a. Federalism in the United States

As a nation of independently sovereign states, but with a centralized federal government, “federalism” denotes a complex, constitutionally mandated system of laws, some interrelated and some not, that largely derive from the U.S. Congress and the representative legislatures of each state. The laws are in addition to the Constitutions of the U.S. and each state; and pursuant to the U.S. Constitution, federal law is superior to the law of the several states. Further, the executive branch of each federal and state jurisdiction is, or at least can be, an important source of legal rules and policies through their rulemakings, executive orders, guidance documents, agency manuals and inter-agency memoranda of understanding (MOUs) or similar materials. Finally, the judiciaries of each federal and state jurisdiction also are an important source of law and legal precedent through their case decisions and important statutory interpretations.²⁹

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

²⁸ Jan. 20, 2011 working version available at http://www.oas.org/DIL/GT-DADIN-doc_334-08_rev6_eng.pdf.

²⁹ In addition to the various sources of federal and state authority mentioned, local jurisdictions such as counties and municipalities vested with certain authority from the states in which they are located, can play an influential role in

b. Status of Tribes in the United States

Native American tribes in the U.S., of which as many as 566 are federally recognized,³⁰ are considered to be sovereign nations. Under U.S. Supreme Court cases interpreting and applying the Supremacy Clause of the U.S. Constitution, however, the U.S. Congress is deemed to have plenary control over Native American affairs, to the exclusion of states and other nations.³¹ Congress, in turn, has delegated expansive authority to the Executive Branch, and in particular the President and the Secretary of Interior.³² Several decisions from the U.S. Supreme Court have deemed federal agencies to have a guardian-ward relationship, or so-called Trust responsibility, with, Native American tribes.³³ Pursuant to authorities that are beyond the scope of this paper, and subject to specific exceptions, tribal governments have jurisdiction over many activities within “Indian Country,” a term of art in Native American law that includes reservations, “dependent Indian communities,” and other areas associated with tribes. Over the course of U.S. history, however, great amounts of traditional tribal lands have become federally owned subject to the multiple use and mineral development preferences of a large number of public land statutes that must be administered by land management agencies.

c. Property Rights in the United States

The manner and means by which individuals and companies with development projects in the U.S. acquire and hold constitutionally protected property interests in general, and mineral interests in particular, are exceptionally variable. Property interests in the U.S. devolve from a private and public lands history that often has engendered—particularly in the western U.S.—a patchwork of private lands; federal or state public lands available (or not) for entry or lease; special category or withdrawn federal or state lands; and reservation, allotted, executive order, native corporation and Indian country lands, among others.

The real property patchwork, moreover, often exists not only in a two-dimensional geographical sense, but also in a third, essentially vertical, dimension involving split-estate lands in its simplest form, and minerals-based or formation-based delineations (and divided interest scenarios) in the context of multiple mineral or multiple horizon holdings or development.

how land may or may not be used within their territorial, and in some cases “extra-territorial” jurisdictions. Although the ordinances of local jurisdictions cannot be overlooked by those seeking to gain a complete understanding of particular development scenarios, and although there are examples of local authorities entering into land use planning-related MOUs with federal officials such as the Bureau of Land Management within the United States Department of Interior (as in the case of Maricopa County in Arizona), to date local jurisdictions generally are not commonly viewed as significant sources of protections for sacred sites and cultural resources.

³⁰ See Matthew L.M. Fletcher, *Tribal Consent*, 8 Stan. J. Civ. Rts. & Civ. Liberties 45, 64 (April 2012). When a tribe is “federally recognized,” the United States officially recognizes a legal and political relationship between the United States and the tribe. See Cohen’s *Handbook of Federal Indian Law* § 3.02[4], at 140 (2005 ed.).

³¹ See generally Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 Tex. L. Rev. 1, 25-80 (2002). The plenary authority of Congress over Indian Affairs is clear in the case of “external Indian affairs,” but debated insofar as concerns “internal Indian affairs, including the authority of Indian tribes to govern themselves.” See Fletcher, *supra*, at 76.

³² 25 U.S.C. § 2, 9 (2005).

³³ See generally Robert McCarthy, *The Bureau of Indian Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. Pub. L. 1 (2004).

Further, among important doctrines in U.S. property laws that complicate consultation processes on issues of sacred sites and cultural properties, one stands out as particularly problematic. Specifically, case law from federal and state jurisdictions generally recognize the dominance of the mineral estate in relation to the surface state. As discussed herein, that doctrine, combined with a New Mexico court’s recognition of mineral interests as property interests protected by due process of law, proved to be significant in the court’s decision striking down a state agency’s listing of an over 700 square mile landscape known as Mt. Taylor and its surrounding mesas, as a “traditional cultural property” under a state cultural property statute.

The necessary preoccupation of U.S. law with the manner and means of acquiring and holding property interests, together with the hallowed position of property rights as fundamental rights constitutionally protected by due process of law, and the status of mineral estates as dominant, pose distinct challenges in achieving the goal of accommodation with indigenous peoples’ rights to sacred sites and TCPs they do not themselves currently own. Under U.S. law, that challenge is perhaps manageable if good faith, meaningful consultation and reasonable accommodation is what is required under UNDRIP. If, however, UNDRIP’s FPIC language were to be interpreted as granting indigenous peoples an absolute right to withhold consent to a project, the current real property regime likely would be an insurmountable impediment to meeting that goal, or at the very least could spawn substantial claims for just compensation resulting from “takings” under the U.S. Constitution.³⁴

2. United States Authorities on Sacred Sites and Traditional Cultural Properties

The legal sources that have been relied upon in the efforts to protect sacred sites and TCPs in the U.S. are numerous and varied. Many, though not all, of them are federal authorities, including the U.S. Constitution, statutes from Congress, Presidential Executive Orders, regulations from federal agencies, inter-agency MOUs and guidance documents. As will be seen, state statutes and regulations also can be significant, as in the notable example from the state of New Mexico involving five tribes’ nomination of Mt. Taylor and its surrounding mesas for listing on the New Mexico state registry as a “traditional cultural property.”

a. First Amendment

The First Amendment of the U.S. Constitution provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;”³⁵ This provision essentially prevents the government from two types of religious persecution, by saying that government can neither impose a religion on people nor prevent people from having their own religion. It also contains somewhat divided sentiments about religion, between protecting the freedom of religion, on one hand, and ensuring that religion is disentangled from the workings of government, on the other, and that provides a source of tension in sacred sites and traditional cultural properties law in the U.S., as will be seen.

³⁴ U.S. Const. amend. V.

³⁵ U.S. Const. amend. I.

The first part of the First Amendment, known as the Establishment Clause, provides “Congress shall make no law respecting an establishment of religion.”³⁶ The most significant attempts to use this clause in relation to sacred sites are 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. In general, the attempts have come up short. Judicial decisions in this area reflect a tendency to downplay as problematic tribal religion-based justifications for agency action, in favor of scouring factual circumstances to identify secular purposes that courts perceive to pass muster under the Supreme Court’s three-pronged “*Lemon*” test.³⁷ The most notable recent example involved an Establishment Clause 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.³⁸ In two earlier cases, federal courts had implied that federal agency action imposing outright bans on particular uses of public lands in order to accommodate religious traditions might violate the Establishment Clause.³⁹ In the case involving Cave Rock, however, the Ninth Circuit Court of Appeals distinguished the rationale of those earlier cases as involving exclusively religious goals, and 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 archeological attributes.⁴⁰

Evaluating Establishment Clause cases purely from the perspective of international norms reflecting a goal of protecting the rights of indigenous peoples to their religious traditions and cultural identities, one might conclude that the clause as currently interpreted poses an impediment to aligning with those norms. Thus far, however, the results in the cases seemingly have shielded the U.S. from substantial criticism, though recent federal administrative developments expressly promoting protections for sacred sites may serve to bring the potential tension between the Establishment Clause and trends in international indigenous rights law to a head.

The second part 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 U.S. Forest Service’s construction of a paved log road on federal public lands within the Six Rivers National Forest.⁴¹ The area had been listed as the Helkau historic district on the National Registry pursuant to the National Historic Preservation Act. Although the tribes prevailed in the lower federal courts, which held there was no “compelling governmental interest” in burdening the tribes’ religions with the log road, the Supreme Court reversed. Rather than apply the standard “compelling governmental interest”

³⁶ U.S. Const. amend. I.

³⁷ See *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (agency action survives the Establishment Clause if it (1) has a secular purpose, (2) does not have the principal or primary effect of advancing religion, and (3) does not foster an excessive entanglement between the government and religion).

³⁸ *Access Fund v. U.S. Dept. of Agriculture*, 499 F.3d 1036 (9th Cir. 2007).

³⁹ See *Natural Arch and Bridge Society v. Alston*, 209 F.Supp.2d 1207, 1223-1225 (D. Utah 2002), *aff’d*, 98 Fed. Appx. 711 (9th Cir. 2004), *cert. denied sub. nom., DeWall v. Alston*, 543 U.S. 1145 (2005); *Bear Lodge Multiple Use Assn.*, 2 F.Supp.2d 1448, 1450 (D. Wyo. 1998), *aff’d*, 175 F.3d 814 (10th Cir. 1999), *cert. denied*, 529 U.S. 1037 (2000).

⁴⁰ *Access Fund*, 499 F.3d at 1042-1046.

⁴¹ *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988).

test, the Court reasoned that the Free Exercise Clause could not be used to divest the government of its right to use its land.⁴²

Later cases likewise have rejected the “compelling governmental interest” test, have found that laws of general applicability are not invalid merely for infringing on the free exercise of religion, and have relegated the Free Exercise Clause to serving as a basis for judicial relief only where a government’s action specifically targets religious practices or impedes more than the right of free exercise of religion.⁴³ The line of cases is viewed as having “rendered the Free Exercise Clause of little relevance for protecting tribal sacred places located on federal lands.”⁴⁴ As discussed later in this paper, however, Congress has sought to breathe new life into protections for the free exercise of religion by its adoption of the Religious Freedom Restoration Act (“RFRA”), an act the effectiveness of which remains to be seen. What also remains to be seen is whether the pressures of international norms that are evolving to protect indigenous peoples’ rights such as core religious identity and cultural survival might begin to have some influence on U.S. jurisprudence under the Free Exercise Clause⁴⁵ and RFRA.

b. National Historic Preservation Act

The National Historic Preservation Act (“NHPA”) “represents the cornerstone of federal historic and cultural preservation policy.”⁴⁶ Passed by Congress in 1966, NHPA is a comprehensive program to identify, evaluate and preserve historic properties through the procedural vehicle of listings, or determinations of eligibility for listings, of properties on the National Register of Historic Properties.⁴⁷ The statute was amended in 1992 to provide that “[p]roperties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.”⁴⁸ Under NHPA Section 106, federal agencies having direct or indirect jurisdiction over a proposed “undertaking” are required, before granting a license 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.”⁴⁹ The Advisory Council on Historic Preservation, which is the agency charged with implementing the Section 106 process, has adopted regulations addressing tribal consultation processes that are discussed later in this paper.

⁴² 485 U.S. at 453.

⁴³ See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

⁴⁴ See Dean B. Suagee and Jack F. Trope, Protection of Native American Sacred Places on Federal Land, Rocky Mt. Min. L. Fdn. Inst. Proceedings, Sec. 12.02[1][a], at p. 12-5 (Vol. 54 2008); see also Walter E. Stern, Cultural Resources Management-Tribal Rights, Roles, Consultation, and Other Interests (A Developer’s Perspective), Sp. Inst. On Red Reg. of Cultural Res., Wildlife and Waters of the U.S., Paper No. 3, p. 12 (Rocky Mt. Min L. Inst. 2012). (“After *Lyng*, any claim to restrict federally authorized use of public lands to accommodate Indian religious uses appears untenable.”).

⁴⁵ The subject of the ability or inability of jurisprudence under the U.S. constitution—fundamentally a human rights-driven instrument, but often ensnared within an “original intent” milieu—to evolve with and/or meet developing international human rights norms in general, and indigenous rights in particular, is not covered here.

⁴⁶ Stern, *supra*, at. 5.

⁴⁷ 16 U.S.C. §§ 470w(5).

⁴⁸ 16 U.S.C. § 470a(d)(6).

⁴⁹ 16 U.S.C. § 470f.

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 categorizes properties of traditional importance to tribes as “traditional cultural properties” (“TCPs”).⁵⁰ Even before the 1992 amendments to NHP and the earlier issuance of *Bulletin 38*, the use of TCPs were part of a “long-standing federal policy of treating places that hold religious or cultural importance to Indian tribes as potentially eligible for the National Register.”⁵¹ *Bulletin 38*, which allows for documenting of TCPs even based on oral traditions, 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.” Although not a regulation, *per se*, a failure to follow the guidance of *Bulletin 38* after being told TCPs existed in the area of an undertaking was deemed a violation of the “reasonable and good faith effort” standard by the U.S. Forest Service, one of the United States’ agencies (along with the Bureau of Land Management, among others) managing federal public lands.⁵² There must be an actual place that can be located for a TCP to exist, for example; the Forest Service did not violate NHPA when it tried but failed to locate a historically significant trail associated with a tribe’s “survival march.”⁵³

c. New Mexico’s TCP Process and Mt. 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”).⁵⁴ New Mexico’s 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 (i.e., 2072 square kilometers) encompassing the entirety of Mt. Taylor, a volcanic mountain located in western New Mexico, and its surrounding mesas.⁵⁵ The tribes argued an emergency listing was necessary due 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 land owners 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;⁵⁶ and (3) that the state acted unlawfully in counting as part of the TCP common lands of a Spanish land grant-merced confirmed under the 1848 Treaty of Guadalupe Hidalgo between the U.S. and Mexico. Although other parties including ranchers, uranium companies and others asserted

⁵⁰ National Park Service, National Register Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties* (1990).

⁵¹ Suagee and Trope, *supra*, § 12.02[2][c], at p. 12-12.

⁵² *Pueblo of Sandia v. United States*, 50 F.3d 856, 860-862 (10th Cir. 1995); see also *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800 (9th Cir. 1999) (*Bulletin 38* is the recognized criteria for identifying and assessing TCPs).

⁵³ See *Hoonah Indian Association v. Morrison*, 170 F.3d 1223, 1230-1232 (9th Cir. 1999).

⁵⁴ N.M. Stat. Ann. §§ 18-6-1 to -23 (1978).

⁵⁵ See *Rayellen Resources, Inc. v. NM Cultural Prop. Rev. Committee*, No. CV2009-812 (N.M. Dist. Ct. 2011).

⁵⁶ Mr. Butzier represented three such mineral interest owners of split estate lands in objecting to the listing on due process grounds including lack of notice resulting from the state’s decision to only notify surface owners.

further grounds, on the basis of all three of these grounds the state trial court reversed the state's listing.⁵⁷ The State agency involved appealed to the New Mexico Court of Appeals, which certified the appeal as raising important issues for decision by the New Mexico Supreme Court, where the case remains pending as of this writing.⁵⁸

d. Religious Freedom Restoration Act

Congress adopted the Religious Freedom Restoration Act ("RFRA")⁵⁹ in 1993 to attempt to reestablish the "compelling governmental interest" test discussed above under the Establishment Clause. The U.S. Supreme Court has held RFRA unconstitutional as applied to the states under the Fourteenth Amendment,⁶⁰ 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.⁶¹ Meanwhile, cases have proceeded under RFRA in the lower courts. For example, the Ninth Circuit Court of Appeals analyzed 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.⁶² 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.⁶³ The court held that the tribes' activities did constitute the exercise of religion, but rejected the RFRA claim because the deposition of snow made out of 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.⁶⁴

e. 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."⁶⁵ The U.S. Supreme Court has relegated 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 AIRFA essentially adds no procedural or

⁵⁷ *Id.*

⁵⁸ Oral arguments were heard in the case in late October 2012, and a ruling is expected soon.

⁵⁹ 42 U.S.C. § 2000bb to 2000bb-4.

⁶⁰ *See City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

⁶¹ For a good discussion of these issues, see Sara Brucker, *Navajo Nation v. United States Forest Service: Defining the Scope of Native American Freedom of Religious Exercise on Public Lands*, 31 *Environs: Envtl. L. and Policy J.* (2007).

⁶² *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (*en banc*).

⁶³ *Id.* at 1068.

⁶⁴ *Id.* at 1063-1064 and 1070.

⁶⁵ 42 U.S.C. §1996.

substantive rights beyond the rights afforded by the Free Exercise Clause and NEPA.⁶⁶ Second, 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.”⁶⁷

In a challenge by the Havasupai tribe to the Forest Service’s modification of a plan of operations for a uranium mining company’s project on National Forest Lands in Arizona, however, a federal district court interpreted 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.⁶⁸ 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 the plan modification but was not forthcoming on its religion-based issues of concern and did not identify any sites of religious significance.

f. Executive Order No. 13007 on Indian Sacred Sites

In 1996, then-President Clinton issued an Executive Order “to protect and preserve Indian religious practices.”⁶⁹ Among the definitions in the order is a definition of “sacred site”:

any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or Indian individual determined to be an appropriately authoritative representative on an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion; provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site.⁷⁰

Executive Order 13007 imposed on federal land management agencies two basic obligations to be undertaken “to the extent 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.”⁷¹ The Order also contains procedures and timelines for effectuating the obligations.⁷²

g. 2012 Interagency Memorandum of Understanding and 2013 Action Plan

As recently as December of 2012, the Secretaries of four U.S. Departments, the Departments of the Interior, Agriculture, Energy and Defense, together with 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

⁶⁶ *Ling*, 485 U.S. at 455.

⁶⁷ *Id.*

⁶⁸ *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1488 (D. Ariz. 1990).

⁶⁹ Executive Order No. 13007 (May 24, 1996), is codified in the U.S. Code Annotated with AIFRA, 42 U.S.C. §1996.

⁷⁰ *Id.*, § 1(b).

⁷¹ *Id.*, § 1(a).

⁷² *Id.*, § 2.

Sacred Sites.”⁷³ 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 2012 Interagency MOU relies on the definition of “sacred site” in Executive Order 13007. Of particular note, however, the MOU much more expansively observes:

Sacred sites often occur within a larger landform or are connected through features or ceremonies to other sites or a larger sacred landscape. Agencies should consider these broader areas and connections to better understand the context and significance of sacred sites. Sacred sites may include, but are not limited to geological features, bodies of water, archeological sites, burial locations, traditional cultural properties, and stone and earth structures.⁷⁴

The MOU requires the participating agencies to review the same U.S. authorities discussed in this paper to determine their relevance to sacred sites and to determine whether any interagency measures “may be warranted to better protect sacred sites.”⁷⁵ It sets forth various agreements among the participating agencies to take certain actions including training, development of guidelines, creation of a facilitating website, public outreach, consideration of confidentiality improvements and impediments to protecting sacred sites, exploration of collaborative stewardships of sites, and certain activities designed to improve the effectiveness of, and the tribes’ capacities to participate in, consultation processes discussed in a later section of this paper.

On March 5, 2013, the agencies participating in the MOU announced an Action Plan for the MOU.⁷⁶ The Action Plan repeats certain definitions in the MOU and establishes points of contact for each department and two inter-departmental working groups, an Executive Working Group consisting of agency executives, and a Core Working Group consisting of departmental staff who may identify subject matter experts from their respective agencies.⁷⁷ It remains to be seen at the time of this paper how effectively these working groups will carry out the stated mission of the Action Plan and objectives of the MOU, whether and when members of the public will be invited to participate, and what the ultimate product(s) will be of the efforts.

⁷³ Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites (Effective December 4, 2012. The MOU remains in effect until December 31, 2017, although it may be extended by the written consent of the concurring agencies. An agency participating in the MOU also may opt out by providing a 60-day written notice to the other signatories.

⁷⁴ *Id.*, § II, p. 1.

⁷⁵ *Id.*, § III, p. 2.

⁷⁶ Action Plan to Implement the MOU Regarding Interagency Coordination and Collaboration for the Protection of Sacred Sites (March 5, 2013).

⁷⁷ *Id.*, pp. 2-5.

D. Other Examples of State Laws

State laws specifically recognizing sacred sites are not numerous, but it is likely the number will increase in coming years. For example, in New Zealand, Maori sacred sites are protected by the treaty with the Maori, the Treaty of Waitangi.⁷⁸ The Treaty guarantees Maori control over their taonga, or treasures, which includes cultural 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”⁷⁹ Vanuatu law requires protection of sacred sites prior to granting timber concessions.⁸⁰ The Republic of Congo’s Indigenous Rights Law protects sacred sites and cultural and spiritual objects.⁸¹

E. 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 conducted prior to receiving Bank financing, and must include public consultations with project-affected groups.⁸² When a project is likely to have adverse impacts on a cultural property, the EA must include “appropriate measures for avoiding or mitigating these impacts,” which “may range from full site protection to selective mitigation, including salvage and documentation, in cases where a portion or all of the physical cultural resources may be lost.” Potential impacts are to be considered as early as possible, as they “may not be known or visible.” The International Finance Corporation’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.⁸³ When proposed projects will be located on lands used for “cultural, ceremonial, and spiritual purposes,” the Performance Standards require certain steps to minimize or mitigate the detrimental effect of the project.

F. The Right to Sacred Sites and TCPs as Customary International Law

The sources discussed in the preceding sections recognize the right of indigenous peoples to their sacred sites, but none are 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.

Customary international law is not a constant, but evolves with international political and policy changes. It is one source of law listed in Article 38 of the Statute of the International

⁷⁸ Treaty of Waitangi, U.K.-Maori, Feb. 6, 1840; *see also* Claire Charters, *Do Maori Rights Racially Discriminate Against Non-Maori?*, 40 Victoria U. Wellington L. Rev. 649, 650 (2009-2010).

⁷⁹ An Act to Establish Community Rights Law of 2008 with Respect to Forest Lands (2009), § 6.6.

⁸⁰ Forestry Act [Cap 276] (2006).

⁸¹ Law No. 5-2011 on the Promotion and protection of the rights of indigenous peoples (2011), § 16.

⁸² World Bank Operating Procedure 4.11, ¶¶ 3, 4, 6, 11.

⁸³ International Finance Corporation, Performance Standards on Environmental and Social Sustainability (2012).

Court of Justice, which sets forth sources of international law, which may be consulted when determining whether an international norm exists:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁸⁴

A norm of customary international law is developed when widespread state practice and *opinion juris*, a sense of legal obligation, exist.⁸⁵ While international declarations or widespread industry standards are not necessarily statements of international law, they are considered evidence of *opinion juris* based on their formation, application, and interpretation by States.⁸⁶

Customary international law recognizes a right to State protection of lands traditionally owned and occupied by indigenous peoples.⁸⁷ Indigenous rights to use, control, and occupy their traditional lands has been identified as a human right, rooted in broader principles of rights to property, culture, and non-discrimination.⁸⁸ Indigenous peoples' right to land is recognized as connected to the right to engage in traditional cultural and spiritual practices that necessarily occur or are based upon specific geographic locations or landscapes.⁸⁹ The International Law Association ("ILA"), in a comprehensive report on the rights of indigenous peoples, defines the land right recognized 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* human communities." The ILA defines the content of the indigenous right to traditional lands as including a prohibition on 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.⁹⁰

⁸⁴ Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, 1060, T.S. No. 993; *see also The Paquete Habana*, 175 U.S. 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 . . .").

⁸⁵ Wiessner, *supra*, at 130; Restatement (3d) of Foreign Relations Law of the United States § 102; *see also* Vadi, *supra*, at 845 (discussing the persistent objector doctrine as a defense to the application of customary international law).

⁸⁶ Jonathan I. Charney, *Universal International Law*, 87 Am. J. Int'l L. 529, 543 (1993).

⁸⁷ *See generally* Tiernan Mennen & Cynthia Morel, *From M'Intosh to Endorois: Creation of an International Indigenous Right to Land*, 21 Tulane J. Int'l & Comp. L. 37 (2012).

⁸⁸ 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*, 32 Fordham Int'l L.J. 298, 319-23 (2008) (citing authorities).

⁸⁹ *See* Wiessner, *supra*, at 129.

⁹⁰ International Law Association, *supra*, at 27-28; *see also id.* at 23 (discussing indigenous peoples' right to cultural heritage as recognized in customary international law).

A specific right to sacred sites, although not explicitly protected to the same extent as is the right to lands or territories, should be recognized as a customary international law right.⁹¹ Customary international law norms are not static, and are expanding to protect indigenous cultural heritage, including sacred sites.⁹² 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, demonstrates a growing acceptance and recognition of a legal right to sacred sites. It is important to note, however, that the right recognized is generally undefined, 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 geographic 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.⁹³

III. Requirements to Consult and Gain FPIC when Rights to a Sacred Site or TCP May be Affected by an Extractive Project

Sources requiring or encouraging consultation with indigenous populations, as well as with officials charged with preservation of historic and cultural properties, have proliferated at all levels of government in the United States and in the laws, treaties, declarations, and other instruments applicable on voluntary or mandatory bases to mining and oil and gas development projects around the globe.⁹⁴ This section reviews consultation and FPIC with special attention to the duties and rights of the extractive industry.

Consultation and FPIC are duties imposed on States and/or non-State actors, and may be considered procedural rights, the significance of which is derived from the protection of the substantive rights of indigenous peoples, such as sacred sites. Consultation and FPIC increasingly are mandated by international and domestic law to occur prior to and during development projects by extractive industries when rights of indigenous peoples are, will, or may be affected.⁹⁵ 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.”⁹⁶ This understanding is consistent with the definition of consultation in ILO 169, Art. 6(2): “[t]he consultations carried out in application of

⁹¹ See Weissner, *supra*, at 134 (“Equally crucial to the effective protection of indigenous peoples’ cultures is the safe-guarding of their land.”).

⁹² Vadi, *supra*, at 859.

⁹³ This raises the concept of *ubi jus ibi remedium*: may there be a right without a remedy?

⁹⁴ An interesting question that is outside the scope of this paper is the question of the applicability to indigenous peoples’ government. For discussion, see Wenoma T. Singel, *Indian Tribes and Human Rights Accountability*, 44 San Diego L. Rev. 567 (2012).

⁹⁵ See United Nations Declaration on the Rights of Indigenous Peoples, A Business Reference Guide, Exposure Draft 24 (Dec. 10, 2012) (“FPIC is required whenever there is a risk of impact to any right that is essential to the relevant indigenous peoples’ survival.”).

⁹⁶ Anaya 2012, *supra*, ¶ 64.

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 is explored in the following sections. Companies and indigenous peoples often have different perceptions of the actions that constitute adequate consultation or FPIC.⁹⁷ Generally, consultation is the process in which the State and/or corporation discusses a development project with affected indigenous peoples. Professor Hershey advocates a consultative process that begins with initial contact between a corporation and indigenous peoples, and the “establish[ment] of a formal protocol that identifies the community’s needs and its political, social, and religious characteristics relevant to future contact and relations,” and identifying the proper authorities with whom to conduct the consultation.⁹⁸ 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.”⁹⁹ Consultation must be culturally appropriate, and consent should include agreed-upon terms.¹⁰⁰ Consent is the agreement by the affected peoples to permit a project to continue. Good faith and mutual respect are essential.¹⁰¹

A. International Law

Sources of international law recognize a State duty to conduct consultation and obtain FPIC (although the “C” may be consent *or* consultation, depending on the source). UNDRIP addresses the concept of consultation and consent in various articles related to indigenous peoples’ rights to land and territory. UNDRIP expressly refers to FPIC with respect to the following rights: relocation, Art. 10; taking cultural, intellectual, religious and spiritual property, Art. 11; adoption or implementation of legislative or administrative measures that may affect indigenous peoples, Art. 19; confiscation, taking, occupation, use, or damage of lands or territories, Art. 28; storage or disposal of hazardous waste materials on indigenous peoples’ lands, Art. 29; and “prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources,” Art. 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. Indigenous peoples shall have a right to participate in the process,” Art. 27; to establish mechanisms to access or repatriate ceremonial objects and human remains, Art. 12.

⁹⁷ Robert Alan Hershey, *Globalization and Its Special and Significant Impacts on Indigenous Communities*, Arizona 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.”).

⁹⁸ *Id.* at 41.

⁹⁹ 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, ¶ 21.

¹⁰⁰ Anaya 2012, *supra*, ¶¶ 66-68.

¹⁰¹ *Id.* ¶ 23.

ILO 169 requires consultation prior to legislative or administrative decisions affecting indigenous peoples, Art. 6(1)(a), and prior to exploitation of mineral resources, Art. 15(2). FPIC is required prior to removal. Art. 16. Other procedural requirements include pre-development studies, Art. 7(3), cooperation to “protect and preserve the environment,” Art. 7(4), and the right “to participate in the use, management and conservation of [the] resources,” Art. 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*,¹⁰² ruled that Article 21’s right to property, with regards to the construction of a dam, was violated by the State, 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 rights established in ILO 169, the American Convention, and UNDRIP, recently have been analyzed 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 on whose traditional lands the concessions were granted.¹⁰³ 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”¹⁰⁴ 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, and requires the following:

[T]he State has the obligation to consult the said community in an active and informed manner, in accordance with its customs and traditions, within the framework of continuing communication between the parties. Furthermore, the consultations must be undertaken in good faith, using culturally-appropriate procedures and must be aimed at reaching an agreement. In addition, the people or community must be consulted in accordance with their own traditions, during the early stages of the development or investment plan, and not only when it is necessary to obtain the community’s approval, if appropriate. The State must also ensure that the members of the people or the community are aware of the potential benefits and risks so they can decide whether to accept the proposed development or investment plan. Finally, the consultation must take into account the traditional decision-making practices of the people or community. Failure to comply with this obligation, or engaging in consultation without observing their essential characteristics, entails the State’s international responsibility.

¹⁰² Judgment, IACtHR, Nov. 28, 2007.

¹⁰³ Inter-Am. Ct. H.R. (June 27, 2012).

¹⁰⁴ *Id.* ¶ 159.

The Draft American Declaration would require FPIC (consent) with respect to dispossession of cultural heritage, Art. XII(2); acts affecting the environment, Art. XVIII(3); adoption or implementation of administrative or legislative measures affecting indigenous peoples, Art. XXII(2); relocation, Art. XXV; measures to recognize and protect cultural heritage and intellectual property, Art. XXVIII(3); and decisions “referring to any plan, program, or project that affect the rights or living conditions of indigenous peoples,” Art. XXIX(5).

B. United States Laws

1. Sources of Consultation and Consent Requirements in United States Authorities

a. 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 license 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.”¹⁰⁵ 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.”¹⁰⁶ 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.¹⁰⁷

b. National Environmental Policy Act

Another federal statute that requires tribal consultation and consideration of cultural resources, like NHPA, is the National Environmental Policy Act (“NEPA”).¹⁰⁸ Although NEPA’s primary focus of reviewing and assessing project alternatives and environmental impacts of federal actions, regulations and agency guidance materials associated with NEPA place a responsibility on lead review agencies to conduct tribal consultations.¹⁰⁹ It should be noted both that NEPA and NHPA may be applied simultaneously,¹¹⁰ but that meeting the tribal consultation requirements of one of the statutes does not necessarily satisfy the similar requirements of the other.¹¹¹ The Council on Environmental Quality has adopted regulations implementing NEPA, and one regulation places an obligation on the federal agency leading the NEPA review to seek comments from Indian tribes once an Environmental Impact Statement

¹⁰⁵ 16 U.S.C. § 470f.

¹⁰⁶ 36 C.F.R. §800.2(c)(2)(A).

¹⁰⁷ 36 C.F.R. § 800.2(c)(2)(D).

¹⁰⁸ See 42 U.S.C. §4321, *et seq.*

¹⁰⁹ For a good and practical NEPA compliance overview article, see Joan E. Drake, *The NEPA Process: What Do We Need to Do and When?*, 43 Rocky Mountain Mineral Law Foundation Journal 117 (2006).

¹¹⁰ *Morris County Trust for Historic Preservation v. Pierce*, 714 F.2d 271, 282 (3d Cir. 1983).

¹¹¹ For a fuller discussion of this point, see Stern, *supra*, p. 7.

(“EIS”) has been prepared in draft “when the *effects* may be on an Indian reservation.”¹¹² Additionally, agency guidance material have encouraged tribal consultation at other phases of NEPA review, including during earlier scoping processes.¹¹³

An important case addressing compliance with NEPA’s tribal consultation requirements involved a tribal challenge to a Final EIS assessing snowmaking facilities that would use recycled wastewater at a proposed expansion of a ski area at San Francisco Peaks in Arizona.¹¹⁴ The tribal plaintiffs contended that the proposed facility would “spiritually contaminate the entire mountain and devalue their religious exercises.”¹¹⁵ 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.” The Court upheld the impact analysis of the Forest Service because it drew on “existing literature and extensive consultation with the affected tribes,” and described “at length the religious beliefs and practices of the Hopi and the Navajo and the ‘irretrievable impact’ the proposal would likely have on those beliefs and practices.”¹¹⁶

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.”¹¹⁷ Another commentator similarly characterizes the United States’ general standard for indigenous participation in extractive industries as “meaningful consultation,” exemplified by Executive Orders issued, respectively, Presidents Clinton and Obama, 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.”¹¹⁸

c. 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 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.”¹¹⁹ NAGPRA’s provisions include the means by which a federal agency must determine the “ownership or control” of any such items that are excavated

¹¹² 40 C.F.R. §1503.1(a)(2) (emphasis added). This regulation is not limited to *activities* on reservations; *effects* may result from off-reservation activities.

¹¹³ See, e.g., BLM Manual Handbook H-1790-1, §6.3.2.

¹¹⁴ *Navajo Nation v. United States Forest Service*, 479 F.3d 1024 (9th Cir. 2007).

¹¹⁵ *Id.* at 1063.

¹¹⁶ *Id.* at 1059.

¹¹⁷ Stern, *supra*, p. 3.

¹¹⁸ Akila Jenga Kinnison, *Indigenous Consent: Rethinking U.S. Consultation Policies In Light of the U.N. Declaration on the Rights of Indigenous Peoples*, 53 Ariz. L. Rev. 1301, 1304-1305 (2011) (citing President Clinton’s 2000 Executive Order 13,175 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 E.O. 13,175, available at <http://www.epa.gov/tp/pdf/tribal-consultation-memorandum-09.pdf>).

¹¹⁹ 25 U.S.C. §3001(3)(A)–(D).

or discovered, whether inadvertently or intentionally, on federal or tribal lands.¹²⁰ 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.”¹²¹ Further, “proof of consultation or consent . . . must be shown.”¹²²

d. Executive Order on Tribal Consultation

In 2000, President Clinton issued an Executive Order “in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications.”¹²³ Although the Order does not mention sacred sites or TCPs, it does provide that the U.S. recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.”¹²⁴ Moreover, in a statement accompanying the Order, President Clinton acknowledged that “Indian nations and tribes ceded lands, water, and mineral rights in exchange for peace, security, health care, and education. The Federal Government did not always live up to its bargain. That was wrong”¹²⁵ Nine years later, President Obama re-affirmed 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. . . .”¹²⁶ Both President Clinton’s Executive Order and President Obama’s Memorandum state that their statements are not intended to create substantive or procedural rights enforceable against the U.S.

C. 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. 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.¹²⁷ The Bolivian Constitution requires the State to consult 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.¹²⁸ Mexico’s National Commission for Development of Indigenous Peoples establishes a

¹²⁰ 25 U.S.C. §3002.

¹²¹ 25 U.S.C. §3002(c)(2).

¹²² 25 U.S.C. §3002(c)(4).

¹²³ Executive Order 13175—*Consultation and Coordination With Indian Tribal Governments* (Nov. 6, 2000).

¹²⁴ *Id.*, § 2(c).

¹²⁵ Statement on Signing the Executive Order on Consultation and Coordination With Indian Tribal Governments (Nov. 6, 2000).

¹²⁶ Memorandum for the Heads of Executive Departments and Agencies Regarding Tribal Consultation (Nov. 5, 2009).

¹²⁷ Ley 29785 del Derecho a la Consulta Previa a los Pueblos Indígenas y Originarios Reconocido en el Convenio 169 de la Organización Internacional del Trabajo (OIT) of Aug. 8, 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).

¹²⁸ Bolivia Const. Art. 30(15) (2009).

consultation system, but does not incorporate FPIC.¹²⁹ Papua New Guinea's Motu Koita Assembly Act requires prior and informed consent before a license may be granted to conduct projects on indigenous lands, and further authorizes the creation of a registry of consultants to assist villages and landowners to participate in consultation process.¹³⁰ In New Zealand, consultation and consent requirements imposed on the government derive from the Treaty of Waitangi.¹³¹ The Treaty establishes a partnership between the government and the Maori, which is enforced through consultation and consent before any State action is taken which affect the Maori. Ecuador, on the other hand, failed to pass a draft Law on Consultation and Participation.¹³²

In the Philippines, the Indigenous Peoples Rights Act¹³³ contains FPIC language and defines "indigenous peoples" in terms of groups that have continuously occupied communal lands under claims of ownership since time immemorial.¹³⁴ 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."¹³⁵

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.¹³⁶ The Court faulted the Ministry of Transportation for failing to conduct consultation or obtain the required environmental study prior to permitting road construction; 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 recognized the concept of native title,¹³⁷ established the Native Title Tribunal, vested the Australian federal courts with authority to consider native title claims, and requires, for acts affecting indigenous, 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

¹²⁹ See CERD/C/MEX/Q/16-17 (2012), ¶ 17.

¹³⁰ Motu Koita Assembly Act 2007, ¶¶ 50-51.

¹³¹ Treaty of Waitangi, U.K.-Maori, Feb. 6, 1840.

¹³² See CERD/ECU/CO/20-22 (2012), ¶ 17.

¹³³ Indigenous Peoples Rights Act, Republic Act No. 8371 (Oct. 29, 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).

¹³⁴ See Cress and Dalupan, *supra*, at 167.

¹³⁵ *Id.* at 202-204 ("[T]here is a growing recognition of the importance of partnership with communities for the development of the area in which they are commonly situated. Open communication lines, greater transparency, and access to information contribute to a company's acceptability in an area, and consequently to its continued operations and sustainability.")

¹³⁶ *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* (May 10, 2011), available at <http://www.culturalsurvival.org/news/colombia/colombian-court-confirms-indigenous-peoples-right-free-prior-and-informed-consent>.

¹³⁷ Native Title Act of 1993, as amended C2012C00780; *Mabo v. Queensland (No. 2)*, 1992 HCA 23.

business or development. ILUAs are registered with the National Native Title Tribunal. While the Native Title Act requires ILUAs only of government actors, “any party” may be party to an ILUA. 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.”¹³⁸

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 in a meeting (not the majority of members of affected peoples).¹³⁹ The Navigable Waters Protection Act, renamed the Navigation Protection Act, increased the amount of development permitted on and around waterways.¹⁴⁰ The Environmental Assessment Act,¹⁴¹ which decreases the amount of time in which environmental assessments must be conducted, imposes no requirement to conduct consultation with indigenous peoples. Protests in Canada against these legislative changes, as well as other government acts such as the Keystone Pipeline, concern in part the lack of consultation that occurred before they were enacted, and the fact that consultation is not required by the changes to the law.¹⁴²

While Canada’s legislative branch arguably diminished procedural requirements to conduct consultation or seek consent with affected indigenous peoples, the judicial branch is more protective of these rights. The Canada Supreme Court has 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.¹⁴³ “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 common law duty to conduct consultation is “grounded in the honour of the Crown.”¹⁴⁴ The duty to consult “arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it.” The content of consultation required under Canadian law depends on the circumstances, though it must always be in good faith. The Supreme Court has stated that consent may be required, such as when hunting or fishing regulations are enacted governing indigenous lands.¹⁴⁵ Generally, however, “there is no duty to agree; rather, the commitment is to a meaningful process of consultation.” While recognizing that consent may be proper at times, in general the consultation process is one

¹³⁸ Foster, *supra*, at 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.

¹³⁹ C-45, § 206 *et seq.* (2012).

¹⁴⁰ *Id.* § 316 *et seq.*

¹⁴¹ C-38, § 52 *et seq.* (2012).

¹⁴² *See* Kent McNeil, “Idle No More Deserves Our Thanks,” Canadian Legal Ease (Jan. 17, 2013), available at <http://canadianlegalease.com/2013/01/17/idle-no-more/>. Also of interest is the International Treaty to Protect the Sacred from the Tar Sands and Keystone XL, drafted and signed by indigenous representatives and allies at a gathering in South Dakota in January 2013.

¹⁴³ *Council of the Haida Nation and Guujaaw v. Minister of Forests and Attorney General of British Columbia*, 2004 3 R.C.S. 511, 520.

¹⁴⁴ *Id.* at 522, 526 (stating that the honor of the Crown requires consultation whether a treaty exists or not).

¹⁴⁵ *Id.* at 531 (citing *Delgamuukw v. British Columbia*, 1997 3 S.C.R. 1010).

of balancing. In order to be meaningful, consultation must take place before an action is taken. 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.¹⁴⁶

In Canada, where no law expressly requires their use, a number of extractive industries projects are operated pursuant to an Impact and Benefit Agreement (“IBA”) between companies and indigenous peoples, a contract that sets forth the rights and relationship of the parties.¹⁴⁷ Developers enter into IBAs with indigenous peoples affected by proposed projects as part of the process to obtain the necessary regulatory approvals (recalling that Canadian law requires the government to conduct consultation), as well as a business practice that results in a decreased chance of litigation alleging violations of indigenous rights, and a good business practice.¹⁴⁸

D. International Guidelines and Industry Standards

Numerous sets of guidelines regarding consultation and FPIC have been developed under the auspices of the United Nations, which reflect an understanding of legal requirements required by the legal documents discussed above. Professor Anaya currently is developing standards for consultation to guide States, corporations, and indigenous peoples affected by development.¹⁴⁹ While additional standards on this point from Professor Anaya likely will add a certain level of clarification, as the standards would not be binding on States, corporations, or indigenous peoples, they may simply add to the difficulty in determining what standards apply.

The United Nations’ Guiding Principles on Business and Human Rights,¹⁵⁰ developed under the Protect, Respect, and Remedy framework, recognizes the duties of States to protect human rights, of corporations to respect human rights, and the right of victims of human rights violations to a remedy. The Guiding Principles provide that businesses “should respect human rights. This means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.” To meet this standard, the Guiding Principles 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. The Guiding Principles state corporations should conduct “meaningful consultation with potentially affected groups and other relevant stakeholders” as part of due

¹⁴⁶ *Id.* at 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). For further suggestions, see *Guidelines for Environmental Assessments with Indigenous Peoples* (1997), by the World Council of Indigenous People and the Centre for Traditional Knowledge, funded by the Canadian government, available at http://www.kivu.com/?page_id=370.

¹⁴⁷ For more information, see IBA Research Network, <http://www.impactandbenefit.com/home/>.

¹⁴⁸ See generally Sandra Gogal, Richard Riegert, and JoAnn Jamieson, *Aboriginal Impact and Benefit Agreements: Practical Considerations*, 43 *Atla. L. Rev.* 129 (2005-2006).

¹⁴⁹ Report of the Special Rapporteur (2012), *supra*, ¶ 86; see Hershey, *supra*, at 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.”).

¹⁵⁰ 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 (Mar. 21, 2011), endorsed by the Human Rights Committee, Res. 17/4 (2011).

diligence. The commentary recommends human rights due diligence be conducted prior to and during a project, and that consultations be culturally appropriate. The Guiding Principles do not require consultation, however, and the commentary considers outside experts may serve as a “reasonable alternative[.]”

In draft form at this time, the UNDRIP “Business Reference Guide” expands on the UNDRIP and the Guiding Principles and provides direction for compliance therewith.¹⁵¹ 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.”

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.¹⁵² Chapter 26 recognizes the importance of participation by indigenous peoples in sustainable development activities on their traditional lands, and encourages governments to incorporate indigenous peoples’ interests and input into the formulation of sustainable development policies.

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. The Bank’s Safeguard Policy Statement (“SPS”)¹⁵³ requires “meaningful consultations,” and consent in the following circumstances: “(i) commercial development of the cultural resources and knowledge of Indigenous Peoples; (ii) physical displacement from traditional or customary lands; and (iii) commercial development of natural resources within customary lands under use that would impact the livelihoods or the cultural, ceremonial, or spiritual uses that define the identity and community of Indigenous Peoples.”¹⁵⁴ Consent is defined as “broad community support.”

The Inter-American Development Bank has an Operational Policy on Indigenous Peoples and Strategy for Indigenous Development.¹⁵⁵ The Policy includes a commitment to strengthening governmental processes for good faith consultation processes that “take into account the general

¹⁵¹ Exposure draft (Dec. 10, 2012), available at http://www.unglobalcompact.org/Issues/human_rights/indigenous_peoples_rights.html.

¹⁵² Agenda 21: The U.N. Program of Action From Rio, U.N. Sales No. E.93.I-11 (1993).

¹⁵³ Asian Development Bank Policy Paper, Safeguard Policy Statement (June 2009).

¹⁵⁴ *Id.* at 18; *id.* at 20 (defining meaningful consultation as early and ongoing, disclosing adequate information to an inclusive group, in a free atmosphere).

¹⁵⁵ Inter-American Development Bank (July 2006).

principle” of FPIC.¹⁵⁶ The mechanisms for operations that *target* indigenous beneficiaries, the Bank requires consent or an agreement with the affected population; but consent is not necessarily required for all projects that *impact* indigenous peoples.¹⁵⁷ The Bank’s Operating Guidelines for the Indigenous Peoples Policy state that consultation should be conducted “with a view to reaching agreement or obtaining consent.”¹⁵⁸ Additionally, the Bank requires development of a local grievance mechanism “scaled to the risks and impacts of the project,” and permits affected peoples to make complaints to the Bank’s Accountability Mechanism. The Bank encourages use of Country Safeguard Systems, including administrative and legal forums when possible.

The European Bank for Reconstruction and Development likewise has developed a policy on indigenous peoples, and Performance Requirement 7 specifically addresses the need for private sector projects to respect indigenous peoples’ rights.¹⁵⁹ Citing the UNDRIP, it requires FPIC for activities including projects with impacts on traditional or customary lands.

The World Bank’s Operational Policy with regard to indigenous peoples requires free, prior and informed *consultation*, not consent, for Bank-financed projects that affect indigenous peoples.¹⁶⁰ If a proposed project will affect an indigenous population, a social assessment is required, which includes engaging the affected indigenous peoples in free, prior and informed consultation. If the consultation process demonstrates “broad support” by the indigenous community, the developer must prepare a report that includes measures to address adverse effects, the “culturally appropriate project benefits” that will be provided, recommendations for ongoing consultation, and any formal agreements; if the Bank is unable to ascertain that broad indigenous support exists, it “does not proceed further with project processing.” When the assessment is considering lands or natural resources, the developer must consider, among other factors, “the cultural and spiritual values that the Indigenous Peoples attribute to such lands and resources.” The developer is to prepare an Indigenous Peoples Plan to set forth the developer’s intended actions with regard to the affected indigenous peoples.

The IFC Performance Standards require due diligence to ensure that human rights issues can be addressed. A corporation must 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. When the affected community is indigenous, a process of informed consent and participation, and the company must “incorporat[e] into their decision-making process the views of the Affected Communities on matters that affect them

¹⁵⁶ *Id.* at 34.

¹⁵⁷ *Id.* at 43; *see also* Operational Policy on Indigenous Peoples (IPP) – Operating guidelines, Inter-American Development Bank (Jan. 2007), 33 (“In the IPP, this concept [consent] only applies directly in the context of independent projects for the indigenous peoples[.]”).

¹⁵⁸ Operational Policy on Indigenous Peoples (IPP) – Operating guidelines, Inter-American Development Bank (Jan. 2007), 14, 18 (requiring an agreement or consent for “projects with particularly significant potentially adverse impacts on indigenous peoples or groups”).

¹⁵⁹ European Bank for Reconstruction and Development, *Environmental and Social Policy* (2008), at 50.

¹⁶⁰ World Bank, *Operational Policy 4.10*, ¶ 10. According to a World Bank review, in a three-year period from 2005 to 2008, 12% (132 projects) of World Bank projects were required to apply OP 4.10; only 3%, or 4 projects, were in the energy and mining sector. OPCS Working Paper, *Implementation of the World Bank’s Indigenous Peoples Policy, A Learning Review* (FY 2006-2008), ¶¶ 3, 30 (Aug. 2011).

directly[.]” Performance Standard 7 specifically addresses indigenous peoples, and requires the disclosure of information about the project and consultation for all projects affecting indigenous peoples. FPIC, which is a “mutually accepted process” that “does not necessarily require unanimity,” is required in certain circumstances: when the project will be located on or develop “lands traditionally owned by, or under the customary use of, Indigenous Peoples, and adverse impacts can be expected[.]” FPIC can be satisfied by compensation if continued use and access of traditional lands is not feasible based on the circumstances of the development project. FPIC is also required “[w]here a project may significantly impact on critical cultural heritage.” Performance Standard 8 requires consultation where cultural heritage will be affected by a project, and requires access to cultural sites by traditional or alternative routes, though “subject to overriding health, safety, and security considerations.” Good faith negotiations are required for all consultations.¹⁶¹

The OECD Guidelines for Multinational Enterprises, updated in 2011 (“OECD Guidelines”),¹⁶² “provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards.” Section IV addresses human rights generally, and directs 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, and to “[p]rovide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.” Such process may include judicial or non-judicial forums, and may include “operational-level grievance mechanisms”; at a minimum, the process should be “based on dialogue and engagement with a view to seeking agreed solutions.” Section VI suggests providing public information about the effects of projects on the environment. The 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 Porgera Joint Venture Mine in Papua New Guinea; the NCP’s review is pending.¹⁶³

The International Bar Association’s Model Mining Development Agreement (“MMDA”)¹⁶⁴ requires a Social Impact Assessment and Action Plan, which addresses the effect of a mining project on surrounding communities, and includes provisions that address indigenous peoples who live on or own the land in question, and requires consultation in the case of displacement. The MMDA requires all parties to commit to protecting human rights as recognized in the UDHR, ICCPR, ICESCR, as well as “applicable law.” It also 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 Equator Principles, industry benchmarks for project finance voluntarily adopted by financial institutions, require borrowers to consult with “project affected communities in a

¹⁶¹ IFC Performance Standard Guidance Note 7, GN 25, 38.

¹⁶² The OECD Guidelines are part of the OECD Declaration on International Investment and Multinational Enterprises. OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing.

¹⁶³ Report of the National Contact Points to the Investment Committee (2012), available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/report2012-rapport2012.aspx?lang=eng&view=d>.

¹⁶⁴ Available at www.mmdaproject.org.

structured and culturally appropriate manner.” Where the impact on the community will be significant and adverse, free, prior, and informed consultation, and informed participation, are required, and projects must “adequately incorporate[]” the communities’ concerns.¹⁶⁵ The terms free, prior, and informed, however, have more agreed-upon definitions. The Equator Principles—which require consultation, not consent—define “free” as “free of external manipulation, interference or coercion, and intimidation,” “prior” as “timely disclosure of information,” and “informed” as “relevant, understandable and accessible information,” and entails a process that continues for the duration of the project.¹⁶⁶ Certain of the IFC’s Performance Standards are considered applicable to the Equator Principles, including those on indigenous peoples and cultural heritage.

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.¹⁶⁷ The ICCM recommends negotiated agreements based on both developing legal requirements to form agreements, and to avoid litigation.

Additionally, common amongst 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 realization 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.¹⁶⁸ 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 currently are 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.¹⁶⁹

Two sets of guidelines that discuss indigenous peoples have been issued under the Convention on Biological Diversity. The Akwé: Kon Guidelines are intended as a tool for governments and non-governmental actors to utilize when conducting impact assessments for development projects on indigenous lands. The Guidelines recommend a multi-stage assessment process, with consultation, development of mechanisms and a process for participation of indigenous peoples in the assessment process, development of an agreement between the developer and the community, and establishment of a review process. The Tkarihawié: ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biological Diversity,¹⁷⁰ sets forth ethical principles “intended to promote respect for the rights of indigenous

¹⁶⁵ Equator Principles, Principle 5.

¹⁶⁶ Equator Principles, Principle 5 n.5.

¹⁶⁷ Available at <http://www.icmm.com/library/indigenouspeoplesguide>.

¹⁶⁸ Karin Buhmann, *A Poverty Perspective on Human Rights and Business*, in *Casting the Net Wider: Human Rights, Development and New Duty-Bearers*, 245-263, 252 (Solomon, Tostensen and Vandenhoe, eds., 2007).

¹⁶⁹ European Commission, *A renewed EU strategy for 2011-14 for Corporate Social Responsibility*, COM(2011) 681 (Brussels, Oct. 25, 2011).

¹⁷⁰ Available at <http://www.cbd.int/traditional/code/ethicalconduct-brochure-en.pdf>; (2011).

and local communities to enjoy, protect, and pass on to future generations, their cultural and intellectual heritage” The ethical principles, to be followed by researchers and others working with indigenous communities, include 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.

E. Laws and guidelines promulgated by Indigenous Peoples

An increasing number of indigenous peoples, through their governments or community organizations, 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;¹⁷¹ and the Nunavut Impact Review Board’s Proponent’s Guide to Conducting Public Consultation for the NIRB Environmental Assessment Process.¹⁷²

F. Is Consultation or 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, nor does it create a vested right in indigenous peoples.¹⁷³ Certain ideas have been proposed for making the rights stated in UNDRIP legally binding on States and non-State actors. It is unlikely that UNDRIP will be made into a binding convention, although Professor Foster has noted that States could adopt an international convention that incorporated the UNDRIP principles and “require contracting states to enact legislation making those principles binding on private actors subject to their jurisdiction,” and develop a forum, such as an arbitral tribunal or human rights body, to adjudicate and protect those rights.¹⁷⁴

Although requirements to consult and obtain FPIC are not, as of this time, expressly binding on States or non-State actors, consultation and consent are developing into precepts of international common law, which may be binding on non-State actors. The Inter-American Court, in the *Sarayaku v. Ecuador* decision, recognized “the obligation to consult [as] a general principal of international law.”¹⁷⁵ The duty to conduct consultation identified in *Sarayaku* exists

¹⁷¹ Navajo Code CMY-19-88.

¹⁷² 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>.

¹⁷³ George K. Foster, *Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium between Economic Development and Indigenous Rights*, 33 Mich. J. Int’l L. 627, 668 (2012) (“[T]he relevant provisions do not purport to give indigenous peoples a special power that they can lord over other groups within society; rather, they call on states to use restraint and good faith in their dealings with indigenous peoples, in light of the acute losses states have inflicted on such peoples in the past and the unique risks that extractive projects pose to them.”).

¹⁷⁴ See Foster, *supra*, at 670, 674-75.

¹⁷⁵ Inter-Am. Ct. H.R. (June 27, 2012) ¶ 164.

“from the first stages of planning or preparation.”¹⁷⁶ While the OAS Draft Declaration will not be binding law, the rights included therein are reflective of a growing body of international common law regarding indigenous rights.

Whether consultation or FPIC may be considered a customary international law norm or not, its content is undoubtedly a process whose contours are dependent on the specific right it is intended to protect. 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.”¹⁷⁷ Indigenous peoples’ rights to their sacred sites and cultural resources, particularly when such are their traditional lands or territory, the level of consultation or FPIC required is significant.

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.

IV. 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.¹⁷⁸ To assert violations of substantive rights, indigenous peoples may assert a claim against a State, and, increasingly, 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 a MNE’s right to proceed with development activities.

The Guiding Principles direct States to ensure access to forums to address human rights abuses by corporations. The forums include domestic judicial mechanisms,¹⁷⁹ State-based non-judicial grievance mechanisms,¹⁸⁰ non-State based grievance mechanisms, such as corporation, industry, or stakeholder-administered mechanisms, and human rights bodies,¹⁸¹ and operational-level mechanisms for affected individuals and communities.¹⁸² The number of potential forums

¹⁷⁶ *Id.* ¶ 167.

¹⁷⁷ Anaya 2012, *supra*, ¶ 64; *id.* ¶ 65 (noting that other safeguards such as necessity, proportionality, and public purpose requirements provide protection even where consent is not required).

¹⁷⁸ ICCPR, Art. 2(3).

¹⁷⁹ Guiding Principles, *supra*, Principle 26.

¹⁸⁰ *Id.* Principle 27.

¹⁸¹ *Id.* Principle 28.

¹⁸² *Id.* Principle 29; *see also id.* 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).

has been criticized because they appear 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.”¹⁸³

A. 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 U.N., 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 various 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.”¹⁸⁴ The Commission then seeks to negotiate a settlement between the parties, or issues a report with recommendations to remedy the dispute.¹⁸⁵ 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.¹⁸⁶

A recent decision of the Inter-American Court, *Sarayaku v. Ecuador*,¹⁸⁷ held that Ecuador violated 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 authorizing a corporation to conduct oil exploration and exploitation activities in the Sarayaku’s territory “without previously consulting them and without obtaining their consent.” Ecuador entered into a contract with CGC, and granted CGC property that was undisputedly inhabited by the Sarayaku (as well as other indigenous groups). 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, in order to ensure the implementation of said concession would not harm their ancestral territory, or their subsistence and survival as an indigenous people.” The court concluded that the rights of

¹⁸³ Surya Deva, *Guiding Principles on Business and Human Rights: Implications for Companies*, European Company Law 9, no. 2 101, 108 (2012).

¹⁸⁴ American Convention, Art. 44 – 51.

¹⁸⁵ *Id.* Art. 50

¹⁸⁶ *Id.* Art. 61(1) (“Only the State Parties and the Commission shall have the right to submit a case to the Court.”).

¹⁸⁷ Inter-Am. Court H.R. No ____ (June 27, 2012).

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” thus failing to conduct good-faith consultations, and “discouraged a climate of respect” between indigenous communities and the oil company, failure to use culturally appropriate procedures, approval of an environmental impact plan that was not subject to State monitoring and “did not take into account the social, spiritual and cultural impact that the planned development activities might have on the Sarayaku People,” and the information provided by the company was insufficient to permit the Sarayaku to make an informed decision.

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 Peoples’ 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 organizations (“NGO”) 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.¹⁸⁸ The Commission concluded the forced eviction violated the right to practice religion, because “the sacred grounds” were “essential to the practice of their religion.” It also concluded that cultural rights were violated based on denial of access to 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.

B. United States Courts

Courts in the United States are often looked to as forums to remedy human rights violations that occur in other countries. Although rights to sacred sites in foreign countries do not appear to have been litigated in U.S. courts, those rights within U.S. law, particularly as relevant to Native Americans, are a subject of much litigation. This section reviews both international law and U.S. law claims.

¹⁸⁸ No. 276/003, ¶ 1; see Mennen & Morel, *supra*, at 38 (discussing a case in which the African Commission considered the Endorois’ claims for violation of their right to land based on evictions for tourism purposes).

1. International Human Rights in U.S. Courts

The rights articulated in United Nations declarations are not enforceable in U.S. courts, because declarations “do not impose obligations as a matter of international law.”¹⁸⁹ 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 U.S.¹⁹⁰ Rights guaranteed by international common law, however, are U.S. law, and may be enforced in U.S. courts.¹⁹¹ The Alien Tort Statute (“ATS”)¹⁹² provides United States federal courts with jurisdiction over common law causes of action under international law.¹⁹³ 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.¹⁹⁴ Determining whether an international norm exists requires analysis of the “current state of international law,” as well as the authorities identified in *The Paquete Habana*, and must consider the foreign policy implications of their rulings.

Customary international law norms that may be asserted under the ATS include torture,¹⁹⁵ genocide,¹⁹⁶ war crimes,¹⁹⁷ extrajudicial killing, prolonged arbitrary detention,¹⁹⁸ and medical experimentation on human subjects without their consent.¹⁹⁹ Aiding and abetting liability—including by a corporation—is recognized by customary international law, although federal appellate courts do not agree on the standard.²⁰⁰ Claims rejected as insufficient include the rights to health and life, and against pollution,²⁰¹ environmental abuses,²⁰² and cultural genocide.²⁰³ 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. Of note in considering whether violation of rights related to the indigenous lands and the environment may be asserted

¹⁸⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004); see also, e.g., *Sei Fujii v. State*, 242 P.2d 617, 622 (Cal. 1952) (finding no private right of action under the United Nations Charter).

¹⁹⁰ See *Prophet v. United States*, 106 Fed. Cl. 456, 464 (Fed. Cl. 2012) (concluding no subject matter jurisdiction existed over a cause of action alleging violation of UNDRIP because it is not an “act[] of the United States Congress . . . and, therefore, the United States has not waived sovereign immunity” for suit in federal court); *Joyner-El v. Giammarella*, 09 CIV. 3731 (NRB), 2010 WL 1685957, *3 n.4 (S.D.N.Y. Apr. 15, 2010) (concluding the UNDRIP does not create a federal cause of action).

¹⁹¹ *The Paquete Habana*, 175 U.S. at 700 (“International law is part of our law.”).

¹⁹² 28 U.S.C. § 1350.

¹⁹³ *Sosa*, 542 U.S. at 724.

¹⁹⁴ *Id.* at 725.

¹⁹⁵ *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

¹⁹⁶ *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 760 (9th Cir. 2011).

¹⁹⁷ *Id.* at 765.

¹⁹⁸ *Doe v. Exxon Mobile Corp.*, 654 F.3d 11 (D.C. Cir. 2011).

¹⁹⁹ *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 187 (2d Cir. 2009).

²⁰⁰ *Compare Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 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 F.3d 388, 398 (4th Cir. 2011); *with Doe v. Exxon Mobile Corp.*, 654 F.3d 11, 32 (D.C. Cir. 2011) (determining a knowledge *mens rea* standard is consistent with customary international law).

²⁰¹ *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003).

²⁰² *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 167 (5th Cir. 1999).

²⁰³ *Id.* at 168.

under the ATS is the recent \$18 million dollar verdict against Chevron in Ecuador. The plaintiffs currently are seeking to enforce the verdict against Chevron, for environmental harm in violation of Ecuadorian law, in the United States and other countries.²⁰⁴ Although the claim was not brought under the ATS, the willingness of U.S. courts to enforce the judgment may demonstrate developing recognition of a legal right. Currently before the Supreme Court is a petition to determine whether corporations can be held liable for money damages to indigenous peoples for environmental harm; again, although this claim is not brought under international law, if the Court were to recognize such a claim, it may be more willing to recognize international law norms regarding indigenous peoples' rights to land generally.²⁰⁵

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.”²⁰⁶ 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.²⁰⁷ Whether a corporation can be held liable for violations of customary international law (the law of nations) is a question currently before the U.S. Supreme Court.²⁰⁸ The *Kiobel* case, while a case that only tangentially includes environmental and indigenous lands claims, is significant to this discussion due to the question of corporate liability for extraterritorial human rights violations in U.S. courts. Historically, corporations have been held liable when aiding, supporting, or participating in human rights violations,²⁰⁹ and may be held liable for criminal violations under U.S. law.²¹⁰ The Supreme Court’s ruling is expected by June 2013.

Most U.S. appellate courts to have considered the issue have concluded that corporations may be held liable for claims brought under the ATS. In *Sarei v. Rio Tinto, PLC*, the Ninth Circuit Court of Appeals held that corporations may be liable for genocide “because the prohibition is universal,” and war crimes, as well as aiding and abetting liability for violations of

²⁰⁴ See generally *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 423 (U.S. 2012); see also N.Y. Times, *Mixed Decision for Shell in Nigeria Oil Spill Suits* (Jan. 20, 2013) (reporting that a Dutch court concluded Shell could be liable for some oil spills in Nigeria caused by Shell’s foreign subsidiary, but was not liable for spills caused by third-party criminal acts).

²⁰⁵ Petition for Certiorari, *Native Village of Kivalina and City of Kivalina v. ExxonMobil Corp. et al.*, No. 12-1072 (filed Feb. 25, 2013).

²⁰⁶ *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995); see Restatement (Third) of Foreign Relations Law § 404 (1987) (“A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism . . .”).

²⁰⁷ *Kadic*, 70 F.3d at 242; see also Restatement (Third) of Foreign Relations § 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.”).

²⁰⁸ *Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (argued Oct. 1, 2012).

²⁰⁹ See *United States v. Krauch*, 8 CCL No. 10 Trials, at 1081, 1140 (1952) (Nuremberg trials) (finding industrialists liable for crimes against peace, war crimes, and crimes against humanity); see also Geneva conventions Relative to the Laws of War, art. 3, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Common Article 3 binds non-state actor to certain laws of war).

²¹⁰ See U.S. Racketeer Influenced Corrupt Organizations Act, 50 U.S.C. §§ 1-2.

customary international law.²¹¹ *Sarei* rejected, however, the argument that a food and medical blockade or racial discrimination violated customary international law. Regarding racial discrimination, the court concluded that “there is a universally recognized prohibition against systemic racial discrimination,” but the plaintiff had not demonstrated that “the prohibition was sufficiently specific and obligatory.”²¹² In *Doe v. Exxon Mobile Corp.*, the D.C. Circuit concluded that corporate liability for claims under the ATS (in that case, extrajudicial killing, torture, prolonged arbitrary detention) existed based on U.S. common law’s recognition of corporate and agency liability.²¹³

In *Kiobel*, the case currently before the Supreme Court, the Second Circuit Court of Appeals reached an opposite conclusion.²¹⁴ In that case, the plaintiffs, Nigerian residents, alleged claims against oil corporations for aiding and abetting the Nigerian government in violating the law of nations. Concluding that “customary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations,” *Kiobel* held that the ATS does not provide jurisdiction for claims against corporations for violation of the law of nations, considering claims of aiding and abetting extrajudicial killing, crimes against humanity, torture, cruel, inhuman, and degrading treatment, arbitrary arrest and detention, violation of rights to life, liberty, security, and association, forced exile, and property destruction.

Kiobel’s holding, if affirmed by the Supreme Court, does not prevent individual corporate actors from being liable under international law. As the Second Circuit stated, “nothing in this opinion limits or forecloses suits under the ATS against the individual perpetrators of violations of customary international law—including the employees, managers, officers, and directors of a corporation—as well as anyone who purposefully aids and abets a violation of customary international law. Nor does anything in this opinion limit or foreclose criminal, administrative, or civil actions against *any* corporation under a body of law *other than customary international law*—for example, the domestic laws of any State. And, of course, nothing in this opinion limits or forecloses legislative action by Congress.”²¹⁵

In addition to the barriers imposed by ATS jurisdiction, for a claim to succeed in a U.S. federal court, a plaintiff must establish personal jurisdiction, venue, statute of limitations, the *Sosa* analysis of whether an international common law claim exists upon which a U.S. court can grant relief, and prove the claim.²¹⁶ A *forum non conveniens* defense, which requires dismissal of a case when a different forum is more appropriate, may be asserted in an ATS case, though

²¹¹ 671 F.3d 736, 760 (9th Cir. 2011); see also *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1018-19 (7th Cir. 2011) (“If a corporation complicit in Nazi war crimes could be punished criminally for violating customary international law, as we believe it could be, then *a fortiori* if the board of directors of a corporation directs the corporation’s managers to commit war crimes, engage in piracy, abuse ambassadors, or use slave labor, the corporation can be civilly liable.”).

²¹² *Id.* at 769 (but stating that a “claim premised on apartheid may be cognizable under the ATS”).

²¹³ 654 F.3d 11, 57 (D.C. Cir. 2011).

²¹⁴ 621 F.3d 111, 117 (2d Cir. 2010).

²¹⁵ 621 F.3d at 122.

²¹⁶ See generally Koh, *supra*; cf. *Mohamad v. Palestinian Authority*, ___ U.S. ___, 132 S. Ct. 1702, 1705 (2012) (holding the Torture Victims Protection Act’s, 106 Stat. 73, note following 28 U.S.C. § 1350 (1992), imposition of liability on “individuals” did not extend to non-natural persons such as corporations).

courts have discerned a policy, at least in torture cases, favoring exercising jurisdiction over ATS cases.²¹⁷ Additionally, courts are considering whether parties seeking to assert a claim under the ATS must exhaust domestic or administrative remedies prior to bringing a claim.²¹⁸ It should be noted that, where an agreement between the parties to arbitrate exists, exhaustion of arbitration requirements would be required before litigation could proceed.²¹⁹

While most suits alleging violation of international human rights filed in the U.S. are brought in federal court, plaintiffs may also bring suit in the courts of the fifty states. For example, plaintiffs in *Alomang v. Freeport-McMoran, Inc.*,²²⁰ alleged violations of international human rights, but the action was dismissed on grounds that the defendant was not liable for the actions of its subsidiary. Most state court suits, however, address rights of the myriad Native American peoples of the U.S.

2. Domestic U.S. claims regarding sacred sites

Indigenous peoples in the U.S. 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 indigenous peoples, as demonstrated in the case involving the Mt. Taylor TCP, discussed above. Cases against the federal government may proceed under the Administrative Procedures Act, which permits court review of agency action,²²¹ or under the Federal Tort Claims Act, which permits claims directly against the government.²²² Because U.S. 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.²²³

C. 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

²¹⁷ See *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2d Cir. 2000).

²¹⁸ See *Sarei*, 671 F.3d at 754 (prudential exhaustion analysis to be applied when nexus to US courts weak, and particularly to claims that are not of “universal concern”); *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1025 (7th Cir. 2011) (exhaustion not required when home country not able to remedy violation).

²¹⁹ See *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1236 (9th Cir. 2007), *on reh’g en banc*, 550 F.3d 822 (9th Cir. 2008) (discussing arbitration as a remedy that must be exhausted when an exhaustion requirement is imposed).

²²⁰ 811 So. 2d 98 (Ct. App. La. 2002).

²²¹ See *Access Fund v. U.S. Dept. of Agric.*, 499 F.3d 1036 (9th Cir. 2007).

²²² See *Quechan Indian Tribe v. United States*, 535 F. Supp. 2d 1072 (S.D. Cal. 2008).

²²³ The complicated and evolving question of tribal court jurisdiction is outside the scope of this paper. For more information, refer to, e.g., 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).

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 and their rights.²²⁴ 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.²²⁵ 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.²²⁶ 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.²²⁷

New Zealand courts consider and apply international law, and are required to construe domestic law to be consistent with international law.²²⁸ In the recent case of *Greenpeace of New Zealand, Inc. v. Minister of Energy and Resources*,²²⁹ 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. On appeal, it was argued that the Minister failed to consult with Maori, and to consider the effect of the permit upon Maori culture and resource use. Additionally, it was argued that UNDRIP was violated because “indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories or resources and the State shall consult and cooperate in good faith with them on such issues.” The court defined “meaningful consultation” as requiring to “be made available to the other party sufficient information to enable it to be adequately informed so as to be able to make intelligent and useful responses.” 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.²³⁰ 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 Huelliche-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

²²⁴ *Council of the Haida Nation and Guujaaw v. Minister of Forests and Attorney General of British Columbia*, 2004 3 R.C.S. 511, 539.

²²⁵ *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17.

²²⁶ *Anvil Mining Ltd. c. Association canadienne contre l'impunité*, 2012 QCCA 117 (CanLII); appeal dismissed, [2012] 1 S.C.R. 572.

²²⁷ See Bruce Broomhall, *Extraterritorial Civil Jurisdiction: Obstacles and Openings in Canada* (May 1, 2012), available at <http://www.ejiltalk.org/extraterritorial-civil-jurisdiction-obstacles-and-openings-in-canada/>.

²²⁸ See *N.Z. Maori Council v. Attorney General*, [1989] 2 N.Z.L.R. 142 (CA) ¶ 142; Stevenson, *supra*, at 330-31.

²²⁹ [2012] N.Z.H.C. 1422.

²³⁰ *Id.* ¶ 139; *id.* ¶ 141 (rejecting the argument that the UNDRIP required the Minister to consider Maori environmental concerns without being informed of such concerns, because UNDRIP “does not create binding legal obligations”).

wind turbines in a protected national park, after the Hulliche community argued that ceremonial sites would be affected and the Regional Environmental Commission (Corema) had not conducted consultation. The court ordered an environmental impact assessment be conducted, with consultation with the affected community as required in ILO 169.²³¹ Months later, the court ruled against the Hulliche-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).²³² Citing ILO 169 Art. 5, the court noted the importance of religious and cultural rights, but concluded no right to access private property existed.

An ongoing case in Belize concerns the government's grant of mining concessions and corporate mining activities on indigenous lands. A lawsuit was initially filed in the Belize courts, but was never heard. The indigenous population then petitioned the Inter-American Commission on Human Rights, which issued a ruling on the merits, which the Belize government challenged. Members of the affected community then filed a second suit in Belize's courts. In *Cal v. Attorney General of Belize*, the Supreme Court of Belize was the first high court to rely on UNDRIP in ordering the government to recognize 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.²³³ Significantly, the land at issue included multiple sacred sites. The Belize government did not implement the Court's ruling in *Cal*, although it was called upon to do so by the U.N. Human Rights Council. The Mayans filed a second lawsuit, in which the holding in *Cal* was affirmed and applied to all Mayan villages in the Toledo District of Belize.²³⁴

Throughout the various challenges by the indigenous population, development—including petroleum exploration—has been ongoing, by US Capital Energy, Inc., and its Belizean subsidiary. On March 15, 2013, the Human Rights Committee considered Belize's actions under the ICCPR in the absence of a report by Belize. Belize did submit written replies to the Committee's list of issues, which state that indigenous populations have no rights unless they have satisfied certain criteria, and that the question of whether the Mayans satisfy that criteria is on appeal, but "as a matter of good governance," Mayans are consulted on "any major development issue in the areas where they predominately reside."²³⁵ In support of the Mayans' indigenous rights, NGOs have submitted a Shadow Report relating to the examination of Belize by the Committee on March 15, 2013.²³⁶ Among other charges, the Shadow Report states that Belize violated ICCPR Article 27 by granting oil concession on land traditionally owned, used, and occupied by Mayans, including land that is considered sacred, in the absence of

²³¹ Ryan Seelau, "Chile's Supreme Court Halts Wind Farm Projects and Orders Consultation with Mapuche People," Indigenous News.org (Mar. 25, 2012), available at <http://indigenousnews.org/2012/03/25/chiles-supreme-court-halts-wind-farm-project-and-orders-consultation-with-mapuche-people/> (last visiting Feb. 27, 2013).

²³² Ryan Seelau, "Chilean Supreme Court Rejects Mapuche Claim to Access a Sacred Site," Indigenous News.org (Sept. 25, 2012), available at <http://indigenousnews.org/2012/09/25/chilean-supreme-court-rejects-mapuche-claim-to-access-a-sacred-site/> (last visited Feb. 27, 2013) (contains link to opinion).

²³³ Claim Nos 171 and 172 of 2007, Belize Supreme Court (2007).

²³⁴ *The Maya Leaders Alliance et al. v. Attorney General*, Claim No. 366 of 2008 (2010). This case is currently on appeal.

²³⁵ Written Replies, Country of Belize, to Human Rights Committee List of Issues prepared in the absence of the initial report of Belize, CCPR/C/BLZ/Q/1 (2012).

²³⁶ Submission to the 107th session of the Human Rights Committee, Shadow Report Relating to the Examination of Belize, Sarstoon Temash Institute for Indigenous Management and Minority Rights Group International (Feb. 2013).

consultation.²³⁷ Among the activities allegedly conducted in violation of indigenous right to consultation were conducting exploratory activities without prior consultation with the population; submitting to the government an environmental report without incorporating comments from the indigenous population; conducting meetings for the stated purpose of consultation at a time and in a place that did not permit meaningful discussion. 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, parcelling 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."²³⁸

In 2001, the High Court of Kenya 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.²³⁹ Tiomin Kenya had not submitted the required environmental impact assessment 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 licenses while it considers reforms to its mining laws, including required local ownership.²⁴⁰

D. Other Potential Forums to Remedy Violations of Rights

Requirements to consult and receive FPIC have a tremendous upshot for corporations: by entering into an agreement, based on good faith 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 to address concerns and grievances. The grievance mechanism is to be 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 require companies to establish grievance mechanisms, which are not exclusive of administrative or judicial remedies.²⁴¹ The Equator Principles also require the development of a grievance mechanism "to receive and facilitate resolution of concerns and grievance about the project's social and environmental performances raised by individuals or groups from among project-affected communities."²⁴²

²³⁷ *Id.* Part 4.

²³⁸ U.N. Hum. Rt. Comm., Advance Unedited Version, Concluding Observations, CCPR/C/AGO/CO/1 (undated).

²³⁹ *Nzioka v. Tiomin Kenya, Ltd.*, Civil Case No. 97 (Kenya High Court 2001).

²⁴⁰ See John Muchira, Licenses cancelled in latest snag to hit Kenya titanium industry, *Mining Weekly* (Jan. 25, 2013), available at <http://www.miningweekly.com/article/licences-cancelled-in-latest-snag-to-hit-kenya-titanium-project-2013-01-25>.

²⁴¹ IFC Performance Standard 1, ¶ 35.

²⁴² Equator Principles, Principle 6.

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 licenses or concessions.²⁴³ When a MNE challenges a State law requiring FPIC or consultation, it may be forced to arbitrate such a claim.²⁴⁴

Some communities have used community referenda to assert a community's right to FPIC. For example, the people of Sipacapa, in 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.²⁴⁵ 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.²⁴⁶ 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. Under home state regulation, MNEs' extraterritorial activities would be regulated for human rights and environmental compliance under the laws of their home state.²⁴⁷ For example, the United Nations Committee on the Elimination of Racial Discrimination has requested Norway hold MNEs domiciled in Norway liable for extraterritorial human rights violations.²⁴⁸ The Committee has also noted Canada's Corporate Social Responsibility Strategy does not include measures regarding MNE liability.²⁴⁹

V. Consultation and FPIC are Means to Honoring Indigenous Peoples' Rights to Sacred Sites and TCPs

Legal requirements imposed on States and corporations 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 and TCPs are recognized 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

²⁴³ Foster, *supra*, at 676-77.

²⁴⁴ See generally Margaret Clare Ryan, *Glamis Gold, Ltd. v. The United States and the Fair and Equitable Treatment Standard*, 56 McGill L. J. 919 (2011).

²⁴⁵ See Brent McGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development*, 27 Berkley J. Int'l L. 570, 625-26 (2009).

²⁴⁶ Inter-Am. Comm. on H.R., 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* (May 20, 2010).

²⁴⁷ See generally Sara L. Seck, *Home State Responsibility and Local Communities: The Case of Global Mining*, 11 Yale Hum. Rts. & Dev. L.J. 177 (2008).

²⁴⁸ CERD/C/NOR/CO/19-20 (2012), ¶ 17.

²⁴⁹ CERD/CAN/CO/19-20 (2012), ¶ 14.

consultation, accommodate indigenous peoples' concerns, and seek FPIC at each stage of the 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, licenses, 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, FPIC, and reaching formalized agreements result in the avoidance of protracted public litigation,²⁵⁰ and an improved business reputation when commencing future development projects on indigenous lands.²⁵¹ 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.”²⁵² Each of these “safeguards” and other measures (such as employment programs) 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 minimize 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 practically needed even in circumstances where it may not legally be required.

²⁵⁰ 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. The forums available for claims of violation of rights to sacred sites are numerous (although the U.S. Supreme Court may limit such claims against corporations—but not individual corporate actors—in *Kiobel*).

²⁵¹ See generally John W. Miller and Alistair MacDonald, *Indigenous Peoples Get Last Word on Mines*, Wall Street Journal (March 26, 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.”).

²⁵² Report of the Special Rapporteur, *supra*, ¶ 52.

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 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.