

Natural Resource Development, Business and the Rights of Indigenous Peoples

Report on the seminar arranged by the Norwegian National Human Rights Institution and Norway's National Contact Point for Responsible Business Conduct, Karasjok, June 2019.



Norwegian National
Human Rights Institution



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1. Executive Summary

In June 2019, the *Norwegian National Human Rights Institution* (Norwegian NHRI) together with *Norway's National Contact Point for Responsible Business Conduct* (Norway's NCP) arranged a seminar in Karasjok, to discuss natural resource development and the rights of Indigenous peoples.

It was the first time a National Human Rights Institution and an OECD National Contact Point organised a seminar together on business activities and Indigenous rights. The two-day seminar served as a platform for discussion between business and Sámi representatives, as well as other stakeholders such as local governments, academics and experts from the Norwegian NHRI, Norway's NCP and the OECD central office in Paris.

The overall aim of the seminar was to discuss the different perspectives and experiences of various stakeholders in concrete cases regarding natural resource development and its impact on the Sámi people. The Norwegian NHRI and Norway's NCP presented the international expectations on responsible business conduct, including the responsibility of businesses to respect human rights, in this case Indigenous peoples' rights. Examples of how conflicts are dealt with in practice were presented, both from the business perspective and from the impacted Sámi communities. Challenges, lessons learnt and best practices for consultation with Indigenous peoples on mitigation measures were also discussed. Norway's NCP launched the Norwegian and Sámi language versions of the *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*. The guidance gives advice on how enterprises can comply with the *OECD Guidance for Responsible Business Conduct* in order to avoid causing harm and remediate harm that has already occurred. The guidance contains a chapter on recommendations for dialogue with Indigenous peoples.

The seminar program is provided at **Appendix A**.

The seminar focused on two different cases, the construction of wind parks in the Sámi village of Jijnjevaerie in Sweden and the planned opening of a copper mine in Kvalsund municipality in Norway, with a particular focus on the human rights implications of these projects and their effects on the Sámi people's reindeer herding areas. The cases were discussed in light of international standards regarding Indigenous peoples' rights and responsible business conduct, including *article 27 of the ICCPR*, *ILO Convention No. 169*, the *UN Declaration on the Rights of Indigenous Peoples*, the *UN Guiding Principles on Business and Human Rights* and the *OECD Guidelines for Multinational Enterprises*. The role of National Human Rights Institutions and OECD National Contact Points in promoting these standards and providing advice and guidance on their implementation was also discussed. The Statkraft – Jijnjevarie Sámi village case has also been handled by Norway's NCP under the OECD complaint mechanism.

A number of important questions were raised in relation to how companies should strive to ensure responsible business conduct and respect for the rights of the Sámi people. One of the main challenges identified during the seminar was ensuring the **effective participation of Indigenous peoples** in natural resource development projects when the parties have different understandings of consultation. The costs incurred by Sámi communities in responding to project proposals were also discussed and questions were raised over whether these costs should be shared by businesses and governments, rather than being left solely to Indigenous peoples. Challenges associated with language differences, translation and communication between parties were also underlined.

Other issues stressed by various speakers concerned the lack of adequate **impact assessment processes**. Particularly the lack of a holistic approach which assesses the potential impacts of a project from a socio-economic, cultural and human rights perspective and the need to carry out impact assessments at an earlier stage of the project cycle. The importance of an independent third party to carry out mapping and impact studies was further highlighted, as well as the need for mechanisms that allow Indigenous peoples to question the evaluations, methods and findings of impact assessments. Some speakers emphasised the difficulties faced by Indigenous peoples in **accessing reliable information** about the negative impacts of proposed development projects as well as the use of different maps by various parties when discussing a project.

Finally, the seminar discussed **challenges faced by businesses**, including difficulties in identifying effective methods for stakeholder engagement, identifying reliable third parties that can assist in the consultation process, how to carry out thorough impact assessments that both parties can agree upon, as well as a lack of guidance from government agencies on the required standards for consultation processes.

By discussing and highlighting some of these key issues, we hope that Sámi communities, companies, governments, as well as other NHRIs and OECD National Contact Points can be better prepared to handle future business development projects in line with international standards on Indigenous peoples' rights and responsible business conduct.

2. Introduction

We need renewable energy for a more sustainable future, but it shouldn't come at the expense of the Sámi people's livelihoods, cultures and sustainability.¹

Norway and Sweden are set to see an increase in natural resource development projects in coming decades, particularly in the extractive and renewable energy sectors, many of which are likely to occur in areas subject to Sámi rights and interests. The shift towards renewable energy is essential in addressing climate change and meeting the Sustainable Development Goals (SDGs), but also gives rise to new challenges and risks for Indigenous peoples. Globally, the relationship between the extractive and renewable energy industries and Indigenous peoples has often been problematic, with projects sometimes resulting in human rights violations. In recent years however, the increased recognition of Indigenous rights in legal and policy frameworks and the focus on international standards for responsible business conduct have enabled more Indigenous peoples to reach mutually acceptable agreements with businesses. For the Indigenous Sámi people, living in Northern Norway, Sweden, Finland and Russia, extractive industry and natural resource development projects may bring opportunities for economic development, but often also have an adverse impact on their traditional way of life and threaten their livelihoods, such as reindeer husbandry and fisheries.



Image 1: Karin Buhmann, Copenhagen Business School, Gro Nystuen, the Norwegian NHRI and Ola Mestad, Norway's NCP.

¹ Mariann Gråik, OECD and NIM's Seminar on Indigenous People's Rights and Natural Resource Development Projects. Karasjok 5. June 2019.

With these challenges in mind, the Norwegian NHRI and Norway's NCP decided to arrange a seminar in Karasjok to discuss natural resource development and the rights of Indigenous peoples. The seminar was the first time a National Human Rights Institution and an OECD National Contact Point organised a seminar together on business activities and Indigenous rights, providing a forum for dialogue between business and Sámi representatives, as well as several other stakeholders. It was an important opportunity to build mutual understanding and to discuss how human rights frameworks and mechanisms can better assist in resolving conflicts between the development priorities of businesses and the rights and interests of Indigenous peoples.

National Human Rights Institutions and OECD National Contact Points are uniquely placed to promote dialogue and cooperation on these issues. The Norwegian NHRI was established by the Norwegian Parliament in 2015 as an independent public body with a legislative mandate to protect and promote human rights in Norway in accordance with international and domestic law.² Its functions include monitoring, reporting and advising public authorities and other actors on human rights implementation, as well as promoting human rights awareness and cooperation. Norway's NCP is also an independent public body, established with the purpose of assisting the Norwegian authorities in promoting the *OECD Guidelines for Multinational Enterprises*. The functions of Norway's NCP include providing advice and guidance on the Guidelines and offering dialogue and mediation in cases where parties claim that enterprises have not observed the Guidelines.

Prior to the seminar, the Director of the Norwegian NHRI and the former Director of Norway's NCP gave a presentation in the Sámi Parliament's plenary session. The Norwegian NHRI presented their Annual Report and Norway's NCP launched the Norwegian and Sámi language versions of the *OECD Guidance for Meaningful Stakeholder Engagement in the Extractive Industry*.³ At the seminar, the Norwegian NHRI provided information on the international human rights framework, including the rights of Indigenous peoples and the obligation of states to protect Indigenous peoples from the human rights violations of third parties, in this case, businesses. Norway's NCP gave information on the government's expectations on businesses regarding compliance with international standards such as the *OECD Guidelines for Multinational Enterprises* and the *UN Guiding Principles on Business and Human Rights*.

² The Norwegian National Human Rights Institution Act, 1 July 2015.

³ <https://www.responsiblebusiness.no/nyheter/veileder-for-interessentdialog-i-utvinningssektoren-pa-samisk-og-norsk/>



Image 2: Sámi language version of the OECD Guidance for Meaningful Stakeholder Engagement in the Extractive Industry.

3. The International Human Rights Framework

The first day of the seminar included a discussion on the international human rights framework, led by **Gro Nystuen** and **Laila Susanne Vars** from the Norwegian National Human Rights Institution. The discussion focused on several international instruments which are relevant to the rights of Indigenous peoples and natural resource development projects, including:

- The *International Covenant on Civil and Political Rights* (ICCPR);
- The International Labour Organisation *Indigenous and Tribal Peoples Convention No. 169* (ILO Convention No. 169);
- The *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP);
- The *UN Guiding Principles on Business and Human Rights* (UN Guiding Principles);
- and
- The *OECD Guidelines for Multinational Enterprises* (OECD Guidelines).

These instruments carry a variety of different legal impacts and create different degrees of obligation. While the ICCPR and ILO Convention No. 169 are legally binding on ratifying states, the UNDRIP, the UN Guiding Principles and the OECD Guidelines come under the broad category of ‘soft law’. Soft law instruments are not legally binding in themselves,

but may complement and guide the interpretation of treaty and customary law, and adopting states are expected to give them due consideration in good faith.⁴

While a detailed analysis of every international instrument listed above is beyond the scope of this report, a summary of the provisions which were most directly relevant to the seminar is provided at **Appendix B**.

4. The Statkraft – Jijnjevaerie Sámi village Case

The seminar brought together the parties involved in a complaint handled by Norway and Sweden's OECD National Contact Points. Representatives from Statkraft and SSVAB as well as the affected community, Jijnjevaerie Sámi village, discussed the details of the case, the handling and advice from the OECD and the follow up.⁵

Jijnjevaerie is a Sámi village in northern Sweden and in recent years, Statkraft has built a total of four wind parks in or nearby Jijnjevaerie winter herding pastures. Correspondence between the Jijnjevaerie Sámi village and Statkraft regarding the project began in 2007, followed by meetings in 2008. There were a number of challenges and no agreement was reached in the early discussions between the two parties. In 2010, Statkraft received planning permits from the relevant local authorities to build 460 wind turbines in the area, which the Sámi village of Jijnjevaerie appealed through the municipal court to the Swedish Superior Environmental Court. In November 2011, the Swedish Superior Environmental Court acknowledged that the wind parks would have an impact on reindeer herding practices, but nevertheless gave Statkraft conditional approval to start the construction of 360 wind turbines in Jijnjevaerie on the basis of, among other things, national interest in renewable energy.⁶

In 2012, the Sámi village of Jijnjevaerie filed a complaint against Statkraft through the OECD complaint mechanism, arguing that the consultation process with Statkraft was inadequate. The Sámi community claimed that the wind power project would limit their possibility of continuing to pursue sustainable reindeer herding and potentially dislocate their community from the environment which supports their cultural identity. The Sámi village requested that the NCPs facilitate meaningful dialogue with Statkraft/SSVAB. This was done, but unfortunately, the mediation process settled without result. In February 2016, the NCPs concluded their handling of the complaint from Jijnjevaerie Sámi village.

⁴ See generally: Alan Boyle, 'Soft Law in International Law Making' in Malcolm Evans (ed) *International Law* (Oxford University Press, 2014) 120; Dinah Shelton, 'Soft Law' in David Armstrong (ed), *Routledge Handbook of International Law* (Routledge, 2009) 72; Andrew Guzman and Timothy Meyer, 'International Soft Law' (2010) 2 *Journal of Legal Analysis* 171.

⁵ A Sami village (Sameby) is in Sweden a legal entity for Sami reindeer herding carried out on land areas usually stretching from or nearby the mountain areas in the west, down to forest- and coastal areas in the east. The reindeer herding rights are established as ancient prescriptive usufruct rights for the Sami reindeer herders, regulated by the Swedish Reindeer Herding Act (SFS 1971:437) and with a legal protection as other rights to real property.

⁶ Swedish Superior Environmental Court, Stockholm, Decision 2011-11-23, Case nr. M 824-11.



Image 3: Gro Nystuen and Laila Susanne Vars, the Norwegian NHRI.

In the NCPs final statement, it was underlined that Statkraft did not violate OECD’s Guiding Principles, but there was nonetheless room for improvement. The OECD recommended that Statkraft pay more attention to the promotion of Indigenous rights and the implementation of the Guiding Principles in future projects. The OECD National Contact Point further recommended that both parties endeavour to reach an agreement concerning the size and scope of the project and issues of compensation.

In 2016, the Sámi village of Jijnjevaerie and Statkraft, managed to reach an agreement by themselves. The agreement aims at regulating the impact of and the preventive measures in the wind power projects, in order to reduce the negative effects on the Jijnjevaerie Sámi village and reindeer herding.

4.1. *The Sámi Perspective*

Sweden has an obligation to protect us, but we can criticise the efforts made. The Indigenous peoples are there, but our rights and interests are not always accommodated or protected. There are no regulations on how we should co-exist.⁷

Mariann Gråik presented the Jijnjevaerie Sámi villages’ experience of mobilising against the construction of the wind parks in their traditional reindeer herding lands and the difficulties they faced in the consultation process. Gråik emphasised several challenges in the consultations with Statkraft. For example, both parties used different maps of the

⁷ Mariann Gråik. OECD and NIM’s Seminar on Indigenous People’s Rights and Natural Resource Development Projects. Karasjok 5. June 2019.

area to inform their discussions, which made it difficult to develop a common understanding of the issues. Only the Sámi people's map showed more specific information on the available reindeer pastures across different seasons, and how the project would have a negative impact on these areas. Gråik also underlined that, in general, it was difficult to find documentation and information about the possible negative impacts of wind power for the Indigenous community, and they could have benefited from assistance in mapping the impact area.

In 2012, Jijnjevaerie Sámi village filed a complaint to the OECD complaint mechanism. Gråik explained how it was an overwhelming and slow process for the Indigenous community. The Sámi people were also expected to communicate in English at first, which created additional difficulties and the need for external assistance with translation. Nevertheless, the engagement and the search for more information initiated by the OECD Contact Point, gave them hope. The mediation between the Sámi community and Statkraft was difficult. They spent a lot of time and resources on travelling, reading documents and preparing for the process. Gråik underlined how they felt that it was the Sámi community who were pushing to reach an agreement during the entire process. For example, in an attempt to mitigate damage, Jijnjevaerie Sámi village proposed alternative sites for wind power development where the environmental impacts would be of a lesser degree, but Statkraft did not respond to the proposal and showed little engagement and commitment to find a negotiated solution. The fact that the final statement held by the OECD National Contact Point concluded that there was no breach of the Guidelines, was a big disappointment for the Sámi community. Gråik also advised the OECD NCPs to give more information on what is meant by meaningful dialogue and how the affected party should be heard, considering the unequal power balance between the parties. In her final remarks, Gråik stated the following:

Our ambition was to stop the project, but we didn't manage to do that completely. Today the parks are there, and we have lost areas of land. It has come at a cost and I can't say that we are satisfied.⁸

4.2. *The Business Perspective*

Statkraft and SSVABs' perspective on the development of wind parks in Jijnjevaerie, was presented by **Malin Hillström**. Hillström stated that Statkraft/SSVAB endeavoured to maintain an open and transparent dialogue with the Jijnjevaerie Sámi village from the very beginning of the project in 2007 in a manner that was understandable and accessible for Sámi community members. According to Hillström, Statkraft tried to find opportunities for coexistence and to take into consideration the concerns and suggestions from all relevant parties, including the Sámi village, interest groups, the courts as well as

⁸ Mariann Gråik, OECD and NIM's Seminar on Indigenous People's Rights and Natural Resource Development Projects. Karasjok 5. June 2019.

the OECD. This was demonstrated in the considerable amount of time it took to reach an agreement and the importance for Statkraft to minimise the adverse impacts of the wind parks. Both internal staff and external consultants were engaged in mapping out the effects of the project for Jijnjevaerie Sámi village, and their findings were taken into consideration. During the whole process, Statkraft tried to build confidence and respect for both sides. Today, Statkraft has agreements with three of four Sámi villages. The agreements regulate the conditions and protective measures that the company must take to reduce the impact of wind power on the Sámi villages and reindeer herding. In her concluding remarks Hillström said:

Statkraft would like to establish and maintain trust, understanding and respect for each other. The wind parks are there now, and we will continue to work towards a good relationship and cooperation with the local communities.⁹



Image 4: Anders Eira, Protect Sápmi, Sidsela Nyebak, Statkraft and Mariann Gråik, Jijnjevaerie Sameby.

4.3. Reflection and Lesson Learnt

The varying perspectives of the two parties regarding the same case illustrate the complexities and difficulties associated with renewable energy projects in Indigenous lands and territories. The case demonstrates the need for enterprises to ensure responsible business conduct and respect for human rights, to conduct adequate risk-based human rights due diligence and meaningful stakeholder engagement. It raises questions regarding whether Statkraft could have been more accountable to the

⁹ Malin Hillström. OECD and NIM's Seminar on Indigenous People's Rights and Natural Resource Development Projects. Karasjok 5. June 2019.

communities affected by the project and whether renewable energy projects should be approved in cases where the development has adverse consequences for Indigenous peoples' livelihood, culture and traditional way of life. It also raises questions on the responsibility of the government to protect affected communities from human rights violations by third parties, and how to address the power imbalance between a large enterprise and a small Indigenous community.

The former chair of Norway's National Contact Point, **Ola Mestad** presented the OECD perspective on the NCP's handling of the complaint: Jijnjevaerie Sámi village vs Statkraft/SSVAB. Mestad stressed that recommendations of the OECD National Contact Point should not be confused with a legal judgement, as NCPs cannot impose sanctions, compel parties to participate, stop projects, nor order compensation. Having said that, Mestad noted that there is no better international complaint mechanism concerning business activity and local communities. The NCP provides a low threshold complaint mechanism that offers dialogue and mediation with a goal to achieve agreement between the parties. He also reiterated that one of the strongest tools that the complaint mechanism has is to give recommendations on responsible business conduct in the future, even if a clear violation of the OECD guidelines has not been identified.

Mestad highlighted that special measures need to be taken into consideration when carrying out resource development projects in Indigenous territories. Several important questions were raised in the final statement from the NCPs in this case. For example, did Statkraft give due consideration to the Sámi community's rights and interests in relation to the establishment of wind parks in Jijnjevaerie? Was there any assessment carried out concerning due diligence for responsible business conduct in the context of human rights? To what extent did the company mitigate the potential negative consequences, and in what way did the company carry out consultations?

In Mestad's opinion, the consultation could have been conducted better with a view in obtaining the Sámi people's consent. The complaint and mediation process also lasted too long from 2012-2015 and was not intensive enough. Mestad finished his presentation by emphasising that the OECD Guidelines require that stakeholder dialogue is embedded in project plans and in the daily operations of businesses. Furthermore, it is essential that this dialogue gives affected communities a real opportunity to influence the decision-making processes, includes all groups affected by the project, and continues throughout the project lifecycle. Mestad underscored that under international standards such as the OECD Guidelines it is expected that corporations are fully aware of Indigenous peoples' distinct rights, and how these rights need to be complied with when implementing projects that affect Indigenous people. The *OECD Guidance on Meaningful Stakeholder Engagement in the Extractive Sector*, launched during the seminar in Norwegian and Sámi versions, provides useful advice and standards on these issues.

According to **Mariann Gråik**, one of the lessons learnt by the Jijnjevaerie Sámi community following the negotiation process was that they need to be stronger in saying no to projects that will clearly infringe their rights upfront.

The consequences weren't understood at the beginning – it was such a new issue. The conversations didn't start in the correct way. With today's knowledge, this project may not have been approved.¹⁰

Gråik also noted that the community felt they were facing this issue alone, with little support from other actors. She underlined several important points, including the need to document traditional knowledge in the area before a project commences, as communities may lose a lot of knowledge in the areas affected by the development. Additionally, she noted that Indigenous peoples incur significant costs in responding to project proposals and participating in consultation processes, diverting their limited resources from other important areas. She further questioned whether these costs should be left solely to Indigenous people or whether businesses and governments should share the burden.



Image 5: Ola Mestad, Norway's NCP, Mariann Gråik, Jijnjevaerie Sameby and Malin Hillström, SSVAB.

¹⁰ Mariann Gråik. OECD and NIM's Seminar on Indigenous People's Rights and Natural Resource Development Projects. Karasjok 5. June 2019.

Malin Hillström emphasised that Statkraft had many positive meetings with the Sámi community and, when their interests were opposed, they tried to discuss other topics where there was more room for agreement. Hillström said that Statkraft will take all of the lessons learnt and the knowledge they have gained forward to shape their work in the future. “It is important to take the time to begin future dialogue with new eyes”,¹¹ Hillström stressed.

Anders Eira from Protect Sápmi first gave an introduction to the organisation’s work, which is to maintain and strengthen the Sámi cultural community, promote the interests of Sámi industries adapted to the requirements of modern society as well as to “provide assistance in securing the interests, land rights, resource rights and potential for development of Sámi land rights holders”.¹² Eira discussed consultation processes seen from the perspective of Indigenous peoples. He stated that the human rights framework is there, but the challenge is insufficient knowledge both on methods for dialogue and lack of knowledge on the actual facts. What is the basis for discussion and who should cover documentation and travel costs, as well as loss of income during the process for the affected Indigenous community? Eira suggested that these costs should be covered by the enterprise that is interested in developing the area and not by the affected community. He highlighted the importance of having an adequate impact assessment study (konsekvensutredning) that covers the actual consequences, and the possibility to ask for a second opinion on the studies conducted by enterprises. It is important that the investigator has adequate knowledge to gather relevant information and take into consideration the cumulative effects the project will have on the impacted area. It is in the interest of the enterprises and project developer to have a sufficient knowledge base, that both parties agree upon. It is also important to consider whether participants have the necessary mandate to negotiate and enter into agreements.

Sidsela Nyebak talked about Statkraft’s experiences with stakeholder dialogue from other projects. She gave an example from Chile, where a project was put on hold due to concerns relating to Indigenous peoples’ rights, forcing Statkraft to consider other options. Nyebak said that stakeholder dialogue is very important to Statkraft, but from time to time, they do not always succeed in reaching a mutually beneficial solution. Nyebak emphasised the importance of focusing on multiple forums for dialogue, and to use language which is clear and easy to understand. She also discussed several challenges in relation to consultations. From a company’s perspective it can be difficult to decide which organisations and groups to speak with, as representatives exist in some areas, but not in others. Businesses also need to ensure they include both male and female representatives. The format of consultation is another important aspect, as it takes time

¹¹ Malin Hillström. OECD and NIM’s Seminar on Indigenous People’s Rights and Natural Resource Development Projects. Karasjok 5. June 2019.

¹² Protect Sápmi, Web: <http://protectsápmi.com/engelsk/about-protect-sápmi/> (accessed 25.10.2019).

to find the right style/language, venue and to be attentive to cultural differences. “We try to reach an agreement, but it can be difficult, there are multiple interests and expectations to balance. Companies cannot address every expectation, but should try to find a solution”.¹³

Several important issues were discussed during the first day’s **panel discussion**, including the process of obtaining permits, compensation, the complex decision-making processes in companies and the issue of incomplete maps or maps that do not include relevant information from an Indigenous perspective and the need to have information brought forward in a manner, time, place and language that is appropriate for the affected community. All these issues are elements that are considered in the *OECD Guidance on Meaningful Stakeholder Engagement in the Extractive Sector*, with advice and recommendations. A number of participants underlined the necessity and benefit of a third party that also carries out mapping and conducts impact studies, in addition to the studies carried out by the companies themselves. Furthermore, participants discussed how Indigenous peoples should have the possibility to question the evaluations, its methods and its findings. After all, for local communities it is not only a point on the map, it is their homes and livelihood.

5. The Nussir Case

The second day of the seminar focused on the impact of extractive industries on Indigenous peoples and the planned opening of the Nussir copper mine in Kvalsund municipality. Nussir ASA is a Norwegian mining company established in 2005, which aims to deliver copper and other metals to meet the growing demand for copper in renewable energy systems internationally.¹⁴ The Nussir project has been approved by the government following a broad impact assessment process, but is heavily contested for several reasons. On the one hand, several stakeholders argue that the planned disposal of mining waste in the Repparfjord is likely to cause environmental damage and that the project will significantly impact on the Sámi people’s reindeer herding areas. On the other hand, government agencies, Nussir, Kvalsund municipality and others argue that the project will have minimal impact on both the environment and the reindeer herding areas, while also creating economic development and job opportunities in a small community affected by depopulation.

The Nussir-field in Kvalsund was discovered in the late 1970’s and is the biggest underdeveloped copper deposit in Norway. The zoning plan for the extraction of copper from Nussir and Ulveryggen was approved by Kvalsund municipality on 8 May 2012. The plans are to establish an underground mining operation, with the waste debris and tailings

¹³ Sidsela Nyebak. OECD and NIM’s Seminar on Indigenous People’s Rights and Natural Resource Development Projects. Karasjok 6. June 2019.

¹⁴ Nussir – The Norwegian Copper Company. Web http://www.nussir.no/en_about_nussir.php. (accessed 30.08.2019.)

(fine grained material) deposited underwater in the nearby Repparfjord. Nussir ASA, the mining company which will carry out the work, received a discharge permit from the Environment Directorate in 2016 (a permit that was approved by the Ministry of Climate and Environment). The mine is estimated to be in operation for 25-30 years and it is predicted to provide approximately 150 jobs.¹⁵ The Ministry of Trade, Industry and Fisheries stressed how considerable weight should be given to the impact on the Sámi people's lives and culture, and how the project will mitigate negative effects. Thus, there will be certain conditions attached to the project, including the prohibition of mining activities during certain times of the year to avoid reindeer being disturbed in the calving season. Other conditions require reduced mine activity during certain times of the year that are particularly important for reindeer husbandry in the area. The Ministry approved the opening of the copper mine in Kvalsund municipality on 14 February 2019.¹⁶

5.1. *The Sámi Perspective*

Indigenous peoples have a connection to the land as our home. When we think of our people's future, a lot of reindeer herders don't like the idea of selling the land and taking it from their children. There are other values in our culture that are more important than money.¹⁷

Oda B. Skarstad gave an in-depth presentation of the approval process for Nussir's proposed mining operation and the potential consequences for the Sámi people in the area. She explained that there are approximately 11,000 reindeer in the area that are likely to be affected, particularly in relation to their ability to move between summer and winter pastures. After Kvalsund municipality approved the zoning plan for the extraction of copper from Nussir and Ulveryggen, both the Sámi Parliament and West Finnmark district board for reindeer husbandry objected to the plan.

In March 2014 the zoning plan was approved by the Ministry of Local Government and Modernisation. The decision of the Ministry reads: "[...] It is assumed that the proprietor, in consultation with the reindeer herders, will come up with mitigation measures that lay the foundation for the continuation of reindeer husbandry in the area. This must be done before the measure is implemented."¹⁸ It has proved challenging for the parties to reach an agreement on mitigation measures. Nussir ASA submitted their application for an operating license pursuant to Article 43 of the Mineral Act to the Directorate of Mining (DMF) in May 2016. DMF sent the application to a public hearing in June 2017. Several consultation statements have been submitted in the consultation process.

¹⁵ Ibid.

¹⁶ Regjeringen.no Web: <https://www.regjeringen.no/no/aktuelt/nussir/id2629241/> (accessed 06.09.2019).

¹⁷ Anders Eira. OECD and NIM's Seminar on Indigenous People's Rights and Natural Resource Development Projects. Karasjok 6. June 2019.

¹⁸ Ministry of Local Government and Modernisation, decision, March 20, 2014, p. 8

The consultation statement from the Norwegian Sámi Association (NSR) emphasises that there has not been an assessment of the cumulative effects of a number of individual measures in the area that affect Sámi cultural practices.¹⁹ The lack of a professional assessment of the sum effect of all measures affecting reindeer husbandry has also been addressed during the official consultations with the reindeer husbandry operators in the area, held in May 2018. In later consultations in January and February 2019, the Sámi Parliament pointed out that a socio-economic analysis of the mining project has not been carried out, while the NFD states that it is not a requirement under the law.

We have already experienced large intrusions in our reindeer herding areas and this is yet another one. It will cause a reduction in the reindeer population, that is the sum of the effects. We already have a reduction, and if it goes down again, we would have to withdraw from our reindeer business, which is also our livelihood and tradition. Who will take responsibility for this? ²⁰



Image 6: Audience members.

Mikkel Nils Sara, leader of the Fiettar reindeer herding district,²¹ discussed the challenges associated with the mining project from the reindeer husbandry perspective. Sara explained how Sámi reindeer herders have a deep belonging and connection to the area

¹⁹ Norwegian Sámi Association, consultation statement, August 31, 2017, p 1

²⁰ Mikkel Nils Sara. OECD and NIM's Seminar on Indigenous People's Rights and Natural Resource Development Projects. Karasjok 6. June 2019.

²¹ A reindeer herding district is a legal entity organizing reindeer herders or *siidas*, groups of reindeer herders, common management of reindeer herding and use of reindeer grazing lands within a certain geographical area normally situated from the inland to the coast. The reindeer herding rights are usually established as usufruct rights based upon ancient prescriptive rights regulated through the Norwegian Reindeer Herding Act of 2007.

where the planned mining project will take place. There is written evidence of reindeer herding in the area 300 years ago, but the practice dates back even longer. The Fiettar reindeer herding district will be most affected by the project, but other districts will too, with the main concern being the potential effects on reindeer seasonal migration between summer, fall and winter pastures, from the north to south. “For centuries we have learnt to adapt with the reindeer habitat, people need to learn how the reindeer move in the terrain and how we move with them, we need to explain how this habitat is interconnected”.²² The Sámi reindeer herders need to preserve all of the pasture areas, because “...if you lose one area, it effects the others, they are interconnected, this is the most important principle, if you take away one area, the rest will fall apart”.²³

Sara also emphasised how habitat loss is one of the biggest reasons for loss of species and biodiversity. Small changes can have huge effects on reindeer migration patterns. Narrow passages would, for example, make it difficult for reindeers to move through, and if one passage is closed, the entire system breaks down. Sara explained that this detailed knowledge has been passed down through generations using Sámi technical terminology, and it is difficult to translate this knowledge and document the impacts when the dialogue with government and project developers has only been in Norwegian.

Can the Ministry decide that the reindeer are supposed to pass in a certain area or take a certain route? Do they have the competency to make that assessment? As reindeer herders, we have assessed that the reindeer will not take the route which has been assigned in the approval of the project. We know how they are likely to behave in the new environment and routes, and we don't think it will work. Reindeer are also very careful when they go downhill and prefer gradual declines, but some of the assigned areas are too steep, if we remove one area and it forces the reindeer to use the steeper route, the system is in danger of collapsing.²⁴

Sara argued that the municipality did not adequately consult with the reindeer herding communities when considering planning and zoning approvals for the project. He also noted that Sámi reindeer herders were not represented in the municipal board. Neither did Nussir have any contact with the reindeer industry early on, “...initially we have been completely neglected in this project”.²⁵

The Sámi Parliament's view of the mining project was presented by **Torvald Falch**. In his first remarks, Falch explained why the Sámi Parliament is against the mining project in Kvalsund municipality. He further explained how the Sámi Parliament did not agree with the Mineral Law, which came into force in 2010, as the law does not adequately reflect

²² Mikkel Nils Sara. OECD and NIM's Seminar on Indigenous People's Rights and Natural Resource Development Projects. Karasjok 6. June 2019.

²³ Ibid.

²⁴ Mikkel Nils Sara. OECD and NIM's Seminar on Indigenous People's Rights and Natural Resource Development Projects. Karasjok 6. June 2019.

²⁵ Ibid.

Sámi peoples' rights. Another challenge raised by Falch was the consultations with Nussir ASA and the fact that Nussir decided to carry out its own process through Kvalsund municipality. "We never came into a dialogue with Nussir about whether or how the project could be realised".²⁶ The Sámi Parliament does not think that the mitigation measures will work. Neither has there been a study or consultation regarding the socio-economic consequences of the project, although the Mineral Law clearly stipulates the need to assess this. Falch noted that the evaluations conducted by the Ministry concluded that the positive impacts of the project outweighed the negative and were justified in accordance with the Mineral Law.

The government does not have the same local skills and knowledge as we do, and they put too much weight on what the mine operator thinks. The impact studies which were carried out illustrate the negative consequences of the project, also on the local level, because it influences the whole use of the area of land. The consequences are so serious that the project cannot be carried out. The Ministry has acknowledged that the consequences are there, but believe they are insignificant and can be mitigated. However, the mitigation measures have not come from the people who will be influenced themselves, they come from the government.²⁷

Immediately after the Ministry approved the opening of the copper mine in Kvalsund municipality in February 2019, the Sámi Parliament, appealed the decision to the King's Council in October 2019. The complaint had not yet been processed when drafting this report.

5.2. *The Business and the Municipality's Perspective*

The Kvalsund Municipality's perspective on the Nussir mining project was presented by **Ingar Eira**. He explained that in the 1970s, when there was mining activity in the area, there was a sense of optimism in the community, but much of this optimism is gone and there has been a dramatic increase in the amount of people leaving the area for better opportunities. The Kvalsund municipality now has less than 1000 inhabitants and both Sámi and non-Sámi residents are suffering from the depopulation. The municipality supports the mining project because they believe it will generate opportunities for economic development and local employment, which will help to restore confidence in the community about their future.

²⁶ Torvald Falch. OECD and NIM's Seminar on Indigenous People's Rights and Natural Resource Development Projects. Karasjok 6. June 2019.

²⁷ Torvald Falch. OECD and NIM's Seminar on Indigenous People's Rights and Natural Resource Development Projects. Karasjok 6. June 2019.



Image 7: Ingar Eira, Kvalsund Municipality.

Our job in the municipality is to ensure that the local population can stay and live there, which requires jobs, if the people move out, we lose the culture and tradition, and then the Sea Sámi culture will be gone. Being able to stay in our homelands and maintain our culture, was one of the main reasons we supported this proposal, if people have hope for the future, they will stay.²⁸

Eira also underscored that approval was only given for the project after consideration of the potential impacts on the environment, reindeer husbandry and the fishing sector. The Municipality consulted with researchers who assured them that modern technology allows mining debris and tailings to remain on the ocean floor without floating up, hence the lowest risk option with the lowest impact on the environment was to deposit the waste in the fjord. The impact on reindeer from depositing the waste on the land would have been too great. Unfortunately, according to Eira, the mining project has divided the people, including within the Sámi population. Nonetheless, Eira notes that the Kvalsund Municipality must represent all local residents, not just the Sámi population.

The business perspective was presented by **Øystein Rushfeldt**, the CEO of the mining company Nussir ASA. Rushfeldt explained that it is important to take a number of key issues into consideration in modern mining activities, including climate change, energy efficiency, Indigenous rights, the work environment etc. The planning process for the opening of the Nussir mine has taken over 10 years, has encountered several challenges

²⁸ Ingar Eira. OECD and NIM's Seminar on Indigenous People's Rights and Natural Resource Development Projects. Karasjok 6. June 2019.

and has demanded a lot of capacity and resources. Rushfeldt argued that the planned copper mine can make an important contribution to the shift towards renewable energy, as global demand for copper is increasing for use in green technologies, such as electric cars and batteries. He also stressed that Nussir ASA is anchored in the local community and has strong relationships with stakeholders in the area. Moreover, he stressed that Nussir ASA have held many meetings with Sámi reindeer herding groups and have endeavoured to ensure the project does not disturb reindeer husbandry in the area. He emphasised that Nussir ASA has committed to a number of mitigation measures and will limit the impact of the mine by using existing mining infrastructure and areas, keeping operations underground and depositing tailings in the fjord.

Everyone who knows this area and who lives there will know how it looks, the reindeer and the mining are not in the same area. We will be operating in a tunnel and are not using new areas of land. I find it hard to imagine how we could represent a significant threat to the reindeer business.²⁹

5.3. *Reflections and Lessons Learnt*

Kathryn Dovey from the OECD gave a presentation on the expectations on responsible business conduct under the OECD guidelines. She explained the complaint mechanism of the OECD, and how NCPs can contribute to agreements between parties on responsible business conduct. Indigenous rights have increasingly been a key area of focus in complaint cases handled under the OECD Guidelines. There have been 22 cases handled by NCPs that have dealt with issues on responsible business conduct and Indigenous peoples, involving NCPs in countries such as Norway, Switzerland, Netherlands, Sweden, France, United Kingdom, Ireland, Peru, Spain, New Zealand, Italy, Australia, Germany and Belgium. These are the home countries of the involved enterprises, but the impact may have occurred in other countries where the business or business partners operate.

In her presentation, **Cathrine Halsaa**, from Norway's National Contact Point for the OECD, raised several challenges in relation to stakeholder dialogue. These included the uneven power dynamics between parties, ensuring meaningful participation in consultation processes, issues with language and communication, as well as practical considerations like compensation for travel costs, finding the right time and place to meet and the appropriate community representatives. She further noted that the participation of a neutral third party in the consultation process is important and can assist in reaching a better outcome for all parties.³⁰

²⁹ Øystein Rushfeldt. OECD and NIM's Seminar on Indigenous People's Rights and Natural Resource Development Projects. Karasjok 6. June 2019.

³⁰ Cathrine Halsaa. OECD and NIM's Seminar on Indigenous People's Rights and Natural Resource Development Projects. Karasjok 6. June 2019.



Image 8: Kathryn Dovey, OECD.

Halsaa presented the *OECD Guidance for Meaningful Stakeholder Engagement in the Extractive Industry*, which addresses these issues. The guidance was launched in Norwegian and Sámi³¹ on the occasion of the seminar. The OECD Guidance gives advice on how enterprises can comply with the OECD Guidelines, and avoid causing harm and remediate harm that has already occurred. The Guidance includes separate chapters on engaging with Indigenous peoples, women, workers and trade unions, and explains that engaging with stakeholders makes good business sense in that it can contribute to attaining a “social licence to operate”. Good stakeholder consultation can also give an early identification of risks, and reduce costs through dealing with issues before they may arise, instead of a costly process of repairing lost trust after a negative impact.

Language and communication issues were also raised by the participants involved in reindeer herding, who noted that it can be difficult to explain their concerns when there are no similar words in Norwegian or English for Sámi concepts and terms. Proposals from businesses and government are always written in Norwegian and reindeer owners try to translate their submissions to Norwegian, but it is a big challenge and some things are lost in translation. It can be difficult to get a complete picture of the actual situation without a common understanding of the core concepts and terminology used by both parties. Participants also argued that impact studies for this project should have been carried out earlier and should have involved more consultation, especially in the early scoping phase

³¹ <https://www.responsiblebusiness.no/nyheter/veileder-for-interessentdialog-i-utvinningssektoren-pa-samisk-og-norsk/>

of the project. The meetings between the Sámi community and Nussir ASA, have not been documented, nor were they conducted systematically.

The panel discussion on the second day raised several important questions. **Laila Susanne Vars** underscored that the Norwegian NHRI's reading of the impact assessment for the project concludes that there are significant consequences for the Sámi reindeer herding groups in the area, and that the assessment ordered by Nussir ASA shows the same. Vars further noted that the government and Nussir ASA must use these reports, especially given the local Indigenous knowledge that has gone into them.

“We have a systems challenge – we do not have adequate impact assessment processes in place to assess the potential consequences of projects such as this. The impact assessments used today do not have a holistic approach, and do not assess the impacts of a project and its consequences for the whole Indigenous community and their culture. The current impact assessments only focus on the very specific area where the mine or wind parks would be located, but as a matter of fact, those interventions effect the whole society, and not only the immediate geographical area. In our opinion, the assessment from Nussir doesn't adequately consider whether international human rights obligations have been fulfilled.”³²

In her final remarks, Vars stressed the need for transparent and effective consultation processes to ensure that affected parties have an opportunity to be heard and influence the project and to better enable stakeholders to track and monitor consultations.



Image 9: Anders Eira, Protect Sápmi, and audience members.

³² Laila Susanne Vars. OECD and NIM's Seminar on Indigenous People's Rights and Natural Resource Development Projects. Karasjok 6. June 2019.

6. Key Issues

Discussions during the seminar covered a wide range of topics and there were a variety of views expressed by speakers and participants. The following section summarises the key issues raised regarding **Indigenous participation, impact assessments, access to information** and **challenges for businesses**.

6.1. *Indigenous Participation*

- Businesses and Sámi communities often have different understandings of what constitutes ‘effective participation’ and free, prior and informed consent (FPIC);
- Businesses sometimes engage with the Sámi people late in the project cycle, when they have less ability to influence the decision-making process;
- It is unclear how parties should approach negotiation and agreement-making in situations where the Sámi people oppose a project outright, and the only remaining issue is mitigating potential damages;
- The inter-generational impacts of a project are often unclear, making it hard for Sámi representatives, especially reindeer herders, to agree to projects which may affect the rights of future generations;
- The costs involved in responding to project proposals, documenting their potential impacts and participating in consultation, negotiation and mediation are a burden on the Sámi people;
- Businesses do not always keep adequate documentation and records from consultations and translation is not always provided, causing communication problems throughout the process; and
- Consultation practices vary greatly between different business and projects, and there is a lack of systematic follow up by the government to ensure that consultations have been carried out in accordance with international standards.

6.2. *Impact Assessments*

- Impact assessments are often carried out too late in the project cycle and there are not enough opportunities for the Sámi people to question their evaluations, methods and findings;
- Impact assessment processes are not holistic as they do not assess the potential impacts of projects from a socio-economic, cultural and human rights perspective, nor do they take into account the cumulative effects of past, present and planned developments in Sámi areas;
- There is a need for an independent third party to carry out mapping and impact assessments, in addition to the studies carried out by businesses and Sámi people themselves; and
- The authorities tasked with approving natural resource development projects on the basis of impact assessments lack Sámi-specific knowledge and expertise.

6.3. *Access to Information*

- The Sámi people often face difficulties in accessing reliable information about the potential negative impacts of proposed resource development projects;
- Sámi communities often lack an in-depth understanding of the OECD complaints mechanism;
- Different maps are used by various parties when discussing a proposed project and often do not include relevant information from a Sámi perspective, such as Sámi place names or the location and size of seasonal reindeer herding areas; and
- There is a need for Sámi communities to document their traditional knowledge, customary use and histories related to a proposed development site before a project commences, otherwise the knowledge may be lost.

6.4. *Challenges for Businesses*

- Businesses need more assistance and guidance to ensure that international standards on human rights and responsible business conduct are adapted to the Norwegian context and implemented in practice;
- Businesses need more assistance and guidance in identifying effective methods and best practices for carrying out stakeholder engagement and impact assessments in an Indigenous context, in line with the expectations of due diligence for responsible business conduct in the OECD Guidelines; and
- There is a lack of guidance from government on the standard of consultation required between businesses and the Sámi people.

7. Concluding Remarks

The broad objective of the seminar was to discuss the human rights implications of increased business activity in the extractive and renewable energy industries in areas traditionally owned, occupied or used by the Sámi people. In particular, the seminar focussed on two case studies concerning the Norwegian companies Statkraft and Nussir, and the role of the OECD National Contact Points in these cases. The case studies served to provide practical examples of the key human rights issues which arise in relation to natural resource development in Indigenous lands or territories.

The seminar was an opportunity for dialogue between key stakeholders, experts and interested members of the public and provided useful insights for all involved. Many participants were pleased that they had the opportunity to give presentations uninterrupted and to participate in respectful and engaging discussions on the issues. Representatives from enterprises and academia gained valuable knowledge about traditional practices related to reindeer herding and the difficulties in documenting this for the purpose of mapping possible negative effects from business operations.

Participants also learned more about the efforts of businesses to conduct meaningful consultation with affected Indigenous communities and to identify and avoid the potential negative impacts of their operations. They also learned how third parties such as Protect Sápmi and the OECD National Contact Point can provide support to the parties in documenting impacts and providing dialogue and mediation.

The seminar provided an overview of international standards regarding Indigenous peoples' rights and their relevance for both states and businesses. It highlighted the obligations of the state to ensure a regulatory framework which complies with international standards on Indigenous peoples' rights and responsible business conduct, as well as the responsibility of businesses to respect these standards. The seminar also demonstrated the important role of National Human Rights Institutions and OECD National Contact Points in promoting international standards on Indigenous rights and responsible business conduct, and in providing advice and guidance to help resolve issues.

8. Appendix A: Program

Wednesday, June 5: Indigenous rights, business operations and wind power

Part 1: The OECD National Contact Point's handling of the complaint from Jijnjevaerie Sámi village against Statkraft / SSVAB - wind power development in reindeer husbandry areas

- Welcome - Gro Nystuen, Ola Mestad, Karin Buhmann
- Presentation of the complaint from the Contact Point - Ola Mestad.
- Presentation of the case from Jijnjevaerie Sámi village - Mariann Gråik
- Presentation of the case from Statkraft / SSVAB - Malin Hillström
- Questions and answers

Part 2: Agreement mechanisms and rights protection

- How to negotiate from Indigenous peoples' perspective? - Anders Eira, Protect Sápmi
- Statkraft's various experiences with stakeholder dialogue regarding mitigation measures - Sidsela Nyebak, Statkraft
- Panel discussion with Ola Mestad and representatives from Statkraft, Jijnjevaerie Sámi village and Protect Sapmi

Part 3: Indigenous rights under international law

- Introduction to international human rights framework - Gro Nystuen and Láilá Susanne Vars, NIM
- Plenary discussion

Thursday, June 6: Indigenous rights, business development and mining activities

Opening Session: OECD guidance for meaningful stakeholder engagement in the extractive industry

- The OECD guidelines for multinational enterprises and the OECD National Contact Point complaint mechanism, Kathryn Dovey, OECD
- The OECD guidance on meaningful stakeholder engagement and special recommendations for dialogue with Indigenous peoples - Cathrine Halsaa, Norwegian NCP, and Karin Buhmann, Copenhagen Business School

Part 1: Presentation of the Nussir case

- Review of the project and the view and role of Kvalsund municipality - Ingar Eira, Kvalsund municipality
- Overview of the operating license decision - Oda B. Skarstad

Part 2: Problems with the project

- The reindeer herding perspective - the Fieltar reindeer herding district / Mikkel Nils Sara
- The developer's perspective - Øystein Rushfeldt, Nussir (via Skype)
- The Sámi Parliament's perspective - Torvald Falch, The Sámi Parliament
- Questions and answers

Part 3: Panel debate

- Torvald Falch (The Sámi Parliament), Laila Susanne Vars (NIM), Ingar Eira (Kvalsund municipality), Øystein Rushfeldt (Nussir), Anders Eira (Protect Sápmi), Mikkel Nils Sara (Fieltar).

9. Appendix B: The International Human Rights Framework

9.1. Article 27 of the ICCPR

Under article 27 of the *International Covenant on Civil and Political Rights* (ICCPR), persons belonging to ethnic, religious or linguistic minorities “shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”. The Human Rights Committee, which monitors the implementation of the ICCPR, has adopted a broad interpretation of article 27, noting that Indigenous cultures are closely linked to a way of life associated with the use of lands and resources.³³ Therefore, article 27 may require states to adopt positive legal measures to protect Indigenous peoples’ economic and social activities and to ensure their effective participation in decisions which impact their way of life. The Committee has subsequently elaborated on the threshold required for a violation of these positive obligations in a number of their individual cases.³⁴

In the *Länsman* cases, which concerned the effects of stone quarrying, logging and road construction in Sámi reindeer herding territories in Finland, the Committee stated that measures will amount to a violation of article 27 if their impacts are so substantial that they effectively deny the Sámi people the right to enjoy their cultures in that area.³⁵ The Committee also noted that while a single measure in isolation may not constitute a violation of article 27, the cumulative effects of several measures may together erode the rights of the Sámi people to enjoy their culture.³⁶ However in both cases, the Committee did not find a violation of article 27 because the affected communities were consulted and the measures in question had only a limited impact on their cultures.³⁷

The concept of cumulative effects was also alluded to in the earlier case of *Lubicon Lake Band v Canada*, which concerned the approval of leases to oil, gas and timber companies in northern Alberta. In this case, the Committee found that the state was in violation of article 27 as both “historical inequities” and “certain more recent developments” were threatening the way of life and culture of the Indigenous peoples concerned.³⁸

³³ Human Rights Committee, *General Comment No 23: Article 27 (Rights of Minorities)*, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) paras 3.2 and 7; *Ivan Kitok v Sweden*, Communication No 197/1985, UN Doc CCPR/C/33/D/197/1985 (27 July 1988) para. 3.2; *Chief Bernard Ominayak and Lubicon Lake Band v Canada*, Communication No 167/1984, UN Doc CCPR/C/38/D/167/1984 (26 March 1990) para 32.2; *Apirana Mahuika et al. v New Zealand*, Communication No 547/1993, UN Doc CCPR/C/70/D/547/1993 (27 October 2000) para 9.4.

³⁴ The Human Rights Committee may consider individual communications alleging violations of the ICCPR in States that have ratified the Convention’s First Optional Protocol.

³⁵ *Länsman et al. v Finland*, Communication No 511/1992, UN Doc CCPR/C/52/D/511/1992 (8 November 1994) para 9.5; *Jouni E. Lansman et al. v Finland*, Comm. No 671/1995, UN Doc CCPR/C/58/D/671/1995 (14 March 1996) para 10.4.

³⁶ *Jouni E. Lansman et al. v Finland* (1996) para 10.7; *Jouni Länsman et al. v Finland*, Communication No 1023/2001, UN Doc CCPR/C/83/D/1023/2001 (2005) para 10.2.

³⁷ *Länsman et al. v Finland* (1994) paras 9.6 and 9.8; *Jouni E. Lansman et al. v Finland* (1996) paras 10.5 and 10.7.

³⁸ *Chief Bernard Ominayak and Lubicon Lake Band v Canada*, Communication No 167/1984, UN Doc CCPR/C/38/D/167/1984 (26 March 1990), para 33.

In *Apirana Mahuika et al. v New Zealand*, the Committee concluded that while legislative limitations on Maori fishing rights did restrict the communities concerned from enjoying their culture, the State party had engaged in broad consultation and taken the necessary steps to ensure the sustainability of Maori fisheries, thus complying with article 27.³⁹ The Committee emphasised that the acceptability of measures which interfere with Indigenous peoples' culturally significant economic activities depends on the extent to which the community concerned has participated in the decision-making process and whether they will continue to benefit from their traditional economy.⁴⁰

In *Ángela Poma Poma v Peru*, there was a clear breach of article 27 because the state had approved water-diversion and well-drilling projects on the Aymara people's farmlands for decades without conducting any impact studies or consultations, ultimately destroying their llama and alpaca grazing areas, and thus their very livelihood.⁴¹ In this case, the Committee noted that measures which substantially compromise or interfere with the culturally significant economic activities of Indigenous peoples will only be acceptable if:

- Studies are undertaken by a competent and independent body in order to determine the impact of the measures on the community concerned;
- Steps are taken to minimise any negative consequences of the measures and repair any harm done;
- The measures respect the principle of proportionality so as not to endanger the very survival of the community and its members;
- The community can continue to benefit from their traditional economy; and
- The community has had the opportunity for effective participation in the decision-making process, which means more than mere consultation and requires their free, prior and informed consent.⁴²

9.2. ILO Convention No. 169

Under *ILO Convention No. 169*, article 14(1), states are required to recognise Indigenous peoples' rights of ownership and possession over their traditionally occupied lands, as well as safeguard their rights to lands which they have traditionally used for subsistence and cultural activities.⁴³ Article 15(1) recognises as a general principle that the "rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded", including the right "to participate in the use, management and

³⁹ *Apirana Mahuika et al. v New Zealand*, Communication No 547/1993, UN Doc CCPR/C/70/D/547/1993 (27 October 2000), para 9.8.

⁴⁰ *Ibid*, para 9.5.

⁴¹ *Ángela Poma Poma v Peru*, Communication No 1457/2006, UN Doc CCPR/C/95/D/1457/2006 (24 April 2009), paras 7.6, 7.7.

⁴² *Ibid*.

⁴³ *International Labour Organisation Convention 1989 No. 169*, opened for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991), art 14.

conservation of these resources". In cases where the state retains ownership over mineral, sub-surface or other resources, article 15(2) of the Convention requires the state to ensure that Indigenous peoples are adequately consulted, participate in the benefits of the project and receive fair compensation for any damage incurred.⁴⁴

Under article 6, states have a general obligation to consult with Indigenous peoples in decision-making processes which directly affect them, through their own representative institutions and "with the objective of achieving agreement or consent." Article 15 deals specifically with consultation over the use of natural resources, requiring states to establish and maintain procedures through which they consult with Indigenous peoples "with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands." The ILO Committee of Experts has on several occasions confirmed that articles 6 and 15 require states to consult with Indigenous peoples with the objective of achieving agreement or consent, but has noted that this does not amount to a right of veto or require that consultations necessarily lead to agreement or consent.⁴⁵

Article 7(1) of the Convention recognises the right of Indigenous peoples to determine their own priorities for development and to participate in development plans which impact on the lands they occupy or otherwise use. Article 7(3) of ILO Convention No. 169 requires states to ensure that studies are carried out, in cooperation with the Indigenous peoples concerned, to assess the social, spiritual, cultural and environmental impact of planned development activities, and to consider the results of these studies as fundamental criteria for the development. This necessarily requires states to ensure that Indigenous peoples are informed, consulted and participate at the earliest possible stage in any planned resource development projects.

9.3. *The UN Declaration on the Rights of Indigenous Peoples*

The *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP) is a soft law instrument and not legally binding in itself, but may complement and guide the interpretation of treaty and customary law, and adopting states are expected to give soft law instruments due consideration in good faith. Under the UNDRIP, Indigenous peoples have the right to own, use, develop, control and strengthen their spiritual relationships with their

⁴⁴ Ibid, art 15(2).

⁴⁵ International Labour Organisation, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (100th Session of the International Labour Conference, 2011) ILC.100/III/1A, 787, https://www.ilo.org/ilc/ILCSessions/previous-sessions/100thSession/reports/reports-submitted/WCMS_151556/lang-en/index.htm; International Labour Organisation, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (101st Session of the International Labour Conference, 2012) ILC.101/III/1A, 942, https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_174843.pdf.

traditionally owned or occupied lands, territories and resources.⁴⁶ In addition, articles 18 and 32(1) affirm Indigenous peoples' right to participate in decision-making processes through their own distinct institutions and procedures, and to determine their own priorities for the development or use of their lands and resources. Under articles 19 and 32(2), states shall consult and cooperate in good faith with Indigenous peoples, through their own representative institutions, in order to obtain their free, prior and informed consent before approving any law, policy or project which directly affects "[...] their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources".

Former Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, has said that the obligation to adopt 'special, differentiated consultation procedures' arises where state decisions affect Indigenous peoples' particular interests in ways not felt by others in society.⁴⁷ Anaya further notes that the principle of free, prior and informed consent, as affirmed in the UNDRIP, does not accord Indigenous peoples a general right of veto over laws, policies or projects that affect them, but rather requires states to establish specific consultation standards that have consent as the goal or objective.⁴⁸ This means that states and businesses should engage in good faith negotiations and try in earnest to reach a mutually acceptable agreement, rather than merely provide information about decisions that Indigenous peoples have no genuine ability to influence.⁴⁹

9.4. *UN Guiding Principles on Business and Human Rights*

While states are the primary duty-bearers of human rights obligations under international law, there has been growing recognition in recent decades that human rights also have implications for businesses. In 2011, the UN Human Rights Council unanimously adopted the *Guiding Principles on Business and Human Rights* (Guiding Principles), which recognise the state duty to *protect* human rights, the corporate responsibility to *respect* human rights, and the right of victims to access an effective *remedy*.⁵⁰ The Guiding Principles are promoted by many stakeholders, including the UN Global Compact, which is a global network of companies that have aligned their businesses with key labour, environmental and human rights principles.⁵¹

⁴⁶ *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) arts 25 and 26.

⁴⁷ James Anaya, *Report Special Rapporteur on the Rights of Indigenous Peoples*, UN Doc A/HRC/12/34 (15 July 2009) para 43.

⁴⁸ *Ibid*, para 46.

⁴⁹ *Ibid*, para 49; EMRIP, *Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making*, 18th sess, UN Doc A/HRC/18/42 (17 August 2011) paras 9, 23, 53.

⁵⁰ The "Protect, Respect and Remedy" framework was first developed by John Ruggie, former Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises.

⁵¹ United Nations Global Compact, "Human Rights: The Foundation of Sustainable Business" (2018) <https://www.unglobalcompact.org/library/5647>.

The Guiding Principles acknowledge that while states are not responsible for human rights abuses committed by businesses and other private actors, they must take steps to prevent, investigate, punish and redress such abuses through legislation and regulation.⁵² Business enterprises also have a responsibility to respect human rights by carrying out due diligence to identify and address the human rights impacts of their business activities and by taking all necessary and reasonable precautions to prevent harm.⁵³ The duty to ensure access to effective remedies for human rights abuses extends to both states and business enterprises. Accordingly, states must take appropriate steps to investigate, punish and redress human rights violations committed by private actors, while business enterprises have a responsibility to establish policies, procedures and complaint mechanisms to resolve grievances.⁵⁴

The responsibility of businesses to respect human rights, as outlined in the Guiding Principles, also includes the human rights standards that specifically concern Indigenous peoples, such as article 27 of the ICCPR, ILO Convention No. 169 and the UNDRIP.⁵⁵ Despite this, there has been some ambiguity among governments and businesses regarding the manner in which the Guiding Principles apply to the situation of Indigenous peoples.⁵⁶ In 2013, the UN Global Compact produced a business reference guide on the UNDRIP in order to “help business understand, respect, and support the rights of Indigenous peoples by illustrating how these rights are relevant to business activities”.⁵⁷ The Guide places particular emphasis on the responsibility of businesses to respect Indigenous peoples’ rights to self-determination and to free, prior and informed consent, with practical examples of implementation.⁵⁸

9.5. *The OECD Guidelines for Multinational Enterprises*

The Organisation for Economic Cooperation and Development (OECD) first adopted *Guidelines for Multinational Enterprises* (OECD Guidelines) in 1976 and has since revised them on several occasions. The OECD Guidelines are recommendations addressed by governments to multinational enterprises, providing non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards. OECD Guidelines were amended in 2011,

⁵² UN Guiding Principles, principles 1-10.

⁵³ Ibid, principles 11-24.

⁵⁴ Ibid, principles 25-31.

⁵⁵ James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples: Extractive Industries and Indigenous Peoples*, UN Doc A/HRC/24/41 (1 July 2013) para 52.

⁵⁶ James Anaya, ‘International Framework and Standards Applicable to Resource Extraction on Indigenous Peoples’ Lands’ (Paper presented at Seminar on Extractive Industries and Indigenous Peoples, Centre for Sámi Studies, 10 September 2012) p 14, <https://uit.no/Content/327123/Extractive%20industries%20and%20indigenous%20peoples%20-%20Sep%2010%202012%20-%20Report.pdf>.

⁵⁷ UN Global Compact, *A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples* (2013) 2, https://www.unglobalcompact.org/docs/issues_doc/human_rights/IndigenousPeoples/BusinessGuide.pdf.

⁵⁸ Ibid, 25 and 37.

including through a new chapter on human rights which is consistent with the Guiding Principles on Business and Human Rights (UNGP). The OECD Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting. The Norwegian authorities expect Norwegian businesses to be familiar with and use the Guidelines.

In supporting the OECD Guidelines, states commit to establishing an implementation and complaints mechanism administered by National Contact Points (NCPs).⁵⁹ Norway's NCP is established as an impartial, independent public body. The role of the NCP is to assist Government in promoting the Guidelines and provide guidance and offer dialogue and mediation to solve cases where parties claim that enterprises has not observed the Guidelines.

The OECD Guidelines recommend that enterprises conduct due diligence in order to identify, prevent and mitigate any actual or potential adverse impacts of their business activities, including those related to human rights. These include any adverse impacts that may be associated with their operations, supply chains and other business relationships. Paragraph 40 of the OECD Guidelines acknowledges that some human rights may be at greater risk than others in certain industries or contexts, and that businesses should therefore pay particular attention to United Nations instruments which elaborate further on the rights of specific groups, including Indigenous peoples.

The OECD has also produced a sectoral guidance document entitled *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, which provides practical information on meaningful stakeholder engagement for mining, oil and gas enterprises, but is also relevant for other business sectors.⁶⁰ The OECD Guidance includes a separate section on Indigenous peoples, which highlights the importance of designing appropriate and effective processes for Indigenous engagement in accordance with Indigenous peoples' rights under international law.⁶¹ The OECD is currently elaborating on guidance documents to ensure equal guidance and treatment of these issues among the 48 national contact points. The goal is to achieve a level playing field for business internationally with the same requirements and standards.

⁵⁹ Ibid, p 18 (para 11).

⁶⁰ OECD, *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector* (2017) https://www.oecd-ilibrary.org/governance/oecd-due-diligence-guidance-for-meaningful-stakeholder-engagement-in-the-extractive-sector_9789264252462-en.

⁶¹ Ibid, 92-99.

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