

**International Expert Group Meeting**  
**Indigenous peoples, business, autonomy and the human rights**  
**principles of due diligence, including free, prior and informed**  
**consent**

Thank you very much to Alexey Tsykarev, Vice Chair of the Permanent Forum, and to all members of the Forum and Secretariat for inviting me to speak.

I am a professor of law at the University of Colorado where I direct the American Indian Law Program. Earlier this year I concluded 5 years on the Expert Mechanism on the Rights of Indigenous Peoples as its member from N. America and previous chair. I am also the co-lead with Sue Noe at the Native American Rights Fund on [The Implementation Project](#) to realize the aims of the UN Declaration on the Rights of Indigenous Peoples in the United States.

EMRIP's mandate is to advise the Human Rights Council on the human rights of Indigenous Peoples and to help states and IP's achieve the aims of the Declaration. EMRIP has produced two studies of relevance to this topic, including in 2017, "[Good practices and challenges in business and in access to financial services by indigenous peoples](#)". And, in 2019, we presented our study on "[Free, Prior, and Informed Consent](#)," which will be covered in tomorrow's panel on that topic.

In the first study, EMRIP grounded the topic of Indigenous Peoples' involvement in business and access to financial services within a human rights framework, looking particularly at the Declaration.

As an initial point, consistent with the indivisibility of human rights, economic redress and empowerment of Indigenous Peoples should be understood as means for Indigenous Peoples to attain their right to the

dignity and diversity of their cultures, their health and societies, traditions and futures, as guaranteed in the United Nations Declaration on the Rights of Indigenous Peoples.

Article 3 of the Declaration enshrines indigenous peoples' right to freely pursue their economic, social and cultural development as an integral part of their right to self-determination. Article 4 – which is sometimes overlooked – elaborates that Indigenous Peoples have the right to autonomy regarding the ways and means for financing their autonomous functions, as a component of the right to self-determination.

Article 23 of the Declaration provides for indigenous peoples' right to development, including the right to determine and develop economic priorities, strategies and programmes. Those provisions underlie indigenous peoples' right to unlock their business potential, do business as an integral part of their right to self-determination, and maintain sustainable economies in their own communities, while also participating in national and regional markets if they wish.

In addition, Article 39 recognizes the right of Indigenous Peoples to financial and technical assistance, which should be culturally sensitive and not contribute to dependency relationships with the State, markets or financial institutions.

Other instruments recognize rights in this realm as well. ILO 169 Article 23 provides that “rural and community-based industries, subsistence economy and traditional activities of IPs, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development”.

The UN's Sustainable Development Goals, provide important and wide-ranging guidance on human rights and business, emphasizing inclusive and sustainable economic growth, full and productive employment and decent work for all.

The Convention on Biological Diversity also recognizes indigenous traditional knowledge, as in Article 8 (j)'s provision that States shall respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities and promote their wider application with the approval and involvement of the holders of such knowledge, and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

As many people in the human rights movement have just returned from COP 26, we should observe that the Paris Agreement acknowledges the role of indigenous peoples' traditional knowledge in addressing climate change (art. 7 (5)) and reminds States to respect, promote and consider their human rights obligations when taking action to address climate change (preamble). Accordingly, Indigenous Peoples have a stake in climate change related businesses, funding and financial services.

Some of the most significant barriers to Indigenous Peoples' rights in the context of business enterprises and autonomies include, of course, the centuries-long exploitation of their lands and resources by others who invaded, appropriated, and development them, without the consent of IPs and without their participation or benefit. These expropriations, which have only been quantified in very exceptional circumstances (such as the [Cobell](#) lawsuit of the 1990s and 2000s where the US govt ended up paying 3.4B to settle claims it had asserted a right to, and then mismanaging, Indigenous lands and resources over 100 years), underscore the necessity of a remedial approach to Indigenous Peoples land, natural, and cultural resources, that have so long been taken from them. I would like to see more accounting for

these losses and more remedies for them around the world. This must include universal recognition of Indigenous Peoples own laws, customs, and traditions – their aboriginal title – as a basis for cognizable property rights, as is the case in some states in Latin America and should be the case everywhere, with titling, demarcation, and restitution all to follow.

Relatedly Indigenous Peoples have been for generations excluded from participating fully in the world of development and economic wellbeing. When colonial powers imposed their own ways of valuing and exploiting, treating Indigenous Peoples as incapable wards who could not participate on their own terms, Indigenous Peoples lost generations of opportunities to become educated and empowered in development strategies and goals. It resembles other arenas, whether language, culture, or subsistence, in which Indigenous Peoples own ways of life and development were disrupted such that they could not pass on knowledge to the next generation. It is difficult to know how Indigenous Peoples cultivation, production, trade, investment, and capacities would have evolved under their own control. Various project, such as the [Harvard Project on Economic Development](#), try to address issues of capacity building in business and development and we need more such programs worldwide.

The flip side of the coin is that the exclusion of Indigenous Peoples from the development context has also marginalized their own values when it comes to determining what resources should – and what resources should not – be commodified in markets. One palpable set of examples concerns natural resource extraction at sacred lands. These are places – lands and waters – that Indigenous Peoples hold out for religious ritual and ceremony, that are not appropriate in their worldview for development. Indeed, Indigenous Peoples often have sacred duties to take care of the place and the spirits who reside there. Yet dominant societies, industries, and governments now have the power to impose their own priorities—with one current example being the Apache

religious site of [Oak Flat, in Arizona, USA](#), which is slated to be destroyed for copper mining, thus obviating the coming of age ceremonies for young women that occur there. The safeguard of “free, prior, and informed consent” can help to bring Indigenous Peoples and values into discussions of this nature, and is critical to preserving human rights.

Finally, with respect to the last question on how Indigenous Peoples can deal with businesses’ appropriation of their traditional knowledge and resources, I would like to point out a process (that has not come to fruition yet) and a set of examples that give some home.

As many of you know, the [World Intellectual Property Organization](#) has for the last 21 years been trying to formulate instruments regarding traditional knowledge, traditional cultural expressions, and genetic resources. Intellectual Property law, as it has evolved in most western systems, has a number of limits – copyright does not recognize intergenerational collective expressions that remain in the oral tradition; patent does not protect traditional Indigenous knowledge regarding medicinal plants (only those that are synthesized in a lab); and trademark requires a symbol or sign to be used in commerce for protection. We need better and more comprehensive laws to protect Indigenous Peoples’ own cultural expressions whether in commerce or not, and I hope the WIPO process will make progress toward respecting Indigenous Peoples’ human rights.

While the WIPO process continues, Indigenous Peoples in some regions have already advanced models for the protection of traditional knowledge in business. The [National Movement of Women Weavers of Guatemala](#) – representing 30 different organizations of Maya weavers – have powerfully shown the costs and harms of exploitation of their huipil and other textile designs by knockoffs in local, regional, and global internet markets. The harms are economic but also dignitary

because these designs, as well as the textiles themselves, have cultural, personal, and place based meaning. The Maya Weavers have proposed national legislation to recognize collective rights in place and culture based textiles, and while I understand it is still under development, this is a notable example. And in South Africa recently the [Khoi and San people](#) negotiated an agreement with the Rooibos tea industry such that they will be acknowledged for their traditional knowledge regarding cultivation and uses of the tea – receive a percentage of revenues – and also have opportunities to participate in cooperatives for rooibos development, as well as land recovery.

I will conclude now and thank you for the opportunity to participate in the discussion.