



June 1, 2013

Mr. Georg Kell
Executive Director
United Nations Global Compact

Sent by email: undrip@unglobalcompact.org

Posted on Forum: <http://human-rights-forum.maplecroft.com/showthread.php?10734-Call-for-Comment!-Guide-for-Business-on-UNDRIP-and-Indigenous-Peoples-Rights>

Re: Exposure Draft of Guide for Business on Indigenous Peoples' Rights – Comments

Dear Mr. Kell:

We are writing in response to the United Nations (UN) Global Compact's request for comments on the Exposure Draft of the United Nations Declaration on the Rights of Indigenous Peoples Business Reference Guide (Exposure Draft).¹ NEI Investments (NEI) commends the UN Global Compact for providing the opportunity to comment on the Exposure Draft and for taking concrete steps to enable companies to take practical actions to respect and support indigenous peoples' rights.

With approximately C\$5 billion in assets under management, NEI's approach to investing incorporates the thesis that companies integrating best environmental, social and governance (ESG) practices into their strategy and operations will build long-term sustainable value for all stakeholders, and provide higher risk-adjusted returns to shareholders. We invest in a number of companies with operations that have direct or indirect implications for indigenous groups. In this context, we would like to offer the following comments.

General Comments

In general, the Exposure Draft is a strong document that should be a useful guide to companies looking to ensure their operations are in compliance with the principles of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The Exposure Draft clearly identifies and demarcates the roles that states and businesses play in respecting and supporting indigenous rights. Most importantly, the document has identified the key fundamental actions a company should undertake in order to adequately respect and support the rights of indigenous peoples. We would agree that the seven actions listed should be fundamental expectations. In particular, we are pleased to see the inclusion of free, prior and informed consent (FPIC) in this list.

Part II of the document (UNDRIP Rights) provides practical, actionable suggestions for meeting each article of UNDRIP. This is a very useful tool and we commend the UN Global Compact for the inclusion of varied examples to illustrate possible actions

¹ United Nations Global Compact (2012). Exposure Draft of Guide for Business on Indigenous Peoples' Rights. http://www.unglobalcompact.org/Issues/human_rights/indigenous_peoples_rights.html

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that could be taken. We would recommend that these be updated as more businesses adopt the reference guide and the list of successful examples is expanded.

Introduction (p. 4)

We believe it is important that the exposure draft should explain to readers why a guide specific to indigenous peoples' rights is required. However, the current introduction places a heavy emphasis on the negative living conditions and victimization some indigenous peoples have experienced or continue to experience, while only briefly highlighting the unique and positive role indigenous peoples can play in the world. Undoubtedly, it remains important to explain the historic injustices and marginalization that indigenous peoples have experienced, as these topics are very relevant to the discussion about indigenous peoples' rights and the responsibilities of businesses. Perhaps there could be a greater emphasis on the link between indigenous cultures and their traditional lands, and the important role that indigenous peoples will play in the future development of natural resources.

Aside from the positive role that indigenous people can play in imparting a different value system in regard to ecosystem services, indigenous communities can be a vital contributor to the success of resource development – from granting and maintaining social license to actively participating as owners, contractors and employees. While these attributes are touched on throughout the document, it would be beneficial to explicitly highlight them earlier in the introduction.

As well, on page 94 (under the heading *Article 43: UNDRIP as minimum standards*) the document properly identifies that the rights recognized in UNDRIP should be viewed as minimum standards, and in some cases higher standards will be required. This would be good context to include in the introduction of the reference guide.

Policy Commitment (p. 14)

We agree with the suggestion that senior management be given the responsibility to drive, implement and review the policy. Our experience engaging companies on ESG issues confirms that it is vital that the highest levels of management be directly engaged and involved in driving the policy. However, we believe that the Exposure Draft would be strengthened by also adding a role for the board of directors. The board is ultimately responsible for the strategic direction of the company and as such should be signing off on the creation of an indigenous peoples policy.

Due Diligence and Impact Assessments (p. 17)

We strongly support the suggestion that due diligence and impact assessment methodologies and processes must involve meaningful engagement with and participation by relevant indigenous peoples in their creation. We believe the due diligence process is a key opportunity not only to avoid impacts but also to build a strong relationship with potentially impacted communities. Thus the suggestion that businesses should report back to communities on the results of the due diligence process is also a welcome one.

We note that the document does not specifically name human rights impact assessment (HRIA) as a tool but instead uses the terminology of impact assessment, though it could be implied that HRIA is included in that reference. We would recommend that HRIA be specifically mentioned as a due diligence tool that is separate from other impact assessment tools (e.g. environmental impact assessment or social impact assessment). It is our belief that HRIA is a vastly underutilized tool, and explicit inclusion in the document would be a useful way to encourage adoption of this practice. Otherwise, the recommendations for performing human rights due diligence (specific to indigenous rights) are all sound.



The Exposure Draft mentions in its discussion of situations where governments do not adequately respect indigenous rights (p. 20) that a company may need to withdraw from a project if the negative impacts of the proposed project could outweigh the positive. The document does not discuss the implications of withdrawing from a project under these circumstances. It is possible that the government will seek another corporate actor that is willing to move ahead without community consent or adequate concern for indigenous rights. Advice on the best course of action in this situation would be useful (for example, should the company continue to maintain its relationship with the community, and can it contribute to the empowerment of the community?).

Consultation, Engagement and Decision-Making (p. 22)

We support the recommendation to develop a consultation process that respects indigenous traditions and governance structures. As well, we support the guidance to ensure that marginalized groups, such as indigenous women, are included in the consultation and decision-making process. There is however a possible tension between meeting these two objectives. Further advice, or at least recognition, of this potential challenge would strengthen the document.

Articles 9 and 33: Identity and Group Membership (p. 42)

The Exposure Draft encourages companies to ensure that the positive and negative effects of a project are evenly distributed across identity groups. While it is probable that the word “evenly” is being used in the sense of “fairly”, rather than in the sense of “providing equal amounts of benefits or impacts”, there is some ambiguity. In certain situations it will not be possible, or desirable, to distribute benefits (or impacts) equally across different groups. Certain groups may face more direct impacts on traditional lands, be more marginalized historically, or be of significantly larger or smaller size. As such, equal distribution of benefits may not be desirable or possible. Perhaps the term “evenly” could be replaced with a less ambiguous term such as “fairly” or “equitably”.

Conclusion

In conclusion, we see considerable value in the Exposure Draft and commend the UN Global Compact for inviting public comments. The business reference guide should help to further respectful and supportive relationships between businesses and indigenous people. We will continue to follow the development of this document with interest. Should you have any questions with regard to this submission, please do not hesitate to contact Jamie Bonham (Manager, Extractives Research & Engagement, NEI Investments) at jbonham@NEIinvestments.com or +1-604-742-8328.

Sincerely,

A handwritten signature in black ink that reads "Michelle de Cordova".

NEI Investments

Michelle de Cordova
Director, Corporate Engagement & Public Policy, NEI Investments



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