EXTRACTIVE INDUSTRY, HUMAN RIGHTS AND INDIGENOUS RIGHTS IN NEW ZEALAND'S EXCLUSIVE ECONOMIC ZONE

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I. Introduction

This article is a response to the recent surge of interest over extractive industry in New Zealand and the opposition to this by many iwi. The New Zealand government has in recent years made offshore exploration and production a high priority.[1] By the extractive industry, we mean the people, companies, and activities involved in removing oil and gas, metals, coal, stone and other useful resources from the ground.

To date practically all exploration and extraction of petroleum occurs in what is known as the Exclusive Economic Zone (EEZ) – extending from 12 to 200 nautical miles off-shore.[2] New Zealand has one of the largest exclusive economic zones in the world, with an area of ocean over 20 times the size of its land-mass. All of New Zealand's petroleum production occurs in the Taranaki Basin off the coast of Taranaki province and all but one of the off-shore fields are in the EEZ.[3] We focus on the *regulation* of extractive industry in the EEZ and the protections offered to iwi. The principal piece of legislation is the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 which came into force on 28 June 2013 (EEZ Act).

We seek to add a new dimension to the debate by talking about how developments in international law relating to indigenous peoples' rights, as well as business and human rights, may assist iwi. Both areas of law are relatively novel in the New Zealand context. Māori advocates played an important role in the development of international human rights for indigenous peoples – particularly negotiation of the rights set out in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). But this has been a long drawn out process – the UNDRIP took nearly 25 years to draft – and local Māori

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1 See Ministry of Economic Development *New Zealand Energy Strategy 2011-2021: Developing our Energy Potential and the New Zealand Energy Efficiency and Conservation Strategy 2011-2016* (Wellington, 2011).

2 See Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, s 9.

3 Waitangi Tribunal *The Report on the Management of the Petroleum Resource* (Wai 796, 2011).

advocates have tended not to use international law.[4] Instead, Māori advocacy and law reform have developed along a uniquely New Zealand path, with a particular focus on the Treaty of Waitangi,[5] customary rights,[6] and historical rectification in the form of "Treaty settlements."[7]

Business and human rights – the notion that companies must respect human rights – is a relatively new field in international law, and there has been very little written about it in the New Zealand context.[8] However, it has generated a great deal of interest for indigenous peoples globally given the proliferation of extractive industry projects within their traditional territories. Many businesses have been and remain a major source of investment and job creation. However, some businesses have had a negative impact on indigenous peoples.

In this article, we argue the current regulation of extractive industries in the EEZ falls short of international indigenous rights in several important respects. We also argue that extractive industries operating in the EEZ need to be aware of and comply with the new UN business and human rights regime.

Part II of this article outlines the international law relating to indigenous rights, with a particular focus on the UNDRIP. In Part III, we talk about the UN Guiding Principles on Business and Human Rights – how they emerged and what they offer. In Part IV, we outline briefly the current regulatory framework in New Zealand for extractive industry within the EEZ, including measures of protection for Māori. In particular we will focus on the Crown Minerals Act 1991 and the EEZ Act, which governs the allocation, exploration and extraction of natural resources in New Zealand's Exclusive Economic Zone. Part V sets out two cases studies relating to extractive industry proposals in the EEZ. The first case study, *Greenpeace v Minister of Energy*,[9] relates to the government's decision to grant an exploration permit to Petrobras prior to enactment of the EEZ Act. The second concerns the recent Trans-Tasman Resources Limited application to extract iron sands from the EEZ – the first case to be decided under the new EEZ regulatory regime.

In Part VI, we set out our conclusions. First, New Zealand contains a robust regulatory process for extractive industry in the EEZ, including important protections for Māori interests. This can be compared to many other countries

4 Athough iwi have appealed to UN human rights treaty bodies, see United Nations Committee on the Elimination of All Forms of Racial Discrimination (CERD) *Decision 1(66) New Zealand Foreshore and Seabed Act 2004* CERD/C/66/NZL/Dec.1(2005); *Mahuika v New Zealand Comm No 547/1993* CCPR/C/70/D/547/1993 (2000).

5 Matthew Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008).

6 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

7 See Office of Treaty Settlements *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (2nd ed, Wellington, 2003) at 96.

8 To date, only one New Zealand article has focussed on the UN Guiding Principles. See Henry Clayton "Business and Human Rights: Businesses Doing More Than Domestic Law Requires" (2011) Human Rights Research Journal 2.

9 *Greenpeace of New Zealand Inc v Minister of Energy and Resources and New Zealand* [2012] NZHC 1422.

that lack suitable regulation, with little or no protections for indigenous peoples.[10] However, the current regulations in several important respects are not consistent with the standards set out in the UNDRIP, UN human rights treaty body decisions and best practice. We focus on consultation and Free Prior and Informed Consent (FPIC); the lack of effective environmental and social impact assessments; and benefit sharing. Secondly, we suggest areas extractive industries need to focus on to ensure they respect the human rights of indigenous peoples. Finally, we argue that there are major issues left unaddressed relating to iwi authority or *tino rangatiratanga*, over offshore waters adjacent to their territories. This includes the issue of ownership of petroleum in the EEZ.

II. International Law and the Human Rights of Indigenous Peoples

A. The UN Declaration on the Rights of Indigenous Peoples

'Indigenous rights' has become a significant field in international law, culminating in the adoption by the UN General Assembly of the UNDRIP in 2007.

The UNDRIP has been heralded as a breakthrough achievement for indigenous peoples. In particular, art 3 provides:

> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 3 of the UNDRIP is expressed in almost identical terms to common art 1 of the International Human Rights Covenants (that is, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)). It is the linchpin of the UNDRIP and a hard fought victory for indigenous peoples. States were strongly opposed to the inclusion of the right to self-determination, given its close association with the decolonisation movement.[11] But it was retained largely due to the persistence of indigenous

10 In relation to Guatemala, for example, the UN Special Rapporteur on the Rights of Indigenous Peoples has focused on "the lack of consultation with indigenous people on the projects, furthered by the lack of domestic regulations on consultation and a series of misunderstandings about the content and scope of the regulations that do exist." James Anaya *Observations on the Situation of the Rights of the Indigenous People of Guatemala with Relation to the Extraction Projects, and other Types of Projects, in their Traditional Territories* A/HRC/18/35/Add.3 (2011) at [1]. See also Amnesty International *Guatemala: Mining in Guatemala: rights at risk* AMR 34/002/2014 (2014).

11 Under the decolonisation programme, dozens of colonies acquired independence, leading to the creation of new states. Inspired by the decolonisation program, indigenous advocates in the UNDRIP negotiations argued that indigenous peoples as 'peoples' were entitled to the right to self-determination and the option of independence. See, for example the World Council of Indigenous Peoples *International Covenant on the Rights of Indigenous Peoples* doCip Doc. 200479_2 (1983) (on file with authors).

advocates in negotiations. The right to self-determination is subject to art 46 of the UNDRIP, which seeks to preserve the territorial integrity of the encapsulating state. However, the indigenous right to self-determination still stands as a significant achievement. No other human rights instrument for minorities or indigenous peoples refers to self-determination.[12]

Other key rights in the UNDRIP include the right to self-government, traditional lands, culture, and measures aimed at restoring lands taken from indigenous peoples without their consent. The UNDRIP also recognises the right to consultation, as well as the right of indigenous peoples to give their FPIC to projects that might affect their territories.

The UNDRIP is not a binding international instrument. Technically, it is a resolution of the UN General Assembly. However, it is vested with significant legitimacy given the active role indigenous advocates and State delegates played in negotiating the text.[13] As the UN Special Rapporteur on the Rights of Indigenous Peoples has noted:[14]

> The Declaration is the result of a cross-cultural dialogue that has taken place over decades and in which indigenous peoples have played a leading role. The norms of the Declaration substantially reflect indigenous peoples' own aspirations, which after years of deliberation have come to be accepted by the international community.

Also, the UNDRIP has been formally endorsed by an overwhelming majority of UN member states. Australia, Canada, New Zealand and the United States of America voted against the UNDRIP in the UN General Assembly but later reversed their position. Furthermore, the Declaration is being promoted by a host of NGOs[15] and UN agencies.[16] And, as noted below, rights in the UNDRIP have been applied in many human rights treaty body decisions. However, one of the most powerful norms in the context of extractive industries is indigenous peoples' right to FPIC.

1. The Right to Free, Prior and Informed Consent

Of all the rights in the UNDRIP, so far Free Prior and Informed Consent (FPIC) has generated the most attention and discussion. This is largely due to the effects industry has on indigenous peoples and their territories.

12 See, for example, the International Labour Organisation's Indigenous and Tribal Peoples Convention (No 169) (opened for signature 27 June 1989, entered into force 5 September 1991). The Convention contains important provisions in relation to indigenous peoples' rights to lands and consultation and a range of economic, social and cultural rights. But it does not recognise the right to self-determination.

13 See generally Claire Charters and Rodolfo Stavenhagen *Making the Declaration Work* (IWGIA, Copenhagen, 2009).

14 James Anaya *Report of the Special Rapporteur on the Rights of Indigenous Peoples* A/66/288 (2011) at [67].

15 Amnesty International has campaigned on the UN Declaration on the Rights of Indigenous peoples and its implementation. See for example Amnesty International *Guatemala: Mining in Guatemala: rights at risk*, above n 10.

16 United Nations Development Programme *UNDP and Indigenous Peoples: A Practice Note on Engagement* (2001); and International Fund for Agricultural Development *IFAD Engagement with Indigenous peoples Policy* (2009).

Extractive industry such as mining, logging, and oil and gas exploration all impact on indigenous peoples' rights in various ways. But the common concern is that indigenous peoples are often side-lined due to poor planning and weak consultation processes employed by states and companies. States and corporations have been complicit in intimidating local communities – or have offered bribes and other inducements – in order to ensure development projects may proceed without resistance.[17] Indigenous peoples may be given information about the proposed project,[18] but what most indigenous peoples seek is their effective participation in the planning and execution of the project. In some cases, this includes the right to withhold their consent to any project that may have a major impact on their lands and resources.

The right to FPIC, as outlined in art 32 of the UNDRIP, specifically addresses the requirement to obtain indigenous peoples' informed consent prior to the approval of any project within their traditional lands and territories:[19]

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

As stressed in the last sentence of art 32, the concept of FPIC is particularly important in the context of extractive industry. It recognises that such activities have the potential to impact significantly on indigenous peoples' lands, territories and natural resources.[20]

During the UNDRIP negotiations, some States including New Zealand argued that the right to FPIC is an unworkable right of veto.[21] However, a body of policy, scholarship and jurisprudence has provided greater clarity about the content of the right to FPIC and its application in the context of extractive industry. In particular, the Inter-American Court of Human Rights has given perhaps the most comprehensive authoritative guidance.

17 For example, logging concessions with indigenous landowners in Papua New Guinea: Joshua Pietras "An (Indigenous) Rights Based Approach to Deforestation in Papua New Guinea" (2014) 22 Waikato Law Review (forthcoming).

18 According to the Special Rapporteur, "International standards are not met when the consultation is merely informational or consists solely of a formal procedure involving the signing of a document by the local authorities, especially since the communities' traditional decision-making structures do not always correspond to those of the authorities concerned." James Anaya *Preliminary Note on the Application of the Principle of Consultation with Indigenous Peoples in Guatemala and the Case of the Marlin Mine*, A/HRC/15/37/Add.8 (2010) at [15].

19 United Nations Declaration on the Rights of Indigenous Peoples A/Res/61/295 (2007), art 32(2) [UNDRIP].

20 Under UNDRIP, FPIC is also a requirement in situations involving the removal of an indigenous group from its traditional lands (art10); and situations involving the storage of hazardous materials in indigenous peoples' lands (art 29).

21 Rosemary Banks "Explanation of Vote by HE Rosemary Banks, New Zealand Permanent Representative to the United Nations" (13 September 2007).

In the *Case of the Saramaka People v Suriname* (2007),[22] the Court heard a complaint lodged by the Saramaka people relating to logging and mining concessions awarded without proper consultation by the Suriname government on territory possessed by the Saramaka. This was said to infringe their right to property under art 21 of the American Convention on Human Rights. Previous decisions of the Inter-American Court had recognised that indigenous forms of property could be given protection under art 21.[23] However in *Saramaka*, not only did the Court recognise this human right to property for the Saramaka people, it held that the right could not be justifiably infringed without compliance with several specific "safeguards". These safeguards were intended to protect the special relationship that the members of the Saramaka people have with their territory, which in turn ensures their survival as a tribal people.

The first safeguard asserts that the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan within Saramaka territory. Additionally, the Court ruled that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State had a duty, not only to consult with the Saramaka people, but also to obtain their FPIC, according to their customs and traditions. Second, the State must guarantee that the Saramaka people will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment.[24]

Indigenous peoples do not have an absolute or "unworkable right of veto" over all activities within their traditional lands and territories. Rather, indigenous peoples have the right to say "no" to activities that have potential to significantly impact them and their territories. The right to FPIC has been affirmed in several human rights treaty body decisions, including the UN

22 *Saramaka People v Suriname (Judgment – Preliminary Objections, Merits, Reparations, and Costs)* Inter-American Court of Human Rights Ser C No 172, 28 November 2007 at [129]-[134]. The Saramaka tribal people are not indigenous peoples. However, the Court treats indigenous peoples and tribal peoples on the same basis given their shared cultural difference and vulnerabilities.

23 This right has been recognised by the Inter-American Court in the breakthrough decision of *Awas Tingni Mayagna (Sumo) Indigenous Community v Nicaragua (Judgment – Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C (No 79), 31 August 2001 [*Awas Tingni*].

24 See also, *Saramaka People v Suriname (Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs)* Inter-American Court of Human Rights Series C No 185, 12 August 2008 at [41] (explaining that environmental and social impact assessments need to address the "cumulative impact of existing and proposed projects. This allows for a more accurate assessment on whether the individual or cumulative effects of existing or future activities could jeopardize the survival or indigenous or tribal people").

Human Rights Committee,[25] the UN Committee on the Elimination of Racial Discrimination (CERD)[26] and the African Commission on Human and Peoples' Rights.[27]

Professor James Anaya, the (former) UN Special Rapporteur on the Rights of Indigenous Peoples, has played an important role in promoting discussion about the application of FPIC. In a series of reports he has stressed the need to focus not only on consent, but on establishing a process that will result in indigenous peoples' full engagement with the proposed development:[28]

> Consultation procedures regarding proposed extractive operations are channels through which indigenous peoples can actively contribute to the prior assessment of all potential impacts of the proposed activity, including the extent to which their substantive rights and interests may be affected. Additionally, consultation procedures are key to the search for less harmful alternatives or in the definition of mitigation measures. Consultations should also be mechanisms by which indigenous peoples can reach agreements that are in keeping with their own priorities and strategies for development, bring them tangible benefits and, moreover, advance the enjoyment of their human rights.

The idea is that indigenous peoples should be involved early in the process including the preparation of regulatory frameworks on relevant areas such as the environment and natural resource allocation and strategic planning for resource extraction. Indigenous peoples' early and meaningful participation in these processes and in specific projects will likely foster indigenous peoples' support for projects.

In the context of FPIC, an important consideration is whether the right applies in those cases where indigenous peoples do not formally own the land subjected to extractive industry. Often states do not recognise indigenous ownership of their traditional lands, despite the fact that indigenous communities have occupied and used the lands for many generations.

25 "The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community." See Human Rights Committee *Angela Poma Poma v Peru Comm No 1457/2006* CCPR/C/95/D/1457/2006 (2009) at [7.6].

26 "The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories". See CERD *General Recommendation XXIII: Indigenous Peoples* A/52/18 (1997) at [5].

27 "Additionally, the African Commission is of the view that any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions." *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (Judgment)* African Commission on Human and Peoples Rights 276/03, November 2009 at [291].

28 James Anaya *Report of the Special Rapporteur on the Rights of Indigenous Peoples: Extractive Industries and Indigenous Peoples* A/HRC/24/41 (2013) at [59].

Instead, lands are assumed to be state-owned or under private ownership.[29] Companies and states may therefore seek to avoid consultation and FPIC obligations on the basis that the land is not owned by indigenous peoples. While land rights may not have received formal recognition domestically (eg through some grant of title), provided they exist in fact – through evidence of an indigenous tenure system – international law will recognise the right. In the *Awas Tingni v Nicaragua* decision of the Inter-American Court of Human Rights, for example, the court ruled that Nicaragua had violated the Awas Tingni right to property in the American Convention by granting a logging concession over their territory without their consent. While the community held no legal title to the land, the Court accepted that it was owned according to their tradition and this right could be recognised and protected under art 21.[30]

Furthermore, the UNDRIP recognises in art 26 that "indigenous peoples have the right to lands, territories and resources which they have traditionally owned, occupied or otherwise used and acquired." There is also the obligation of States to demarcate and give legal recognition to indigenous peoples' lands.[31] As noted by the UN Special Rapporteur on the Rights of Indigenous Peoples:[32]

> Legislative and administrative reforms are needed in virtually all countries in which indigenous peoples live, in order to adequately define and protect their rights over lands and resources, including lands not exclusively under their use or possession, such as those related subsistence practices or to areas of cultural or religious significance, which may be affected by extractive industries.

This fundamental principle relating to recognition and demarcation of traditional lands has been repeatedly endorsed in the decisions of the UN Committee on the Elimination of Racial Discrimination,[33] the

29 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) (rejecting the erroneous assumption the Crown owned the New Zealand foreshore and seabed).

30 See *Awas Tingni*, above n 23.

31 UNDRIP, above n 19, art 26(3).

32 Anaya, above n 28, at [46].

33 See CERD *General Recommendation XXIII*, above n 26, annex V at [5]: "calls upon States parties to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources …".

UN Committee on Economic, Social and Cultural Rights,[34] the UN Human Rights Committee,[35] Inter-American Human Rights Court,[36] and International Labour Organization.[37]

2. Impact Assessments

As noted in the *Saramaka* decision, the Court ruled that no concession will be issued within *Saramaka* territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment.

Impact assessments are of major importance in any proposal to conduct extractive projects in indigenous peoples' territories. Most of the information about the project and its potential implications for indigenous peoples will be gathered and disclosed through these assessments.

There are now a range of resources available for determining what should be included in impact assessments. A particularly useful guide is "The Akwe: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities".[38] These Guidelines were developed by the Working Group on art 8(j) of the Convention on Biological Diversity, which recognises the role of indigenous peoples in the conservation and management of biodiversity through the application of indigenous knowledge. To this end, the Guidelines set out a list of core recommendations for states and businesses to follow when engaging with indigenous peoples. In this connection, impact assessments should take into account the proposed objectives of the project, its scope, scale and expected duration. When potential adverse effects are identified, impact assessments should explain how those adverse effects will be avoided, minimised, mitigated or compensated.

34 The UN Committee on Economic Social and Cultural Rights has recognised the need for secure rights to traditional land in order to ensure that indigenous way of life is maintained. Committee on Economic, Social and Cultural Rights [CESCR] *Consideration of Reports Submitted by States Parties Under Articles 6 and 17 of the Covenant: India* E/C.12/IND/CO/5 (2008) at [44]; CESCR *Consideration of Reports Submitted by States Parties Under Articles 6 and 17 of the Covenant: Bolivia* E/C.12/BOL/CO/5 (2008) at [23], [36]; CESCR *Consideration of Reports Submitted by States Parties Under Articles 6 and 17 of the Covenant: Kenya* E/C.12/KEN/CO/1 (2008) at [12] and [31].

35 See, for example, *Lansman et al v Finland Comm No 511/1992* CCPR/C/52/D/511/1992 (1994). UN General Assembly Fifteenth Session *Report of the Human Rights Committee* A/50/40 at [66]-[76]; *Mahuika et al v New Zealand Comm No 547/1993* CCPR/C/70/D/547/1993 (2000); and Human Rights Committee *Report of the Human Rights Committee* CCPR/C/70/D/547/1993 (2000).

36 *Awas Tingni*, above n 23; *Moiwana Community v Suriname (Judgment)* Inter-American Court of Human Rights Series C (No 124), 15 June 2005; *Yakye Axa Indigenous Community v Paraguay (Merits, Reparations and Cost)* Inter-American Court of Human Rights Series C (No 125), 17 June 2005; *Sawhoyamaxa Indigenous Community v Paraguay (Merits, Reparations, and Costs)* Inter-American Court of Human Rights Series C (No 146), 29 March 2006; *Saramaka People v Suriname*, above n 24.

37 See, the observation of the ILO *CEACR in relation to India and the Sardvar Hydro Project, 1988 Report 3* (Part 4A)(75th session).

38 Secretariat of the Convention on Biological Diversity *Akwe Kon Guidelines* (Quebec, 2004).

Furthermore, impact assessments should outline how communities affected by the project will receive culturally appropriate social and economic benefits; and include clear assessment of the full range of human rights potentially affected, and measures that will be taken to prevent violations.

As noted by the UN Special Rapporteur on the Rights of Indigenous Peoples, impact assessments must "pay heed to the full spectrum of the human rights of indigenous peoples" as well as "mitigation measures to reduce impacts upon those rights, compensation for such impacts and benefit sharing …".[39]

3. Benefit Sharing

In *Saramaka*, the Inter-American Court referred to the need for the Saramaka tribal peoples to obtain a reasonable benefit from any projects planned within their territory. There is growing recognition of the need for indigenous peoples to share in the benefits made from extractive projects in their territories.[40] This flows from the recognition of the rights indigenous peoples possess in their lands, territories and resources as outlined in art 26 of UNDRIP.

The Special Rapporteur has expressed concern at the extraction model being promoted by States and corporations where "an outside company, with backing by the State, controls and profits from the extractive operation, with the affected indigenous peoples at best being offered benefits in the form of jobs or community development projects that typically pale in economic value in comparison to profits gained by the corporation."[41]

In addition to benefit sharing, as noted below, the Special Rapporteur encourages a shift towards new models of extractive industry, which entail "genuine partnership arrangements between indigenous peoples and corporations, in which the indigenous partner has a significant or even controlling share in the ownership and management of the partnership, or models in which indigenous peoples develop their own extractive business enterprises."[42]

4. Effect of UNDRIP on Extractive Industries

Although the UNDRIP was only adopted in 2007, it has already been widely accepted as a fundamental document on the human rights of indigenous peoples. The UNDRIP has potential to redefine the way in which States seek to engage with indigenous peoples, especially in relation to extractive industries. However, it is often the companies proposing extractive

39 James Anaya *Summary of Activities: Progress Report on Study on Extractive Industries* A/HRC/21/47 (2012) at [52].

40 As the Special Rapporteur on the rights of indigenous peoples notes: "there is growing awareness that agreements with indigenous peoples allowing for extractive projects within their territories must be crafted on the basis of full respect for their rights in relation to the affected lands and resources, and provide for equitable distribution of the benefits of the projects within a framework of genuine partnership. Anaya, above n 28, at [72].

41 Anaya, above n 39, at [74].

42 At [75].

projects that have the greatest potential either to promote human rights or violate them. The following section will outline recent attempts through the UN Human Rights Council to hold companies responsible for the 'human' impact of their activities and what this means for indigenous peoples in the age of the UNDRIP.

III. Business and Human Rights – The UN Guiding Principles

A. Background

Just as indigenous rights in international law came into prominence in the early 1990s, the international community began to focus its attention on business enterprises and whether human rights might extend to certain industries. This was a marked departure from the orthodox approach of seeing human rights as obligations owed by the State to its citizens. However, it was clear that many businesses were now encroaching steadily into areas formerly administered by governments – especially in weaker states where companies held considerable influence and power over local governments – and that specific business practices were violating human rights.

Several initiatives have since taken root, but the focal point has been the UN proposals led initially by the UN Commission on Human Rights (now the UN Human Rights Council). In 1998, the Commission on Human Rights charged its subsidiary body – the Sub-Commission on the Promotion and Protection of Human Rights – with drafting a report on corporates and human rights. If adopted, the resulting "Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights" would have imposed on companies the same human rights obligations that States accepted under international treaties.[43] Many human rights NGOs supported the report. However the business community, represented by the International Chamber of Commerce and the International Organization of Employers, strongly opposed what was deemed the "privatisation" of human rights. That is, to transfer to companies the duty to protect, uphold, fulfil and promote human rights.[44] As a result of this conflict, the Commission on Human Rights decided not to act on the proposal, saying that there were some helpful elements, but no legal standing.[45] Instead, in 2005, the Commission established a mandate for a

43 *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* E/CN.4/Sub.2/2003/12 (2003).

44 David Kinley and Rachel Chambers "The UN Human Rights Norms for Corporations: The Private Implications of Public International Law" (2006) 6 Human Rights Law Review 447 at 480.

45 Office of the High Commissioner for Human Rights *2004/116: Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights* (2004) (item 3).

Special Representative of the Secretary-General on the "issue of human rights and transnational corporations and other business enterprises" to undertake a new process. In 2005, the UN Secretary-General appointed Professor John Ruggie of the Harvard School of Governance to fulfil that role. After wide consultation with stakeholders – including businesses, states and NGOs – Ruggie developed the UN Guiding Principles on Business and Human Rights.

B. UN Guiding Principles on Business and Human Rights

In June 2011, the Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (UN Guiding Principles) as the first global standards for preventing and addressing the adverse human rights impacts of business activities.[46] The UN Guiding Principles set out a three-pronged "Protect, Respect and Remedy" Framework.

The first pillar of the UN Guiding Principles concerns the States' duty to protect against human rights abuses by third parties, including business enterprises. Therefore, States are not per se responsible for the human rights abuses of private actors. However, States may breach their own obligations under international human rights law where such abuses can be attributed to them, or where they fail to take the appropriate steps to prevent, investigate, punish and redress corporate-related human rights abuses.

The corporate responsibility to respect (as opposed to a *duty* to *protect*) human rights indicates that businesses must take active steps to avoid infringing on the human rights of others and address such impacts when they do occur. This second pillar sets out the process for companies to 'show and tell' how they are meeting their responsibilities; by which they become aware of, prevent and address their adverse human rights impacts.[47]

The third pillar addresses both the State's duty to provide effective remedies through judicial, administrative and legislative means; and the corporate responsibility to address and remedy any adverse human rights impacts to which they contribute. The importance of having effective remedial mechanisms cannot be overstated. It is an integral part of States' duty to protect and the corporate responsibility to respect human rights.

46 See Human Rights Council *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* A/HRC/17/31 (2011).

47 United Nations Office of the High Commissioner for Human Rights "The Corporate Responsibility to Respect Human Rights: An Interpretative Guide" (United Nations, Geneva, 2012) at 32.

However, the Guiding Principles were never intended to create new binding international law or impose additional obligations on companies.[48] According to Ruggie:[49]

> … its normative contribution lies in elaborating on existing standards and practices of States and businesses; integrating them within a single framework; and identifying where the current regime falls short and how it could be improved.

In this sense, the Guiding Principles provide governments, companies and international organisations with a normative framework for navigating complex human rights issues and responding to new challenges when they arise.

C. UN Guiding Principles and the UNDRIP

The Guiding Principles were welcomed by a variety of stakeholder and public interest groups. In fact, many of the most important instruments and initiatives on corporate social responsibility have been, or are in the process of being, updated in light of the UN Guiding Principles.[50] Yet some indigenous organisations and human rights NGOs were disappointed that the framework only focused on the human rights set out in the two International Human Rights Covenants, coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work.[51] When the Guiding Principles

48 Robert C Blitt "Beyond Ruggie's Guiding Principles on Business and Human Rights: Charting an Embracive Approach to Corporate Human Rights Compliance" (2012) 48 Texas Journal of International Law 33 at 43.

49 Professor John G Ruggie, Special Representative for the Secretary General for Business and Human Rights "Presentation of Report to United Nations Human Rights Council" (Geneva, 30 May 2011).

50 One of the most important initiatives to emerge out of the business-human rights debate is the UN Global Compact, which was established in 2000 by the UN Secretary-General. Its purpose is to encourage businesses worldwide to voluntarily adopt a framework for business enterprises. Principle 1 calls on companies to respect and support the protection of internationally recognised human rights; and Principle 2 calls upon them to ensure that they are not complicit in human rights violations. Companies signed up to the Global Compact are required to develop their own policy statements on how they endeavour to respect human rights throughout the course of their operations. Another important development in this area is the OECD Guidelines for Multinational Enterprises, adopted in May 2011. The revised Guidelines contain a new chapter on human rights based on the UN Guiding Principles. In addition, the ISO 26000 standard on social responsibility, adopted in late 2010, draws on key aspects of the UN Framework and has since been updated to comply with the Guiding Principles. Finally, the International Financial Corporation's (IFC) Performance Standards on Environmental and Social Sustainability draw on many of the expectations set out in the UN Guiding Principles. In particular, Performance Standard 7 focusses on indigenous peoples and requires IFC clients to avoid adverse impacts, obtain the community's participation and consent, including FPIC, and provide mitigation and development benefits. For general discussion, see Martje Theuws and Mariette van Huijstee *Corporate Responsibility Instruments: A Comparison of the OECD Guidelines, ISO 26000 & and the UN Global Compact* (SOMO, Amsterdam, 2013).

51 ILO Declaration on the Fundamental Principles and Rights at Work, adopted by the International Labour Conference at its Eighty-Sixth Session, Geneva, 18 June 1998.

first appeared before the UN Human Rights Council in March 2011, they did not refer independently to indigenous peoples. In June 2011, however, the Council directed the Working Group to "integrate a gender perspective throughout the work of the mandate and to give special attention to persons living in vulnerable situations, in particular children".[52] But given the extent of extractive industry impacting on indigenous peoples and their rights, indigenous advocates were disappointed to see no express, singular reference to indigenous peoples.

However, a number of efforts have since taken root to provide a clearer link between the UN Guiding Principles and UNDRIP. Some of this has occurred through the two bodies established by the UN Human Rights Council to promote the implementation of the Guiding Principles – the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises;[53] and the Forum on Business and Human Rights.[54] Both meet in Geneva, the Working Group three times a year; the Forum once every year. During the first year of its operation, the Working Group discussed the issue of indigenous peoples on several occasions, with a particular emphasis on violation of their rights in connection with extractive industries and other types of business activities, as well as making recommendations on how companies can improve their engagement with indigenous peoples. At the first annual Forum on Business and Human Rights, the Working Group held a panel discussion entitled "Business Affecting Indigenous Peoples", with participation from Professor James Anaya, the (then) UN Special Rapporteur on the Rights of Indigenous Peoples.[55] In addition, the Expert Mechanism on the Rights of Indigenous Peoples has issued a report outlining how companies might fulfil their responsibilities under the Guiding Principles to respect indigenous rights.[56] Similar reports have emerged from the UN Global Compact,[57] human rights NGOs,[58] and national human rights institutions.[59]

52 Human Rights Council *Human Rights and Transnational Corporations and Other Business Enterprises* A/HRC/RES/17/4 (2011) at [6(f)].

53 Human Rights Council *Human Rights and Transnational Corporations and Other Business Enterprises* A/HRC/RES/17/4 (2011).

54 Human Rights Council *Human Rights and Transnational Corporations and Other Business Enterprises* A/HRC/RES/17/4 (2011).

55 Human Rights Council *Summary of Discussions of the Forum on Business and Human Rights, prepared by the Chairperson, John Ruggie* A/HRC/FBHR/2012/4 (2013) at 16-17.

56 Human Rights Council *Expert Mechanism on the Rights of Indigenous Peoples: Comment on the Human Rights Council's Guiding Principles on Business and Human Rights as related to Indigenous Peoples and the Right to Participate in Decision Making with a Focus on Extractive Industries* A/HRC/EMRIP/2012/CRP1 (2012).

57 United Nations Global Compact *A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples* (United Nations Global Compact, New York, 2013).

58 Johannes Rohr and José Aylwin *Business and Human Rights: Interpreting the UN Guiding Principles for Indigenous Peoples* (IWGIA, Copenhagen, 2014).

59 Australian Human Rights Commission "Business and Human Rights" (2012) <www.humanrights.gov.au>.

Together, these efforts highlight the potential of the UN Guiding Principles to address the human rights implications of business activity in indigenous peoples' territories. It is against this background that the current framework for extractive industries in New Zealand will be examined.

IV. New Zealand Context – The Regulatory Framework and Iwi Safeguards

A. Overview

As is well known in New Zealand, Māori occupy a special status as indigenous peoples or Tangata Whenua of the land. The Treaty of Waitangi signed by Māori tribes and the British Crown in 1840 has acquired great significance in New Zealand's constitutional arrangements, law and government activity. Article 2 of the text guaranteed *tino rangatiratanga* (chieftainship or sovereignty) over lands, villages and "taonga" (treasures) to Māori. The Treaty has provided the basis of government efforts to address historical injustices relating to taking of Māori land and resources during colonisation and settlement. Through the Treaty of Waitangi settlement process, the Crown has addressed and settled claims across the country relating to deep sea commercial and traditional fisheries (Sealords Fisheries Deal);[60] land confiscations;[61] Māori interests in forestry;[62] and aquaculture.[63]

Yet there have been strongly contested issues over Māori claims to rights in New Zealand's coastline and off-shore waters. Under the Sealords Fisheries Deal, Māori agreed to give up any claims based on customary or Treaty rights to commercial fisheries in exchange for $150 million; regulations recognising and providing for customary food gathering; and over 40 percent of New Zealand's fishing quota.[64] Several tribes were strongly opposed to the legal extinguishment of their customary and Treaty rights to fishing.[65] But Parliament enacted legislation to give effect to the settlement.

The controversy over Māori claims to the foreshore arose from the *Attorney-General v Ngāti Apa* decision which indicated tribes could possess proprietary rights in the foreshore (the area between high and low tide) and seabed (the area from the low tide out 12 nautical miles to the edge of the EEZ).[66] The government quickly legislated to quell public concern about tribes obtaining ownership of New Zealand beaches. The legislation

60 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.
61 Ngati Ruanui Claims Settlement Act 2003.
62 Central North Island Forests Land Collective Settlement Act 2008.
63 Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report* (Wai 953, 2002); Maori Aquaculture Claims Settlement Act 2004.
64 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.
65 But Ngāti Porou appealed unsuccessfully to the UN Human Rights Committee arguing that it violated the right of iwi to enjoy their culture and their right to access justice.
66 *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA).

contained the issue by allowing Māori to claim clearly prescribed customary rights in the foreshore. Māori sought an urgent hearing from the UN Racial Discrimination Committee alleging that the law was discriminatory. The Committee identified "discriminatory elements" in the law and urged the Government to engage with tribes.[67] The law was repealed and replaced by the Marine and Coastal Area (Takutai Moana) Act 2011 – which permits Māori to claim "customary rights" and a "customary marine title." Under the Act, the holders of a customary marine title do not acquire a proprietary right to foreshore and seabed lands, although they will own minerals in the area (other than precious minerals).[68] That said, the standards of proof set out in the Act make it difficult to establish these customary and title rights.[69]

In relation to petroleum, a Taranaki tribe, Ngā Ruahinerangi, argued in an urgent hearing before the Waitangi Tribunal that the Crown by nationalising petroleum under the Petroleum Act 1937 had violated the principles of the Treaty. As noted above, all of New Zealand's petroleum production occurs in the Taranaki Basin off the coast of Taranaki province. In 2003, the Waitangi Tribunal found that, prior to 1937, Māori had legal title to the petroleum in their land[70] and that expropriation in 1937, without compensation, was a breach of the Treaty.[71] The Tribunal found that Māori had a Treaty interest in petroleum in these circumstances and that, whenever that Treaty interest arises, Māori have a right to a remedy for the wrongful loss of petroleum.[72] The Government refused to accept the Tribunal's recommendations. The Government's position is that the Crown owns precious minerals (including petroleum, uranium, gold and silver) under the Crown Minerals Act 1991 (which replaced the Petroleum Act 1937).[73] Section 10 of the Crown Minerals Act notes these minerals "shall be the property of the Crown."[74]

67 CERD "Decision 1(66): New Zealand Foreshore and Seabed Act 2004", above n 4.

68 See Marine and Coastal Area (Takutai Moana) Act 2011, s 83(2).

69 See A Suszko "The Marine and Coastal Area (Takutai Moana) Act 2011: A Just and Durable Resolution to the Foreshore and Seabed Debate?" (2012) 25 NZULR 148 ("while the Act recognises a greater range of Maori property rights than the 2004 Act, the high threshold test for establishing such rights will likely prove difficult for many customary groups. Due process may be restored, to some degree, but it may be empty in outcome.").

70 Waitangi Tribunal *The Petroleum Report* (Wai 796, 2003) at 79.

71 Waitangi Tribunal *The Petroleum Report* (Wai 796, 2003).

72 Waitangi Tribunal *The Petroleum Report* (Wai 796, 2003).

73 The Office of Treaty Settlements notes: the Crown owns and manages nationalised minerals (including petroleum, uranium, gold and silver) under the Crown Minerals Act 1991, in the national interest. It considers that it should continue to do so. These resources are therefore not available for use in Treaty settlement. See, Office of Treaty Settlements *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, above n 7, at 96.

74 See s 10 Crown Minerals Act 1991. However, there remains the possibility of iwi obtaining judicial recognition of a common law Māori customary interest in petroleum on the basis that the language in s 10 does not extinguish such interests but instead is a reference to the Crown's (notional) radical title in all property. See for example *Delgamuukw v British Columbia* [1997] 3 SCR 1010 (where aboriginal title included subsurface minerals).

In relation to the EEZ and Continental Shelf, and precious minerals in the EEZ, the government does not claim any ownership rights, but rather the exclusive right to exploit resources in the area.[75]

In sum, Māori do not have any ownership rights in the foreshore or seabed (excepting the possibility of non-precious minerals if a customary marine title is established) or EEZ and Continental Shelf, nor do they possess rights to the petroleum and other precious minerals. Instead, Māori interests are provided for in the regulations governing the extraction of minerals within the EEZ. The core statutes relating to mining are the Crown Minerals Act 1991, which deals with prospecting, exploration and mining activities for certain Crown owned Minerals; and the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, which deals with the environment impacts of those activities.

B. Legislation

1. Crown Minerals Act 1991

Permits to explore and extract oil and gas are allocated under the Crown Minerals Act 1991 (the Crown Minerals Act). The purpose of the Act is "to promote prospecting for, exploration for and mining of Crown owned Minerals for the benefit of New Zealand".[76] Its focus is, therefore, on economic matters, not environmental issues or indigenous peoples. Companies obtain permits to explore for oil and gas through the annual 'Block Offer' process managed by New Zealand Petroleum and Minerals. Once the block offers have been released, companies bid for permits to explore within the designated area. Each company is 'credit-checked'; this includes an assessment of its technical and financial capability, and its environmental and safety record. The permit to undertake exploratory drilling in a particular block is normally given to the company with a work programme that "has the best information-gathering value and that is most likely to find petroleum deposits in a timely manner".[77] When an exploratory well indicates that commercial quantities of oil and gas can be extracted, the company holding the exploration permit can then apply for a petroleum mining permit provided the application is made before the exploration permit expires.

75 United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994), art 56 provides: "In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds."

76 Crown Minerals Act 1991, s 1A.

77 New Zealand Petroleum and Minerals, Ministry of Business, Innovation and Employment, *Minerals Programme for Petroleum 2013*, s 7.2(3), [*Minerals Programme for Petroleum 2013*].

As noted above, under the Crown Minerals Act, all precious minerals are deemed to be the property of the Crown. However, s 4 of the Act provides that all persons exercising powers and functions under the Act "must have regard" to the principles of the Treaty. In addition to the Crown Minerals Act, the Minerals Programme for Petroleum (MPP) sets out Treaty safeguards.[78] The current MPP 2013 provides for defined areas of land of particular importance to the mana of an iwi or hapu to be excluded from the operation of the MPP or any permit.[79] Currently, this includes Mount Taranaki and the Titi islands. In addition, the MPP 2013 specifies the matters on which iwi and hapu must be consulted by the government.[80] The duty to consult will arise whenever a party applies for a prospecting, exploration or mining permit; during the preparation of a Petroleum Exploration Permit Round; and where an application has been made to extend the area of the permit or to explore or mine for a mineral not included in the permit.[81]

With respect to extractive companies, neither the Crown Minerals Act nor the Mineral Programmes imposes any positive obligations to consult with Māori. While companies are generally encouraged to consult with Māori before undertaking any activities under a mineral permit, failure to do so will not render the permit invalid. In this sense, consultations are seen as a desirable, albeit voluntary step for companies. However, the Crown Minerals Act provides for annual iwi engagement reports by Tier 1 permit holders (Complex, higher risk and return petroleum and mineral operations).[82] This applies to "iwi or hapū whose rohe (territory) includes some or all of the permit area or who otherwise may be directly affected by the permit".[83] While iwi engagement reports have the potential to enhance the importance companies place on engagement with hapū and iwi, there are some obvious drawbacks. There is no requirement that iwi be involved in the drafting and review of the reports. Under the MMP 2013, "Permit holders are encouraged to consult with relevant iwi and hapū before submitting their report and, where possible and appropriate, to include in the report the views of those iwi and hapū on the content of the report".[84] However, there is no obligation on companies to listen to iwi concerns or have their reports reviewed and verified by them. Nor are reports independently commissioned or reviewed. As a result, it is possible that reports may give a false impression that consultations and engagements between industry and iwi have been satisfactory.

78 The Programme that applies depends on when a permit was granted. The Minerals Programme in place at the time a permit was granted prior to 24 May 2013 will continue to govern those permits (until the permit holder requests a change or the permit holder opts in to the new regime). Permit applications pending on, and those granted after, 24 May 2013 will be considered under the new *Minerals Program for Petroleum 2013*.

79 At s 3.1(1), at 17.

80 New Zealand Petroleum and Minerals "Iwi and Communities" (2013) <www.nzpam.govt.nz>.

81 *Minerals Programme for Petroleum 2013*, above n 77, at s 2.2(1).

82 Crown Minerals Act 1991, s 33C.

83 At s 33C(1).

84 *Minerals Programme for Petroleum 2013*, above n 77, at s 2.11(3).

The granting of a permit under the Crown Minerals Act does not give the permit holder an automatic right to access any land.[85] The general rule is that the permit holder must negotiate an agreement with the landowner (and occupier) before undertaking any project on their land. This essential requirement gives landowners the opportunity to negotiate a benefit-sharing agreement with permit holders so that both parties can profit from the activities.[86] However, s 53 of the Act expressly states that no access agreement is required if a petroleum permit relates to land in the continental shelf; or land in the common marine or coastal area, except for land described under Schedule 4 (Conservation estate land). In essence, this means that petroleum companies will not normally need to obtain an access agreement from local whanau, hapū or iwi for activities in the EEZ and Continental Shelf and thus there is little incentive for companies to enter into a benefit-sharing agreement. So while the Crown does not prohibit or actively discourage benefit sharing between industry and Māori, it does not actively encourage it either.

The Crown Minerals Act and the Mineral Programmes make it clear that they are not primarily concerned with the health, safety and environmental issues relating to prospecting, exploration and mining activities. All of these matters are regulated under separate pieces of legislation. However, a rudimentary assessment of the applicant's health, safety and environmental policies and capabilities are undertaken for all applications for Tier 1 activities. This assessment relates to compliance with the Health and Safety in Employment Act 1992, the Maritime Transport Act 1994, the Resource Management Act 1991 and the EEZ Act. However, permit holders will still need to obtain the relevant authorisations and resource consents under those statutes before undertaking any activities. For extractive activities in the EEZ and Continental Shelf, permit holders will need to obtain a marine consent under the EEZ Act.

2. Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

The EEZ Act was adopted in 2012 to fill in the gaps in the regulation of activities within the EEZ and Continental Shelf.[87] Colloquially known as the "RMA at Sea",[88] the EEZ Act aims to "promote the sustainable management of the natural resources of the EEZ and Continental Shelf".[89] Unlike the

85 New Zealand Petroleum and Minerals "What about Land Access?" (2014) <www.nzpam.govt.nz>.

86 Duncan Laing and others (eds) *Resource Management Law* (online looseleaf ed, Brookers) at [B53.01].

87 The EEZ Regulatory Regime comprises the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (the EEZ Act), regulations made pursuant to that Act (the EEZ Regulations) and, to a lesser extent, the Environmental Protection Authority Act 2010 (the EPA Act).

88 Chris Simmons "The RMA at Sea?" [2012] NZLJ 385.

89 Section 10 EPA Act defines *sustainable management* as "managing the use, development, and protection of natural resources in a way, or at a rate, that enables people to provide for their economic well-being while–(a) sustaining the potential of natural resources (excluding

Crown Minerals Act, the focus is not economics, but the environment. The EEZ Act is similar to the Resource Management Act 1991 in the sense that it aims to promote sustainable management through a robust consent process. The general rule is that no person or company may do any activity, including mining, within the exclusive economic zone or continental shelf unless the activity is authorised by a marine consent.

The newly established Environmental Protection Authority (EPA) is responsible for issuing marine consents and ensuring that permit holders comply with the relevant environmental and safety standards. Certain activities managed under the EEZ Act are "permitted", which means that they do not require a marine consent. Significantly, this includes exploration for petroleum and minerals (excluding drilling for petroleum).[90] All other activities are categorised as "discretionary" and require a marine permit.

When applying for a marine consent, companies must submit an impact assessment,[91] prepared in accordance with s 39 of the EEZ Act. The purpose of an impact assessment is twofold: First, it requires companies to identify the effects of the proposed activities on the environment and on persons with an "existing interest", which includes an interest in a Treaty settlement;[92] the Sealords fisheries settlement;[93] and protected customary right, or customary marine title recognised under the Marine and Coastal Area (Takutai Moana) Act 2011. The impact assessment must describe any consultation undertaken with persons whose existing interests are likely to be adversely affected by the proposal and specify those who have given written approval to the activity.[94] Second, the impact assessment ensures that companies take steps to avoid, remedy and mitigate any adverse effects identified, and if necessary, look for alternative solutions.[95] It is also possible for the EPA to commission an independent review of the impact assessment.[96] There is no requirement that the impact assessment include an assessment of the potential human rights implications of the proposal.

The EPA and the applicant both have a duty to notify (but not a duty to consult) iwi authorities, customary marine title groups, and protected customary rights groups and others with existing interests who are affected

minerals) to meet the reasonably foreseeable needs of future generations; and (b) safeguarding the life-supporting capacity of the environment; and (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

90 Environmental Protection Authority "Permitted Activities" (2014) <www.epa.govt.nz>.

91 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 38.

92 See Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 1992, s 4(d) definition of "existing interest": "the settlement of a historical claim under the Treaty of Waitangi Act 1975".

93 See Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 1992, s 4(e) for definition of "existing interest": "the settlement of a contemporary claim under the Treaty of Waitangi as provided for in an Act, including the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992".

94 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 39(1)(e).

95 At s 39(1)(g)(h).

96 At s 44.

by the application.[97] Beyond this, neither party has a duty to consult with local hapū and iwi on matters relating to the application; although the impact assessment requirement indicates that there ought to be consultation with existing interests likely to be adversely affected.

In deciding whether to grant a marine permit, the EPA must "give effect" to the principles of the Treaty of Waitangi.[98] This is a stronger than the requirement to "have regard to" Treaty principles under the Crown Minerals Act. To give effect to the Treaty, the Act establishes an independent Māori Advisory Committee, the Ngā Kaihautū Tikanga Taiao, to provide advice and assistance to the EPA on matters relating to policy, process, and decisions of the EPA.[99] The advice and assistance must be given from the Māori perspective and come within the terms of reference of the committee as set by the EPA.[100] The EPA is neither required to take Ngā Kaihautū's advice into account or follow it.

However, unlike the Resource Management Act 1991, there are no national or regional policy statements, nor are there plans, to guide how the EEZ Act is to be applied. Such plans have been a key initiative under the RMA and have been especially critical to ensuring Māori interests are recorded during any consent application. Under that Act, tribes are required to be consulted in relation to consent applications that may affect them and are encouraged to prepare "iwi management plans" so local governments may easily identify their special interests (for example, a traditional relationship with specific rivers, lakes, mountains and waahi tapu).[101] Iwi management plans under the RMA cover only activities on land or within 12 nautical miles of the coastline.

In addition, the RMA recognises the possibility of tribes acquiring some of the powers exercised by local governments under the RMA. While this power has not been used to date, it provides a potential model for application in the EEZ.

3. Summary of New Zealand framework

In sum, the current legislative regime governing extractive industries in New Zealand contains a raft of measures that seek to promote the Treaty of Waitangi, good environmental performance and the effective allocation of Crown owned minerals. Yet, as our case studies will demonstrate, the current regulatory framework seems to be failing Māori. In addition, it falls short of internationally recognised standards relating to indigenous rights and business and human rights.

97 At s 45.
98 At s 12.
99 Environmental Protection Authority Act 2011, s 19.
100 At s 19.
101 Resource Management Act 1991, s 36B.

V. Case Studies

A. Case Study 1 - Petrobras

This case study concerns iwi opposition to oil exploration in the Raukumara Basin, located off the East Coast of the North Island of New Zealand. The grant occurred prior to the enactment of the EEZ Act and therefore the right to explore, as well as the exploration activities themselves, were administered under the Crown Minerals Act.

In 2007, the Government decided to conduct seismic testing in the Raukumara basin off the East Cape of the North Island. The results were very promising. Later, in September 2008, the newly elected National government issued a public statement of its intention for a "block offer release" for deep water exploration in the Raukumara and Northland Basins. The "block offer release" by the Government was an invitation to seek competitive bids by investors interested in exploring and exploiting mineral resources within the Raukumara Basin.

Prior to the block offer release, in early August 2008, the Crown provided Ngāti Porou and Te Whānau-ā-Apanui with advance notice of the block offer process and offered face-to-face consultations to give them the chance to raise their ideas and concerns. The Ministry of Justice anticipated the possibility of redrawing boundaries if Ngāti Porou or Te Whānau-ā-Apanui objected strongly to the blocks encroaching into their foreshore and seabed area or tribal rohe. While Ngāti Porou had indicated that it would be willing to engage in consultations, Te Whānau-ā-Apanui did not actively respond as it said it was focussed on other issues; namely foreshore and seabed negotiations.[102]

On 19 August 2008, the Ministry of Energy sent a follow-up email to representatives of Te Whānau-ā-Apanui, stating that Ministry had been trying to contact them by telephone over the last few days and that it was about to post out letters to commence consultations on the Raukumara block offers. It strongly advised Te Whānau-ā-Apanui to reconsider its previous decision not to actively engage in consultations.[103] Later that day, the Ministry sent out letters to the 69 iwi and hapū within the region, including Ngāti Porou and Te Whānau-ā-Apanui. The letter outlined the block offer consultation proposal, including a map, as well as other information and terms and conditions likely to be attached to any permit. All were invited to comment and seek direction consultations if they so wished. The deadline for responding was set at 18 September 2008.

Less than one month later, on 17 September 2008, the Ministry sent a follow-up e-mail to Te Whānau-ā-Apanui, stressing the importance of the block offer consultations. Attempts were made to contact representatives by telephone, with messages being left, but nothing further was heard.

102 *Greenpeace of New Zealand Incorporated v Minister of Energy and Resources* [2012] NZHC 1422 at [31].

103 At [33].

The Minister of Energy was then provided with an Iwi Consultation Report, advising him of the outcomes of the iwi and hapū consultations. Of the 69 relevant iwi and hapū that were contacted, only three responded: with Ngāti Tūwharetoa (Bay of Plenty) expressing their full support for the proposal, and Ngāti Porou providing only nominal support. The Report referred to the initial response of Te Whānau-ā-Apanui that no action be taken in the meantime. On this point, the Report concluded that the granting of an exploration permit would not impact on the resolution of foreshore and seabed settlements as any Māori customary rights to petroleum had been extinguished under the Petroleum Act 1937. Based on this advice, the Minister decided to go ahead and release the block offer.[104]

The block offer notice was a comprehensive document outlining to prospective bidders what they needed to provide, including details of the company's financial performance, technical capabilities, work experience and a good understanding of geological matters. But there was no requirement for companies to demonstrate a good understanding of Treaty rights, human rights, or how their exploration activities might impact on local communities. There was nothing about whether companies needed to consult with Māori.

The only applicant was Brazilian-based Petrobras, one of the largest and most experienced energy companies in the world. The Minister was satisfied that Petrobras had all the capabilities, both financial and technical, as well as the necessary experience to enhance New Zealand's petroleum industry.[105] Thus, on 1 June 2010, the Minister granted an exploration permit to Petrobras for five years.

Before embarking on the work programme under the exploration permit, Petrobras met with various stakeholder groups including local hapū and iwi. It approached leaders from Te Whānau-ā-Apanui and Ngāti Porou in November 2010, asking them to meet to discuss the project, and a meeting took place on 7 December 2010. A follow-up meeting was also held, with Ngāti Porou attending on behalf of Te Whānau-ā-Apanui. Matters discussed at the meeting included the opportunities and risks associated with Petrobras' proposed exploration project, the importance of fishing to iwi in the region, and how the parties could work together to benefit from the project.[106] At both meetings, representatives of Te Whānau-ā-Apanui indicated that no consent would be given to Petrobras to follow through with the project.

In February and March 2011, iwi leaders were advised by Petrobras that it would soon be undertaking seismic surveys in the Basin and that there was an opportunity for further discussions with community groups. A wānanga (forum) was held for Ngāti Porou on 10 April 2011, and some representatives of Te Whānau-ā-Apanui attended.[107] Again, Te Whānau-ā-Apanui rejected Petrobras' plans.

104 On 10 December 2008, the Minister publicly announced the block offer and invited bids for exploration permits in the Raukumara Basin, with a closing date of 28 January 2010.

105 *Greenpeace of New Zealand Incorporated v Minister of Energy and Resources*, above n 102, at [45].

106 At [46].

107 At [47].

On 11 April 2011, Petrobras conducted its first seismic test in the Raukumara basin.[108] Te Whānau-ā-Apanui, along with other locals, gathered on the shores of the East Cape to protest oil exploration within their rohe. They were joined by a Greenpeace flotilla of five ships, which sailed out to try and stop seismic testing off the East Cape.[109] On 13 April 2011, Petrobras was forced to temporarily halt its operations after protestors swam in the path of its survey vessel. In response to ongoing protests, the New Zealand Navy and Police intervened and apprehended Te Whānau-ā-Apanui fisherman, Elvis Teddy, for unlawfully interfering with the survey ship.

Unshaken by the protests, Petrobras decided to press on with its New Zealand operations.[110] During April and May, Petrobras carried out extensive seismic testing in the Raukumara Basin. Over the next few months, it obtained a complex technical report on the seismic survey data from a consultant company and a report from a marine environmental research company, which had been approached to provide marine mammal impact mitigation and monitoring during the seismic survey.

On 19 September 2011, Greenpeace and Te Whānau-ā-Apanui brought judicial review proceedings to challenge the Minister's decision to grant the block offer to Petrobras in the High Court.[111]

1. High Court Decision

The applicants challenged the Minister's decision on two broad grounds. The first was based on environmental matters. Greenpeace argued the Minister failed to consider the potential environmental effects and failed to take New Zealand's international obligations into account.[112] It alleged these obligations arose from the 1982 United Nations Convention on Law of the Sea, the Convention for the Protection of the Environment and Natural Resources in the South Pacific Region 1986 (the Noumea Convention), and customary international law.

108 "PM Hits out at Petrobras Exploration Protesters" Stuff.co.nz (11 April 2011) <www.stuff.co.nz>.

109 "Petrobras Sea Exploration Halted by Protesters" Radio NZ (12 April 2011) <www.radionz.co.nz>.

110 Grant Bradley "Petrobras Pledges to Press on Despite Protests" *New Zealand Herald* (online ed, 13 April 2011).

111 *Greenpeace of New Zealand Incorporated v Minister of Energy and Resources*, above n 102, at [3]. Before proceeding with the inquiry, Gendall J acknowledged that the only issue was whether there was a legal error in the Minister's decision to grant the exploration permit, and if so, whether the Court should exercise its discretion to grant relief. The judgment refers to the Minerals Programme for Petroleum 2005, which has since been replaced by the Minerals Programme for Petroleum 2013. For the most part, the substance and nature of those documents remain unchanged.

112 In particular, they alleged that the Crown failed to consider the risk of transboundary harm arising from petroleum activities; the obligation of New Zealand to conduct an environmental impact statement; and the obligation to consider potential harm to the environment arising from all activities allowed by the permit. In response, the Crown argued that the Minister was entitled to have regard to the fact that any such international obligations were already being met through other legislation. That is, the Minister was not required to turn his mind to those matters, as New Zealand's international obligations had already been dealt with and were relevant to other statutory regimes.

The second argument was based on the Treaty of Waitangi. The applicants alleged that the Minister did not adequately consult with Te Whānau-ā-Apanui about the exploration permit and potential effects upon its taonga, and therefore failed to have regard to the principles of the Treaty of Waitangi as required by s 4 of the Crown Minerals Act. It was argued that these principles were linked to art 29 of the UNDRIP, which provides that: "[i]ndigenous peoples have the right to the conservation and protection of … their lands or territories or resources."

Greenpeace requested a declaration that the Minister had failed to comply with the Minerals Programme for Petroleum (MPP) 2005 and that the exploration permit should, therefore, be quashed. At no point did the applicants make any submissions against Petrobras or point to any obligations it might have in relation to consultation with iwi. However, this was because only the decisions of "public bodies" are subject to judicial review by the courts.

(a) Environmental Grounds

On environmental grounds, the Court considered whether the Minister had failed to "promote the responsible discovery and development of petroleum resources" by failing to assess the potential effects on the environment, when he was required to take account of international obligations relevant to managing petroleum resources in the exercise of his powers. Gendall J stated that the Minister's decision-making powers cannot be considered in isolation from the wider statutory framework in which they exist. Nothing in the MPP 2005 or the Crown Minerals Act required the Minister to consider environmental obligations stemming from New Zealand's international obligations. And although "it seems obvious that minimising risk or harm to the environment falls within international obligations" the Minister cannot be required to consider the environmental effects or give effect to international environmental obligations when they are already dealt with under other statutory regimes and fall outside his powers.

(b) Treaty Principles and the UNDRIP

On the question of Treaty principles under s 4 of the Crown Minerals Act, the Judge noted that the Treaty is a partnership between the Government and Māori, requiring each to act reasonably towards one another and with utmost good faith, and that this included responsibilities akin to fiduciary duties. The duty of the Crown is not simply passive but extends to active protection.[113] The Crown's duty of active protection of Māori included an obligation to consult with them on major issues.[114]

It was accepted that there was no consultation before the Minister granted the permit application to Petrobras, but in assessing Treaty compliance, the Minister's decision must be viewed in context. Extensive consultations

113 Clare Tattersall "The Consequences of not Responding to Consultative Efforts"(2013) (online April) Maori Law Review.

114 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 682-683, per Richardson J.

occurred in the development of the first Minerals Programme for Petroleum in 1995 and later in 2005. Through this process, the Crown was able to hear Māori interests and concerns, and certain areas, particularly in the Taranaki region, were excluded from allocation of mineral permits. At neither stage did Te Whānau-ā-Apanui make submissions. Further consultations occurred with Māori prior to the review of the MPP in 2005, and the draft of the MPP was released for public and iwi submission. A total of 26 submissions were received, mostly from petroleum interests, but four from iwi. Te Whānau-ā-Apanui did not make any submissions at this time.[115]

In the Judge's view, Te Whānau-ā-Apanui could have used this opportunity to raise concerns over its taonga, but it did not do so. It was also noted that before the Raukumara block offer release, the Minister gave Te Whānau-ā-Apanui advance notice of the consultation process and there was an opportunity for face-to-face meetings and discussions. Again, Gendall J thought that Te Whānau-ā-Apanui had failed to actively engage with the Minister.

On this point, his Honour stated that "consultation and good faith listening to concerns are a two-way street, with obligations on Māori interests and the Crown."[116] This means that there was at least some obligation on Te Whānau-ā-Apanui to point to concerns over its taonga. Although his Honour accepted that the Crown must actively participate in good faith negotiations, he noted that it could not be expected to always know what particular taonga may be important to Māori. There was simply no evidence that Te Whānau-ā-Apanui had raised any of the concerns now argued in this case.

The Court thought it was significant that Petrobras had met with Te Whānau-ā-Apanui on at least three occasions after the exploration permit was granted.[117] While noting that this did not replace the Crown's obligation to consult, there was no evidence that Te Whānau-ā-Apanui had raised its taonga issues then, or if it did so, why it did not then seek to challenge the permit decision.

Finally, the Court rejected Te Whānau-ā-Apanui's argument that the UNDRIP added to the Crown's duty of active protection of Māori and their taonga. Gendall J noted that the UNDRIP does not create binding legal obligations, although the New Zealand Government now supports it as an affirmation of international human rights.[118] Accordingly, the applicants' case was dismissed.

B. Case Study 2: Trans-Tasman Resources

The second case study is focused on a company's obligations under the EEZ Act 2012; in light of an application for a marine consent to extract minerals from the EEZ and Continental Shelf.

115 *Greenpeace of New Zealand Incorporated v Minister of Energy and Resources*, above n 102, at [24].
116 At [133].
117 At [138].
118 At [141].

In November 2013, Trans-Tasman Resources Limited (TTR) applied to the EPA to undertake iron ore extraction in an area of 65.76 square kilometres, located between 22 and 36 kilometres off the coast of South Taranaki (the South Taranaki Bight). TTR proposed the excavation of up to 50 million tonnes per year of the seabed, containing iron sand for processing on a large vessel. Around 10 per cent of the extracted material would be processed into iron ore concentrate for export, with residual material (approximately 45 million tonnes per year) returned to the seabed.

The case received considerable attention since it was the first application to be decided under the EEZ Act. The EPA in this case decided to establish a Decision-Making Committee (DMC) to hear and determine the marine consent application. The DMC ultimately decided to refuse consent.

The primary reasons for declining consent were the uncertainties in the scope and significance of the potential adverse environmental effects. The DMC was not satisfied that the life-supporting capacity of the environment would be safeguarded or that the adverse effects of the proposal could be avoided, remedied or mitigated, given the uncertainty and inadequacy of the information presented.

According to the DMC, the proposal had seemed "premature" and the applicant should have spent more time understanding the proposed operation and the local environment, as well as engaging with existing interests and other parties. As previously discussed, the EEZ Act contains numerous mechanisms for ensuring Māori participation in the consent process. However, it appeared that TTR had not done enough to consult with local iwi about the impacts on them and their resources, especially fishing interests. TTR argued before the DMC that:[119]

> The Project will not have any adverse effects on coastal wāhi tapu sites or customary fisheries. TTR has met with, and provided draft environmental reports, to iwi along the South Taranaki Bight coastline. The Te Taihauāuru Iwi Fisheries Forum is working with the iwi to coordinate research into the Project and make recommendations on the Project.

However, iwi submitters to the DMC disagreed. While there is no express call for iwi (or anyone else) to be consulted under the EEZ, the DMC noted:[120]

> in understanding and addressing existing interests, some level of consultation appears to us to be not just good practice but an important element in compiling a robust proposal. Further, a failure to consult adequately with tangata whenua/tangata moana may be seen as culturally offensive and disrespectful.

119 Trans-Tasman Resources Limited *South Taranaki Bight Iron Sands Project Impact Summary Assessment* (online, 21 October 2013).

120 Decision Making Committee *Trans-Tasman Resources Ltd Marine Consent Decision* (EPA, June 2014) at [594].

Iwi submitters noted that while they had been provided with information, this failed to adequately address their key questions and was insufficient to draft an assessment concerning the cultural impacts.[121] Further, TTR failed to respond to iwi requests for more information or clarification.

Intent on lodging their application TTR proceeded with it, despite lacking any iwi recognised cultural impact assessment.[122] Instead, TTR lodged an internal desktop study model – a computer generated report used to identify potential hazards in the early stages of offshore field development. There had been no time to prepare a cultural impact assessment at the date of the application – given the approaching deadline – and its absence raised doubts for iwi about the effects of the project.

The Ngā Kaihautū Tikanga Taiao Report considered "there to be gaps and that a wider set of interested and/or affected iwi could have been consulted".[123] According to the Report these gaps included, "the lack of sufficient information relating to the potential effects on Māori fishing activity (commercial and customary); cultural association; impacts on waahi tapu and waahi tupuna; social and economic implications of specific relevance to Māori and ultimately the exercising of kaitiakitanga".[124] After reiterating that iwi were "a significant and important 'existing interest,'"[125] the DMC acknowledged the perspective of concerned iwi that while TTR had made an attempt to consult with them, such attempts fell short of building any meaningful relationship with iwi groups.[126] Notable, in this respect, is the reference to TTR's early consultation comprising of letters to an array of iwi groups, the content of which the DMC noted as being directed more towards pursuing viable investors than engaging in any consultative process.[127]

There was no Māori participation in the expert's conference either, which proceeded regardless, on the justification that Māori interests would not be prejudiced by lack of Māori inclusion.[128] Subsequently, due to the lack of any iwi recognised cultural impact assessment in TTR's application, the chance for Māori to make submissions during the EPA hearings equated as the sole opportunity for Māori to make their views known to the DMC.[129]

TTR did seek consent from the DMC subject to its meeting specific conditions aimed at protecting iwi interests. However, it was not clear if iwi wished to participate to the extent proposed by TTR and whether what was proposed was acceptable to iwi. As the DMC noted, "it was apparent to us,

121 *Statement of Evidence in Chief of Rose Austen-Falloon on behalf of Trans-Tasman Resources Ltd*, 17 February 2014 at [68] in Decision Making Committee *Trans-Tasman Resources Ltd Marine Consent Decision* (EPA, June 2014) at [599].

122 Decision Making Committee *Trans-Tasman Resources Ltd Marine Consent Decision* (EPA, June 2014) at [600].

123 At [622].

124 At [617].

125 At [595].

126 At [592] and [595].

127 At [596].

128 At [602].

129 At [602].

and not contradicted by TTR, that iwi were not engaged in the drafting of the latest suite of consent conditions nor have they agreed to them".[130] Without understanding or knowing the views of iwi in relation to the suggested conditions of consent, the DMC was unable to determine if the effects on iwi as an existing interest were appropriately taken into account.

VI. Gaps in the Regulation of Extractive Industry in the EEZ

To date, international indigenous rights and business and human rights have hardly featured in the context of Māori resistance to extractive industries. This is especially the case in relation to business and human rights. Instead, Māori have largely relied on traditional Treaty-based and environmental arguments in voicing their opposition to extractive activities. These tools are directed at the State, but do not target those companies that carry out extractive activities within their tribal rohe.

What is needed, we suggest, is reform to the EEZ regulatory regime to ensure it conforms to international human rights standards and practice. Business practice also needs to change.

A. Consultation

As noted in Part II, under the UNDRIP, states have a duty to consult with indigenous peoples and "obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources."[131] As we have seen, consent is not a requirement in all cases; only those where the project is likely to have a significant impact on indigenous peoples and their territories.

The question then will be whether any proposed extractive project in the EEZ is likely to have a significant impact on local iwi and hapū. The answer to that will depend on the facts of each case. A proposal to explore for oil in the EEZ without drilling may not have a major effect. Excavating iron sands would arguably have a major impact. But even for proposed actions that are not likely to have a significant impact on iwi and hapū, engagement with them should be with the aim of obtaining their consent to the proposed action. The reason for this is that any activity carried out in iwi and hapū territory needs to be treated with caution given the close association they have with their lands and waters and their interests in fisheries and other offshore resources. Moreover, there is a particular emphasis by indigenous advocates on comprehensive consultations. In this connection, timing is important as well as ensuring that the process is culturally appropriate. Meetings need to be held at appropriate times and iwi and hapū must be given sufficient time to respond.

130 At [641].
131 UNDRIP, art 32(2).

The fact that iwi do not formally own the EEZ or Continental Shelf adjacent to their traditional rohe should not undermine the right to FPIC. As noted above, while land rights may not have received formal recognition domestically (eg through some grant of title), provided there are rights grounded in customary ownership, use and occupation then international law will recognise the right.[132] In the Report on the Crown's Foreshore and Seabed Policy (Foreshore Report), the Waitangi Tribunal noted, "[i]t has been Crown policy from 1848 to the present day to recognise that Māori, according to their own customs and usages, had rights equating to ownership of the entire land surface of New Zealand."[133] The Tribunal could, therefore, see "no reason why Māori custom should stop where or when the tide comes in."[134] Māori did not draw a sharp distinction between rights in land and water adjacent to their communities. In fact, the Waitangi Tribunal has gathered extensive evidence documenting Māori interests in the off-shore area. The Ngai Tahu and Muriwhenua Fishing Reports, for example, noted how as at 1840 hapū fishing grounds were often located well off-shore – at the very least within a 12-mile zone, and sometimes much further out.[135] In the Foreshore Report, the Tribunal concluded Māori tribes exercised *te tino rangatiratanga* over the foreshore and sea in 1840.[136] Furthermore, the rights held by Māori at 1840 were not frozen as at 1840. The Tribunal noted the need to recognise that Māori rights could evolve and develop – so, for example, the development of a deep-sea commercial fishing resource was available to Māori under the Treaty. And, according to the Tribunal, nothing could foreclose the right to development in relation to "Maori te tino rangatiratanga over the seabed (and its minerals)."[137]

In terms of government engagement with iwi, the right to consultation and FPIC could strengthen the protections in the Crown Minerals Act and EEZ. The consultation requirements under the Crown Minerals Act and the Mineral Programmes are problematic. In the *Petrobras* case, Gendall J was satisfied that the Crown had discharged its Treaty obligations because it took active steps to consult with Te Whānau-ā-Apanui, both before the promulgation of the MPP 2005 and the block offer release. However, Te Whānau-ā-Apanui did raise concerns over the effects the block offer might have on its foreshore and seabed claims. Right from the start, the iwi's representatives made it clear that there were to be no negotiations until those matters had been resolved. While the Minister of Energy acknowledged those concerns, he did not think that they were sufficient to call for a halt to the

132 See *Awas Tingni*, above n 23.

133 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004), at 18.

134 At 18.

135 Waitangi Tribunal *The Ngai Tahu Sea Fisheries Report* (Wai 27, 1992); Waitangi Tribunal *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22, 1998).

136 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004), at 27.

137 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004), at 28. See also, the Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report* (Wai 953, 2002), at 54-77.

block offer release. This highlights the constant struggle by hapū and iwi to keep up with proposed developments on their rohe. This is a capacity issue. As the MPP unilaterally imposes deadlines for engaging in consultations with the Crown – a mere 40 days – Māori groups will often face considerable time pressures and will be unable to make a collective decision.

Before granting a marine consent, the EPA has a duty to provide notice of consent applications that may affect iwi authorities, customary marine title groups and protected customary rights groups. In the TTR decision, the EPA's delegate, the DMC, had notified various Māori groups whose traditional rohe included some or all of the proposed mining area. This enabled many iwi to raise their concerns about the company's proposal and make recommendations on how it could be improved. However, the EEZ Act did not require the DMC to *consult* with these groups or provide any information about how the proposal might affect them. Consequently, many iwi were forced to rely on their own advisors or the advice of TTR to fully understand the implications of the proposal and how it would impact on their rights. And, as noted above, TTR was not forthcoming with the information sought by iwi.

Turning to business consultations with Māori, the Crown Minerals Act requires all Tier One permit holders to report annually on their engagement with Māori groups. However, as noted above, there is no obligation on companies to listen to iwi concerns or have their reports reviewed and verified by them. In *Petrobras*, there were some voluntary efforts by that company to consult with representatives of Te Whānau-ā-Apanui, but these efforts were only rudimentary and did not address how its exploration activities might impact on the tribe's lands and taonga. Despite widespread opposition from iwi members, Petrobras decided to press on and expand its operations in the Raukumara Basin. In fact, there was no suggestion that Petrobras had an independent responsibility to respect the rights of Te Whānau-ā-Apanui during the course of its operations.

The EEZ Act does not expressly require applicants to consult with iwi in relation to their proposals. That said, some level of consultation is deemed to be not only desirable, but an important element of compiling a good proposal. In the TTR decision, the DMC noted that the applicant had made some efforts to consult with affected Māori groups. But it was also clear from the iwi submitters that no 'true' relationship had been formed between TTR and the tangata whenua.[138] There were concerns over the lack of information that had been provided to iwi on Māori fishing activities, cultural associations, impacts on Māori and ultimately the exercise of their kaitiakitanga. Given the lack of meaningful consultations, a number of Māori groups decided to oppose TTR's application. The TTR case shows how business-led consultations are important to the process, even if not an express requirement in the EEZ. In any event, TTR came up short. A significant factor in deciding to decline the

138 Decision Making Committee, above n 120, at [595].

application was the speed by which the application for marine consent was prepared; TTR's lack of response to iwi questions, which alienated iwi from the process; and failure to provide a cultural impact report.

One initiative that could assist with identifying tribal interests is introducing iwi management plans into the EEZ Regulatory Regime. These as noted above, are provided for under the RMA but are absent from the EEZ Regulatory Regime. In the RMA context, Iwi Management Plans have proved quite successful and have enabled many iwi to exert greater control over their traditional lands, and resources. There is no good reason why this mechanism should not be extended to the EEZ Act 2012. Iwi Management Plans would allow local Māori groups to outline their tribal rohe and identify specific areas of importance (waahi tapu) as well as things of particular importance (taonga) within the EEZ and Continental Shelf. Decision-making authorities and companies would have a responsibility to consult with Māori groups whenever the proposed area includes some or all of the iwi's rohe or otherwise affects their interests. Furthermore, Iwi Management Plans would allow Māori groups to determine the process by which they wish consultations to occur. Through this, iwi could tailor the consultation process in accordance with their own customs, traditions, priorities and decision-making process.

In this sense, iwi would be able to take charge of the consultation process and give their consent in a manner that is free, prior and informed.

B. Impact Assessments

Impact assessments are an important tool for identifying and managing the adverse impacts of extractive activities on the environment and local communities.

In spite of their well-documented benefits, the Crown Minerals Act does not require companies to conduct an Impact Assessment as it assumes that the mere allocation of mineral permits to companies will not have any adverse effect on the environment or local communities. However, it would be best practice to engage with iwi and hapū at this early stage. A preferable model would require applicants to engage with Māori groups so they can conduct a joint impact assessment before applying for a mineral permit. This would allow the company to identify and better understand potential effects of their activities on iwi and hapū and their traditional territories.

Unlike the Crown Minerals Act, the EEZ Act expressly requires applicants to prepare an impact assessment for all "discretionary activities", such as petroleum drilling and extraction. However, no such impact assessment is required for "permitted activities" such as petroleum exploration. A better model would be to require applicants to prepare an impact assessment, regardless of whether the proposed activities are categorized as permitted or discretionary (unless the activity is likely to have a minor impact).

In addition, compared to the CBD's Akwe: Kon Voluntary Guidelines, there are several important gaps in the impact assessments required by the EEZ Act. There is no requirement to consider the human rights impacts of

the proposed project and in particular the human rights of indigenous peoples set out in the UNDRIP. In particular, there is no requirement to consult (in an appropriate manner) with Māori likely to be affected by the consent application. There is no reference to the right to FPIC in the event of a project having a significant impact on local Māori. Māori groups should be able to participate in the preparation of the impact assessments, thereby fostering a more open and transparent relationship with the applicant company. Such a requirement would also be consistent with indigenous peoples' right to consultation and FPIC under the UNDRIP. There is no reference to the need for expert involvement in the impact assessment including indigenous experts. Nor is there any reference to the need for transparency and public accountability during the preparation of the impact assessment or the need for review and dispute resolution procedures.

C. Benefit Sharing

The Crown Minerals Act is silent on benefit-sharing. It is neither prohibited nor discouraged, but it is certainly not mandatory. The Crown Minerals Act assumes that the Crown is the sole owner of all precious minerals and they should be exploited for the benefit of all New Zealanders, not just individual landowners or iwi.

In a similar vein, the EEZ Act does not make any reference to benefit sharing with affected Māori groups. As consultations under the Act are not required, there is little incentive for the applicant to engage with Māori groups, let alone discuss how they will share the economic and social benefits of their activities.

This can be compared to the practice in Australia of aboriginal peoples and extractive industry negotiating agreements. These agreements may provide for compensation for impacts of projects or access to land, benefit sharing with resource companies, and consultation protocol.[139] Some of them provide substantial benefits. However, this practice is closely linked to native title interests held by aboriginal peoples. The potential of native title claims provides aboriginal peoples with leverage in negotiating these agreements. In New Zealand, however, there remain many unanswered questions about Māori property rights in the EEZ. Interests in the foreshore and seabed and fisheries may be settled for now, but there is no certainty for other potential rights in New Zealand's offshore area. What is clear is that Māori historically held significant interests in the offshore area.

D. Shifting the Paradigm to Tino Rangatiratanga

The problem for Māori is that their principal concern is *tino rangatiratanga* or self-determination, over their territories and that includes the offshore waters adjacent to their traditional territories. The regulations relating to

139 Marcia Langton *Settling with Indigenous People: Modern Treaty and Agreement-making* (Federation Press, Melbourne, 2006).

extractive industry in the EEZ in short are about environmental 'best practice' and economic sustainability; Māori interests are secondary. As a result, there has been much emphasis on kaitiakitanga and Treaty principles, but not on *tino rangatiratanga*. And, as noted above, there remain contested issues concerning Māori interests in the waters adjacent to their lands, including claims to foreshore and seabed and petroleum.

While we have outlined the types of reforms needed in the regulation of extractive industry in the EEZ – relating to consultation, FPIC, impact assessments and benefit sharing – the underlying issues relate to control over the management and ownership of resources in the EEZ.

There are various ways in which this can be addressed. First, there needs to be discussions between iwi and the government over Māori interests in lands and resources in the EEZ. Secondly, in terms of management and regulation, there needs to be consideration of whether that management can be either shared with iwi or delegated to iwi. As noted above, what the RMA has always promised to deliver, yet so far failed to realise, is the possibility of iwi and hapū acquiring some of the powers exercised by local governments under the RMA. That power has not been used to date principally because it requires local governments to initiate the process and the process is subject to broad public consultation.

Moreover, the UN Special Rapporteur on the Rights of Indigenous Peoples has stressed the need to develop new business models for natural resource extraction. In contrast to the prevailing model, in which natural resource extraction is under the control of and primarily for the benefit of others, the Special Rapporteur calls for models that are led by indigenous peoples or involve indigenous peoples partnering up with business enterprises. Not all indigenous peoples are opposed to extractive industry. Opposition or resistance will normally stem from their exclusion. Indeed, indigenous peoples in some cases are establishing and implementing their own enterprises to extract and develop natural resources. According to Anaya, governments should facilitate this process and encourage meaningful partnership between companies and indigenous communities. He asserts that:[140]

> States should have programmes to assist indigenous peoples to develop the capacity and means to pursue, if they so choose, their own initiatives for natural resource management and development, including extraction. States have the obligation not only to respect human rights by refraining from conduct that would violate such rights, but also to affirmatively protect, promote and fulfil human rights.

VII. Conclusion

New Zealand's extractive industry is likely to continue to grow in the EEZ. And Māori are likely to continue to resist exploration and extractive activities in their traditional territories. The reasons for this resistance in large part stem from issues relating to poor engagement by the government and companies

140 Anaya, above n 28, at [12].

with iwi and hapū. Reforms to regulation and company practice would result in greater and more effective engagement by iwi with extractive industry. The UNDRIP and the UN Guiding Principles on Business and Human Rights provide a normative framework to guide these reforms. Additionally, the UNDRIP in particular provides a basis for engagement by Māori with government over their principal issue of concern – *tino rangatiratanga* or self-determination over the offshore waters adjacent to their traditional territories.