

PROMOTING INDIGENOUS-LED ECONOMIC DEVELOPMENT:

WHY PARTIES SHOULD CONSULT THE UNDRIP

by Robert McCreery

INTRODUCTION

Beyond the existence of sustainable local economic systems that have ensured the ongoing development of Indigenous communities for thousands of years, Indigenous peoples are responsible for the creation and deployment of many systems of trade and barter that form the basis of modern commerce.¹ However, the effects of colonisation and conquest have seriously undermined Indigenous economic systems, trading links as well as Indigenous opportunities for entrepreneurship and enterprise.² In this article I outline why consulting the United Nations Declaration on the Rights of Indigenous Peoples³ ('UNDRIP') represents best practice for Indigenous peoples, states and private enterprises wanting to revitalise Indigenous-led economic development.

SHORTCOMINGS OF PREVIOUS POLICIES

It is widely recognised today that welfarism and similar colonial policy structures have not alleviated the poverty experienced in many Indigenous communities. Similarly, they have failed to provide a platform from which Indigenous peoples can pursue entrepreneurial endeavours and manage their own economic development.⁴ However well-intentioned, welfare pre-empts local autonomy and entrepreneurship.

Beyond the ostensible failure of welfarism, other attempts both at local and international levels to reinvigorate Indigenous-led development have met with mixed results. In the context of international efforts preceding the UNDRIP, the most clear, binding obligations toward Indigenous peoples are listed in the International Labour Organization (ILO) Conventions No. 107⁵ and 169⁶. Notably, Convention No. 169 includes provisions for the development of Indigenous institutions and initiatives as well as the right of Indigenous peoples to exercise control over and decide their own priorities for development.⁷ Limiting this treaties' utility, however, is the fact that it has only been ratified by a small number of states.

There are also several human rights treaties that provide various forms of protection and recognition

of the Indigenous right to development. Of note, the instruments that make up the International Bill of Human Rights set out the basic human rights law related to the concept of Indigenous development, including the right to self-determination and the right of individuals and communities to freely pursue their economic, social and cultural development.⁸ These can broadly be criticised, however, for their lack of applicability to the specific needs of Indigenous peoples and that they only embody western concepts of development. In addition, the effectiveness of these instruments can be criticised due to the fact that in the Indigenous policy space there has often been a lack of political will on the part of states to domestically implement international human rights provisions promoting respect for Indigenous values.

THE UNDRIP'S FOUNDATIONS AND FRAMEWORK FOUNDATIONS

The UNDRIP is a non-binding, aspirational declaration of the United Nations ('UN') General Assembly.⁹ Although legally non-binding in the sense that it is not a treaty, the Declaration's standing as an international human rights instrument of influence is bolstered by a number of forms of legitimacy. Foremost, as it is a Declaration of the UN General Assembly and was drafted through the UN's standard-setting process, the UNDRIP benefits from the unrivalled institutional legitimacy of the UN. Also, unlike ILO Convention No. 169, the UNDRIP has now been endorsed by all countries around the world. In addition, the legitimacy of expertise associated with the UNDRIP—attained through the extensive and wide-ranging participation in its drafting—cannot be underestimated. Notably, in addition to Indigenous and non-Indigenous experts, Indigenous peoples played a central role in the drafting of the Declaration over a period of more than 20 years. For the first time in this policy space, therefore, the Declaration reflects the unified views of a range of experts on Indigenous rights and policy as well as Indigenous peoples themselves—the primary beneficiaries.¹⁰

A RIGHTS-BASED FRAMEWORK

Importantly, the Declaration adopts a rights-based

framework and uses rights-based language. Therefore, its implementation must also be rights-based. A rights-based approach encourages cooperation and consultation between states, Indigenous peoples, corporations, civil society and the wider community. It counters failed concepts of economic dependency and welfarism that have hampered previous prospects of Indigenous development. In the context of economic rights, a rights-based framework is particularly important. By endorsing the Declaration and the rights contained within, states acknowledge that they are required to engage Indigenous peoples as peoples 'owed respect, equality, and the right to exercise authority and control over their property and their economic destinies'.¹¹

PARTICIPATION, DEVELOPMENT AND ECONOMIC AND SOCIAL RIGHTS PROVISIONS

Part of the UNDRIP's utility is its structure; clustering different sets of rights. In this way it is a clear exercise in distilling and clarifying the various subjective rights of Indigenous peoples. Provisions related to 'participation, development and economic and social rights' are mostly contained in articles 18–23 of the Declaration.¹² This group enunciates the right of Indigenous peoples, *inter alia*, to: participate in decision-making;¹³ be consulted in good faith;¹⁴ maintain and develop political, economic and social systems or institutions;¹⁵ engage freely in traditional and other economic activities;¹⁶ pursue improvements in the areas of education, employment and vocational training;¹⁷ and, determine and develop priorities and strategies for exercising their right to development.¹⁸

Notably, the direct and indirect language of the economic rights provisions imposes upon states 'a duty or obligation to provide technical and financial assistance for Indigenous development'.¹⁹ In this way the UNDRIP underscores the necessary role of governments in supporting Indigenous peoples to exercise and enjoy their development-related rights, either collectively or individually.²⁰

SELF DETERMINATION AND THE RIGHT TO DEVELOPMENT

Explicitly recognised in article 3 of the UNDRIP, self-determination is a key concept of the Declaration²¹ and essential for the implementation of the various development-related provisions contained within it. As Professor Megan Davis notes:

For indigenous peoples, the right to self-determination is the cornerstone of the Declaration[ref] and without states' acceptance of the right to self-determination the catalogue of rights protected in the body of the Draft Declaration cannot be effective[ref].²²

Davis goes on to explain that, operatively, the Declaration is also useful in explaining what the right to self-determination means in practice.²³

The Declaration is a very clear exercise in translating the right to self-determination from international law into the domestic context ... the Declaration combines positive rights for indigenous peoples and negative rights for states that are divided into a number of themes.²⁴

Of foremost importance for development-related rights, article 3 explicitly recognises the intersection between development and the right to self-determination. Also of significance, self-determination incorporates Indigenous peoples' right to participate in all international, national and local processes relevant to their right to development.²⁵ In this way, article 3 is supported by articles 18 and 19 of the UNDRIP which recognise, respectively, Indigenous peoples' right to participate in decision-making as well as states' obligation to consult and cooperate with Indigenous peoples before adopting and implementing legislative or administrative measures that may affect them.²⁶ Obligating states to consult with Indigenous peoples on matters of development is important as it unambiguously reaffirms Indigenous peoples' right to be involved in the development process.

Perhaps of greatest importance, the broad recognition of the right to self-determination in article 3 of the Declaration is immediately followed by article 4 of the Declaration which limits the right to self-determination to internal aspects of self-determination. This incorporates aspects of control over local economic and financial institutions. Article 4 was a necessary addition to article 3 in order to assuage states' fears over loss of state sovereignty and territorial integrity on recognition of Indigenous peoples' right to self-determination. Also, in response to states' fears of secession, article 46 of the Declaration (the 'savings clause') clearly prohibits 'violations of the territorial integrity of states that might be justified by an Indigenous peoples' claim to self-determination'.²⁷

Loss of sovereignty and territorial integrity have been key issues that have hampered previous attempts to have states formally recognise Indigenous peoples' right to self-determination. Among other concerns, states have feared the financial implications of self-determination.²⁸ In order to have the right to self-determination included in the Declaration it was effectively argued by Indigenous participants during drafting that self-determination is at the core of democratic governance under international law.²⁹ Thus, part of the Declaration's utility lies in the fact that it guides states through the implementation

of the Indigenous right to self-determination 'within a democratic system without disrupting public institutions or the rule of law'.³⁰

INDIGENOUS ENTREPRENEURSHIP AND THE COLLECTIVE

The Indigenous concept of entrepreneurship is fundamentally different to the western concept that is central to the modern, global economic system. The latter is generally considered to convey ideas attached to market competition and commercialisation with an emphasis on individual wealth creation. Diverging from this, the Indigenous concept of entrepreneurship recognises the value of commerce for the attainment of social benefit for the collective.³¹ Reciprocity, social responsibility and sustainability of resources are fundamental principles of Indigenous entrepreneurship, and economic activity is considered to be intrinsically linked to social interaction.³²

Importantly, this collectivism is reflected in the UNDRIP³³—despite the fact that recognition of collective rights met with resistance from states throughout the Declaration's drafting.³⁴ The inclusion of collectivism in the language of the Declaration is an important achievement. It not only promotes the exercise of collective Indigenous management and control over assets and resources, it encourages states to enter into holistic approaches to community engagement rather than only engaging in negotiations with individuals. Reflecting on this, Danielle Conway notes that through the recognition of collective rights the UNDRIP 'validates the universal Indigenous worldview of commerce and economic development'.³⁵

THE RIGHT TO PARTICIPATE IN THE GLOBAL ECONOMY

In addition to traditional concepts of development, modern Indigenous economic development is reliant on the ability of Indigenous peoples to effectively engage in the modern, global, state-based economic system. Noting this, it is almost without exception that the modern economic system has penetrated Indigenous societies, affecting traditional economic systems to varying degrees.³⁶ While this shift has provided opportunities for some it is self-evident that many Indigenous communities have not profited from integration into the global market economy.

Central to Indigenous peoples' ability to effectively engage in the market economy is the ability to retain control over institutions, assets and resources. Unfortunately, many Indigenous groups have already lost control over their

precious commodities. For others, access to markets is limited except through a third party. Too often this is on unfavourable terms as Indigenous land-holders and producers often suffer from limited bargaining power and limited access to good professional advice.

FREE, PRIOR AND INFORMED CONSENT (FPIC)

The UNDRIP includes various provisions that seek to address the concerns of Indigenous peoples wanting or needing to participate in the global economy. Perhaps of greatest note are the provisions related to the principle of free, prior and informed consent ('FPIC'). FPIC is contained generally in the cluster of economic and social rights in articles 18-23 addressed above. Explicitly, article 10 also recognises the principle in relation to the relocation of Indigenous peoples from their lands; article 19 recognises the principle in the context of state regulation and legislation that is likely to impact upon Indigenous peoples; and, articles 29(2) and 32(2) recognise the principle in relation to Indigenous peoples' control over the use of their lands.

FPIC is important as it requires other parties to not only respect the rights of Indigenous peoples to 'own, occupy, develop, control, protect and use their lands, other natural resources, and cultural and intellectual property',³⁷ but also to obtain Indigenous peoples free, prior and informed consent if they are likely to be affected by development projects.³⁸ Although FPIC is not a new concept—it is recognised to varying degrees in international and domestic law³⁹—the subjective and state endorsed recognition of FPIC in the Declaration is a unique development.

FPIC AND TRADITIONAL KNOWLEDGE

While FPIC is often associated with tangible use of Indigenous resources, article 31 of the UNDRIP also recognises that the value of Indigenous assets and resources extends to intangible commodities including Indigenous peoples 'knowledge relating to the sustainable use of land, ecosystems, plant varieties, medicine, folklore and craft and secret sacred knowledge'.⁴⁰ Addressed as 'traditional knowledge' in the Declaration,⁴¹ this recognition is significant for a number of reasons. Foremost, as Conway points out:

Potential users of indigenous assets and resources are put on notice of the probable existence of multiple systems of protection inuring to the benefit of indigenous owners, as well as specific obligations respecting the asset or resource.⁴²

Most importantly, however, it explicitly recognises the right of Indigenous peoples to exercise authority and

control over their Indigenous knowledge and to determine in what manner and to what extent it will be commodified, developed or preserved.⁴³

THE ROLE OF THE STATE

Finally, the UNDRIP recognises the necessary role of the state in supporting, facilitating and protecting Indigenous peoples right to exercise control over their institutions, assets and resources as well as their right to participate fully, if they so choose, in the economy of the state.⁴⁴ Of particular note, article 31(2) recognises that states shall take effective measures to recognise and protect the article 31(1) rights relating to ‘Indigenous knowledge’; and, in the sphere of economic development related to land use, article 32 requires states to cooperate in good faith to properly and sustainably make approved uses of Indigenous lands and resources. Perhaps of even greater significance, article 38 requires states, in consultation and cooperation with Indigenous peoples, to ‘take the appropriate measures, including legislative measures, to achieve the ends of [the] Declaration’.⁴⁵

CONCLUSION

The UNDRIP is a global endorsement of the fact that Indigenous peoples have more than just the right to be beneficiaries of externally controlled economic systems, but that Indigenous peoples have the right to determine and control their own economic futures. Although in many ways it only reflects the rights of Indigenous peoples to the extent they are already recognised in international law, its great utility is that it collectively recognises these rights as they specifically apply to Indigenous people. In doing this it provides clarity as to the nature of Indigenous economic and development related rights and explains how Indigenous-led economic development can advance without impeding states’ economic sovereignty.

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- 1 Danielle M Conway, ‘Promoting Indigenous Innovation, Enterprise, and Entrepreneurship Through the Licensing of Article 31 Indigenous Assets and Resources’ (2011) 64 *SMU Law Review* 1098-9.
- 2 See Megan Davis, ‘International Trade, the World Trade Organisation and the Human Rights of Indigenous Peoples’ (2006) 8 *Balayi: Culture, Law and Colonialism Journal of Law* 4-7; see also Rauna Kuokkanen, ‘From Indigenous Economies to Market-Based Self-Governance: A Feminist Political Economy Analysis’ (2011) 44(2) *Canadian Journal of Political Science* 279-282.
- 3 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/RES/61/295 (13 September 2007) (hereafter ‘UNDRIP’).
- 4 See discussion in Kuokkanen, above n 2.
- 5 ILO Convention (No. 107) Concerning Indigenous and Tribal Peoples in Independent Countries, entered into force on 2 June 1959, 328 *UNTS* 247.
- 6 ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, adopted 27 June 1989, reprinted in (1989) 28 *ILM* 1382.
- 7 See articles 6(1)(c) and 7(1) of ILO Convention (No. 169), *Ibid.*
- 8 See especially the International Covenant on Economic, Social and Cultural Rights (1966).
- 9 UNDRIP, above n 3.
- 10 *Ibid* 1105.
- 11 *Ibid.*
- 12 Australian Human Rights Commission, *Community Guide to the UN Declaration on the Rights of Indigenous Peoples* <http://www.humanrights.gov.au/declaration_indigenous/declaration_short_version.html>.
- 13 UNDRIP, above n 3, art 18.
- 14 *Ibid* art 19.
- 15 *Ibid* art 20.
- 16 *Ibid.*
- 17 *Ibid* art 21(1).
- 18 *Ibid* art 23.
- 19 *Ibid* 78.
- 20 *Ibid* 82.
- 21 See Davis, above n 2; Conway, above n 1; and Kuokkanen, above n 2.
- 22 Megan Davis, ‘United Nations Declaration on the Rights of Indigenous Peoples’ (2008) 9(2) *Melbourne Journal of International Law* 20.
- 23 *Ibid* 20-4.
- 24 *Ibid.*
- 25 Dalee Sambo Dorough, ‘The Indigenous Human Right to Development’ (2010) 1(2) *Indigenous Affairs* 77-8.
- 26 UNDRIP, above n 3, arts 18–19.
- 27 Dorough, above n 25; see also Davis, above n 22, 6.
- 28 See for example Catherine J Iorns, ‘Indigenous Peoples and Self Determination: Challenging State Sovereignty’ (1996) 24 *Case Western Reserve Journal of International Law* 199.
- 29 Davis, above n 22, 20-4.
- 30 *Ibid* 21.
- 31 *Ibid.*
- 32 Jannie Lasimbang, ‘Indigenous Peoples and Local Economic Development’ (Issue No. 5, Asia Indigenous Peoples Pact, 2008) 43.
- 33 Davis, above n 22, 24.
- 34 As such the collective rights in the context of the Declaration have consistently been qualified in reports to reflect the divergence in different states’ approaches to the theme; *Ibid.*
- 35 Conway, above n 1, 1101.
- 36 Lasimbang, above n 32, 43.
- 37 Commentary on the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/38/Rev.2, [10 (c)] (2003); cited in Davis, above n 2, 12.
- 38 *Ibid.*
- 39 Davis, above n 22, 26.
- 40 *Ibid*, 15; see also Conway, above n 1, 1107.
- 41 UNDRIP, above n 3, art 31(1).
- 42 Conway, above n 1, 1107.
- 43 *Ibid.*
- 44 UNDRIP, above n 3, art 5.
- 45 *Ibid* art 38.