4.4 Indigenous Peoples

4.4.1 What is at stake?

Throughout the world, indigenous peoples have long been subjugated and disenfranchised. Today, they are still disproportionately vulnerable to human rights abuses, loss of culture, loss of land and access to territories, and even to the threat of extinction.

As their frontier of operation is expanding to ever more remote areas of the world, sectors such as agriculture, forestry, mining and the oil and gas industry are increasingly encroaching upon territories of indigenous peoples. Even when the actual infrastructure or area of operation remains outside of these territories, secondary effects (infrastructure development, influx of workers and migrants and related effects on public health and prostitution, cultural intrusion etc) may severely affect indigenous people's way of life. Given that it is often male workers that work in these sectors, indigenous women are especially vulnerable to such changes in, or close to their territories.

A body of international law, instruments and norms recognises indigenous peoples' strong claims to sovereignty and self-determination, rights and protection of land and territories. These standards also provide guidance and direction on how to protect their societies, cultures and livelihoods. It is crucial that companies take these issues into account when investments are considered. One of the ways to achieve this is for banks to only offer financing under the condition that the rights of indigenous peoples are not repudiated.[166]

Businesses need to respect and guarantee the rights of indigenous peoples to protect their land, societies, cultures and livelihoods, by acknowledging their sovereignty and self-determination. The bank's policy should ensure that it will only be involved in the financing of companies which respect and guarantee these rights. In developing such a policy, the bank could make use of the best international standards available as described below.

4.4.2 Best standards available

International law recognises that indigenous peoples have inherent rights derived from their distinct identities and their close and special attachment to their ancestral lands. These rights establish the basis for the following standards or norms:

Right to self-identification and self-determination

The right to self-determination for indigenous peoples is also set out in the 1966 International Covenant on Economic, Social and Cultural Rights, which recognises all peoples' right to freely determine their political status, pursue their economic, social and cultural development and dispose of their natural wealth and resources.[167]

The UN Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly of the United Nations in September 2007, also recognises that "indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture". States therefore need to prevent "any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities".[168]

Recognition and protection of, and compensation for land and territorial rights

The distinct cultural identity and existence of indigenous peoples hinge on protection of their ancestral lands and their unique relationship to that land. This is reflected in the following agreements:

- The UN Declaration on the Rights of Indigenous Peoples affords indigenous peoples right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. It also recognises the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions, as well as restitution or compensation where these have been taken or damaged without their consent.[169]
- The ILO Convention 169 establishes clear rights and protection for indigenous peoples to their lands and territories. In addition, it describes measures to safeguard the right of the peoples concerned, to use lands to which they have traditionally had access for their subsistence and traditional activities.[170]
- The MMSD report Finding Common Ground, supported by the IIED and WBCSD, calls for benefit-sharing arrangements that go beyond fair compensation for damages done to indigenous peoples, in order to ensure that these groups actually benefit from the investments in, or in the vicinity of, their territories.[171]
- The Convention on Biodiversity (CBD) addresses the fair and equitable use of biodiversity resources, and requires that the traditional knowledge of indigenous and local communities may only be used with their "approval".[172]

Right to participation

The Vienna Declaration and Programme of Action calls on states to ensure the full and free participation of indigenous peoples in all aspects of society, in particular in matters of concern to them.[173] The UN Declaration on the Rights of Indigenous Peoples also establishes the right to full participation and the importance of fair procedures for resolving conflicts and disputes.[174]

Right to Free, Prior Informed Consent (FPIC)

Amplifying the protection of land and territorial rights, the United Nations Economic and Social Council has described the right of indigenous peoples to *Free, Prior Informed Consent (FPIC)* with respect to developments affecting their lands and natural resources in its Working Paper on FPIC. Unlike a consultation process, FPIC is a two-way, interactive negotiation that offers communities greater influence in decision-making, and is more likely to result in direct benefits for them. The process requires full and early disclosure of information and potential impacts of a proposed investment.

The FPIC principle has been recognised in international law and included in the emerging consensus of states and companies. It was confirmed by the ILO Convention 169[175], the UN Human Rights Norms for Business,[176] the World Commission on Dams, [177] the Inter-American Development Bank[178] and the UN Development Programme.[179] The FPIC principle is the key element for any indigenous peoples policy.

Prohibition of involuntary resettlement

A prohibition of involuntary resettlement is addressed by the UN Declaration on the Rights of Indigenous Peoples*,* which states that indigenous peoples "shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return."[180]

No-Go zones for uncontacted people

The livelihoods and culture of people living in voluntary isolation or uncontacted people must be protected from potential investment. The Inter-American Development Bank recognises this in its indigenous peoples policy by excluding any project that may cause adverse impacts on uncontacted people.[181]

4.4.3 Content of a bank policy

Companies face major moral and risk issues when their investments adversely impact upon indigenous peoples. But apart from the legal, normative, and development arguments for ensuring that host communities have the opportunity to consent to a project, there also a business case. According to a recent publication of the World Resources Institute, multinational corporations and financial institutions that seek local community consent for their operations will have a competitive advantage over those that fail to do so.[182]

Similar to human rights issues affecting other stakeholders, banks may not be directly involved in violations, but they can be complicit to their clients undermining the rights to self-identification and self-determination, consent, participation, recognition, protection and compensation. This may occur in several ways:[183]

- **Direct complicity** occurs when a bank intentionally finances a project or company, while the bank is fully aware that its financial assistance contributes to the violation of the rights of indigenous peoples by the client.
- **Indirect complicity**, when a bank profits - in terms of financial rewards or market share - from transactions with a client committing indigenous rights abuses, although the bank's financing is not directly related to the indigenous rights abuses itself.
- **Silent complicity** occurs when a bank has gained inside knowledge on indigenous rights violations by a present, former or prospective client, but does not report the violations to the appropriate authorities or takes steps to object or prevent the violations.

In order to abstain from any complicity with the violations of indigenous peoples, banks should develop a policy addressing their clients' impact on the rights of indigenous peoples. These policies could well be based on international laws and instruments, such as the UN Declaration on the Rights of Indigenous peoples. Following the rights to participation and *FPIC*, these policies should be developed collaboratively with representatives of indigenous people's organisations.

The bank's indigenous peoples policy can be a stand-alone policy, next to its human rights and labour policies. Consistency between the three policies is important then. The human rights policy can be seen as the overarching policy on human rights issues, while the labour and indigenous peoples policies give more detailed guidance on two very important human rights areas.

Because of the close relationship between the three policies, the bank could also decide to integrate its human rights policy with its labour policy and its indigenous peoples policy. In this case, it is important to include the criteria specifically referring to the rights of indigenous peoples as discussed above.

4.4.4 Scoring table

The considerations in the previous paragraphs lead to the following scoring table with regard to bank policies on indigenous people:

0. *The bank has no policy on this issue;*
1. *The bank's policy endorses the UN Declaration on the Rights of Indigenous Peoples or a similar statement but is not precise on what this means in practice;*
2. *The bank's policy defines a bottom-line on human rights-related activities and practices which will not be financed OR requires an impact assessment with respect to the rights of indigenous peoples for relevant transactions, sectors and countries;*
3. *The bank's policy defines a bottom-line on human rights-related activities and practices which will not be financed AND requires an impact assessment with respect to the rights of indigenous peoples for relevant transactions, sectors and countries;*
4. *The bank's policy is fully in line with the UN Declaration on the Rights of Indigenous Peoples and requires an impact assessment with respect to its elements for all relevant transactions. The policy puts a ban on the bank's direct, indirect and silent complicity with the violation of the rights of indigenous peoples.*

Signatories of the Equator Principles, UN Global Compact and/or the UN Principles for Responsible Investment score 1 point on indigenous peoples. These collective standards are discussed further in paragraph 7.1. The scores for these collective standards are awarded to all signatories, unless the bank's own indigenous peoples policy scores higher. Scores of individual and collective standards are not added up; only the highest score is awarded.

4.4.5 Results

Issues with regard to indigenous peoples are usually not captured by banks in a separate policy. Most of the time they are included in forestry, extractive sector, or dam policies, or in the banks' human rights policy. Very few banks have a cross-sector policy on indigenous peoples.

JPMorgan Chase (United States) has developed a good financing policy on issues concerning indigenous peoples, and Rabobank (the Netherlands) includes a good paragraph on the rights of indigenous peoples in its human rights policy. ING (the Netherlands), HSBC (United Kingdom) and Goldman Sachs (United States) have included the rights of indigenous peoples in one of their sector policies. The scope of their policies is therefore limited. Merrill Lynch acknowledges the rights of native peoples in their environmental framework but without further commitments.

It is remarkable that South African, Australian and American banks often develop an internal policy on diversity in human resources and employment of (respectively) black South-Africans, aboriginal Australians and Native Americans. But most of them do not pay any attention to indigenous rights in their credit policies.

Scores on Indigenous Peoples policies					
JPMorgan Chase	3	Crédit Agricole	1	Scotiabank	1
Rabobank	3	Credit Suisse	1	Société Générale	1
Goldman Sachs	2	Deutsche Bank	1	Standard Chartered	1
HSBC	2	Dexia	1	Sumitomo Mitsui	1
ING	2	Fortis	1	UBS	1
ABN AMRO	1	Intesa Sanpaolo	1	Unicredit	1
ANZ	1	KBC	1	WestLB	1
Banco Bradesco	1	Merrill Lynch	1	Westpac	1
Banco do Brasil	1	Mitsubishi UFJ	1	Bank Mandiri	0
Banco Itaú	1	Mizuho Financial	1	Bank of China	0
Bank of America	1	Morgan Stanley	1	China Construction	0
Barclays	1	Nedbank	1	ICBC	0
BBVA	1	RBS	1	Saudi-American Bank	0
BNP Paribas	1	Royal Bank of Canada	1	Standard Bank	0
Citi	1	Santander	1	State Bank of India	0