

Protecting Biodiversity
From Harmful Financing:
No Go Areas For
The International
Banking Sector

Briefing Paper

07

Areas Where
the Free, Prior,
Informed
Consent of
Indigenous
Peoples
and Local
Communities
Have Not Been
Obtained



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Currently, many banks' biodiversity policies are siloed from Indigenous Peoples policies. However, in order to effectively and holistically address biodiversity impacts, respecting Indigenous and local community rights must be woven into and embedded into any biodiversity plan or policy.

About the Banks and Biodiversity Briefing Paper Series

The Banks and Biodiversity Initiative advocates that banks and financiers strengthen their biodiversity policies and practices. In order to halt and reverse biodiversity loss, the Initiative calls on banks and financiers to adopt eight proposed No Go areas as an important step towards improving their biodiversity policies and practices. This briefing paper series aims to explain the importance of why banks and financiers must exclude harmful direct and indirect financing to industrial, unsustainable, and extractive activities which may negatively impact these critical areas. This briefing paper discusses No Go area 7 on areas where Free, Prior, and Informed Consent has not been obtained from Indigenous Peoples and local communities, which is Paper 07 of the series.

Proposed Banks and Biodiversity No Go Areas

In order to safeguard the rights of Indigenous and local communities in formally, informally, or traditionally held conserved areas – such as Indigenous and community conserved areas (ICCA), Indigenous Territories (ITs) or public lands not yet demarcated – as well as to better address and reflect the current crises of climate change, biodiversity loss, and emergence of zoonotic diseases, the Banks and Biodiversity campaign calls on banks and financial institutions to adopt a No Go areas in prohibiting any direct or indirect financing related to unsustainable, extractive, industrial, environmentally, and/or socially harmful activities in or which may potentially impact the following areas:

AREA 1: Areas recognized by international conventions and agreements including but not limited to the Bonn Convention, Ramsar Convention, World Heritage Convention and Convention on Biological Diversity, or other international bodies such as UNESCO (Biosphere Reserves, UNESCO Global Geoparks, etc.) or Food and Agricultural Organization (vulnerable marine ecosystems), International Maritime Organization (particularly sensitive areas), IUCN Designated Areas (Categories IA – VI)

AREA 2: Nature, wilderness, archaeological, paleontological and other protected areas that are nationally or subnationally recognized and protected by law or other regulations/policies; this includes sites which may be located in or overlap with formally, informally, or traditionally held conserved areas such as Indigenous and community conserved areas (ICCA), Indigenous Territories (ITs) or public lands not yet demarcated

AREA 3: Habitats with endemic or threatened species, including Key Biodiversity Areas

AREA 4: Intact primary forests and vulnerable, secondary forest ecosystems, including but not limited to boreal, temperate, and tropical forest landscapes

AREA 5: Free-flowing rivers, defined as bodies of water whose flow and connectivity remain largely unaffected by human activities

AREA 6: Protected or at-risk marine or coastland ecosystems, including mangrove forests, wetlands, reef systems, and those located in formally, informally, or traditionally held areas, Indigenous Territories (ITs), or public lands not yet demarcated, or Indigenous and community conserved areas (ICCA)

AREA 7: Any Indigenous Peoples and Community Conserved Territories and Areas (ICCAs), community-based conservation areas, formally, informally, traditionally, customarily held resources or areas, Indigenous Territories, sacred sites and/ or land with ancestral significance to local and Indigenous communities' areas where the free, prior, informed consent (FPIC) of Indigenous and Local Communities have not been obtained

AREA 8: Iconic Ecosystems, defined as ecosystems with unique, superlative natural, biodiversity, and/or cultural value which may sprawl across state boundaries, and thus may not be wholly or officially recognized or protected by host countries or international bodies. Examples include but are not limited to the Amazon, the Arctic, among other at-risk ecosystems

Other international bodies have already recognized the value of developing No Go areas, such as the World Heritage Committee and the UN Environment's Principles for Sustainable Insurance Initiative (PSI). The Banks and Biodiversity No Go Policy also aligns with banks and financial institutions' current practice of following institutional Exclusion Lists for sensitive industries or areas, as well as global goals of preventing further biodiversity loss. Projects that do not fall within Exclusion Lists should still be subject to rigorous environmental and social due diligence, assessment, screening, planning, and mitigation policies and procedures'.

For more information on the Banks and Biodiversity Initiative, please see: www.banksandbiodiversity.org.

Areas Where the Free, Prior, Informed Consent of Indigenous Peoples and Local Communities Have Not Been Obtained

Briefing Paper

07



Introduction

Protecting biodiversity from harmful financing requires protecting the rights of Indigenous Peoples and local communities

Biodiversity thrives under the stewardship of Indigenous Peoples. Indigenous and community lands and forests are associated with lower rates of deforestation, higher levels of carbon storage, reduced conflict, and overall better biodiversity conservation. Although Indigenous Peoples only comprise about six percent of the world's population, and traditional Indigenous territories make up just 22 percent of the world's surface, they encompass 80 percent of the world's remaining biodiversity¹. Studies have shown that Indigenous managed lands bear the same or higher levels of biodiversity than protected areas². In fact, the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) recommends recognizing Indigenous Peoples and local communities' cultural knowledge, practices, and actions as a critical pathway for conserving nature³. According to the United Nations (UN) report, "**Indigenous Peoples are the best guardians of world's biodiversity**"⁴.

With the intensification of climate crises and environmental collapses, maintaining biodiversity has become an urgent, global challenge. In order to achieve successful biodiversity outcomes in their financing, banks and financiers must recognize Indigenous Peoples' outsized contributions to the protection and maintenance of land, forests, and biodiversity writ large.

To protect Indigenous rights is to protect biodiversity.

In light of the increasing consensus that Indigenous communities are inexorably linked to solving the biodiversity crisis, banks and financiers should respect and protect Indigenous Peoples and local communities' self-



termination, land, and natural resource rights as a key pillar of biodiversity policies. Currently, many banks' biodiversity policies are often perceived as a separate, standalone issue from Indigenous Peoples and communities' rights. However, in order to effectively and holistically address biodiversity impacts, respecting Indigenous and local community rights must be woven into or embedded into any banks' biodiversity plan or policy.

In doing so, it is critical that banks understand how protecting the right to self-determination and requiring Free, Prior, Informed Consent (FPIC) has doubly positive benefits for protecting people and biodiversity. This paper illustrates how requiring FPIC in fact reduces risks for banks and financiers, and thus why FPIC should be required for all bank financed activities and projects. Conversely, it also raises key considerations of how the failure to require FPIC may trigger a cascade of significant financial, operational, reputational, social, biodiversity, among other risks to banks and financiers.

What is Free, Prior, Informed Consent?

Indigenous and tribal peoples possess a deeply intimate relationship with their environments, have unique ways of relating with both the land and people from other cultures, and live and subsist in ways that are often not understood, appreciated, or respected by outside entities⁵. These differences are significant because they have given rise to a body of international legal standards⁶. The concept of Free, Prior and Informed Consent has in turn emerged from these international agreements and human rights frameworks.

Today, FPIC possesses multiple dimensions. **FPIC is a unique, human right under international law for Indigenous Peoples, and is an important tool for upholding Indigenous People's self-determination. FPIC must be an ongoing, iterative process regarding any activities or projects that could potentially impact their lands or way of life.** FPIC should be applied well before a project or operation receives financing. It should also recur prior to any changes made to the financing or project scope at all operational stages.

In regards to local communities, FPIC can also be used as an international best practice for engagement and consultation.

Understanding FPIC as an expression of Indigenous Rights within International Legal Frameworks

The rights of Indigenous Peoples as they relate to business operations are typically thought of in reference to the right to Free, Prior, and Informed Consent⁷. **But FPIC is in fact part of a broader framework regarding Indigenous Peoples right to self-determination and sovereignty.** In order to understand FPIC, it is necessary to understand the underlying legal frameworks that define it.

The **United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)**⁸, adopted by the United Nations on September 13, 2007 and supported by all member countries, enshrines the rights that "constitute the minimum standards for the survival, dignity and well-being of the Indigenous Peoples of the world"⁹.

UNDRIP makes clear that Indigenous Peoples and individuals enjoy the same human rights that others enjoy, like those stated in the UN Charter and the Universal Declaration of Human Rights. **UNDRIP goes further and elaborates on the minimum rights necessary for the survival, dignity, and well-being of Indigenous Peoples. Importantly, Article 3 in the Declaration specifically enshrines Indigenous Peoples' right to self-determination.** UNDRIP states that "Indigenous Peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired,"¹⁰ and have the right to "own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired"¹¹. These rights are particularly noteworthy for corporate activities which impact Indigenous Peoples and their rights, lands, and resources, and their ability to determine their own economic, social, and cultural development paths.

In addition to the near-universal adoption of the UNDRIP, the member states of the Organization of American States (which includes every country in the Americas except Cuba) have adopted **the American Declaration on the Rights of Indigenous Peoples**, which also affirms the right of Indigenous Peoples to self-determination¹². Of particular relevance to the subject of this paper, the American Declaration **recognizes Indigenous Peoples as enjoying collective rights to "their lands, territories and resources,"¹³ the "right to conserve, restore, and protect the environment and to manage their lands, territories and resources in a sustainable way,"¹⁴ and "the right to own,**

use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired"¹⁵. The American Declaration also includes specific provisions related to the rights of Indigenous Peoples living in voluntary isolation¹⁶.

While, like the UNDRIP, the American Declaration is a nonbinding declaration, 25 of the 35 OAS member states have ratified or adhered to the **American Convention on Human Rights**, which entered into force in 1978¹⁷. **In order to enforce the rights set forth in the Convention, the Convention created the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.**¹⁸ Though the Convention does not outline specific rights for Indigenous and tribal peoples, **it does uphold fundamental rights like the right to property¹⁹ and to judicial protection²⁰ which the Court has supported and relied upon in judgements in favor of Indigenous and tribal peoples.**

Furthermore, several of the bodies that monitor the implementation of international human rights treaties, have called on states to respect the right to FPIC under their respective treaty obligations. The **Committee on Elimination of Racial Discrimination (CERD)** calls on states to "ensure no decisions directly relating to their rights and interests [of Indigenous peoples] are taken without their informed consent."²¹ **The Human Rights Committee (CCPR)** has found that that where any measures substantially compromise or interfere with significant economic activities of Indigenous communities, it requires "not mere consultation but the free, prior and informed consent of the members of the community"²². The **Committee on Economic, Social and Cultural Rights (CESCR)** has stated "States parties and businesses should respect the principle of free, prior and informed consent of indigenous peoples in relation to all matters that could affect their rights, including their lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired."²³ **The Committee on the Elimination on Discrimination Against Women** calls for free, prior, and informed consent of Indigenous women and girls to be required in all matters affecting their human rights.²⁴

And finally, while less widely adopted, 23

countries have ratified **International Labor Organization Indigenous and Tribal Peoples Convention (No. 169)** and have thus taken on binding treaty obligations. ILO Convention No. 169 spells out specific rights for Indigenous and tribal peoples. **Article 7 states that Indigenous and Tribal peoples have "the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use"**²⁵.

In summary, nearly every country in the world has affirmed, some in multiple instances, **that Indigenous Peoples have certain inalienable rights, including the right to self-determination and to manage, distribute, and effectively control their territory, in accordance with their sociopolitical system, customary laws and traditional collective land tenure system.**



The UNDRIP, the American Declaration, ILO 169, and jurisprudence of bodies like the Inter-American Court of Human Rights have established that if activities related to a project would violate or infringe upon the rights of an Indigenous People, then the project may not go forward without the genuine consent of the Indigenous Peoples concerned, and where inalienable rights would be violated¹¹, it may not go forward at all²⁶.

The evolution of these international norms and agreements has over time led to the concept and principles of FPIC in order to ensure Indigenous Peoples rights are fully respected and upheld. **FPIC is defined as consent that is given freely, by people fully informed of the consequences, prior to any decision being made, and according to their own decision-making processes. Banks and financiers must seek to understand and respect Indigenous Peoples customary laws, legal systems, and treaty arrangements, which may predate those of the formal state government, and must take them into account when implementing FPIC.**

Free means that Indigenous Peoples are free from coercion or manipulation to make decisions in their own time, in their own ways, in languages of their own choosing and subject to their own norms and customary laws. They are and should also be free from “divide and conquer” tactics, threats, or implied retaliation that place undue pressure on Indigenous communities to provide consent. Indigenous Peoples must also be free to make decisions in their own time, in their own ways, in languages of their own choosing and subject to their own norms and customary laws²⁷. Best practice of “free”

consent also means that the process is led by Indigenous Peoples' own planning and vision, in which projects or operations account for and respond to their priorities.

Prior means that Indigenous Peoples understand and are involved in a decision-making process and have the opportunity not only to accept or reject a certain project, but to fully participate in the elaboration and execution of its local and regional development. For this right to be guaranteed, **the Indigenous Peoples must be involved during the early planning stages (for example, prior to auctioning exploration concessions) before a project becomes an economic or political inevitability.** The FPIC process is not limited to the design and implementation phases of the project. For example, FPIC is a dynamic process which must be adjusted or renewed with each new change in a project, such as new environmental licensing, revised project scope, etc.

Informed means that Indigenous Peoples have the legal and technical expertise and access to information in forms and languages that allows them to understand the implications of any decision on their lives and future, and that allows them to make informed choices and decisions and to have the capacity to negotiate with the company should they choose to do so, as well as access to independent advice. International financial institutions (IFIs) should be primarily responsible for informing Indigenous Peoples about their financed projects and activities. **It is up to the IFIs to inform, in clear and simple language, Indigenous Peoples who may be potentially affected by its activities. IFIs in turn should require clients and financial intermediaries to fully respect the FPIC and disclose information regarding activities which may impact Indigenous communities.**

If affected peoples choose to withhold their consent or to not enter into negotiations with a company or government, then an activity or project cannot and should not be able to proceed. If not, those activities would violate their right to self-determination, and their right to control what happens on their land and resources²⁸.

¹¹ Most human rights, such as those in the Universal Declaration of Human Rights, are inalienable and thus cannot be given up.

Understanding What Free, Prior, Informed Consent Is Not

FPIC is essential to upholding the rights of Indigenous Peoples and local communities, and so there must be clear distinctions between what FPIC is and what it is not. Corporations, governing bodies, and banks and financiers cannot view FPIC as a one-time checkbox; instead, FPIC must be obtained at each stage of development affecting Indigenous land and resources in a continued and evolving relationship²⁹.

Although FPIC can be obtained via consultation with Indigenous Peoples, consultation alone or in a generic way does not constitute consent, and the possibility of non-consent must be acknowledged and respected³⁰. **In other words, following FPIC procedures and consulting Indigenous Peoples does not automatically**

mean FPIC has been obtained. Indigenous Peoples must provide informed and explicit consent for development or activities to be approved. Whenever necessary, Indigenous Peoples can point out and recommend all the necessary adjustments or conditions to the project so that proposed activities can be approved and receive their consent.

Non-consent following FPIC procedures and consultation is also a possibility. If this scenario occurs, development or activities cannot move forward under FPIC.

Free, Prior and Informed Consent is...		Free, Prior and Informed Consent is NOT...	
✓	The guarantee that Indigenous People are the protagonists in local and regional development	✗	Simply a decision to accept or deny a given project
✓	A best practice applied in the beginning states of a project, prior to receiving financing	✗	Consultation after the project has received political and financial backing
✓	An ongoing, reiterative process	✗	A one-time consultation or dialogue
✓	A human right under international law upholding self-determination	✗	Provided under coercion, threats of violence, or pressure to give affirmative consent
✓	A community-led process that engages all stakeholders and respects Indigenous practices and decision-making	✗	Given by an individual or select group of individuals

Common Missteps in Implementing FPIC

Companies or banks may knowingly or unknowingly press Indigenous Peoples into ways of making decisions that are more comfortable and familiar to them, but which may feel forced, unfamiliar, foreign or difficult for Indigenous Peoples to reconcile with their own processes. If the process is not fair, familiar, and natural to those most impacted, then its outcomes will be unreliable or outright fail to accurately capture if consent has been given or not.

Indigenous Peoples and local communities have their own unique way of understandings, protocols and assumptions about how decisions should be made. This may also include separate terms of reference for women, and men, and how these are negotiated separately and together. **This means that each consultation process must be aware of the particularities present in each Indigenous Peoples. Many problems arise when outsiders do not seek to educate themselves and respect local ways of doing things. This is critical for ensuring and enabling fair participation.**

For example, **rushed timelines and consultations may be designed to suit company rather than community needs. As a result, they fail to involve different knowledge holders with different responsibilities for caring for land, water, and biodiversity, and thus fail to allow adequate time in negotiating a shared understanding between these groups.** This would also require speaking to women's groups and men's groups; speaking with different kinship groups^{III}; and doing consultations in multiple languages in appropriate places at appropriate times.

For instance, bank clients failing to seek permission before visiting the community can also end up trying to run meetings at inappropriate times, such as during harvest times or mourning periods. Bank clients may also fail to do appropriate rituals and ceremonies that also help to communicate the gravity and importance of what is at stake.

Banks must understand and internalize that clients themselves often have an inherent conflict of interest - clients stand to benefit most from projects or operations being approved, not if they are ultimately rejected. This is why it is vital to have independent oversight of processes from a range of parties. A client may speak only to a small number of people, often those who have most to gain and least to lose from the proposal, and misrepresent them as those who have been mandated by the community as representatives. Doing so fails to consult and achieve consent with whole sections of the local community, such as rural women or other minority groups.

A bank client may also fail to understand and respect constraints on what types of decisions can be made. For example, a company may believe that today's generation is entitled to make decisions about land that would deny the next generation(s) the right to use or care for land, and base their plans on 25-year, 50-year, or 100-year time horizons. However, for some Indigenous cultures with a strong sense of inter-generational justice, this idea may be so foreign as to be virtually inconceivable. **Rather than consulting local people to go against their own cultural norms - which are integral to sound environmental stewardship - banks and their clients should ensure their proposals are culturally appropriate.** Similarly, extractive industries should be approached with extreme skepticism - extractive projects and operations are often inextricably linked with harmful environmental behaviors and inequitable business models. Banks and their clients can fail to seek out, and respect, public statements or treaties, such as the Tar Sands Treaty³¹ or the Supreme Sukundemi Declaration³², where Indigenous Peoples clearly express they do not welcome certain industries on their territories. Too often extractive projects dispossess women of their farming and fishing livelihoods and disrupt their sociocultural traditions and

III For many Indigenous peoples, kinship relationships are not only between people but also between people and plants, animals, ancestors, and natural entities like rivers or rock forms.

way of life, such as losing access to the medicinal plants and herbs they use to treat sick community members. Other common mistakes are embedded gender bias by having technical and leadership teams dominated by men, and sidelining women's voices in discussions and processes.

Banks and financiers are primarily responsible for ensuring and overseeing the integral application of the FPIC among their clients. **The challenge of ensuring Indigenous Peoples and local communities' rights are respected can be a complicated process. However, failing to implement FPIC correctly and fairly leads to even more risks and challenges for both banks and their clients.**

Lessons learned over the years have indicated the following ways in which banks and their clients may be failing to implement FPIC processes:

- ♦ Failing to use local people's mother tongue or preferred languages
- ♦ Relying on written communication when dealing with oral cultures
- ♦ Holding meetings at times and places that target groups cannot realistically get to
- ♦ Failing to document decision-making processes and ensure all parties have a record
- ♦ A lack of community access to truly independent project information and advice. Remote or rural communities may be unaware of what they don't know and common pitfalls or concerns of similar projects
- ♦ A lack of community access to truly independent information about the company or financier itself. Communities often do not have access to information about previous legal actions or allegations brought against the company group elsewhere
- ♦ A failure to inform communities of the bank's involvement. If a financier has agreed to finance a project, communities are rarely informed of the bank's name, its policies, and their rights
- ♦ Failing to respect, or ideally be led by, Indigenous Peoples' own planning and priorities, including discussing the projects and operations they wish to see
- ♦ Over-reliance on documents tendered by the client company or consultants working for the client
- ♦ Failing to account for specific accessibility needs - such as elders with mobility needs, people with child-caring responsibilities, monetarily poor people who may face barriers to participation such as transport or long working hours
- ♦ Failure to address security issues, meaning that people do not feel safe to raise concerns
- ♦ Presenting projects or proposals that are rooted in inequality - such as the poorest and most marginalized peoples having to experience great change or hardship for the benefit of wealthier or far-away populations
- ♦ Presenting projects or proposals that encourage one part of the community to turn on another. For example, building a plantation on women's land while offering jobs to men, or paying money upfront for long-term leases that benefit today's generation but disempower youth the next generations to make decisions about land
- ♦ Using FPIC as checklist in order to gain access to financing from banks (e.g., by showing compliance with bank policies) rather than genuinely seeking to respect the rights that are meant to be respected and safeguarded by FPIC



Acknowledging the Unique Differences between Indigenous Peoples and Local Communities

The United Nations (UN) and other international bodies have long recognized Indigenous Peoples as a distinct constituency with unique rights. However, the trend towards amalgamating all Peoples together dishonors the unique, inherent rights of Indigenous Peoples, and has become problematic.

For instance, using “IPLC” as a shorthand term of “Indigenous Peoples” and “local communities” is problematic because it conflates, over-simplifies, and overlooks important distinctions between the two. It is also a form of assimilating and erasing the uniqueness of Indigenous experiences into the more general “local community” description. Doing so elides the hard-fought principles of self-determination and sovereignty of Indigenous nations. **Understanding these nuances between Indigenous Peoples and local communities is critical to ensure that banks’ Indigenous Peoples and biodiversity policies accurately reflect the different challenges and backgrounds which Indigenous Peoples and communities may face.**

Indigenous Peoples are characterized in part due to their connection to and their relationships with the land they live on. As

a term, “Indigenous” traces back to pre-colonial establishment and inhabitancy, used by Western Europeans and travelers who invaded these communities in their explorations.

There have been considerable efforts to explore a more nuanced and descriptive definition of Indigenous Peoples, which is now promulgated by the UN and Indigenous Peoples:

“Indigenous Peoples are inheritors and practitioners of unique cultures and ways of relating to people and the environment... Indigenous Peoples have sought recognition of their identities, way of life and their right to traditional lands, territories and natural resources for years, yet throughout history, their rights have always been violated. Indigenous Peoples today, are arguably among the most disadvantaged and vulnerable groups of people in the world. The international community now recognizes that special measures are required to protect their rights and maintain their distinct cultures and way of life”³³.

In contrast, the term “local communities” has had less friction in the history of its definition, given the lack of identifiable ethnic or political characteristics pertaining to those considered within the term.



If banks and financiers require clients to appropriately implement FPIC, it can be a powerful tool and process for identifying and eliminating risky projects early on, as it accounts for and respects the decisions of impacted communities.

It is important for banks to recognize the differences between Indigenous Peoples and local communities in order to fully understand how potential bank financed activities may impact them differently, as well as inform the development of banks' Indigenous Peoples policies. Doing so is critical for ensuring Indigenous Peoples are able to exercise their right to self-determination and FPIC, which is uniquely recognized and guaranteed under international law. Some of these nuances are obscured in the term "IPLC". For instance, the United Nations Permanent Forum on Indigenous Issues does not recommend using the term "IPLC", stating:

"[T]he Permanent Forum reiterates the position of the Special Rapporteur of the United Nations Human Rights Council on the Rights of Indigenous Peoples, noting that it is unacceptable to undermine their status and standing by combining or

equating them with non-Indigenous entities such as minorities, vulnerable groups or local communities....The Permanent Forum urges all UN entities and State parties to treaties within, inter alia, environment, biodiversity, and climate to eliminate the term 'local communities' in conjunction with Indigenous Peoples so that the term 'Indigenous Peoples and local communities' (IPLC) is abolished and replaced simply with 'Indigenous Peoples'."³⁴

Navigating and addressing banks' potential impacts to both Indigenous Peoples and local communities can be complicated and challenging. In sum, FPIC is a unique, special right to Indigenous Peoples enshrined in international human rights law. At the same time, FPIC can be used as a best practice for consulting local communities in regards to harmful bank financed activities.

Respecting Indigenous and Local Community Rights Reduces Risks to Banks and Financiers

Failing to require FPIC in proposed bank financed activities and projects can incur material, operational, legal, regulatory, and reputational risks. This is because conflicts with Indigenous Peoples and local communities often lead to protracted land and resource disputes.

Indeed, overlooking the need for communities to be involved and consulted under FPIC principles is and continues to be a root cause of many failed projects. An analysis of community complaints reveals that harms most consistently cited by communities around the world related to inadequate or non-existent consultation, disclosure, and due diligence. Of a total of 1,288 complaints from communities across six global regions, 588 cite a lack of consultation and/or due diligence, resulting in a global average of 46%³⁵.

In several instances, companies have had to cancel operations and withdraw from projects

due to staunch resistance resulting from a lack of consent provided from impacted communities. In 2017, an Indian subsidiary of Korean conglomerate POSCO, one of the world's largest steel producers, pulled out of its \$12 billion investment in India, following a decade plus of public resistance to its operations on Indigenous communities' lands in the eastern Indian state of Odisha³⁶. Public protests, arrests, and violence caused numerous delays to the project, ultimately causing the steel giant to abandon the project, which at the time was the largest foreign direct investment in the country³⁷. POSCO had been financed by Bank of New York Mellon, Deutsche Bank, and J.P. Morgan Chase³⁸.

Furthermore, it is well established that activities and projects, which have failed to require or appropriately implement FPIC, face higher costs. This is because community opposition can lead to complex and drawn-

out land conflicts that can significantly delay operations, which in turn increases costs and can potentially create stranded assets. For instance, a 2017 study into palm oil companies' operations in Indonesia found that "the tangible costs of social conflict range from USD 70,000 to USD 2,500,000. The largest direct costs are lost income from disrupted plantation operations and staff time diverted from other tasks to address conflict. Indirect costs result from the opportunity costs of using human and financial resources to address conflict rather than investing it to improve plantation productivity"³⁹. Additionally, the study found that "Tangible costs represent 51% to 88% of plantation operational costs, and 102% to 177% of investment costs on a per hectare per year basis." And that "Intangible or "hidden" costs may range from USD 600,000 to USD 9,000,000, representing expenditures or indirect losses associated with... conflict recurrence or escalation; reputational loss; and risk of violence to property and people"⁴⁰.

Navigating the difficult terrain of ascertaining which communities bear land rights in various host countries can be challenging, but the complexity in doing so reaffirms how requiring clients to implement FPIC can actually safeguard against unnecessary, costly social risks. Respecting communities' rights to FPIC by properly implementing it can be especially useful in countries where host country governments may not be able to or willing to protect the land rights of communities who reside in areas earmarked for development. For instance, in many countries, States claim de facto ownership of all land that is not under private ownership; yet much of this land is customarily claimed by local communities – including Indigenous Peoples, Afro descendant, and other traditional communities. Land rights conflicts between host governments and affected communities can in turn trigger social risks and higher costs to bank financed projects or activities.

Research into concessions in "emerging or frontier markets" has shown that communities live or access land on 93 to 99 percent of concessions studied. One study found that: "Over 40% of land in Peru was allocated for forest, mining, and oil and gas concessions. In Liberia, the use of around 35% of land was conceded for agriculture and timber production. And in Indonesia, 30% of the entire country's land is currently part of some sort of concession"⁴¹.



If banks and financiers require clients to appropriately implement FPIC, it can be a powerful tool and process for identifying and eliminating risky projects early on, as it accounts for and respects the decisions of impacted communities. Doing so also allows banks and clients to deepen their assessments and understandings of different kinds of community claims to the land, instead of over-relying on the host country government interpretation of land rights. This is because a government's interpretation of "official" land rights and ownership may be skewed to benefit a government's political, economic interests, rather than the Indigenous and local communities who may have customary and/or statutory rights to the land and resources and have been living on the land for generations. This is especially relevant in cases where a host country government officially "owns" or "controls" all land.

There are also potential legal risks for not requiring FPIC. Increasingly, emerging national laws and regulation in the United States and Europe are including Indigenous Peoples' rights and Free, Prior, Informed Consent as part of their purview. The proposed US FOREST Act and state bills addressing deforestation in New York and California consider Indigenous Peoples and local communities' land rights and the right to Free, Prior, Informed Con-

sent⁴². Emerging regulations in Europe, such as the European Union's mandatory Human Rights Due Diligence regulation, also aims to address social and human rights⁴³. In 2019, several NGOs filed an OECD complaint against Dutch Bank ING Group for contributing to negative environmental, human rights, and labor impacts caused by ING's palm oil clients⁴⁴. Furthermore, Indigenous communities are increasingly and successfully suing governments for failing to uphold their customary rights to land and to FPIC⁴⁵. **In 2021, the Supreme Court of Belize ruled in favor of Maya land rights, upholding the Jalacte community's right to Free, Prior and Informed Consent (FPIC). The legal decision also required the Belize government to return the stolen lands, and to offer the equivalent of \$3.12 million USD in compensation⁴⁶.**

Furthermore, banks that contribute to environmental and human rights violations, including violations of communities' land

rights and the right to FPIC, may attract significant risks. Social expectations on Indigenous Peoples' rights are rapidly changing. There is a growing number of cases where the violations of Indigenous Peoples' rights have received widespread attention and created reputational risks for banks which can translate into legal and financial risks. In 2017, for example, protests by Indigenous and environmental groups against the Dakota Access Pipeline led to intense reputational risks for financiers. DAPL activists launched a "Defund DAPL" campaign, which led to a \$86.2 million loss in personal account closures⁴⁷. In response to the controversial pipeline which cut across Native American lands without communities' consent, a number of US cities including Seattle, Alameda, Berkeley, Davis, and Santa Monica cut ties with Wells Fargo, one of the financiers of the pipeline, leading to a \$4.3 billion dollar loss for the bank⁴⁸.



Respecting Indigenous Peoples Rights: A Dual Solution to Biodiversity Loss and Climate Change

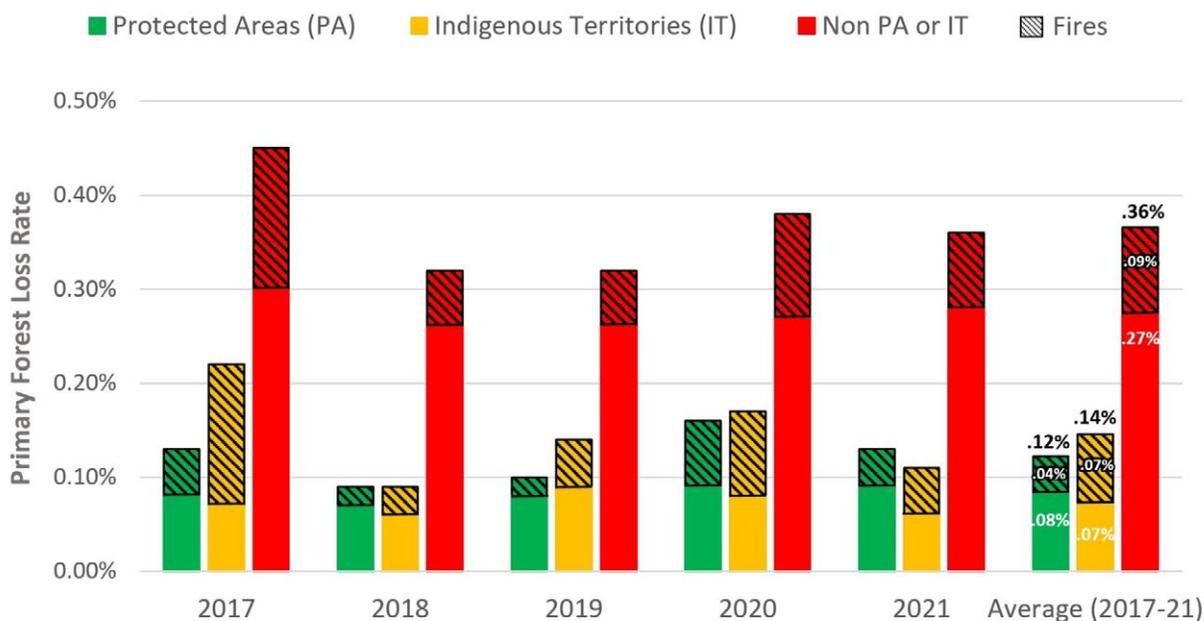
Preserving carbon rich ecosystems and biodiversity is critical to effectively addressing cross-cutting global crises like climate change. Indigenous and community lands hold 293 billion metric tons of carbon (MT)—equivalent to 33 times global energy emissions in 2017⁴⁹. As earlier discussed, forests and biodiversity are protected and preserved much better when under the stewardship of Indigenous Peoples and local communities compared to state or private ownership, including state-governed protected areas. **As such, it is important that banks and financiers develop biodiversity and climate policies and targets which complement and reinforce each other.** Although Indigenous Peoples make up just six percent of the world's population, 80% of the world's biodiversity are found in their territories⁵⁰. These areas often overlap with critical climate regulating ecosystems, such as forests.

Studies have proven that rates of deforestation and biodiversity loss are considerably less in lands and forests with strong legal recognition of communities' rights. One study documented that

deforestation – a key driver of biodiversity loss and climate change – was six times lower in community forests in the Bolivian Amazon, 11 times lower in the Brazilian Amazon, and 20 times lower in the Peten forest of Guatemala⁵¹.

By sustainably managing these areas, Indigenous Peoples, as well as local communities, protect a myriad of plant and animal species that are found in forests, rivers, lakes, coastlands, and pastures. **Preserving these species and their genetic pools are essential for protecting ecosystems with high biodiversity and the climate regulatory value. Securing land rights for Indigenous Peoples and respecting traditional knowledge systems are thus critical for strengthening biodiversity conservation, climate mitigation, and environmental governance. This requires bank policies to safeguard communities' customary and collective rights to land and natural resources, which includes ensuring ongoing compliance with the right to FPIC.**

Primary Forest Loss Rates in the Amazon



Indigenous and community lands and forests are associated with lower rates of deforestation and higher levels of carbon storage. This chart shows how significantly reduced primary forest loss occurs within Indigenous Territories, indicating how the presence of Indigenous Peoples leads to more effective protection of primary forests in the Amazon.

Source: Sourced from *Finer M, Mamani N (2023) Protected Areas & Indigenous Territories Effective Against Deforestation Across Amazon*. MAAP: 176, under Creative Commons.

The historical role of banks in driving human rights abuses

Certain sectors financed by banks are fraught with human rights abuses and destruction of Indigenous Peoples' lands and livelihoods. There are many examples of systemic abuses in many sectors, but well-known sectors associated with causing and driving longstanding conflicts include fossil fuels, mining, industrial agrocommodities, among others.

This legacy has in turn created enduring impacts on Indigenous Peoples, leading many Indigenous groups to reject any future involvement with these sectors. Such environmental and human rights abuses have occurred not only after operations began, but also during early stages of projects, including during consultation and community engagement stages.

The long record of abuse and controversy in high-risk sectors is a clear indicator that banks should not review proposed projects in isolation from the historical context and social impacts of the sector. Instead, **banks should consider the historical, documented patterns of past abuse against Indigenous Peoples in high-risk sectors, and account for how Indigenous communities have responded to previous or similar projects in nearby regions. Where Indigenous Peoples have clearly spoken out against certain sectors and relevant projects in the past, banks should respect Indigenous Peoples' choice not to engage in any further or future proposed activities or projects.**

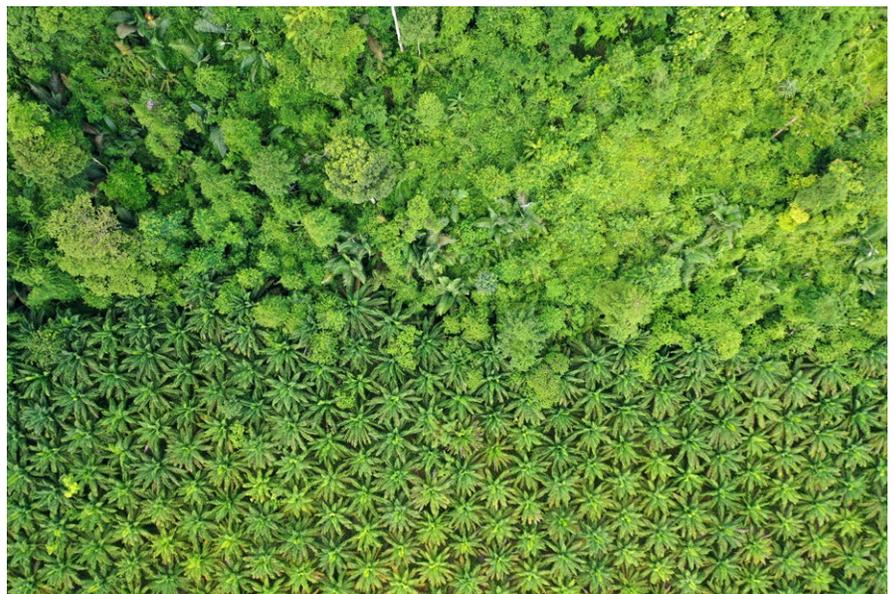
For example, the Shuar and Wampis people in the Peruvian Amazon have consistently and repeatedly opposed the development of oil projects in the Oil Block 64, which overlaps with Indigenous land. Yet, several companies still attempt to launch operations. In fact, the Shuar and Wampis people constantly receive letters from companies and government bodies that wish to engage with the communities; however, the Wampis have clearly rejected not only oil, but also mining and logging on their territories⁵². In 2022, representatives of the

Shuar and Wampis traveled to the US to call on banks, including Citibank, Goldman Sachs, HSBC, and JP Morgan to cut ties with the state-owned Petroperu.⁵³

Separately, at COP15 in December 2022, various Indigenous representatives protested outside of the Royal Bank of Canada (RBC) to denounce its financing of the Belo Sun mining project,⁵⁴ which would have devastating effects in an area that is already experiencing cumulative impacts from other projects in the region, including the Belo Monte hydroelectric dam.⁵⁵

Separately, in 1996, the oil company Compañía General de Combustibles (CGC) commenced "community engagement" activities with Indigenous communities in Oil Block 23 in the Ecuadorian Amazon. **When consent was not given to the project, the oil company resorted to threats and kidnapping of Sarayaku community members, and later forcefully invaded Sarayaku territory in conjunction with the national army and private security⁵⁶. Given the historical trauma, the people of Sarayaku have to this day clearly rejected any form of oil, mining, and lumber extraction in their territories⁵⁷.**

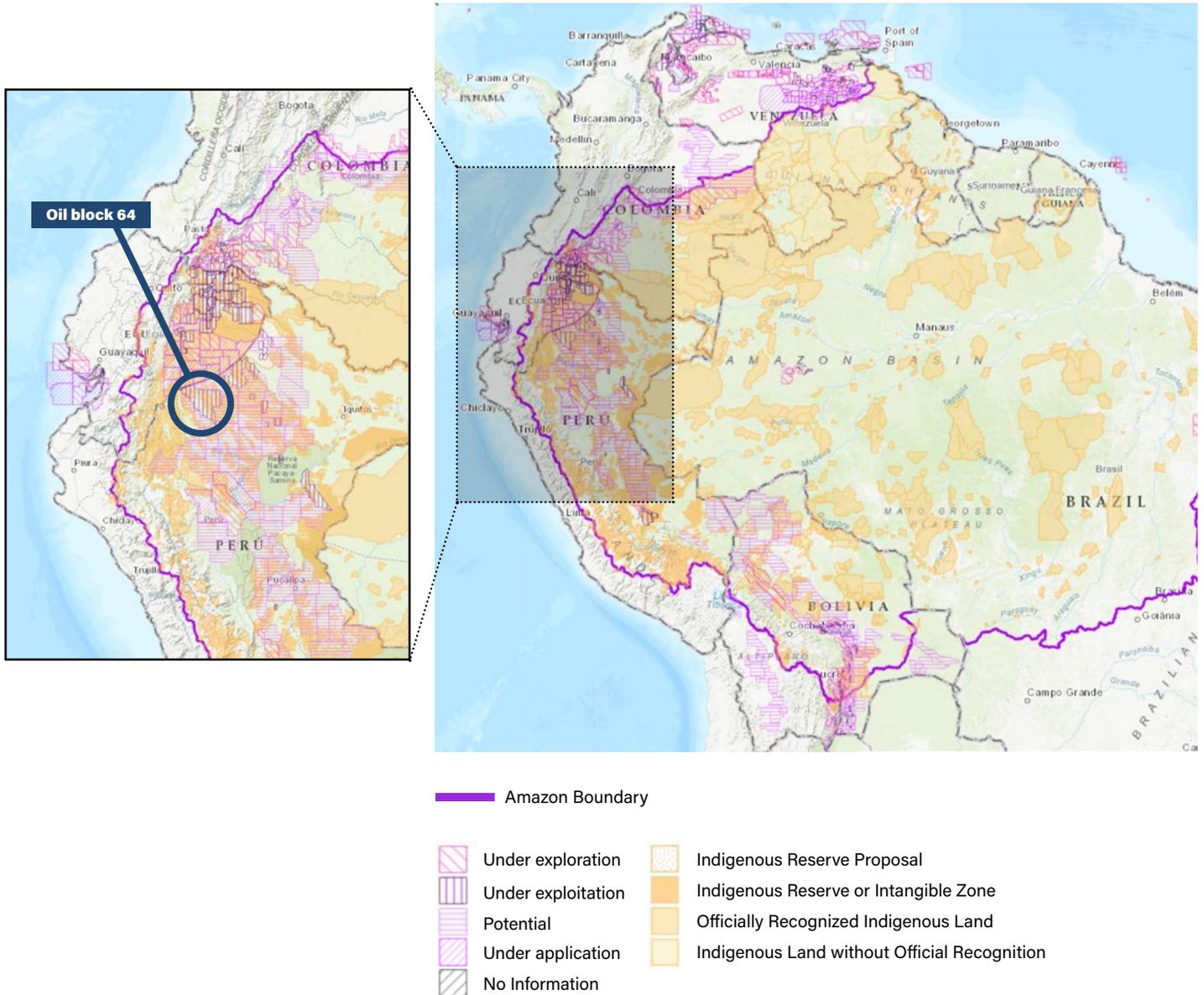
Indigenous Peoples continue to face repeated trauma of land grabs, broken promises, and pollution from bank-financed palm oil producers. International banks and financiers including ABN AMRO, Credit Suisse, Citi, HSBC, MUFG Group, Rabobank, among others are currently tied to companies known for driving community conflicts.



In cases such as these, implementing FPIC would mean respecting Indigenous communities' choice to not engage with project developers, and to immediately halt the development of such projects if consent was not given. For banks, this means not financ-

ing or considering projects in areas where communities clearly have rejected similar activities in the past. Community engagement or consultations cannot and should not be used as a "checkbox" exercise.

Oil blocks overlapping Indigenous lands in the Amazon, including oil block 64



The Shuar and Wampis people in the Peruvian Amazon have repeatedly opposed the development of oil projects in Oil Block 64, which overlaps with Indigenous land. Yet, several companies have still attempted to launch operations. This map shows current and proposed oil blocks overlapping Indigenous Territories in the Amazon, including the contested Oil Block 64. As seen in the map, there is increasing encroachment from oil development onto Indigenous lands in the Amazon across several countries.

Source: [Red Amazónica de Información Socioambiental Georreferenciada \(RAISG\)](#) under RAISG's [Terms of Use](#) policy.



In addition, banks and financiers should not finance projects that may affect Indigenous Peoples living in voluntary isolation. In this case, the right of non-contact must be fully respected. **If not yet developed, banks and financiers should also establish specific policies for Indigenous Peoples in voluntary isolation and recent contact**⁵⁸.

The fraught legacy of harmful and sometimes disastrous bank financed projects in extractive sectors demonstrates the often overlooked fact that impacted communities do not live in a vacuum. Especially in areas known for rich natural resources, communities may have suffered ongoing and repeated abuses or human rights violations due to a recurring extraction of resources, and so it is critical for banks to understand and acknowledge the record of community support or opposition to common projects, sectors, or even companies. This information should be included in feasibility studies or other relevant documents. **For instance, assessment of cumulative impacts should include analysis of past encroachments and controversial projects in the region. Essentially, the recurring lack of community consent to activities associated or caused by extractive sectors should be a red flag for banks, as no amount of mitigation measures are likely to resolve longstanding community opposition.**

This further raises the question of the banking sector's role in financing activities which have led to longstanding conflicts or human rights abuses, and the obligation to develop

institutional systems to provide redress for having financed clients which have caused extensive and serious environmental, social, and human rights violations. One example demonstrating this concern is the palm oil producer Wilmar, which received financing from the IFC and several banks for palm oil operations. In 2007, the IFC's Compliance Advisory Ombudsman (CAO) received complaints from impacted communities following the company's recurring environmental, social, and legal violations. Their investigation found that "the IFC applied a de minimis approach toward assessing each project's supply chain, and that commercial pressures were allowed to prevail and overly influence the categorization of the project, as well as the scope and scale of IFC's environmental and social due diligence"⁵⁹.

The CAO recommended solutions to impacted communities, but more importantly, although the case prompted the IFC to revise its institutional policies regarding palm oil financing, communities in Indonesia continue to face the repeating trauma of land grabs, broken promises, and pollution from other bank financed palm oil producers today. **Indonesian and international banks and financiers including ABN AMRO, Credit Suisse, Citi, HSBC, MUFG Group, Rabobank, among others are currently tied to companies known for driving community conflicts**⁶⁰. Similar to extractive sectors, certain agrocommodities such as palm oil are known to breed conflict, in which community concerns continue to be overlooked if not steamrolled over.

Banks should consider the historical, documented patterns of past abuse against Indigenous Peoples in high-risk sectors, and account for how Indigenous communities have responded to previous or similar projects in nearby regions. Where Indigenous Peoples have clearly spoken out against certain sectors and relevant projects in the past, banks should respect Indigenous Peoples' choice not to engage in any further or future proposed activities or projects.

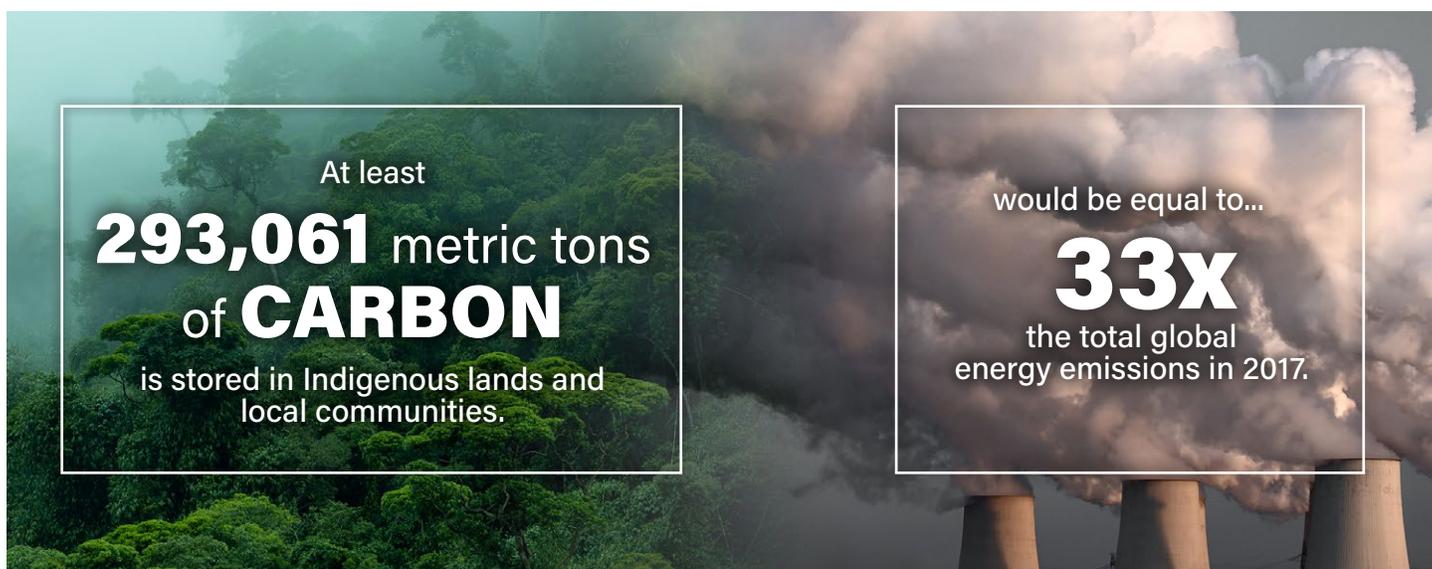
Key Challenges in Ensuring Indigenous Peoples and Local Communities Can Access their Rights

It is important to note that a perceived lack of community opposition does not necessarily indicate community consent to bank financed projects or activities. This is a particularly salient consideration for when banks review the extent of due diligence a client has conducted in assessing social risks or impacts. **Banks should not only be aware and assess the general social impacts of their financing, but should also evaluate whether potentially impacted impoverished or under-resourced communities are able to access their rights - this becomes an even more critical concern if a bank does not require clients to implement FPIC.**

For instance, a lack of legal action or visible opposition to a project cannot be interpreted as a proxy for community consent. Accessing legal support can be challenging in many countries, but it can be even more difficult and financially prohibitive for Indigenous Peoples and local communities. They may not be able to afford fees to file court cases, legal services to inform them of their rights and contest fraudulent land

claims by others; even traveling beyond their local village may be too expensive for many rural peoples. Women are particularly marginalized in land grabs and conflicts, as their primary role in managing natural resources and ecosystems are usually undermined. **The local intellectual traditions and institutions that exist in the local area - such as Indigenous jurisprudence or customary law - are often undercut, or even outright ignored by the state.** This means that the legal power to make decisions about lands, forests and waters is based far away from where they exist, overseen by people who may have never seen, studied, or cared for them.

Furthermore, **communities who resist or problematize harmful and controversial projects may face harassment, intimidation, and criminalization from project developers or government authorities with vested interests. Unjust host country laws or biased policing may criminalize people for exercising free speech, even if they are speaking out against illegal practices.** Affected communities can be



arrested on unfounded charges, such as ostensibly trespassing on their own ancestral lands which they have held for hundreds of years, or on land they already legally own. Without access to lawyers, land defenders face barriers to justice in court, risking prison time, gag orders or fines. Those speaking out may be denied access to employment, vilified, surveilled, beaten, raped or have their property destroyed. **Indigenous Peoples constitute about 5% of the global population, yet represent 30-40% of the documented killings of land and environmental defenders each year⁶¹.**

In other cases, threats or the prospect of coming up against powerful companies, states or individuals, may mean that even if communities oppose projects and operations, they may not feel empowered to protest or take legal action.

Even if a project or company has its own grievance mechanism, it may not be safe or trusted. This is why banks cannot fully rely on project level grievance mechanisms to necessarily resolve community conflicts or concerns. For example, if thousands of people are being forced off their land at gunpoint with the knowledge of the company, they may fail to trust that the same company's grievance process can be trusted to provide a fair outcome.

To address this issue, while banks should push for operational-level grievance processes to be rigorous and fair, and **banks and financiers must also have their own institutional accountability and grievance mechanism as required under the UN Guiding Principles on Business and Human Rights.** Companies and financial institutions may themselves be unaware of complex on-the-ground dynamics. At the same time, at the community-level, it may be risky, if not outright dangerous, to speak out and be willing to provide evidence of negative impacts.



This is why only proceeding where projects, operations, and companies have the Free, Prior, Informed Consent from affected peoples is key. Conversely, it is critical that banks and clients proactively plan for a "no project" scenario if consent is not obtained at any stage.

Ultimately, the projects and operations which are most likely to succeed are those which respond to Indigenous' Peoples and local communities' own planning and vision for their future and the priorities they identify – rather than those imposed by outsiders.

Conclusion

FPIC is consent that is given freely, by people fully informed of the consequences, prior to any decision being made, and according to their own decision-making processes. It is also a unique, human right under international law for Indigenous Peoples, and can be used as a best practice for engaging with local communities. Requiring the implementation of Free, Prior and Informed Consent for affected communities is one of the most effective approaches for protecting people and biodiversity. Although Indigenous Peoples make up just six percent of the world's population, their lands hold 80%

of the world's biodiversity. It is clear that protecting biodiversity requires the protection of Indigenous Peoples and their rights, as the success of biodiversity conservation depends on the protection of Indigenous Peoples. As such, banks and financiers must require FPIC in their policy frameworks, ensure Indigenous Peoples and biodiversity policies are complementary and mutually reinforcing, as well as account for a "no project" scenario at any given stage of a project in order to allow for communities to exercise their rights to consent or oppose financed activities.

KEY TAKEAWAYS

- ◆ Indigenous Peoples are the best guardians of world's biodiversity, in which to protect Indigenous rights is to protect biodiversity
- ◆ FPIC is defined as consent that is given freely, by people fully informed of the consequences, prior to any decision being made, and according to their own decision-making processes
- ◆ FPIC is enshrined under international human rights law for Indigenous Peoples, and is a process for expressing the right of Indigenous Peoples to self-determination
- ◆ FPIC can be used as a best practice for meaningfully engaging with local communities
- ◆ Respecting Indigenous Peoples' right to FPIC is critical in allowing and enabling them to exercise their right to self-determination, and their ability to determine their own economic, social, and cultural development paths
- ◆ Failing to implement FPIC correctly often leads to even more risks and challenges for both banks and their clients
- ◆ Banks and financiers must establish a robust Indigenous Peoples Policy which requires FPIC, if not already developed
- ◆ Banks and financiers should ensure that Indigenous Peoples and biodiversity policies or frameworks are complementary and mutually reinforcing

- ◆ Banks and financiers should prohibit financing to sectors and companies which are well known drivers of human and environmental rights violations, such as the fossil fuel and industrial agribusiness sectors
- ◆ Banks and financiers should establish institutional accountability mechanisms, if not already developed. They should also require any project level grievance mechanism to be fair, accessible, and effective
- ◆ Banks, financiers, and clients should plan for a “no project” option at any stage of a financed activity in order to allow and facilitate proper implementation of FPIC as an iterative process
- ◆ Banks and financiers should consider the historical, documented patterns of past abuse against Indigenous Peoples in high-risk sectors, and account for how Indigenous communities have responded to previous or similar projects in nearby regions
- ◆ Where Indigenous Peoples have clearly and repeatedly spoken out against certain sectors and relevant projects in the past, banks should respect Indigenous Peoples’ choice not to engage in any further or future proposed activities or projects
- ◆ Banks and financiers should explicitly reference and comply with the UN Guiding Principles on Business and Human Rights, in addition to key international law standards on human rights, and Indigenous customary law and protocols
- ◆ Banks and financiers should publicly disclose lending, underwriting, shareholding, and investment in high-risk sectors, including information on ownership and shareholder interests in specific investments in oil palm and other agribusiness companies to ensure transparency, including interests in shadow companies registered in offshore jurisdictions
- ◆ Banks and financiers should establish meaningful incentives for staff and clients to instill and encourage a culture of careful due diligence and responsible decision making on human rights and environmental governance
- ◆ Banks and financiers should include non-compliance clauses in financing agreements, such as the right to interrupt or cancel financing where there is evidence of violation of land rights, FPIC, and/or serious unresolved community grievances (i.e. killings, violence, retaliation, threats, etc)

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