



Respecting Indigenous Rights

An Actionable Due Diligence Toolkit for Institutional Investors

April 2023

Acknowledgements

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- Tulia Machado-Helland, Storebrand Asset Management
- Vemund Olsen, Storebrand Asset Management
- Jimmy Yan, Office of the New York City Comptroller
- Mary Beth Gallagher, Domini Impact Investments LLC
- Isobel Edwards, NN IP (now GSAM)
- Sarah Draper, Global Canopy
- Lina Latincic, Global Canopy
- Pei Chi Wong, Global Canopy
- Josh Brewer, Global Canopy
- Ryan Brightwell, BankTrack
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- Canadian asset manager (anonymous)

The authors also gratefully acknowledge the Indigenous communities, organizations, and advocates with which we have worked over the years.

Cover photo: © Elizabeth Virkina Swanson Andi, member of Santu Urku-Venecia Derecha Kichwa community, Ecuadorian Amazon.

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Published in April 2023 with the support of Amazon Watch.

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Table of Contents

Executive Summary	4
Part A: Fundamentals	5
1. Introduction	6
2. The Investor Imperative to Address Indigenous Rights	8
3. The Rights of Indigenous Peoples	14
4. The Business Responsibility to Respect the Rights of Indigenous Peoples	24
5. Businesses and Indigenous Peoples' Rights	36
Part B: Due Diligence Implementation	44
6. Policy and Governance	45
7. Identify and Assess Actual or Potential Impacts	51
8. Address Actual or Potential Impacts	74
9. Conclusion	82
Annex A: Other Due Diligence Resources	83
Notes	85

Executive Summary

Why are the rights of Indigenous peoples relevant for investors?

In many regions across the world, Indigenous peoples are increasingly experiencing human rights violations, particularly in relation to the extractive, renewable energy, and agribusiness sectors. Institutional investors, as shareholders and providers of capital, play a critical role in driving, enabling, or preventing human rights impacts. The responsibility of investors to conduct due diligence to identify and address actual or potential human and Indigenous rights violations has been established by international standards such as the UN Guiding Principles on Business and Human Rights and the Organization for Economic and Cooperation and Development (OECD) Guidelines for Multinational Enterprises.

In addition to the human rights responsibility and growing expectations on investors to conduct due diligence, there is a strong business imperative for investors to develop policies and processes to identify and address actual or potential human rights impacts on Indigenous peoples to avoid associated risks.

- **Investment risk:** Failing to consider Indigenous rights in due diligence ignores material risks, which has already had financial implications for many businesses and investors, in addition to reputational impacts.
- **Systemic risk:** Indigenous peoples play a key role in protecting the world's biodiversity, and in turn, in combating climate change. It is increasingly recognized that loss of nature and degradation of ecosystems poses a serious systemic risk for the global economy. It is also increasingly acknowledged that the recognition and protection of Indigenous peoples' rights is one of the most effective ways of protecting nature.

This Toolkit

The rights of Indigenous peoples are protected by a robust and growing body of international human rights instruments and jurisprudence. These rights, often not properly understood in the investment community include but are not limited to the right to self-determination; the right to own, control, and use their lands, territories, and resources; and in turn, and the right to give or withhold Free, Prior, and Informed Consent (FPIC) to matters affecting their lives, rights, and territories. This Toolkit intends to fill this gap by providing practical guidance and tools for institutional investors to learn about and meet their responsibility to respect Indigenous peoples' rights, and in turn, avoid financial, and reputational risks. The Toolkit consists of two parts, both of which include case studies.

- **Part A: Fundamentals** provides an overview on the rights of Indigenous peoples, as recognized by international human rights instruments and jurisprudence, and on the business responsibility to respect Indigenous rights laid out in international standards.
- **Part B: Due Diligence Implementation** provides guidance for institutional investors on incorporating Indigenous rights into policies and management systems, as well as practical tools for identifying and addressing actual or potential Indigenous rights impacts, including data sources, due diligence questions, and red flags in company practices and policies.



Part A: Fundamentals

1. Introduction

1.1 Background

While the rights of Indigenous peoples are protected by a robust and growing network of international human rights instruments and jurisprudence, and to a growing degree by private sector standards, there is a significant implementation gap, as demonstrated by the experience of Indigenous peoples. The expansion of business activities into Indigenous lands without the Free, Prior, and Informed Consent (FPIC) of Indigenous peoples, is reflective of and drives increasing adverse impacts on the human rights of Indigenous peoples.¹ According to the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, under extant international human rights law, all businesses, including institutional investors, have a responsibility to respect human rights. Accordingly, institutional investors have a responsibility to use their leverage to prevent, mitigate, and enable remedy for actual or potential human rights impacts on Indigenous peoples.

Ensuring that Indigenous rights are respected is not only a human rights imperative, but also critical from a climate, biodiversity- and international environmental law perspective. As research has shown, the protection of Indigenous rights is central to the protection of global biodiversity and the climate.² As investments on or near Indigenous lands increase, failing to ensure that Indigenous rights are respected means investors risk failing to deliver on their climate and environment commitments. They also risk increasingly being involved in human rights abuses through their investee companies or through the value chains of their investee companies. Investors' failure to understand Indigenous peoples' rights also ignores material business risks, which have already cost investors and companies billions in cost overruns, delays, and project cancellation, in addition to reputational damage.³



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1.2 This Toolkit

This Toolkit provides actionable steps for institutional investors, including asset owners (such as pension funds and insurance companies) and asset managers, with respect to Indigenous rights due diligence. The Toolkit builds on international human rights and environmental law standards and jurisprudence; a wider framework on the business responsibility to respect human rights, including but not limited to the UN Guiding Principles on Business and Human Rights, the OECD Guidelines for Multinational Enterprises, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), emerging international legal frameworks, jurisprudence; and an emerging body of Indigenous peoples' own laws, protocols, and standards related to business conduct.

The Toolkit is not a standalone guide covering the full range of human rights; it is intended to supplement, and be used in tandem with, existing and emerging standards and guidance on the investor responsibility to respect human rights, such as the [Investor Toolkit on Human Rights](#) and the [Stepping Up](#) due diligence guidance.

While this Toolkit is focused on ensuring that investors and businesses meet their responsibility to respect the rights of Indigenous peoples and do no harm, we also consider it critical that businesses, in addition to governments, promote Indigenous peoples' wellbeing and right to freely pursue their economic, social, and cultural priorities. Moreover, we recognize that existing standards, such as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines, have limitations;⁴ as such, the due diligence approach proposed in this Toolkit does not diminish the need of governments to ensure legal recognition of Indigenous peoples' rights to their lands, territories, and resources, and to enact mandatory due diligence regulation for businesses and investors.



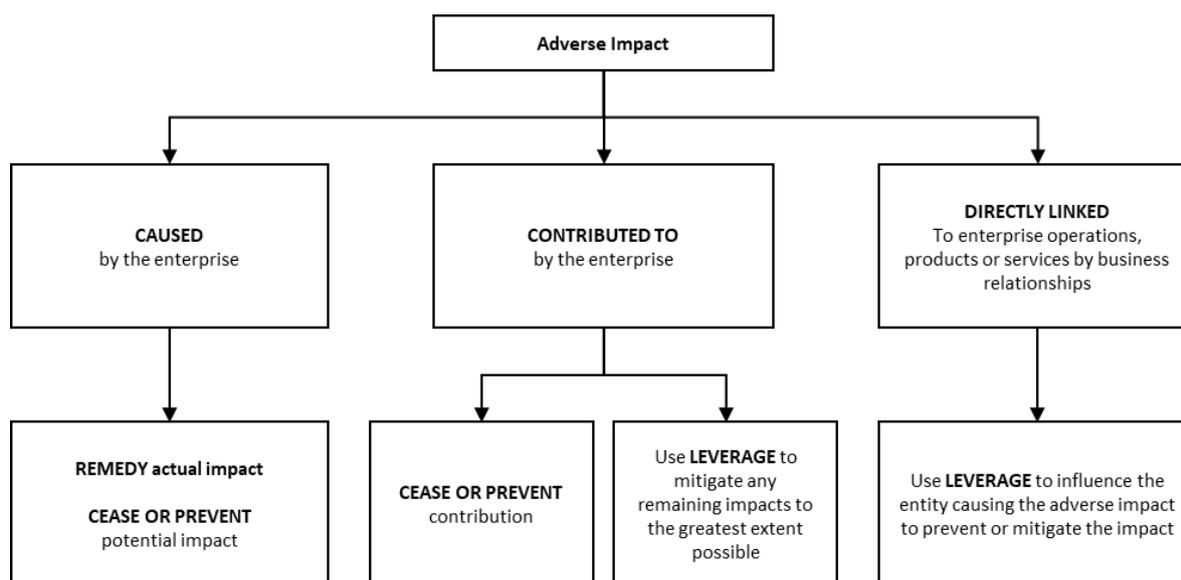
Forest fire over degraded area in an ongoing deforestation process, in Novo Aripuanã, Amazonas state. © Victor Moriyama/Amazon in Flames Alliance

2. The Investor Imperative to Address Indigenous Rights

The investor responsibility to respect human rights

According to the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, all businesses, including institutional investors, have a responsibility to respect human rights. These frameworks have established that institutional investors can contribute to or be linked to adverse human right impacts by their business relationships, e.g., by shareholding, providing loans, or investing in bonds. Where institutional investors contribute to or are linked to adverse human rights impacts by their business relationships, these frameworks stipulate that investors should use their leverage to cease, prevent, and mitigate human rights impacts. The understanding of the human rights responsibility of investors is still in a very nascent stage. However, it has been clearly established by the UN Guiding Principles and the OECD Guidelines that investors can contribute to or be directly linked to adverse human rights impacts.⁵

Figure 1. Responsibility of business enterprises under the OECD Guidelines.



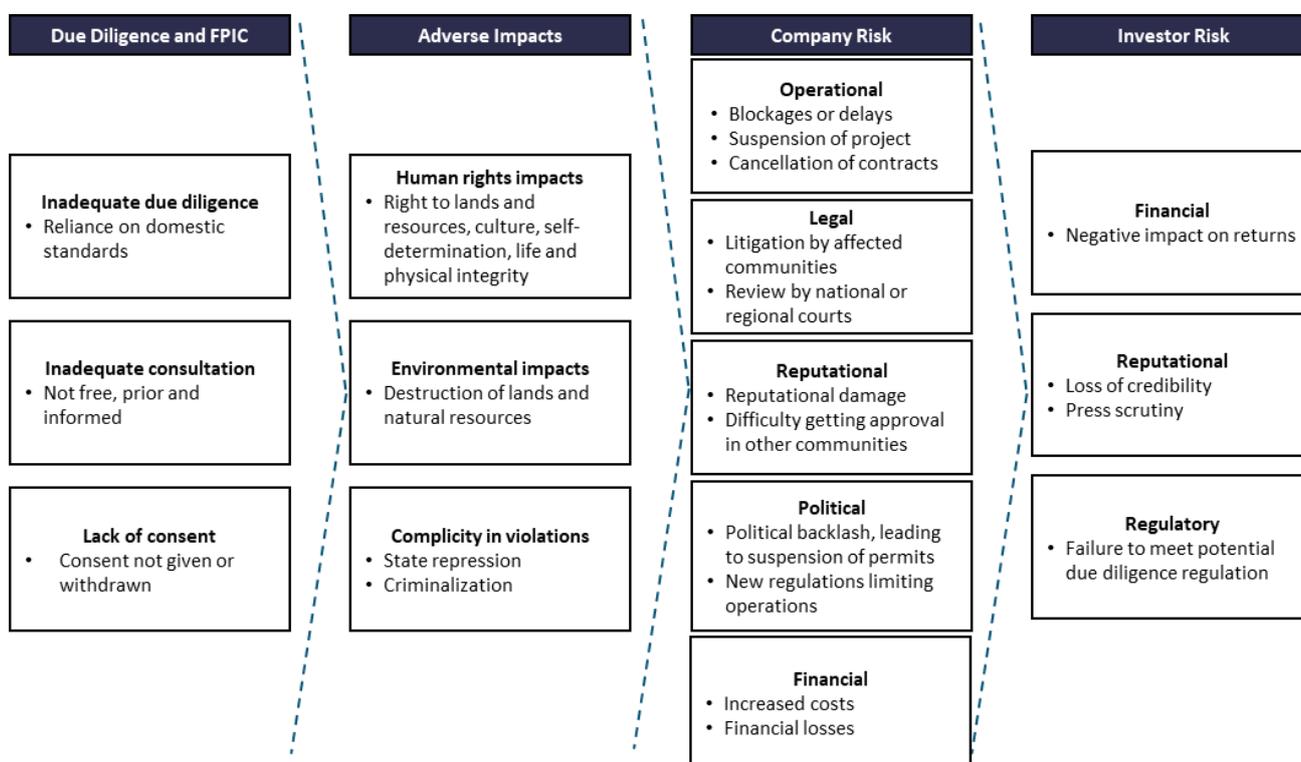
Source: Adapted from the OECD Guidance Responsible Business Conduct for Institutional Investors.

It can be expected that in coming years these responsibilities will be further defined, and interpreted more comprehensively, through upcoming mandatory due diligence regulation, case law, and other work under human rights law. For example, law firm Hogan Lovells considers that a 2019 decision by the UK Supreme Court increases the likelihood that private equity funds could be liable for human rights impacts of portfolio companies under common law in the UK, including for funds with assets in common law jurisdictions, such as Anglophone Africa, the Indian Subcontinent, Australasia and North America.⁶ Investors are also increasingly recognizing their human rights responsibility; in the European Union, various financial institutions have called for financial institutions to be included in upcoming due diligence regulation.⁷

Failure to respect Indigenous rights can lead to material risks for businesses and investors

By failing to understand and conduct due diligence on Indigenous rights, investors may be ignoring material risks that may affect investee companies and, ultimately, investors. Numerous cases exist in which failure to respect Indigenous rights have had material negative impacts on businesses, such as financial losses, reputational damage, and cancellation of projects.⁸ In this regard, a study that examined the risks of community opposition and risks of Indigenous rights violations of 330 oil, gas, and mining projects, found that “leaders,” outperformed “laggards” by 4.2% in annualized returns between 2010 and 2014.⁹

Figure 2. Illustration of how failure to respect Indigenous rights may lead to investor risk



Source: Author’s elaboration

Companies and projects that do not have adequate due diligence processes and consent of Indigenous peoples risk underestimating the ensuing human rights and environmental impacts, which in turn can cause unforeseen risks for companies, such as:

- **Operational delays, increased production costs, and permanent obstruction of projects:** Operational risk can stem from community protests and blockades, which may delay or even permanently obstruct a project. This happened with oil company GeoPark, which alleged it lost at least US \$70.8 million in investment in a failed oil project in the Peruvian Amazon, where Achuar and Wampis communities had vehemently opposed oil companies for decades.¹⁰
- **Reputational damage, which can reduce access to capital and demand for products:** Negative publicity caused by involvement in Indigenous rights abuses can cause reputational damage and erode social license to operate, as illustrated by the case of the Standing Rock

Sioux Tribe’s fight against the siting of the Dakota Access Pipeline (DAPL) on their treaty territory.¹¹

- **Legal and related obstacles and costs:** Indigenous peoples adversely impacted by a project may initiate legal proceedings that could delay, change, or cause the cancellation of a project, such as local courts overturning concessions based on land rights violations, or lawsuits resulting from Indigenous rights abuses committed in connection with projects and activities.

The risks of investing in businesses that fail to respect Indigenous peoples’ rights are increasingly being recognized by investors. For example, BlackRock’s commentary on natural capital, in relation to its 2023 investment stewardship engagement priorities,¹² states that:

*[...] for companies whose operations impact Indigenous Peoples’ lands and legal rights, a failure to obtain, in advance and on an on-going basis, free, prior and informed consent (FPIC) from those Peoples may expose companies to increased legal, reputational or regulatory risk, in light of various local and international laws and norms governing these relationships.*¹³

Companies or projects that fail to respect Indigenous peoples’ rights may also increasingly find it harder to get insurance for their activities. The [statement of commitment](#) from the UN-convened Net Zero Insurance Alliance includes a commitment to promote human rights, including the right to FPIC as articulated in the UN Declaration on the Rights of Indigenous Peoples.¹⁴ Several Insurance companies have started to adopt policies on Indigenous rights and Free, Prior, and Informed Consent, including, Axis,¹⁵ Allianz,¹⁶ and Swiss Re.¹⁷ In October 2022, Axis explicitly committed not to provide insurance for projects undertaken on Indigenous territories without their FPIC.

In some industries it is common practice to include references to Indigenous rights in formal human rights policies.¹⁸ However, corporate policies on Indigenous rights are often ambiguous or inadequately implemented.¹⁹ Thus, when conducting due diligence, investors should go beyond looking solely at corporate policies and disclosures, and triangulate such information with other sources of information, in order to identify and avoid the associated risks.



San Carlos, Ecuador, a community based around petroleum production and suffering one of the highest cancer rates in Ecuador. © Amazon Watch

Case Study: Dakota Access Pipeline Reputational Impact for Financial Institutions

In July 2016, the Standing Rock Sioux Tribe protested and filed a lawsuit against Dakota Access Pipeline (DAPL), to which they had not given their Free, Prior, and Informed Consent. As reports of violence, threats, and intimidation against protestors spread through news channels and social media, the protest gained worldwide support, leading to pressure on banks to divest from the project.

In October 2016, the Standing Rock Sioux Tribal Council ended their relationships with financial institutions that invested in, or otherwise financially supported, any aspect of the Dakota Access Pipeline. Many Indigenous and non-Indigenous civil society organizations also urged banks to divest from the project. In November 2016, a letter signed by over 500 organizations was sent to the seventeen banks involved in a loan arrangement to DAPL, demanding the banks put payouts to the project on hold.²⁰ It is alleged that this led to several banks divesting from the loan, and institutional investors, including Nordea, KLP, and Storebrand, selling their shares.²¹

As a result, Energy Transfer Partners, the operating company of the Dakota Access Pipeline, not only suffered reputational damage, but also reportedly incurred high financial costs followed by a drop in share price. The original estimated cost of the project was \$3.8 billion; however, First Peoples Worldwide estimates that the actual cost was closer to \$7.5 billion.²²



Kichwa of Sarayaku visit to Standing Rock Sacred Stone Camp. © Amazon Watch

Case Study: EDF Wind Project Canceled in México

In 2017, the French company EDF Renewables Mexico was granted construction permits for the Guuna Sicarú project in Mexico, without having conducted appropriate consultation with the Zapotec Indigenous community of Union Hidalgo. After community members of the Zapotec peoples raised concerns that the project had not undergone appropriate consultation processes, the Mexican government initiated a consultation process that was rife with threats, intimidation, and attacks against human rights defenders. After delays and civil lawsuits were brought against EDF, the Mexican Ministry of Energy canceled the contract with EDF Renewables México,²³ and suspended the consultation, thus cancelling the project.²⁴

Case Study: KGHM Ajax Mine rejected by Indigenous legal process

KGHM Ajax Mining Inc. proposed an open pit gold and copper mine near Kamloops, BC, Canada. The mine would have impacted Jacko Lake, also known as Pípsell, a sacred site to the Stk'emlupsemc te Secwepemc Nation (SSN) in whose territory the mine was proposed. The SSN conducted a review process pursuant to their own unextinguished Indigenous laws and rejected the mine in 2017.²⁵ Following the SSN decision, the BC and federal governments both rejected the mine through their own processes.²⁶

Protecting Indigenous rights is critical for addressing systemic risks arising from nature and biodiversity loss

Nature loss is increasingly being recognized as a systemic risk for businesses, investors, and society at large.²⁷ A report by the World Bank, for example, estimates that biodiversity loss and reduction of ecosystem services could lead to significant declines of the world's GDP in 2030, including over 10% in low-income and lower-middle income countries.²⁸ It is also increasingly recognized that protecting Indigenous peoples' rights is one of the most effective ways of halting nature loss.²⁹

Research across various countries and regions find that forests in Indigenous territories are better conserved,³⁰ and that legal recognition of Indigenous rights and territories is critical for preventing deforestation.³¹ Research has also found that projects that fail to respect Indigenous peoples' rights and needs are associated with greater environmental damage.³² In this context, the Forest Declaration Assessment, a multi-stakeholder initiative focused on meeting 2030 deforestation goals, has recommended that in order to meet the goals set out in the New York Declaration on Forests, governments should recognize Indigenous peoples' rights and enforce mandatory FPIC, in addition to other interventions.³³ The role and rights of Indigenous peoples are also recognized by the Convention on Biological Diversity and the Kunming Montreal Global Biodiversity Framework.

Some investors have also recognized the key role that Indigenous rights play in biodiversity protection. Storebrand's 2022 [Policy on Nature](#), for example, states:

*Securing Indigenous Peoples' customary rights is widely recognized as the most effective way of protecting biodiversity and ensuring sustainable use of nature. Storebrand Asset Management expects companies to respect Indigenous Peoples' human rights, including rights to lands, territories, and resources, and to apply international best practice in seeking their Free, Prior, and Informed Consent for business activities that may affect them.*³⁴

While many Indigenous peoples have taken leadership in protecting nature, Indigenous land and environmental defenders face an uphill battle in protecting nature, as they often face serious threats to their security and life. Indigenous land and environmental defenders are frequently the target of attacks, including threats and assassinations, often in relation to business activities.³⁵ As such, efforts to address nature-related systemic risks must also ensure that Indigenous peoples and their rights, are recognized, protected, and respected.

Government non-compliance with international and domestic law increases the risk of Indigenous rights violations

While some companies have committed to respect internationally recognized rights of Indigenous peoples, other companies simply seek to comply with national legislation or government requirements. However, governments often fail to adhere to their own international and domestic obligations, increasing the risk of violations of Indigenous peoples' rights and the subsequent involvement of international, regional, or domestic courts.

Several examples exist in which international, regional, and domestic courts have ruled that concessions or permits granted by governments to private-sector actors were illegal and have ordered national governments to suspend concessions due to failure to respect Indigenous peoples' rights.³⁶ Such court decisions do not solely reference instruments explicitly related to Indigenous peoples, such as the UN Declaration on the Rights of Indigenous peoples (UNDRIP) but also a multitude of international instruments, and domestic regulation.

Case Study: Court Ruling on Mining Concessions in Ecuador

In 2017, the Cofán de Sinangoe people filed a complaint with the Constitutional Court of Ecuador due to 20 mining concessions being granted to miners without consultation and FPIC of the affected Indigenous communities. While the government argued that there was no requirement to consult, the Constitutional Court of Ecuador rejected the State's argument and ruled that the concessions were illegal.³⁷ Some of the reasonings of the court include:

- Indigenous rights derive from traditional ownership, not from the State.
- Direct adverse effects on Indigenous peoples due to unauthorized intrusion.
- The right to a healthy environment had been violated.

3. The Rights of Indigenous Peoples

This section provides an overview of Indigenous peoples' rights as enshrined in international human rights law, along with case studies, to illustrate the relevance of these rights for businesses and investors.

3.1 Who are Indigenous peoples?

Indigenous peoples inhabit all continents of the world except Antarctica, speak three quarters of the world's approximately 6,000 languages, and live in over 70 countries worldwide. The UN-system body has not adopted an official definition of Indigenous peoples, given the diversity of Indigenous peoples. In some contexts, other terms may be used, such as Tribes, First Peoples/Nations, Aboriginals, Ethnic groups, Adivasi, or Janajati.³⁸ Investors should also be aware that in many parts of the world, the history of Indigenous peoples has been marked by efforts to negate or erase their identities.³⁹

The Chairperson of the Working Group on Indigenous Populations states that the factors considered relevant to the understanding of the concept of "Indigenous" include:

- (a) Priority in time, with respect to the occupation and use of a specific territory.*
- (b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws, and institutions.*
- (c) Self-identification, as well as recognition by other groups, or by state authorities, as a distinct collectivity.*
- (d) An experience of subjugation, marginalization, dispossession, exclusion, or discrimination, regardless of whether these conditions persist.⁴⁰*

In Africa, the use of the term Indigenous has focused less on aboriginality and more on groups whose modes of living differ significantly from dominant society, and whose cultures are under threat. The African Commission's Working Group of Experts on Indigenous Populations/Communities has suggested that the focus in an African context should instead be on:

- (a) Self-definition as Indigenous and distinctly different from other groups within a State.*
- (b) Special attachment to and use of their traditional land, whereby, their ancestral land and territory has a fundamental importance for their collective physical and cultural survival as peoples.*
- (c) Experience of subjugation, marginalization, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life, or modes of production than the national hegemonic and dominant model.⁴¹*

These frameworks should be used as reference, rather than as absolute definitions or requirements. In certain regions or countries, Indigenous peoples represent majority populations, such as in Greenland,⁴² and in most Pacific Island countries.⁴³ In Asia, various terms are used for identifying Indigenous peoples, including Indigenous peoples, ethnic minorities, Tribes, or Tribal groups, Indigenous communities, hill tribes, Adivasis, Janajatis, and Scheduled Tribes.⁴⁴

Indigenous peoples in voluntary isolation

Indigenous peoples living in voluntary isolation are “indigenous peoples or subgroups thereof that do not maintain regular contact with the majority population and tend to shun any type of contact with outsiders.”⁴⁵ The meaning of “voluntary” can be controversial, as the decision to remain in isolation may be a survival strategy in response to surrounding pressures rather than a choice of free will.⁴⁶ It is known that they exist in the Americas; West Papua, Indonesia; and on India’s North Sentinel Island.⁴⁷ In the Americas, it is known that they exist in Bolivia, Brazil, Colombia, Ecuador, Paraguay, Peru, and Venezuela, and there are indications of their presence in Guyana and Suriname. Although it is difficult to know the exact numbers, estimates refer to approximately 200 distinct peoples.⁴⁸

3.2 The rights of Indigenous peoples

The rights of Indigenous peoples are protected under core human rights treaties and are also explicitly recognized by several international instruments, including but not limited to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and the International Labor Organization Convention 169 (ILO Convention 169). Indigenous rights include the universal individual rights of all people, as well as the collective rights of Indigenous peoples, including the overarching right to self-determination, as affirmed under the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the UNDRIP.

The UNDRIP elaborates on existing human rights instruments, international law, and jurisprudence as they apply to Indigenous peoples, considering their distinctive cultures and histories, including Indigenous peoples’ connection to the environment and traditional lands, and a legacy of dispossession, discrimination, violation of their human rights, and the non-recognition of their own political and cultural institutions.⁴⁹ The Declaration represents the clearest articulation of Indigenous peoples’ rights and is recognized by treaty bodies as an interpretive guide for core human rights treaties as they pertain to Indigenous peoples.⁵⁰ The Declaration sets out the minimum standards for the survival, dignity, and well-being of the Indigenous peoples of the world (UNDRIP Article 43). The Declaration addresses both individual and collective rights of Indigenous peoples, including the right to self-determination, culture, lands, territories, and resources.



Birds flying over Amazon rainforest canopy. © André Dib/Amazon Watch

Box 1. Primary international sources of Indigenous peoples' rights

- [United Nations Declaration on the Rights of Indigenous Peoples \(UNDRIP\)](#)
- [International Labour Convention \(ILO\) on the Rights of Indigenous and Tribal Peoples in Independent Countries, No. 169 \(ILO Convention 169\)](#)
- [International Covenant on Civil and Political Rights \(ICCPR\)](#)
- [International Covenant on Economic, Social and Cultural Rights \(ICESCR\)](#)
- [International Convention on the Elimination of All forms of Discrimination \(ICERD\)](#)
- [Convention on the Elimination of all Forms of Discrimination against Women \(CEDAW\)](#)
- [Convention on the Rights of the Child \(CRC\)](#)
- [American Convention on Human Rights](#)
- [American Declaration on the Rights of Indigenous Peoples](#)
- [African Charter on Human and Peoples' Rights](#)
- [The Convention on Biological Diversity](#)
- [Rio Declaration on Environment and Development](#)
- [Escazú Agreement](#)
- [Paris Agreement](#)
- Judicial and treaty body decisions and communications interpreting the rights listed in many of the aforementioned treaties and declarations.

Note: Many of these instruments do not explicitly address Indigenous peoples; it is their interpretation, often considering the UNDRIP, that has led to the development of the current normative framework of Indigenous peoples' rights.

The UNDRIP was adopted in 2007, reflecting the recognition accorded under international human rights law of Indigenous peoples' right to self-determination, and by extension, the requirement to obtain their Free, Prior, and Informed Consent. Initially, four countries – Canada, United States, New Zealand, and Australia – voted against the declaration; however, by 2012, all of them reversed their position. The universal support of the UNDRIP affirms a consensus on the recognition of Indigenous peoples' individual and collective rights.⁵¹ Several of the provisions in the UNDRIP are reflective of customary international law, further re-affirming the rights of Indigenous peoples and associated obligations and responsibilities of States and businesses.⁵² In addition, several countries have incorporated, or are planning to adopt, provisions of the Declaration into national law.⁵³

Individual and collective rights: The UNDRIP recognizes Indigenous peoples' right to the “full enjoyment, as a collective or as individuals, of all human rights and the fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and International Human Rights Law” (UNDRIP Article 1). The recognition of collective rights of Indigenous peoples is fundamental for Indigenous peoples' physical and cultural survival as peoples.⁵⁴

Right to self-determination: The UNDRIP affirms Indigenous peoples' right to self-determination which means they have the right to freely determine their political status and freely pursue their economic, social, and cultural development (UNDRIP Article 3). In exercising their right to self-determination, Indigenous peoples have the right to autonomy or self-government in matters relating to their internal and local affairs (UNDRIP Article 4).

The Special Rapporteur on the Rights of Indigenous Peoples has described self-determination as “a foundational right, without which Indigenous peoples’ other human rights, both collective and individual, cannot be fully enjoyed.”⁵⁵ Similarly, the Expert Mechanism on the Rights of Indigenous Peoples has stated that “all the rights in the Declaration are indivisible, interdependent, and grounded in the overarching right to self-determination.”⁵⁶

The right to self-determination means that the decision of Indigenous peoples in voluntary isolation to remain isolated must be respected.⁵⁷ If this right is not respected, it may lead to violations of the right to life and put their physical survival at risk.⁵⁸

Right to non-discrimination: The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) commits States to eliminate all forms of racial discrimination and promote understanding among races. The UNDRIP specifies that “Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity” (UNDRIP Article 2). This means that States have an obligation to ensure that their constitution, regulation, or policies do not discriminate against Indigenous peoples.⁵⁹

International human rights law as it applies to Indigenous peoples is closely linked to the right to non-discrimination. The Committee on the Elimination of Racial Discrimination (CERD) has recognized that Indigenous peoples have been discriminated against and deprived of their human rights and lost their lands and resources; as such, the Committee has called upon State Parties to “ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.”⁶⁰ It is also linked to land rights of Indigenous peoples; as the Inter-American Court of Human Rights has stated, “Non-recognition of the equality of property rights based on indigenous tradition is contrary to the principle of non-discrimination.”⁶¹

Cultural rights: The UNDRIP, and international human rights more broadly, recognizes Indigenous peoples’ right to:

- Maintain and strengthen their distinct cultural institutions.
- Not be subjected to forced assimilation or destruction of their culture.
- Practice their cultural traditions and customs.
- Maintain, protect, and develop the past, present, and future manifestations of their cultures.
- Manifest, practice, develop, and teach spiritual and religious traditions, customs, and ceremonies.
- Maintain, control, protect, and develop their cultural heritage, traditional knowledge, and cultural expression.

Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) addresses cultural rights. The Committee on Economic, Social and Cultural Rights (CESCR) has specified that the *communal* dimension of Indigenous peoples’ cultural life is indispensable to their existence, development, and well-being. In this regard, the Committee has stated that “Indigenous peoples’ cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity.”⁶²

Article 27 of the International Convention on Civil and Political Rights specifies that ethnic, religious, or linguistic minorities “shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” In this regard, the United Nations Human Rights Committee (CCPR) considers that Indigenous peoples have the right to effective participation in decision-making in matters that affect their culturally significant economic activities, “which requires not mere consultation but the free, prior, and informed consent of the members of the community.”⁶³

Case study: Right to non-discrimination and right to culture of the Sami people in Norway

In 2010, the Norwegian Water Resources and Energy Directorate issued licenses for the Roan and Storheia wind farms (among others). Although Indigenous Sami peoples of Norway objected to the project, stating that it violated their cultural rights to reindeer herding, the Norwegian Ministry of Petroleum and Energy rejected the position of the Sami people and allowed construction to start.

In October 2021, the Supreme Court of Norway ruled that the project violated the rights of Sami peoples to enjoy their own culture, citing Article 27 of the International Covenant on Civil and Political Rights. In addition, the ruling cited Article 5 (d) (v) of the International Convention on the Elimination of All Forms of Racial Discrimination, which specifies States’ obligation to eliminate racial discrimination in all its forms and to guarantee the right of everyone to equality before the law, in the enjoyment of the right to own property alone as well as in association with others.⁶⁴

Rights to land, territories, and natural resources: International human rights law recognizes Indigenous peoples’ 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 (UNDRIP Article 26; ILO Convention 169 Articles 13 & 14). This means that Indigenous peoples’ land rights are inherently derived through their traditional ownership, irrespective of whether it has been recognized formally by the State. Moreover, the UNDRIP, and international human rights law more broadly, recognize Indigenous peoples’ right to:

- Maintain and strengthen their distinctive spiritual relationship with their lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.
- Redress, by means that can include restitution or, when this is not possible, just, fair, and equitable compensation for the lands, territories, and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used, or damaged without their Free, Prior, and Informed Consent.
- The conservation and protection of the environment and the productive capacity of their lands or territories and resources.
- Determine and develop priorities and strategies for the development or use of their lands and territories and other resources.
- 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.

Indigenous peoples' collective rights to land, territories, and natural resources are intrinsically linked and fundamental to "their cultures, their spiritual life, their integrity, and their economic survival,"⁶⁵ as recognized by the Inter-American Court on Human Rights. The Court recognizes that, "For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations,"⁶⁶ and "to prevent their extinction as a people."⁶⁷

Right to life, security, and physical integrity: Every human being has the right to life and security (UDHR Article 3, ICCPR Article 6, ICCPR Article 9). The UNDRIP also recognizes that Indigenous peoples have "the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group" (UNDRIP Article 7).

Indigenous peoples and Indigenous human rights defenders disproportionately experience violations of these rights, often by State and private sector actors. The harms of attacks against Indigenous people and community leaders are of collective nature, particularly where Indigenous peoples' own representatives are targeted.⁶⁸

The rights of Tribal peoples

Some non-Indigenous peoples also have rights similar to those of Indigenous peoples, including collective rights to land and property. The rights of Tribal peoples have been recognized by several international instruments, including but not limited to the ILO Convention 169.

Whereas the terms "IPLCs" or "Indigenous peoples and local communities," are sometimes used, such usage may challenge the understanding and protection of the specific rights of Indigenous peoples. Whereas Indigenous peoples are collectively distinct peoples, the term local community is not well-defined, and could consist of any community, such as communities in proximity to Indigenous territories, whose interests may be in direct opposition to Indigenous peoples' interests.⁶⁹

While this Toolkit focuses on the rights of Indigenous peoples specifically, some of the due diligence guidance provided in Part B of this Toolkit may also be useful for due diligence with respect to Tribal peoples, or other people with collective land tenure systems and rights, many of whom face a comparable situation to that of Indigenous peoples. The [Land Rights Standard](#) elaborates further on this topic.

Case Study: Saramaka vs Suriname

The Saramaka people are Afro-descendant people that have been living on their traditional territory in Suriname since the 1700s. After the government of Suriname granted mining and logging concessions on this territory to private companies, the Saramaka people filed a complaint with the Inter-American Court of Human Rights. The Court considered that members of Saramaka people make up a Tribal community that "have distinct social, cultural, and economic characteristics, including a special relationship with their ancestral territories, that require special measures under international human rights law in order to guarantee their physical and cultural survival." As such, the Court ruled, *inter alia*, that the Saramaka people have collective rights to their territories and ordered the State of Surinam to delimit, demarcate, and grant them collective land titles.⁷⁰

3.3 Free, prior, and informed consent

FPIC safeguards substantive rights of Indigenous peoples

The concept of Free, Prior, and Informed Consent (FPIC) is a human rights norm that seeks to safeguard Indigenous peoples' collective rights and cultural identity, and operationalize the right to self-determination of Indigenous peoples, considering their particular historical, cultural, and social situation.⁷¹ FPIC is grounded in the overarching right to self-determination as well as on the need to dismantle structural discrimination of Indigenous peoples. FPIC as a human rights norm also seeks to restore Indigenous peoples' cultural integrity, pride, and to redress the power imbalance between Indigenous peoples and States.⁷² As noted by the Special Rapporteur on the rights of Indigenous peoples, the primary rights that may be affected by external actors, which are safeguarded by the right to FPIC include:

*[...] in addition to rights of participation and self-determination, rights to property, culture, religion and non-discrimination in relation to lands, territories and natural resources, including sacred places and objects; rights to health and physical well-being in relation to a clean and healthy environment; and the right of indigenous peoples to set and pursue their own priorities for development, including with regard to natural resources.*⁷³

The right to FPIC is affirmed by international human rights treaty bodies including The Human Rights Committee (CCPR),⁷⁴ the Committee on the Elimination of Racial Discrimination (CERD),⁷⁵ the Committee on Economic, Social and Cultural Rights (CESCR),⁷⁶ the Committee on the Elimination of Discrimination Against Women (CEDAW),⁷⁷ and the Committee on the Rights of Child (CRC).⁷⁸

While expert bodies view FPIC as both a process and a right that enables Indigenous peoples to exercise their overarching right to self-determination, self-governance, and to own, control, and use their lands, territories and resources, common industry practice has too often interpreted FPIC in ways that are inconsistent with international human rights law, e.g., by treating FPIC as a merely a consultation.⁷⁹

Broadly speaking, FPIC is required if “a measure or project is likely to have an impact on indigenous peoples’ lives or land, territories, or resources,”⁸⁰ and in relation to matters fundamental to the “rights, survival, dignity, and well-being” of Indigenous peoples;⁸¹ matters that may put Indigenous peoples’ cultural resources associated with their way of life and cultural expression at risk;⁸² matters that may affect their cultural, intellectual, religious, and spiritual property;⁸³ in relation to access to traditional knowledge of Indigenous peoples;⁸⁴ in relation to storage or disposal of hazardous materials on Indigenous territories, and in relation to relocation of Indigenous peoples.⁸⁵

Pursuant to the business responsibility to avoid infringing on human rights, there is no reason to pre-emptively define only a set of narrow situations where FPIC is required, or to pre-emptively define situations where FPIC will not be required. As the Expert Mechanism on the Rights of Indigenous Peoples has stated, “The perspective of the [I]ndigenous peoples concerned on the potential broader impact” is the starting point for determining whether a project affects them, and in turn, to determine whether FPIC is required.⁸⁶ It should also be noted that FPIC is not a standalone right but must be understood in the context of the substantive rights that it safeguards.⁸⁷

In the case of Indigenous peoples in voluntary isolation, they exercise their right to FPIC by their decision to not maintain contact. The Expert Mechanism on the Rights of Indigenous Peoples has noted that any contact with Indigenous peoples in voluntary isolation that is not initiated by themselves would be a violation of their human rights, and that seeking consent by force or coercion would lead to serious human rights violations, including the crime of genocide.⁸⁸

Elements of a legitimate FPIC process

The right to FPIC also means Indigenous peoples have the right to be consulted about proposals that may affect their rights and, to participate in decision-making. A consultation is a dialogue and negotiation over the course of a project, which should be undertaken in cooperation with Indigenous peoples where Indigenous peoples have the right to influence the outcome of decision-making processes that affect them. Indigenous peoples' right to participate goes beyond consultation and includes the development of Indigenous peoples' own initiatives and the right to decide their own priorities for exercising control over their own economic, social, and cultural development.⁸⁹

Consultations to obtain consent should be carried out in good faith, and must meet all the thresholds of being free, prior, and informed. The advice of the Expert Mechanism on the Rights of Indigenous Peoples regarding FPIC is summarized below.⁹⁰

Free:

- The context or climate of the process should be free from intimidation, coercion, manipulation, and harassment, ensuring that the consultation process does not limit or restrict Indigenous peoples' access to existing policies, services, and rights.
- Features of the relationship between the parties should include trust and good faith, and not suspicion, accusations, threats, criminalization, violence towards Indigenous peoples or prejudiced views towards them.
- Indigenous peoples should have the freedom to be represented as traditionally required under their own laws, customs, and protocols, with attention to gender and representation of other sectors within Indigenous communities. Indigenous peoples should determine how and which of their own institutions and leaders represent them. They should therefore enjoy the freedom to resolve international representation issues without interference.
- Indigenous peoples should have the freedom to guide and direct the process of consultation; they should have the power to determine how to consult and the course of the consultation process. This includes being consulted when devising the process of consultation per se and having the opportunity to share and use or develop their own protocols on consultation. They should exert sufficient control over the process and should not feel compelled to get involved or continue.
- Indigenous peoples should have the freedom to set their expectations and to contribute to defining methods, timelines, locations, and evaluations.

Prior:

- Involving Indigenous peoples as early as possible. Consultation and participation should be undertaken at the conceptualization and design phases and not launched at a late stage in a project's development when crucial details have already been decided.
- Providing the time necessary for Indigenous peoples to absorb, understand and analyze information and to undertake their own decision-making processes.

Informed:

- The information made available should be both sufficiently quantitative and qualitative, as well as objective, accurate and clear.
- The information should be presented in a manner and form understandable to Indigenous peoples, including translation into a language that they understand. Consultations should be undertaken using culturally appropriate procedures, which respect the traditions and forms of organization of the Indigenous peoples concerned. The substantive content of the information should include the nature, size, pace, reversibility and scope of any proposed project or activity; the reasons for the project; the areas to be affected; social, environmental, and cultural impact assessments; the kind of compensation or benefit-sharing schemes involved; and all the potential harm and impacts that could result from the proposed activity.
- Adequate resources and capacity should be provided for Indigenous peoples' representative institutions or decisions-making mechanisms, while not compromising their independence. Such institutions or decision-making processes must be enabled to meet technical challenges — including, if necessary, through capacity-building initiatives to inform the Indigenous peoples of their rights in general — prior or parallel to the process of consultation.



Villagers in Air Palawhan, Bengkulu, Sumatra, Indonesia are indigenous to Java but were relocated to Sumatra. © Jeff Conant/Friends of the Earth U.S.

Consent

Consent is a principle that enables Indigenous peoples to exercise their right self-determination and their right to control, own, use or develop their lands, territories and resources,⁹¹ and their right to make their own collective decisions regarding matters that affect them.⁹² Indigenous peoples' decision to give or withhold consent is a result of "their assessment of their best interest and that of future generations with regard to a proposal."⁹³ This includes "the right to give or withhold their free, prior, and informed consent."⁹⁴ Consent can only be received when it fulfills the three threshold criteria of having been free, prior, and informed, and is evidenced by an explicit statement of agreement.⁹⁵ Because FPIC safeguards collective rights of Indigenous peoples, it cannot be exercised by individuals.⁹⁶

Consent should be consistent with Indigenous peoples' own laws, customs, protocols, and best practices.⁹⁷ In practice, this often means that Indigenous people, as well as their representative institutions, have their own obligations and responsibilities to consult internally through processes to reach consensus via their own decision-making systems, which often require that decisions not be taken solely by individual leaders and that all impacted communities are involved in the decision-making process. In some cases, they may also require that Indigenous organizations to which they belong, are consulted, and that community members living outside of the community, such as students living in cities, participate in decision-making.⁹⁸

Some private sector standards and policies on Indigenous rights have stressed that Indigenous peoples do not have a "veto right" to projects that may affect them;⁹⁹ however, such positions risk creating a false impression that a project can proceed without violating the rights of Indigenous peoples, even when consent is not obtained. Proceeding with a project that does not have consent is clearly inconsistent with the business responsibility to avoid infringing on human rights, given the risk of irremediable impacts Indigenous peoples often face where the right to FPIC is not respected. This is evidenced by the numerous cases where courts have determined that projects that did not have consent of Indigenous peoples violated Indigenous peoples' rights. **As the Inter-American Commission on Human Rights has clarified, "opposing a decision that Indigenous and Tribal peoples consider seriously harmful to their rights is not a 'veto'; it is the exercise of their self-determination."**¹⁰⁰

While the business responsibility to respect human rights exists beyond compliance with national law and regulation, businesses' failure to respect Indigenous peoples' decision to withhold consent moves them into a "legal grey area" and exposes them to "judicial review and other types of recourse mechanisms, potentially including international, regional and national tribunals, and by Indigenous peoples' own institutions."¹⁰¹



Air Palawhan, Bengkulu Province, Sumatra Indonesia. © Jeff Conant/Friends of the Earth U.S.

4. The Business Responsibility to Respect the Rights of Indigenous Peoples

This section builds on a wider landscape of frameworks and jurisprudence related to the business responsibility to respect human rights, as they apply to the rights of Indigenous peoples. The section also outlines elements of rights-respecting practice that investors should expect from their investee companies and assess investee companies against.

4.1 The business responsibility to respect Indigenous rights

The business responsibility to respect human rights has been affirmed by international frameworks such as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, jurisprudence,¹⁰² as well as human rights treaty bodies,¹⁰³ regional courts,¹⁰⁴ and Special Procedures of the UN Human Rights Council. Accordingly, whereas States have an obligation to protect, respect, and fulfil human rights, businesses (including institutional investors) have a responsibility to respect human rights, meaning that businesses “should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”¹⁰⁵

The responsibility of businesses to respect the rights of Indigenous peoples are confirmed by the UN Guiding Principles,¹⁰⁶ regional courts,¹⁰⁷ UN treaty bodies,¹⁰⁸ and UN Special Procedures. As the Special Rapporteur on the Rights of Indigenous Peoples has affirmed, the responsibility to respect human rights “extends to compliance with international standards concerning the rights of indigenous peoples, in particular those set forth in the United Nations Declaration on the Rights of Indigenous Peoples, no less than it applies to compliance with other international human rights standards.”¹⁰⁹

Policy commitment and due diligence

Where businesses may cause, contribute to, or be directly linked to adverse impacts on Indigenous peoples’ rights by their business relationships, businesses should have in place a policy commitment to respect the rights of Indigenous peoples that sets out due diligence and remediation processes with respect to Indigenous peoples’ rights.¹¹⁰ This requires that businesses identify lands, territories and resources traditionally owned or otherwise occupied and used of Indigenous peoples that might be affected even when they are not formally recognized by the State or established through demarcation or title granting.¹¹¹ Where Indigenous peoples’ lives, rights, lands, territories or resources, or Indigenous peoples’ cultural, intellectual, religious and spiritual property may potentially be affected, they should ensure that good faith consultations are undertaken with Indigenous peoples through their legitimate representative institutions and ensure that the right to give or withhold Free, Prior, and Informed Consent is upheld in a manner that is consistent with Indigenous peoples’ own laws, customs, and traditions and international human rights standards.¹¹² They should also guarantee just and fair redress, i.e., compensation for any adverse impacts on Indigenous peoples’ environment and social, cultural, and spiritual aspects of their lives,¹¹³ and guarantee fair and equitable sharing of benefits arising from activities taking place on their territories.¹¹⁴

In this context, it should be noted that “activities” under the UN Guiding Principles include both actions and omissions. Omissions can include, for example, the non-recognition of Indigenous peoples’ rights.¹¹⁵ Moreover, businesses should not contribute to any acts of omission by the State that could lead to a violation of Indigenous peoples’ rights.¹¹⁶

Given that self-determination is an overarching right of Indigenous peoples, businesses should also recognize and respect this right, which entitles Indigenous peoples not just to “give consent,” but to determine their futures, and own, use, develop, control, strengthen, and maintain their spiritual relationships to their lands, territories, resources, waters, coastal seas, and other resources, and to uphold their responsibilities to future generations.

Businesses should also give heightened attention to the needs and rights of individuals or groups within Indigenous communities that may be of elevated risk of vulnerability or marginalization, such as elders, women, youth, children, and persons with disabilities.¹¹⁷

Tracking effectiveness

The UN Guiding Principles state that businesses should track the effectiveness of their response to human rights impacts in order to drive continuous improvement.¹¹⁸ The Guiding Principles state that, “Business enterprises should make particular efforts to track the effectiveness of their responses to impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization.”¹¹⁹ Given the history of dispossession and violation of Indigenous peoples’ human rights, businesses should thus make concerted effort to track the effectiveness of their responses to Indigenous peoples.

Despite the existence of policies and due diligence processes related to Indigenous rights, Indigenous peoples experience disproportionate levels of business-related human rights violations, which shows that the effectiveness of such policies have often been limited or inadequately implemented. In this regard, investors, and businesses should prioritize what affected Indigenous peoples and Indigenous human rights defenders think would be effective. It is the responsibility of businesses to fully inform themselves of how they can ensure respect for Indigenous peoples’ rights, and institutions, priorities, customs, values, and spiritual relationship to their lands and territories, and their responsibilities for their future generations.

Remediation

According to the UN Guiding Principles, where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in the remediation of those impacts. With regards to Indigenous peoples, the Expert Mechanism on the Rights of Indigenous Peoples set out that “Remediation concerning Indigenous peoples and their lands, territories and resources should be informed by the framework set out in the Declaration on the Rights of Indigenous Peoples.”¹²⁰ This includes but is not limited to the “right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior, and informed consent.”¹²¹

The UN Guiding Principles set out that, “To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.”¹²² Grievance mechanisms should “be devised and implemented with full respect for indigenous peoples’ own justice and dispute resolution systems,”¹²³ and should not preclude access to judicial or other non-judicial grievance mechanisms.¹²⁴

For non-judicial grievance mechanisms to be effective, Principle 31 of the UN Guiding Principles sets out that such mechanisms should be a) legitimate, b) accessible, c) predictable, d) equitable, e) transparent, f) rights-compatible, g) a source of continuous learning, and h) based on engagement and dialogue. To date, non-judicial grievance mechanisms for situations in which Indigenous peoples are commonly affected have often failed to meet the UN Guiding Principles effectiveness criteria, and in many cases, such mechanisms have exacerbated risks of reprisals for those that have used them.¹²⁵ The [OHCHR](#) and [Forest Peoples Programme](#) have further elaborated on best-practices for how businesses can improve the effectiveness of their grievance mechanisms.

Prioritization of Indigenous peoples’ rights

The UN Guiding Principles set out that businesses should prioritize and first seek to prevent and mitigate those adverse human rights impacts that are most severe or where delayed response would make them irremediable.¹²⁶ In this regard, the Expert Mechanism on the Rights of Indigenous Peoples has stated:

*Given the historic record around the world of dispossession of lands, territories and resources of Indigenous peoples and their related exclusion and marginalization, the actual and potential adverse human rights impacts of Indigenous peoples should be prioritized by business enterprises.*¹²⁷

For Indigenous peoples, the severity of impacts may not just relate to human rights impacts on individuals, but also, irremediable impacts on their cultural survival, dignity, and well-being as peoples. As such, businesses should prioritize both collective and individual rights of Indigenous peoples, including those that they are directly linked to by their business relationships in their value chain.

Respect for Indigenous peoples’ decision-making institutions, laws, customs, traditions, and protocols

Under the UN Guiding Principles, businesses should “comply with all applicable laws and respect internationally recognized human rights, wherever they operate.”¹²⁸ Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social, and cultural institutions;¹²⁹ and decision-making institutions.¹³⁰ As such, businesses should comply with Indigenous peoples’ own legal systems, including their customs and traditions in regulating their land,¹³¹ and respect internationally recognized human rights.

Indigenous peoples’ decision-making systems and institutions, often denoted as “customary law,” can include a variety of distinct customs, spirituality, traditions, procedures, and practices,¹³² which may include, for example, councils of elders, village chiefs, and/or Indigenous parliaments and organizations.¹³³

Case Study: Gitanyow's land use plan and forestry partnership

In 2012, the Gitanyow Hereditary Chiefs and the Province of British Columbia (BC) in Canada agreed to the Gitanyow Lax'yip Land Use Plan (GLLUP), which was legalized through both Indigenous law (Gitanyow Ayookxw) and provincial law. The agreement on the GLLUP created enhanced certainty for forestry operations in Gitanyow territory, which had previously been the subject of many years of legal proceedings. The case shows how respecting Indigenous peoples' own laws can create favorable conditions for businesses to operate. As Greg Demille, Manager, Skeena Sawmills Ltd and Skeena Bioenergy stated on the 10-year anniversary of the plan:

*"Skeena Sawmills conducts forest management activities including forest planning, road construction, timber harvesting and silviculture within the Gitanyow Territory. In 2012 we endorsed the Gitanyow Lax'yip Land Use Plan ("GLLUP") built in collaboration with the Gitanyow Huwilp. Implementing the GLLUP has been instrumental in fostering a trusting relationship with the Gitanyow and has provided certainty to the fibre supply requirements of Skeena Sawmills and Skeena Bioenergy's manufacturing facilities located in Terrace BC."*¹³⁴

In addition to traditional decision-making systems and institutions, numerous Indigenous communities have developed contemporary instruments, laws, and standards of conduct for external actors, including businesses, which are increasingly recognized by courts and international human rights treaty bodies.¹³⁵ Because the experience of many Indigenous communities has been that consultation processes are inadequate and do not respect Indigenous peoples' rights, many Indigenous communities have developed their own FPIC protocols and laws based on international human rights law, which seek to facilitate rights-based engagement with external actors.¹³⁶ Those instruments often define under which circumstances meaningful consultation may occur, including for which activities, providing rules, principles, and guidance for external actors for engaging in a rights-respecting manner. In some cases, this means that a consultation should not occur for certain activities and sectors.

Case Study: Belo Sun Mining in Brazil

The Volta Grande mining project, owned by Canadian mining company Belo Sun is a controversy-ridden gold mining project, located in the Brazilian Amazon, in the State of Pará. Since 2012, its license has been suspended numerous times, including because of inadequate consultation processes with Indigenous communities. In 2017, a Brazilian federal court suspended the license of the Volta Grande project, ordering Belo Sun to consult in accordance with the Juruna people's own protocol.¹³⁷

Failure of states to protect and respect Indigenous rights does not absolve business responsibility to respect Indigenous rights

Where national governments fail to protect and respect Indigenous peoples' rights, businesses still have a responsibility to respect individual and collective rights of Indigenous peoples. According to the UN Guiding Principles and UN treaty body jurisprudence, the business responsibility is not solely a matter of compliance with national legislation; rather, businesses have a responsibility to respect internationally recognized human rights, including where national laws do not recognize or protect those rights.¹³⁸ As noted by the Special Rapporteur on the Rights of Indigenous peoples, due diligence

also means businesses should not contribute to or benefit from failure of a State to meet its obligations toward Indigenous peoples.¹³⁹ Moreover, businesses should not seek to replace States' own obligations towards Indigenous peoples.¹⁴⁰

Some common ways that States fail to respect Indigenous rights are by allocating concessions that overlap with Indigenous territory to private sector actors without consent of potentially impacted Indigenous peoples,¹⁴¹ or by signing investment agreements with businesses without the consent of Indigenous peoples, or by entering investor state dispute settlement (ISDS) agreements without the consent of Indigenous peoples that may be affected by such agreements. Such actions are exclusionary by nature and too often lead to violations of Indigenous peoples' rights.¹⁴² The Special Rapporteur of the Human Rights Council has stated that the non-participation of Indigenous peoples in the negotiation of investor state dispute settlement (ISDS) agreements is "in and of itself, a violation of the rights to free, informed and prior consent, participation, consultation and self-determination."¹⁴³

The responsibility to respect human rights also means that businesses "should not undermine States' ability to meet their own human rights obligations."¹⁴⁴ As the Working Group on Business and Human Rights has noted, international investment agreements can "constrain the regulatory ability of States to discharge their international human rights obligations."¹⁴⁵ They may also discourage States from protecting and respecting human rights if doing so could result in an investor-state claim.¹⁴⁶

Where businesses negotiate with States, they should ensure that Indigenous peoples' rights, including the right to Free, Prior, and Informed Consent and participation, is respected. States and businesses should consult and obtain consent from Indigenous peoples about the agreement itself, and not merely consult with Indigenous peoples after agreements have been made.

Due diligence also means businesses should "avoid accepting permits or concessions from States when prior consultation and consent requirements have not been met."¹⁴⁷ Where a State grants a permit or concession to a business to carry out activities on Indigenous lands or territories, businesses should have their own processes to ensure that they do not cause or contribute to adverse human rights impacts on Indigenous peoples. Where States have not obtained FPIC from Indigenous peoples, businesses should suspend their operations until consent has been given.

Case Study: Rio Tinto destroys Juukan Gorge Caves

In May 2020, mining giant Rio Tinto destroyed the Juukan Gorge Caves, a site that represented 46,000 years of culture and history for the Puutu Kunti Kurrama and Pinikura (PKKP) peoples of the Pilbara in Western Australia. Rio Tinto had all the necessary permits from the Australian governments, but the destruction of the caves caused immeasurable reputational harm, which resulted in a Parliamentary Inquiry,¹⁴⁸ the resignation of Rio Tinto's CEO, two executives and two board members,¹⁴⁹ and unprecedented outrage and engagement by large institutional investors,¹⁵⁰ resulting in improved disclosure and governance and an overhaul of how the mining industry deals with Indigenous peoples in Australia.¹⁵¹ Rio Tinto also paid restitution to the PKKP peoples, which it is alleged impacted its share price.¹⁵²

Consultation and FPIC processes should not be used to undermine Indigenous rights

Processes to consult or to seek consent should not be used as a compliance checklist or to legitimize activities that undermine Indigenous peoples' rights and institutions. The experience of some Indigenous communities has been that consultation processes are not conducted in good faith and may even be used to undermine Indigenous peoples' rights. For example, the Kaurareg Aboriginal Land Trust from Australia has noted that in their experience, policy language and programs to gain their consent are "cunningly engineered so that our cultural norms of silence are interpreted by non-native rules of debate and majority votes, duly registered as our agreement."¹⁵³

In some regions, the experience of trap-like consultations has led to numerous Indigenous communities rejecting consultation and FPIC processes that are not meaningful, that are not conducted in good faith, or that do not align with the principles of Free, Prior, and Informed Consent. Where Indigenous peoples reject consultation and FPIC processes, this may indicate that pre-conditions to consult and seek consent in good faith in a manner that guarantees Indigenous peoples' substantive rights do not currently exist in the country or region. Where Indigenous peoples reject consultation and FPIC processes, e.g., for activities that may undermine their rights, businesses should accept that consent has been withheld, and not attempt to consult or seek consent.¹⁵⁴

Case Study: Wampis and Achuar rejection of oil, mining, logging, and consultation (Peru)

Several oil companies have attempted to establish oil projects in Block 64 in the Peruvian Amazon, inhabited by the Wampis and Achuar people of Peru. However, the Achuar and Wampis people have thus far successfully rejected all attempts by oil companies to exploit oil in the region and have clearly stated their continued intention to do so. In July 2022, the president of the Peruvian Federation of Achuar Nationalities (FENAP) told Mongabay "My people will never allow oil, logging, or mining activities. My grandparents passed down these rules to us, and we respect them." Moreover, FENAP also rejects any consultation attempts because they believe it is intended to manufacture legitimacy to the companies despite their opposition to the projects.¹⁵⁵ Despite this rejection, the state oil company, Petroperu, recently stated its intentions to carry out oil activities in the block.¹⁵⁶

Businesses cannot offset negative human rights impacts with CSR (Corporate Social Responsibility) programs

Frequent practice among businesses is to have corporate social responsibility (CSR) or Indigenous relations programs, such as hiring Indigenous community members to gain a social license to operate. In some cases, businesses have engaged in charitable activities, portrayed as corporate social responsibility, while failing to respect Indigenous peoples' substantive rights. As the Office of the High Commissioner (OHCHR) has stated, "a failure to respect human rights in one area cannot be canceled out by a benefit provided in another."¹⁵⁷

Some Indigenous communities have also experienced the use of CSR programs or charitable activities as a tactic to create division within or between communities, or to "manufacture" consent, e.g., by providing benefits to illegitimate community representatives. Where such tactics are used, the CSR programs or charitable activities are coercive by nature and may lead to violations of several rights. Community division tactics also have the potential of leading to conflict between communities, which can put the right to life, physical integrity, freedom, peace, and security at risk.

Case Study: Oil company community benefits, division, and pseudo communities

In 2010, members of the Kichwa people of Sarayaku in Ecuador were attacked by outsiders with dynamite and firearms, leaving three persons severely injured. The intention of the outsiders was to establish a pseudo community within Sarayaku territory in order to negotiate with a subsidiary of the Italian oil company Agip (part of Eni), which held oil concessions granted by the Ecuadorian government. By establishing a pseudo community, the outsiders sought to pave the way for Agip, and be part of their “community relations” program.¹⁵⁸

This was not the first time the Kichwa people of Sarayaku encountered this type of tactic. In 2001, another oil company, Compañía General de Combustibles (CGC), hired the company Daymi Services to carry out what they called “community relations,” which consisted of sociologists and anthropologists developing strategies to divide communities, including by hiring Indigenous personnel to discredit legitimate community leaders, and by creating a pseudo community.¹⁵⁹

Both CGC and Agip failed to establish operations in Sarayaku territory.



OCP Pipeline Rupture, January 2022. © Mauricio Rosenfeld/Amazon Watch

4.2 Elements of rights-respecting business practice

To meet their responsibility to respect the rights of Indigenous peoples, businesses should go beyond compliance with national legislation and tick-the-box exercises. Several guidelines for businesses and for Indigenous peoples have previously been developed, which investors can use as reference for good practice, such as the [Stepping up](#) due diligence guidance and Indigenous peoples’ own [FPIC protocols](#) (for additional resources, see Annex).

A common challenge is that, even if well intentioned, people external to Indigenous communities may assume that their own cultural ways of doing things are universal. However, the onus should be on companies, including investors, to see themselves as guests entering Indigenous territories, and should work to learn about and fit into Indigenous peoples' own protocols and practices for decision-making.

Investors should be aware that, in some areas, there may be a specific history of outsiders trying to use 'divide and conquer' tactics to undermine Indigenous communities. In this context, Indigenous peoples' may be particularly alert to ensuring that any decisions are fully informed, debated, and deliberated with consensus built over time. This may also include stages of consultation with diverse groups within communities, such as women, youth, and elders, or externally with students living in cities, neighboring communities (including across national borders where Indigenous people have been divided by colonial borders), or with regional or national Indigenous organizations.

Best practice for companies and investors is to try to undertake projects that Indigenous peoples themselves have identified as priorities and part of their self-determination and planning for their future, and consistent with their own decision-making processes, laws and political, legal, economic, social, and cultural institutions, and responsibilities for future generations.

For businesses that are "external" to Indigenous communities and territories, the following are elements of rights-respecting practice that investors may expect of investee companies whose activities may affect Indigenous peoples' rights, lands, territories, and resources. The following is not an exhaustive checklist nor a guide, as adequate due diligence must be specific to the context and situation; rather, it aims to provide investors with an idea of what rights-respecting practice may look like.

Policy commitment and due diligence: In addition to having a general due diligence process aligned with the UN Guiding Principles and OECD Guidelines, which is a responsibility of all businesses, businesses should:

- Have a public policy commitment, approved at the highest level, to respect all individual and collective rights of Indigenous peoples, including those set out in the UNDRIP and the ILO Convention 169, which sets out the due diligence and remediation process to respect those rights, including the right to self-determination; right to lands, territories and resources; right to culture and cultural identity; and the right to give or withhold Free, Prior, and Informed Consent.
- A due diligence process to identify the Indigenous peoples and actual and potential impacts on their rights and lands, territories, and resources, that the business may cause or contribute to through its own activities, or which it may be linked to by its business relationships.
- Set clear expectations on personnel, including personnel hired by business partners, to respect Indigenous peoples' rights, legal systems, governance institutions, and decision-making systems, as well as customs and traditions, e.g., through a code of conduct.
- Recognize that FPIC is not a standalone right, but rather, is a right that safeguards Indigenous peoples' collective rights, including to self-determination, and lands, territories, and resources, and other substantive rights.
- Recognize that FPIC is an expression of self-determination and self-governance, meaning that Indigenous peoples should determine and control how FPIC is exercised, in accordance with their own laws, traditions, customs, and protocols.

- Recognize that the responsibility to respect Indigenous peoples' rights, including to self-determination, lands, territories, and culture does not cease once businesses have entered an agreement with Indigenous peoples. Policies and due diligence processes should be ongoing and focus on respecting all rights of Indigenous peoples.

Prior to accepting concessions, permits, or licenses, or negotiating with the State: Businesses should conduct due diligence not just on the project, but also on States, to avoid contributing to, or benefiting from, human rights violations caused by the State:

- Businesses should conduct due diligence to identify whether the State has fulfilled its responsibility to protect Indigenous peoples' rights and whether the pre-conditions exist to consult and seek consent in good faith in a manner that guarantees Indigenous peoples' substantive rights. Businesses should not seek to replace States' own obligations in relation to Indigenous peoples' rights.¹⁶⁰
- Businesses should conduct their own due diligence to ensure and verify that the State has consulted with and obtained consent from all potentially affected communities in a manner that guarantees respect for Indigenous peoples' substantive rights, prior to the approval of a project, concession, permit, or license. Businesses should avoid contributing to States' acts of omission in recognizing and protecting Indigenous rights.
- Businesses should understand the local and historical context of potentially affected communities, including any history of dispossession or repression caused by the State or other third parties. Businesses should ensure they do not contribute to exacerbating a legacy of adverse human rights impacts on Indigenous communities.
- Businesses should consult with organizations that work with Indigenous peoples and Indigenous human rights defenders to understand context-specific risks and take adequate steps to avoid being involved in attacks against human rights defenders.
- Businesses that negotiate agreements with States or government agencies should ensure that Indigenous peoples' right to FPIC, consultation, and participation in decision-making is guaranteed as early as possible, and before the negotiation phase itself. Consultation should not occur merely once agreements have been set.
- Where businesses acquire assets, such as permits, concessions, or acquire companies or projects, they should conduct their own due diligence and avoid acquiring assets that fail to respect Indigenous peoples' rights.

Pre-consultation: Before any consultation occurs, businesses should take necessary steps to ensure that the consultation process itself respects the rights of Indigenous peoples:

- Businesses should conduct their own due diligence to identify communities and legitimate representatives to identify whether they are willing to be consulted. To decide whether to be consulted, some Indigenous peoples may consult internally with community-members about the consultation itself. If the community and their representatives do not agree to be consulted, businesses should not try to pressure community members to accept a consultation.
- Businesses should identify whether potentially impacted Indigenous peoples have a FPIC protocol or autonomous FPIC laws or statutes. If they have a consultation protocol, businesses should adhere to it. If formal protocols do not exist, businesses should ensure they take adequate steps to guarantee any potential consultation is consistent with Indigenous peoples' own procedures, laws, customs, and traditions.

- If the consultation protocol or autonomous FPIC law prohibits certain activities, businesses should not consult with the objective of obtaining consent for carrying out any prohibited activities.
- If permission to consult is granted, Indigenous peoples should decide how they want to be consulted. They should be part of designing the agenda, nature, scope, delimitation, and timelines of the consultation.
- Indigenous peoples should have the possibility to access independent expert advice to develop their own protocols for rights-respecting consultation and business conduct.¹⁶¹
- If consultation is carried out by a third-party actor, businesses should take necessary steps to ensure that the consultation is consistent with international human rights standards and verify whether the consultation is free, prior, and informed.
- Businesses should recognize that the right to participation and FPIC is not simply a matter of saying “yes” to a predesigned proposal. Businesses should recognize that Indigenous peoples have their own priorities for their economic, social, and cultural development, as well as responsibilities for future generations, and be open for initiatives or proposals from Indigenous peoples themselves.

Consultation: Any consultation should be conducted in good faith and meet all the thresholds of having been free, prior, and informed:

- Any consultation should be conducted in a culturally appropriate manner with Indigenous peoples’ own representative institutions and in accordance with their own procedures, consistent with their customs, norms, laws, protocols, as well as international human rights standards, and in a language the Indigenous peoples in question are proficient in and prefer.
- Indigenous peoples should have access to sufficient independent legal and financial expertise and capacity-building, including about their rights and the consultation itself.
- Full and objective information about all aspects should be provided to Indigenous peoples, both at preliminary stages as well as throughout the consultation.¹⁶²
- The consultation is an iterative process. Indigenous peoples should freely decide at any stage of the consultation whether to proceed further with the consultation or not.
- The business or other third party must not engage in any coercive tactics, such as interfering with Indigenous institutions or negotiating with or seeking to influence or bribe individuals, in violation of Indigenous peoples’ own decision-making systems.¹⁶³
- Indigenous peoples should be free to negotiate project design, implementation, monitoring, and benefit-sharing arrangements, including equity co-ownership arrangements.
- Consultations should not leave out any Indigenous communities that may be affected. Businesses should ensure consultation processes do not create any tension, division, or conflict between communities.
- If the consultation involves any form of compensation to community representatives, it should be consistent with the principles of Free, Prior, and Informed Consent, where Indigenous peoples make an independent decision about compensation schemes, according to their own procedures, laws, traditions, and customs.

Social, spiritual, cultural, environmental, and human right impact assessments: Where Indigenous peoples decide to proceed with a consultation, impact assessments are crucial elements of ensuring that decisions to give consent are fully informed, and to mitigate potential impacts.¹⁶⁴ In addition to relevant human rights standards, they should also take into account “indigenous customary laws and traditions (for example those that govern the distribution and ownership of land).”¹⁶⁵

- Impact assessments should ensure objectivity of the assessments, either by independent review or by being performed free from the control of the promoters of the project.¹⁶⁶
- Indigenous peoples should be involved in the design and implementation of the assessments and be able to include their own criteria and assessment parameters according to their own economic, social, and cultural values and priorities; their spiritual relationship to their lands; and their responsibilities to future generations.
- Where Indigenous peoples lack capacity or do not have prior experience in impact assessments, capacity-building, including independent expert advice, may be required, to ensure Indigenous peoples can make their own informed decisions.
- Indigenous peoples should have sufficient time to evaluate and verify, in accordance with their own timelines, the results of such assessments, including with independent expert advice.
- Where multiple projects or operations exist on or near Indigenous territories, impact assessments should also consider the cumulative impacts of those projects or operations, as well as impacts of previous encroachments.
- Depending on their evaluation of the impact assessments, Indigenous peoples are free to give or withhold consent to proceeding further with the consultation.

Consent: Consent should meet the three thresholds of having been free, prior, and informed.

- Consent may be expressed in treaties, agreements, and contracts, for example. Those should be consistent with Indigenous peoples' own procedures and laws, traditions, customs, and protocols.
- Decisions to give or withhold consent should concern each relevant aspect of a project, and not just a generalized statement.¹⁶⁷
- Agreements should include obligations on the business to respect Indigenous peoples' rights and own decision-making systems, laws, traditions, and customs. This may also be operationalized through company policies and codes of conduct for employees and business partners.
- Where the parties do not reach an agreement, Indigenous peoples are free to withhold consent. Any decisions of Indigenous peoples to withhold consent should be respected.
- Businesses should transparently disclose their FPIC processes to enable verification that FPIC has or has not been given, except for information that Indigenous peoples wish to be confidential, such as information on sacred sites.
- Where consent has been given, businesses should, together with the concerned Indigenous peoples, develop and agree on a process to monitor and evaluate the fulfillment of the agreement to which Indigenous peoples have given their consent.
- Where the parties reach an agreement and Indigenous peoples give consent, it should be formally documented, and include detailed statements of *inter alia* the project impacts, provisions for mitigation and reimbursement for any damages, methods for dispute resolution, benefit-sharing agreements, and a description of the consultation and participation that preceded the consent.¹⁶⁸
- The business responsibility to conduct due diligence does not cease once consent has been given; businesses should have an ongoing due diligence process, recognizing that human rights risks may change over time.
- Consent is an ongoing obligation that should be maintained; it cannot rely on a one-time agreement absent further obligations. This also means that consent may be revoked;

particularly where a company fails to respect the consent agreement, or fails to respect their rights and institutions, laws, customs, and traditions.

- Consent being revoked should be understood as a legitimate exercise of the right to self-governance, like how government agencies at national and regional level can suspend permits for projects that fail to comply with legal, social, or environmental requirements.

Benefit-sharing

- Benefits, whether provided by the State or the company, should be seen not as a form of charity, or a way to gain a license to operate, but rather as a way to respect a right that Indigenous peoples are entitled to under international law.¹⁶⁹
- Where possible, and where Indigenous peoples express willingness and have the technical and institutional capacity, equity co-ownership arrangements may be pursued to enable continuous Indigenous participation in decision-making and provide the business with favorable conditions to operate. Such arrangements have already been made in some parts of the world (most notably in Canada).

Grievance and remediation mechanisms

- Businesses operating on or near Indigenous lands should make available a grievance mechanism to which potentially affected rightsholders have agreed, and which is accessible to all potentially affected people in a language they prefer and are proficient in. The mechanism should be developed in a culturally appropriate manner, together with potentially affected communities and experts, in accordance with their customs, traditions, rules, and legal systems.
- Grievance mechanisms should meet the effectiveness criteria laid out in the UN Guiding Principles, both on paper and in practice. In regions where there is an elevated risk of retaliation or attacks against complainants, businesses should take necessary steps to ensure using the grievance mechanism does not exacerbate the risk of retaliation or attacks.

Communication: Businesses should publicly and regularly communicate and disclose,¹⁷⁰ in a form and frequency that reflect the business' human rights impacts; is accessible to potentially affected Indigenous peoples (both in format and language) and other stakeholders; is sufficient to evaluate the adequacy of the business' response to the human rights impacts; and which does not pose risks to potentially affected Indigenous peoples:

- The concessions or operational sites where Indigenous peoples may be potentially affected.
- Impact assessments, including whether and how affected Indigenous peoples have been part of designing, conducting, and verifying them.
- FPIC processes and their outcomes.
- Any grievances and actions taken to provide or enable remedy.
- Any other information that Indigenous peoples require to exercise their rights. This may include information such as information on shareholders and financiers or due diligence regulations to which they are required to adhere.
- Communication should respect confidentiality of information, including with respect to Indigenous peoples' traditional knowledge and sacred sites.¹⁷¹

5. Businesses and Indigenous Peoples' Rights

This section provides an overview of the intersection between business-related activities and Indigenous peoples' rights, including the current landscape of business standards and policies, and business-related human rights risks faced by Indigenous peoples.

5.1 Businesses-related human rights risks faced by Indigenous peoples

As Indigenous peoples face a heightened risk of social and economic marginalization, they are also among the groups most severely affected by business-related activities, particularly by the extractives (oil, gas, and mining), agribusiness, and energy sectors.¹⁷² Those impacts are also often exacerbated by remoteness and cumulative discrimination, which means Indigenous peoples may simultaneously be affected by multiple forms of discrimination and human rights risks and impacts that other groups individually face.¹⁷³

The disproportionate level of negative impacts of corporate activities on Indigenous peoples, and Indigenous human rights defenders in particular, have been documented in several studies.¹⁷⁴ The most common types of documented attacks against Indigenous human rights defenders are judicial harassment, including arbitrary detention, and strategic lawsuits against public participation, followed by killings, intimidation and threats, beatings, and other forms of violence.¹⁷⁵ According to the Business and Human Rights Resource Centre, most attacks against human rights defenders, documented since 2015 were linked to mining, agribusiness, and renewable energy sectors, with Indigenous people being subject to approximately 25% of these attacks, despite comprising approximately 5% of the world's population.¹⁷⁶

Oil and gas

The extractives sector, in particular oil and gas, has generally been seen as the worst human rights offender in relation to Indigenous peoples. A study found that the extractives sectors "account for the most allegations of the worst abuses including complicity in crimes against humanity. These are typically for acts committed by public and private security forces protecting company assets and property; large-scale corruption; violations of labor rights; and a broad array of abuses in relation to local communities, especially indigenous people."¹⁷⁷ In the [Environmental Justice Atlas](#), which documents stories of communities struggling for environmental justice, Indigenous peoples were affected in 67% of documented socio-environmental conflicts in the oil and gas sector.¹⁷⁸

Case Study: Oil concessions on Indigenous territories in the western Amazon

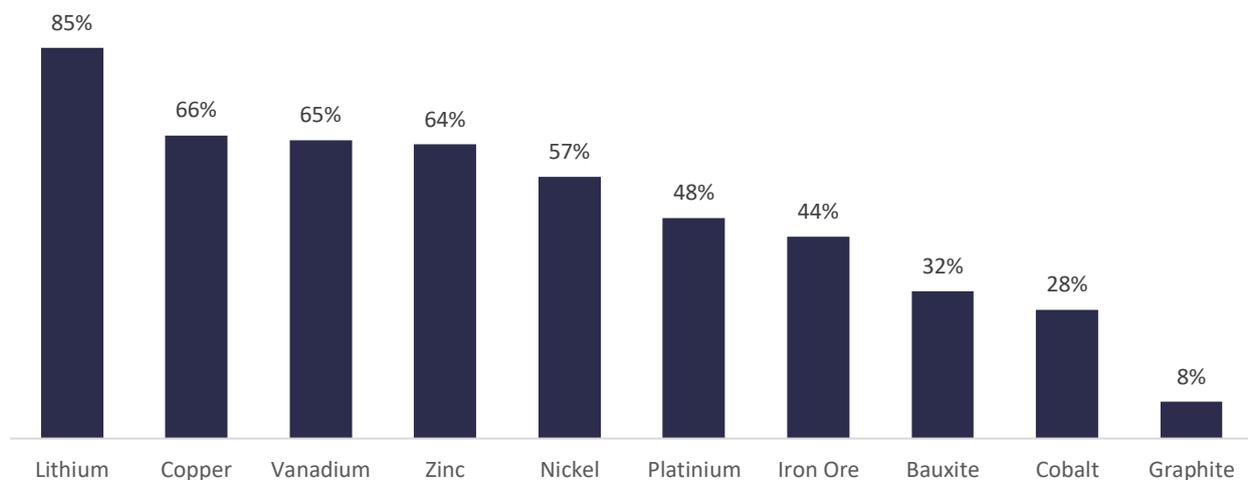
In the western Amazon (Colombia, Ecuador, Peru, Bolivia), Indigenous peoples' territories have been divided into oil concessions without the consent of Indigenous communities. Research from Mongabay has found that in these countries, a total of 1647 Indigenous territories overlap with oil concessions. The percentage of Indigenous communities that overlap with oil concessions is approximately 74% in Ecuador, 61% in Peru, 41% in Colombia, and 36% in Bolivia.¹⁷⁹ Indigenous communities in the western Amazon have repeatedly suffered severe impacts from oil spills, including consequences on food security, health, environmental damage, and access to water.

Mining

Although the mining sector has taken steps to recognize Indigenous peoples' rights in the last few decades, the gap between industry standards and actual practice is still wide.¹⁸⁰ While in some parts of the world, Indigenous communities have entered benefit-sharing agreements with mining companies,¹⁸¹ data from the Environmental Justice Atlas data shows the mining sector to be the sector with the highest occurrence of assassinations, physical violence and criminalization of land defenders, particularly where Indigenous peoples are affected.¹⁸² Moreover, evidence from around the world shows that the rights of those who do not consent to mining projects have rarely been respected. For example, a study found that lack of consultation and FPIC has been the norm of Canadian mining companies in Latin America, not the exception.¹⁸³ As of 2023, Indigenous peoples were affected in 47% of the mining-related socio-environmental conflicts documented in the Environmental Justice Atlas.¹⁸⁴

Whereas the International Council on Mining and Metals' (ICMM) 2013 position statement on Indigenous peoples and its 2015 good practice guidance on Indigenous peoples may be seen in the industry as a reference for good practice, its language on what happens if consent is not given "risks allowing members to pursue projects in the absence of FPIC, putting them in a position where they are potentially complicit in State violations of indigenous peoples' rights." Moreover, several members have fallen short on its policies, particularly regarding human rights violations.¹⁸⁵

Figure 3. Percentage of energy transition mineral projects located on, or near Indigenous land



Source: Author's elaboration based on Owen, J. R., Kemp, D., Harris, J., Lechner, A. M., & Lèbre, L. (2022, July). *Fast track to failure? Energy transition minerals and the future of consultation and consent.*

Human rights risks to Indigenous peoples are also driven by increased demand for minerals in relation to the transition to renewable energy. A study published in June 2022 estimated that 54% of “energy transition mineral projects” are located on or near Indigenous lands.¹⁸⁶ Transition minerals can also affect Indigenous peoples’ water rights in relation to seabed mining, which is a concern of Pacific Indigenous peoples.¹⁸⁷ The [Sirge Coalition](#) has further elaborated on the issue of transition minerals and Indigenous rights.



Erwin Umbu Hamadika and Ignasius Anaboeni, villagers in Kambata Wundut village Sumba, Indonesia, enjoying friendly competition during a village festival. © Jeff Conant/Friends of the Earth U.S.

Agribusiness

Agribusiness-related adverse impacts on Indigenous peoples’ rights stem from land-grabbing and destruction of Indigenous lands for timber and pulp, rubber, agricultural plantations such as palm oil and soy, and for cattle ranching.¹⁸⁸ Many of the worst aspects of modern agribusiness practices have their origins in colonial systems and structures of violence, which relied on stolen land seized from Indigenous peoples and slavery, forced labor, and similar practices.

Those commodities are typically exported to food and beverage manufacturers, or other sectors, through commodity traders such as ADM, Bunge, Cargill, and Louis Dreyfus.¹⁸⁹ Downstream food and beverage manufacturing companies have argued that it is challenging to trace their commodity supply chains. Despite the challenge, companies have a responsibility to avoid human rights abuses and to enable remedies for adverse impacts to which they are directly linked. Institutional investors are linked to those adverse human rights impacts not only through shareholdings of commodity traders and downstream food and beverage companies but also by providing financing to intermediaries and upstream producers and suppliers.¹⁹⁰

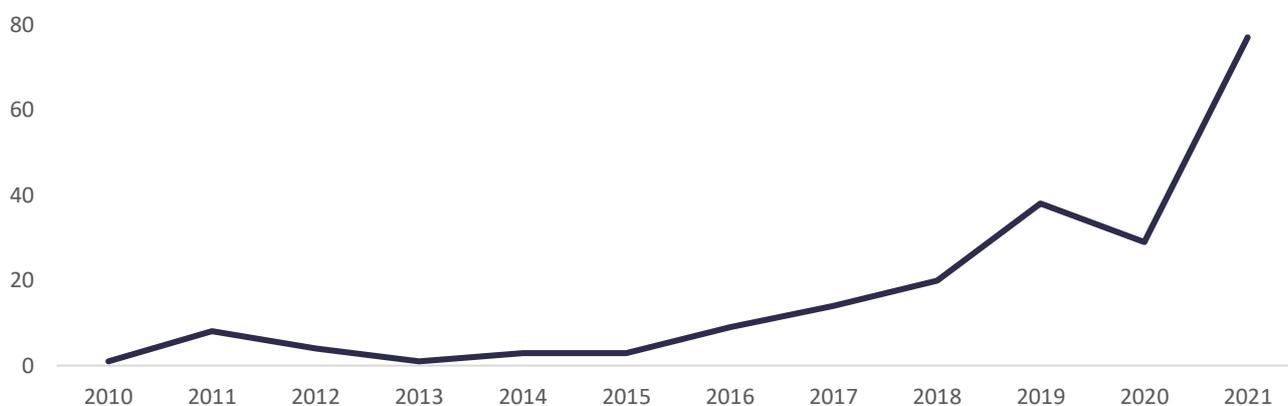
Case Study: Financing of Indigenous rights abuses in Indonesia

In 2021, a coalition of various NGOs published a report that shed light on how household name companies including Nestlé, PepsiCo, Wilmar and Unilever and various financial institutions (including but not limited to ABN Amro, Rabobank, Standard Chartered, and BlackRock) were allegedly connected to ten palm oil plantations involved in human rights and Indigenous rights abuses in Indonesia. According to the report, palm oil from the plantations ended up in the supply chains of global brands, while the operations of those plantations were financed by several major financial institutions.¹⁹¹

Renewable energy

Although the extractives and agribusiness sectors have historically been seen as responsible for the worst human rights abuses on Indigenous peoples, the renewable energy sectors are also increasingly severely affecting Indigenous peoples. According to the Business and Human Rights Resource Centre, “The most serious and commonly occurring human rights issues in the RE sector include the failure to respect the right to FPIC of Indigenous Peoples, [and] land rights abuses in relation to involuntary resettlement and compensation.”¹⁹² The Centre’s report notes that “Between January 2015 and August 2022, out of 883 documented attacks against Indigenous human rights defenders, at least 134 were related to renewable energy projects, including hydropower, wind, and solar.”¹⁹³

Figure 4. Number of allegations linked to renewable energy projects recorded by the Business & Human Rights Resource Centre.



Source: Author’s elaboration based on Business & Human Rights Resource Centre [data](#).

In 2018, the Business & Human Rights Resource Centre published [guidance](#) for investors regarding renewable energy investments which showed that Indigenous rights were at particular risk across each of five sub-sectors of renewable energy development: wind, solar, bioenergy, geothermal and hydropower.¹⁹⁴

In 2021, the Business & Human Rights Resource Centre published the [Renewable Energy Human Rights Benchmark](#), which found that the overall number of allegations of human rights abuses in the renewable energy sector had increased at a rapid pace since 2010. Moreover, it found that companies in the renewable energy sectors overall were not adequately addressing their human

rights risks; they scored particularly low on their most salient risks, including Indigenous peoples' rights, land rights, and protection for human rights defenders.¹⁹⁵

Carbon credits, offsetting schemes and nature-based solutions

Carbon credit schemes involve an actor (typically a company or government) paying for projects intended to mitigate carbon emissions, such as renewable energy development or forest protection. The actor paying for the project receives carbon credits intended to represent the carbon emissions mitigated by the project. Payment through carbon credit schemes is often billed as a sustainable development option for Indigenous peoples, whose territories in forests or grasslands that function as carbon sinks are seen as having potential for land-based carbon offsets, commonly referred to as "nature-based solutions."

Carbon credit schemes have been criticized, as projects have suffered from systemic over-crediting and exaggeration of climate benefits,¹⁹⁶ and in many cases, posed severe threats to Indigenous rights. Many offset projects have failed to respect the right to FPIC; failed to share benefits with Indigenous communities; and often restricted the rights and livelihoods of or even displaced Indigenous peoples from their territories.¹⁹⁷ As of 2023, Indigenous peoples were affected in 61% of the socio-environmental conflicts related to "carbon offset" projects in the Environmental Justice Atlas.¹⁹⁸

Case Study: Total Energies and Shell Carbon Offsets in Peru

Carbon credit programs in Peru, sold by the company Ecosphere+, from which Total Energies and Shell have bought carbon credits (according to the Associated Press), have allegedly restricted access to lands and livelihoods of the Kichwa People of San Martín, in what the Peruvian government has declared the Cordillera Azul National Park. Although there is evidence that the Kichwa People of San Martín have traditionally hunted inside what is now a national park, the Peruvian government argued that there was no need for consent of the Kichwa people, arguing that it was never their territory. In recent times, the Kichwa People have started organizing themselves, demanding compensation, or restitution of lands. According to many Kichwa people concerned, carbon credits have not protected the park; rather, the Kichwa People themselves carry out patrols to confront illegal ranchers and coca growers.¹⁹⁹

Case Study: Carbon Credits in Guyana

The South Rupununi District Council of Guyana, legal representative of 21 Indigenous communities, sent a letter to the Guyanese government asking them to legally recognize and title their lands. The Council states that only once land titles are legally secured, would it be appropriate for them to decide whether and how to participate in carbon credit programs.²⁰⁰

5.2 Indigenous rights in corporate standards

Over recent years, a range of businesses and sectors have become increasingly aware of the critical importance of improving their knowledge and action on Indigenous rights. While international financial institutions such as multilateral development banks and development finance institutions, as well as commercial banks, have developed standards and policies on this issue, institutional investors, including asset owners and asset managers, are among the most recent to join the list of those growing their awareness of this issue. This section highlights examples of key standards that

refer to Indigenous rights. However, it also seeks to caution investors that, in practice, these standards often fall short on protecting Indigenous rights.

IFC (International Finance Corporation) Performance Standard 7

In some sectors and regions, it is widespread practice have policy commitments to adhere the International Finance Corporation (IFC) Performance Standard 7 on Indigenous peoples, which states that it seeks to “ensure that business activities minimize negative impacts, foster respect for human rights, dignity and culture of indigenous populations, and promote development benefits in culturally appropriate ways.” The standard is a requirement for companies seeking loans from the IFC and has also been adopted as a standard by the Equator Principles, a risk management framework for financial institutions (see below). As such, companies seeking project finance from the IFC or from Equator Principles Financial Institutions should, on paper, adhere to the standard.

The IFC Performance Standards and Equator Principles are not fully aligned with the UN Guiding Principles nor with the UNDRIP and internationally recognized rights of Indigenous peoples.²⁰¹ The IFC Performance Standard 7 requires Free, Prior, and Informed Consent in certain circumstances; however, it has been criticized for leaving room for interpretation in its implementation.²⁰² Moreover, research has shown that even the IFC itself has not adequately implemented its standard in projects where Indigenous peoples were present.²⁰³

The Equator Principles

The Equator Principles are a risk framework for financial institutions (typically banks and credit export agencies) to assess and manage environmental and social risks in their finance for projects. In non-OECD countries, the Equator Principles require signatory financial institutions (EPFIs) to evaluate, with the support of an independent consultant, a project’s adherence to the IFC Performance Standards and the World Bank Environmental, Health and Safety (EHS) standards, and in OECD countries, a project’s compliance with host country laws.

However, the Equator Principles’ focus on project finance means that corporate-level finance is not subject to the scrutiny promised by the Principles. Furthermore, the latest version (EP4) has received criticism for its weak and non-committal language, which, according to First Peoples Worldwide, “renders it instantly obsolete, especially for those financial institutions seeking to catalyze meaningful partnership with Indigenous Peoples to avoid social and environmental violence.”²⁰⁴

The weaknesses of the Equator Principles are also related to its inadequate implementation. In 2020, BankTrack reviewed 37 high-risk projects financed by Equator Principles signatories and found several inadequacies. While the Equator Principles require banks to ensure high-risk projects have stakeholder engagement processes and project-level grievance mechanisms, the report found that evidence of stakeholder engagement or project-level complaints mechanisms were missing in 24 out of the 37 projects analyzed, or 65%.²⁰⁵

Multi-stakeholder initiatives and certification programs

Increasingly, various sectors have come to acknowledge the importance of respecting, or at least being seen to address, Indigenous peoples’ rights. Several industry-driven multi-stakeholder initiatives have developed certification standards, which include criteria related to substantive and

procedural rights of Indigenous peoples. Yet even best-in-class certification standards have loopholes and limited implementation in practice.²⁰⁶

Some of these initiatives, including the Aluminum Stewardship Initiative (ASI), Initiative for Responsible Mining Assurance (IRMA) the Forest Stewardship Council (FSC), and the Roundtable on Sustainable Palm Oil (RSPO) have included Indigenous representatives in the standard and certification development process.²⁰⁷ Yet in practice, many certification schemes have often failed to implement their standards on Indigenous rights. A review of five certification schemes highlighted several challenges, such as lack of representation of Indigenous peoples in the governance structures of the multi-stakeholder initiatives, auditors' lack of cultural awareness, and substandard assessments by auditing firms. Although the RSPO is considered the most robust standard, in some geographic regions there is a growing distrust towards auditors, due to a perception that because auditors are too close to the companies, they do not comply with the auditing requirements.²⁰⁸

The limitations of multi-stakeholder initiative certification standards have also been highlighted by the UN Working Group on Business and Human Rights, which found that they tend to lack transparent and independent monitoring mechanisms.²⁰⁹ The International Work Group on Indigenous Affairs (IWGIA) has highlighted the issue that some businesses offset the implementation of their policies on Indigenous rights to those multi-stakeholder initiatives.²¹⁰ A study of multi-stakeholder initiatives more broadly found that most are not rightsholder centric and have failed to protect rightsholders and remedy human rights impacts.²¹¹

Commitments to No Deforestation, No Peat, No Exploitation (NDPE)

Commitments to No Deforestation, No Peat, No Exploitation (NDPE) have increasingly been adopted by companies in agricultural supply chains (particularly in palm oil supply chains). While the terms “no deforestation” and “no development on peatlands” refer to avoiding deforestation and having no new developments on peatland, no exploitation refers to respecting human rights, including the rights of Indigenous peoples.²¹²

NDPE commitments typically include not just companies' own operations but also suppliers. While some actors point out that NDPE policies are among the most effective existing policies for addressing adverse human rights impacts in companies' supply chains, others note that in order for these to function adequately, it would require the entire industry to implement such commitments, which is currently not the case.²¹³ Another issue is that most NDPE policies often only cover one type of commodity (typically palm oil), which means that the policy is often not enforced for companies that cause adverse human rights impacts or deforestation in relation to other commodities.²¹⁴

Corporate policies

References to Indigenous rights in corporate policies are increasingly common, although most companies still do not have such policies. In 2022, the World Benchmarking Alliance assessed close to 400 companies across 8 industries and found that just 13% had a clear commitment to respect Indigenous peoples' rights.²¹⁵ In 2021, the Business and Human Rights Resource Centre found that a quarter of assessed renewable energy companies had policies recognizing the rights of Indigenous peoples.²¹⁶

Banks and financial institutions more broadly are also increasingly including FPIC in their policies but have fallen short on recognizing and committing to respect Indigenous rights beyond FPIC. Research

by Global Canopy found that while 27% of the 150 financial institutions most exposed to deforestation had a commitment to FPIC for at least one commodity, only 6% had a policy to respect the rights to land, territories, and resources of Indigenous peoples.²¹⁷

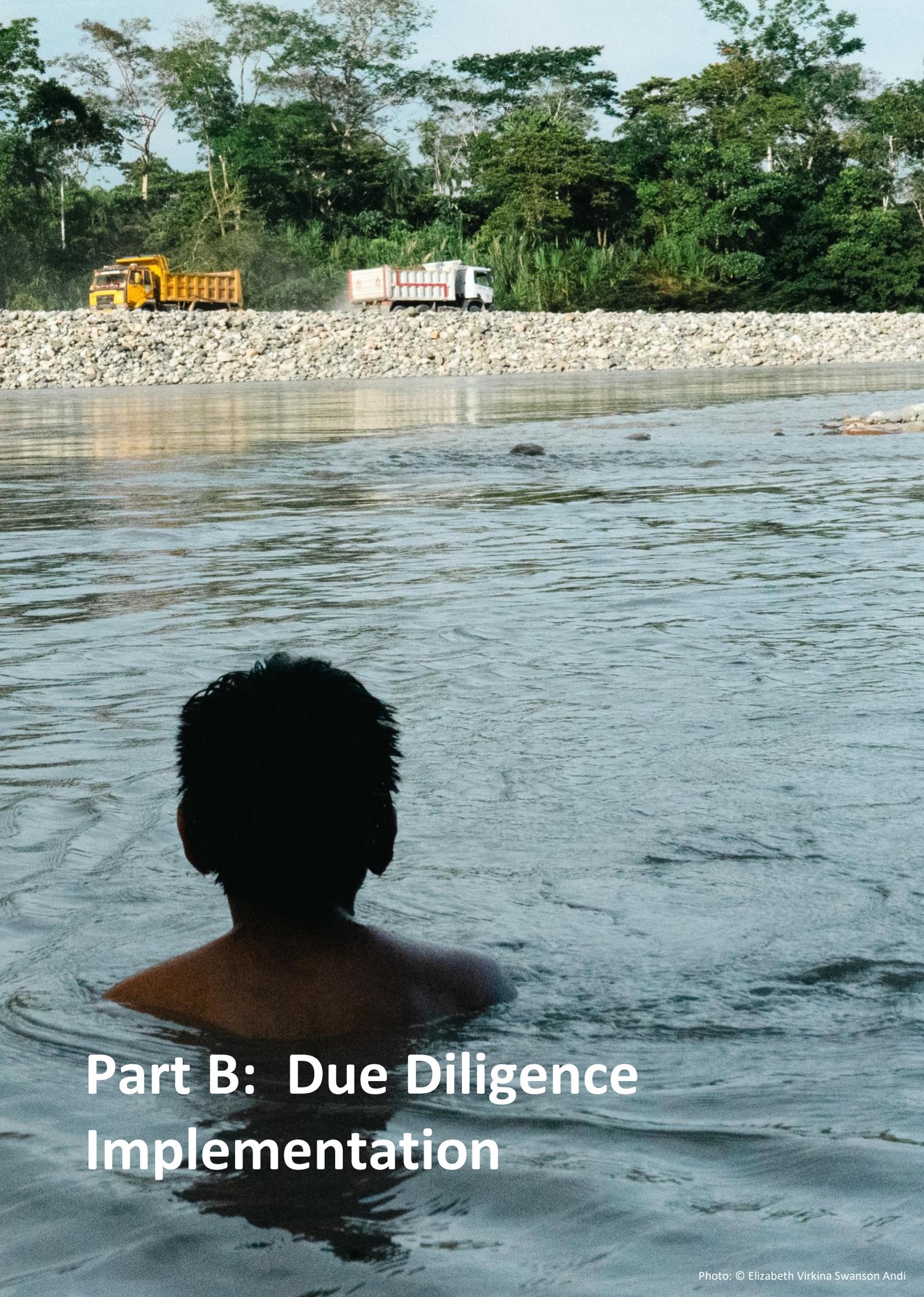
Moreover, policies are often weak and ambiguous, or inadequately implemented.²¹⁸ The *Responsible Mining Index 2022* assessed the 40 largest mining companies in the world and found that “While most companies make mention of their position on FPIC, only a few companies have made formal commitments to respect the rights of Indigenous peoples to FPIC.”²¹⁹

Regulation on Mandatory Human Rights Due Diligence

The UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises have set a precedent for existing and emerging human rights due diligence legislation. Such legislation has already been implemented in some countries, e.g., in Norway, France, Switzerland, and Germany. Similarly, the European Commission is developing a Corporate Sustainability Due Diligence Directive and a regulation for deforestation-free products. While regulation is a necessary step, concerns have been raised that due diligence regulation reflects compromises made as a result of conflicting stakeholder demands, and as such, do not necessarily fully align with the UN Guiding Principles.²²⁰ As such, investors should not necessarily assume that the existence of human rights due diligence regulation guarantees that businesses act in a manner that is fully aligned with the UN Guiding Principles and OECD Guidelines, and which fully respects the rights of Indigenous peoples.



Belo Monte, Altamira. © Sarah Freeman



Part B: Due Diligence Implementation

6. Policy and Governance

This section provides guidance for investors for incorporating a public policy commitment on Indigenous rights and for incorporating Indigenous rights into operational policies, procedures, and management systems. This should include a public policy commitment, which is embedded through operational policies and procedures required to embed the commitment throughout the organization.

Publicly commit to respecting Indigenous rights

The responsibility to respect human rights requires that businesses, including investors, have a public commitment to respect human rights, approved at the most senior level of the business.²²¹ Thus, in relation to Indigenous rights, investors should publicly commit to respect the rights of Indigenous peoples, as part of an overarching human rights policy, or where applicable, other overarching policy, e.g., a responsible investment policy.

Box 2. Indigenous rights checklist for investor policy commitment

Overarching commitment:

- ✓ Commitment to respect individual and collective rights of Indigenous peoples including the rights enshrined in the UN Declaration on the Rights of Indigenous Peoples and the ILO Convention 169.
- ✓ Respect the right to self-determination; culture; right to lands, territories and resources; and Free, Prior, and Informed Consent.
- ✓ Adhere to the UN Guiding Principles on Business and Human Rights and emerging legal frameworks and standards on business responsibilities in relation to human rights.

Expectations on investee companies and their boards:

- ✓ Develop and implement policies and due diligence processes to identify, cease, prevent, mitigate, and remedy actual or potential impacts on the individual and collective rights of Indigenous peoples, in accordance with the UN Declaration on the Rights of Indigenous Peoples and ILO Convention 169.
- ✓ Respect Indigenous peoples' right to self-determination; culture; lands, territories, and natural resources; and Free, Prior, and Informed Consent, which includes the right to withhold consent.
- ✓ Ensure that good faith consultations are undertaken with Indigenous peoples' representative institutions and obtain FPIC prior to initiating any activities affecting Indigenous peoples' lands, territories, and resources, and on an ongoing basis.
- ✓ Where national laws fail to protect Indigenous rights, to respect internationally recognized rights of Indigenous peoples, in particular those set forth in the UN Declaration on the Rights of Indigenous Peoples.

Note: Sometimes policies only mention FPIC, or Indigenous communities, without recognizing Indigenous peoples' collective rights. A policy on Indigenous peoples' rights should explicitly recognize and commit to respect collective rights of Indigenous peoples as "peoples," not just refer to FPIC or Indigenous communities.

Embed commitment through operational policies and procedures

In accordance with the business responsibility to respect human rights, an investor’s overarching policy commitment should be reflected in operational policies and procedures necessary to embed it throughout the business and throughout the investment cycle.²²² Thus, where relevant, investors should incorporate Indigenous rights into operational policies, procedures, and management systems, such as the following:

- Responsible investment policy, sustainable investment policy, or ESG (Environment, Social, and Governance) policy.
- EU Sustainable Finance Disclosure Regulation (SFDR) policies: due diligence policy, statement on principal adverse impacts.
- Engagement policy, proxy voting guidelines, stewardship policy.
- Sector-specific policies and position statements.
- Internal due diligence and screening tools and guidelines.
- Climate and nature-related commitments, strategies, and implementation plans.
- Investment mandates for external investment managers.

Investors should also review current data providers or other internal due diligence systems used and take necessary steps to ensure that they are adequate for identifying and assessing adverse impacts on Indigenous peoples, or request that data providers supply adequate information.

The following case studies demonstrate how Indigenous peoples’ rights can be incorporated into investor policies (although the inclusion of these case studies does not necessarily mean that these policies and their implementation are perfect).

Case Study: Storebrand

Norwegian financial services group Storebrand’s [human rights policy](#) sets out its commitment to respect all internationally recognized human rights and to follow the UN Guiding Principles and the OECD Guidelines for Multinational Enterprises. Storebrand commits to preventing violations and respecting international human rights, including Indigenous and Tribal peoples’ rights. In addition, Indigenous rights are incorporated into several of Storebrand’s policies and statements, including:

- [Sustainable Investment Policy](#)
- [Analysis Criterion: Human Rights](#)
- [Policy on Deforestation](#)
- [Asset Management Human Rights Due Diligence](#)
- [Principal Adverse Impact \(PAI\) Statement](#)
- [Storebrand Policy on Nature](#)
- [Proxy Voting Policy](#)

Case Study: SEB Investment Management

SEB Investment Management’s 2023 [Sustainability Policy](#) incorporates Free Prior and Informed Consent of Indigenous peoples into its integration and active ownership approach. Specifically, SEB Investment Management monitors “the share of investments reporting that they are committed to Free, Prior and Informed Consent to ensure the rights of indigenous peoples.”

Case Study: BNP Paribas Asset Management Sector-Specific FPIC requirements

BNP Paribas Asset Management's [Responsible Business Conduct Policy](#) (as of January 2023) has several sector-specific requirements and evaluation criteria for certain sectors.

Palm Oil

Upstream palm oil companies are required to:

- Have a policy in place to obtain the Free, Prior, and Informed consent (FPIC) of indigenous and local communities, prior to developing new oil palm plantations.

BNP Paribas Asset Management will evaluate whether downstream palm oil companies:

- Respect land tenure rights, including the Free, Prior, and Informed consent of indigenous and local communities.

Forestry Management

BNP Paribas Asset Management requires that upstream pulp companies:

- Will not develop a new plantation on land owned or occupied by local communities without having (and in line with the FSC or PEFC principles and criteria):
 - Conducted a free, prior, and informed consultation process.
 - Achieved an acceptable compensation arrangement, and
 - Implemented an efficient grievance mechanism.

Note: While a policy on Indigenous rights should cover all investments and sectors, this example shows how Indigenous rights can be incorporated into policies based on sector-specific criteria. However, the policy also has several loopholes; for example, the policy lacks commitments to or requirements that investee companies respect the rights set forth in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Moreover, the policy on forestry management requires agriculture companies to have conducted a free, prior, and informed *consultation* process but does not explicitly require companies to have received *consent*.

Case Study: Calvert Research and Management Proxy Voting Guidelines

Calvert Research and Management has incorporated Indigenous rights into its 2023 [Proxy Voting Guidelines](#), setting out its expectations on investee companies and how they will vote.

The guidelines state that investee companies should develop policies to avoid complicity in Indigenous rights violations through business partnerships, supply chains, or financial investments. Additionally, the guidelines state that projects and investments should proceed only with the FPIC of Indigenous communities that may be significantly impacted.

Calvert will “support proposals asking companies to respect the rights of local and indigenous communities to participate in decisions affecting their local environment, consistent with international law regarding the rights of Indigenous people to free, prior, and informed consent.”

Incorporate Indigenous rights into the EU Sustainable Finance Disclosure Regulation (SFDR) framework

Policies: The EU’s Sustainable Finance Disclosure Regulation (SFDR) entered into force in March 2021 and requires financial market participants to disclose sustainability-related information. While the regulation does not explicitly mention Indigenous peoples’ rights, investors can include Indigenous rights in their own policies referred to in SFDR.

- Due diligence policy referred to in Regulation (EU) 2019/2088 Article 4, as shown in Box 3.
- Engagement policy referred to in Regulation (EU) 2019/2088 Article 4, as shown in Box 4.

Box 3. Illustrative language for due diligence policy

[Entity] is committed to respect the rights of Indigenous peoples, including the rights enshrined in the UN Declaration on the Rights of Indigenous Peoples and the ILO Convention 169 on Indigenous and Tribal Peoples. To meet this responsibility, [Entity] conducts due diligence to identify, assess, avoid contributing to, and seek to prevent, mitigate, and enable remedy for actual or potential adverse impacts on the rights of Indigenous peoples.

[Entity] pays heightened attention to actual or potential impacts on Indigenous peoples’ rights to self-determination; right to own, control, and use their lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation and use; right to life, security and physical integrity; right to culture and cultural identity associated with their way of life; and their right to give or withhold Free, Prior, and Informed Consent to projects or proposals that affect their rights, lands, territories, and resources. To identify and assess actual or potential impacts, [Entity] makes best efforts, including by seeking to engage with data providers or by consulting with external experts or affected rightsholders.

Note: This sample text does not illustrate a standalone policy but rather one that forms part of a wider policy which sets out a human rights due diligence process in accordance with international due diligence standards and best practice, which includes a [zero-tolerance](#) approach to attacks on environmental and human rights defenders.



Fire brigade puts out forest fire in Acre, Brazil. © Sérgio Vale/Amazônia Real

Box 4. Illustrative language for engagement policy

[Entity] expects investee companies to respect the rights of Indigenous peoples, including the rights enshrined in the UN Declaration on the Rights of Indigenous Peoples and ILO Convention 169 on Indigenous and Tribal Peoples. Investee companies should develop and implement policy commitments, due diligence processes, and processes to enable remediation to avoid causing or contributing to adverse impacts on Indigenous peoples' rights through their own activities and seek to prevent or mitigate adverse impacts on Indigenous peoples' rights that are directly linked to their operations, products, or services by their business relationships. This responsibility exists over and above compliance with national laws and regulations.

Investee companies should ensure that good faith consultations are undertaken with Indigenous peoples' representative institutions and ensure that Free, Prior, and Informed Consent of Indigenous peoples is obtained prior to initiating any activity affecting their rights, lands, territories, or other resources, and maintain it on an ongoing basis, in a manner that guarantees respect for their individual and collective rights and that is consistent with their laws, customs and protocols and international human rights standards. Investee companies should guarantee redress to affected Indigenous peoples for any negative impacts on their lives and environment, guarantee fair and equitable sharing of benefits arising from the use of their lands, territories, and resources, and respect decisions of Indigenous peoples to withhold consent.

[Entity] supports proposals that ask companies to strengthen their policies and due diligence processes to respect Indigenous peoples' rights, as well as proposals that ask companies to disclose relevant information regarding actual or potential impacts on Indigenous peoples that they may cause, contribute to, or be linked to by their business relationships in their value chain. Where companies fail to uphold our expectations in this regard, we will consider voting against the board of director considered to be responsible for oversight failures.

Note: This sample text does not illustrate a standalone policy but rather one that forms part of a wider policy which sets out engagement processes in accordance with international due diligence standards and best practice, which includes a [zero-tolerance](#) approach to attacks on environmental and human rights defenders.



NoDAPL Action in San Francisco, California. © Amazon Watch

Statement on principal adverse impacts: Regulation (EU) 2022/1288, also known as the “Regulatory Technical Standards” (RTS) provides a list of indicators of adverse sustainability impacts for investors to identify, assess, prioritize, and disclose principal adverse impacts on sustainability factors. In addition to the list of indicators provided by the regulation, investors that fall under the scope of SFDR can select additional indicators, as shown in Table 1.

Table 1. Incorporation of Indigenous rights into the PAI statement (Table 1, Annex I, Delegated Regulation (EU) 2022/1288).

Other indicators for principal adverse impacts on sustainability factors		
<i>[Information on the principal adverse impacts on sustainability factors referred to in Article 6(1), point (a) in the format in Table 2]</i>		
<i>[Information on the principal adverse impacts on sustainability factors referred to in Article 6(1), point (b), in the format in Table 3]</i>		
<i>[Information on any other adverse impacts on sustainability factors used to identify and assess additional principal adverse impacts on a sustainability factor referred to in Article 6(1), point (c), in the format in Table 2 or Table 3]</i>		
Adverse Sustainability Impact	Adverse impact on sustainability factors (qualitative or quantitative)	Metric
Indicators applicable to investments in investee companies		
Additional indicators to assess principal adverse impacts on a sustainability factor		
<i>Indigenous rights</i>	1. <i>Lack of Indigenous peoples’ rights policy</i>	1. <i>Share of investee companies without a policy commitment to respect the rights of Indigenous peoples as articulated in the UNDRIP, including Free, Prior, and Informed Consent</i> 2. <i>Share of investee companies without a policy that requires suppliers to respect Indigenous peoples’ rights as articulated in the UNDRIP, including Free, Prior, and Informed Consent</i> 3. <i>Share of banks without a policy commitment to respect the rights of Indigenous Peoples as articulated in the UNDRIP, including Free, Prior, and Informed Consent</i>
	2. <i>Companies involved in adverse impacts on Indigenous rights</i>	1. <i>Number of incidents of severe adverse impacts on Indigenous peoples’ rights</i> 2. <i>Number of incidents of severe adverse impacts on Indigenous peoples’ rights for which investee companies have not implemented a remediation plan</i>

Note. These indicators may be modified to better fit investors’ investment universe, and as more data becomes available. The European Financial Reporting Advisory Group (EFRAG), through the European Sustainability Reporting Standards (ESRS) is introducing sector-agnostic and sector-specific disclosure requirements for European companies, which include disclosure requirements on Indigenous rights. It is also recommended that investors request data providers to provide data on Indigenous rights.

7. Identify and Assess Actual or Potential Impacts

This section provides guidance for investors on identifying and assessing actual or potential impacts on Indigenous peoples at both the portfolio and individual investment level, drawing on the [Investor Toolkit on Human Rights](#). This includes the assessment of investee companies' human rights due diligence processes, and the assessment of investee companies' human rights outcomes, throughout the investment cycle.

The assessment of the quality of potential investee companies' **human rights due diligence processes** with respect to Indigenous peoples will vary depending on the specific context of a company. For example, appropriate policies and processes for mining companies are likely different from those of downstream food and beverage manufacturing companies.

The assessment of investee companies' **human rights outcomes** should go beyond policy commitments and due diligence processes and address the actual outcomes and impacts of companies on Indigenous peoples, as well as how these are remedied. It should go beyond assessing company inputs and prioritize the perspectives of those Indigenous communities and individuals whose human rights may be affected. Where this is not possible, investors should, in accordance with the UN Guiding Principles, consult with credible, independent expert resources, including human rights defenders and others from civil society.²²³

Case Study: Glencore Corporate Human Rights Benchmark

In the 2022 iteration of the Corporate Human Rights Benchmark (CHRB), the mining company Glencore ranked #17 out of 129 companies, meaning that the company fulfils many of the criteria for achieving a high score according to the CHRB methodology. Yet while Glencore has achieved a high score on the benchmark, civil society organizations have reported on Glencore's alleged systematic involvement in human rights abuses.²²⁴

As such, whereas benchmark methodologies provide a useful tool for businesses and investors to understand gaps in their due diligence processes, and help them understand how to fill those gaps, the scores themselves cannot substitute the need to consider the perspectives of those affected by company activities.

Why special attention to Indigenous rights in due diligence is required

While companies that have strong due diligence process in general are more likely to avoid infringing on the human rights of all people, as the Working Group on Business and Human Rights recognizes, given the specificities of adverse impacts on Indigenous peoples, generic assessments may not be sufficient to fully identify and address potential human rights risks, particularly with regard to collective rights to land, resources and self-determination.²²⁵ Thus, the assessment of investee companies' due diligence processes and human rights outcomes should also specifically focus on collective rights of Indigenous peoples.

Businesses can be involved in adverse human rights impacts both by actions and omissions. Omission may entail, for example insufficient attention to Indigenous rights in due diligence processes. However, effective investor due diligence requires not just assessments of due diligence processes and gaps but also heightened attention to signs that due diligence is not conducted in good faith, e.g., a company or third parties connected to a company (such as contractors or government agencies) that use coercive tactics.

Why investors should require transparent disclosure of FPIC processes

Policies and certification schemes are by themselves not a guarantee that Indigenous rights are or will be respected throughout a business' operations or value chain. This means that adverse impacts on Indigenous peoples largely go unnoticed by investors until Indigenous peoples and civil society organizations denounce those impacts. Often, it may go unreported due to fear of reprisals, such as assassinations, criminalization, lawsuits, threats, defamation, etc.

The existence of policies that mention Indigenous people is often considered by investors and benchmarks as a positive indicator. However, the existence of policies is not a reliable indicator if the same company fails to transparently disclose its operations and value chain in a manner that enables verification that Indigenous peoples' rights are respected. For example, a company that has a policy on Indigenous peoples may respect and have partnerships with Indigenous peoples in one country but be involved human rights abuses in another country, including through subsidiaries or joint ventures.

Therefore, the metric should not be 'does a company have a policy on Indigenous rights or FPIC?' but rather, 'does publicly available evidence exist that allows for independent verification that the company respects Indigenous peoples' rights and has consent at each operational site or concession?'

An example of how information is being disclosed in some sectors includes the High Carbon Stock Approach (HCSA) Quality Assurance process, which includes a peer review process of a company's HCSA report, including with respect to Free, Prior, and Informed Consent of Indigenous peoples, which is then made available on the HCSA [website](#).

Where companies fail to disclose information necessary to understand their actual or potential human rights impacts, and whether and how they have obtained FPIC through Indigenous peoples' legitimate decision-making processes and in accordance with international human rights law, that may itself be a "red flag" that investors need to enhance their due diligence.

Case Study: Report on Canadian companies listed on the Toronto Stock Exchange

A study conducted by the Justice and Corporate Accountability Project reviewed violent incidents involving 28 Canadian companies from 2000 to 2015 across various regions, often affecting Indigenous peoples. The study found that the companies were connected to 44 deaths, 403 injuries, and 709 cases of criminalization, but only reported on 24% of deaths and 12% of injuries in their mandatory reports.²²⁶

Case Study: Tahoe Resources

Canadian mining company Tahoe Resources failed to disclose the extent of community and Indigenous opposition to its Escobal mine in Guatemala. After a series of lawsuits and violent conflicts, the mine was suspended by a Guatemalan court. Tahoe's shares plummeted from a high of \$27 and was eventually sold to Pan American Silver for about \$5 a share.²²⁷

Why investors should require transparent disclosure of companies' value chains

Independently verifiable information is critical for enabling investors and affected communities to assess the quality of companies' due diligence processes, including with regards to companies' value chains. Examples of relevant disclosure include:

- Some companies have started mapping their [forest footprints](#), which includes disclosure on the footprint of their value chain including impacts on the rights of Indigenous peoples and affected communities. Examples of pilot studies some companies have undertaken (albeit to a limited scope) include those of [Unilever](#), [Colgate](#), and [Nestle](#).
- [Triodos Bank](#) publicly discloses information on each organization to which it lends money.
- [Wilmar](#) publicly discloses the grievances filed in its operations and value chain.
- Companies in the palm oil value chain, such as [Nestle](#), have started disclosing a list of their suppliers via the [Universal Mill List](#).

While such disclosure is not common in most sectors and commodity value chains, these examples show that it is possible, and could extend to other sectors and commodities. An interim step for investors entails setting clear expectations and engaging with investee companies about transparent disclosure of their operations, value chains, impact assessments, and FPIC processes and outcomes.

7.1 Map actual or potential adverse impacts at investment universe and portfolio level

This section provides guidance for investors to understand the risk of actual or potential impacts on Indigenous peoples at portfolio or investment universe level. This includes companies that may cause or contribute to adverse impacts on Indigenous peoples through their own activities, or companies that may be linked to adverse impacts on Indigenous peoples by their business relationships.

Identify and map industry and product risk exposure

Sectors and products in which companies may cause, contribute to, or be directly linked to adverse impacts on Indigenous peoples include, but are not limited to:

- Extractives: Mining, oil and gas, coal
- Renewables: Hydropower, wind, solar
- Agribusiness: Palm oil, sugar, cattle, biofuels, fisheries, forestry, rubber, etc.
- Conservation: Carbon and biodiversity credits, conservation programs, etc.
- Infrastructure: Highways, airports, ports, pipelines, renewable energy projects, etc.

Moreover, midstream, and downstream companies can be directly linked to adverse impacts on Indigenous peoples by their business relationships in their upstream value chain. Examples include:

- Food and beverage: sourcing of agricultural products such as palm oil
- Car and battery manufacturers: sourcing of minerals
- Pulp and paper: sourcing of forestry products

- Car seat and car manufacturers: sourcing of leather
- Livestock and animal feed companies: sourcing of soy
- Tire manufacturers: sourcing of rubber
- Metals refineries: sourcing of minerals
- Companies that purchase carbon or biodiversity credits

In addition, large development projects, such as infrastructure or mining projects, involve not only an operating company but also providers of products and services such as suppliers of machinery and equipment, which also have a responsibility to conduct their own downstream due diligence.

Case study: Car manufacturers linked to illegally deforested lands

In December 2022, the Environmental Investigation Agency published a report showing that major car manufacturers importing leather for car seats were at elevated risk of sourcing leather from illegally deforested lands and cattle raised illegally on Indigenous lands. According to the report, car manufacturers, including but not limited to General Motors, Daimler, Stellantis, Volkswagen, and Ford, are alleged to have sourced car leather from automotive leather manufacturers such as the Lear Corporation, which in turn allegedly sourced leather from JBS, Vancouros, and Viposa, all of which according to the report, regularly bought cattle directly from illegal farms.²²⁸

Case Study: Blood gold from the Brazilian Amazon

In the last few years, illegal gold mining has had devastating consequences for Indigenous peoples across the Amazon, and there is compelling evidence that the gold ends up in global value chains.

In the case of Brazil, tech companies, such as Apple, Microsoft, Intel, Tesla, Ford, General Motors, Samsung, Sony, and Volkswagen, are alleged to have bought gold from refineries investigated by Brazilian authorities for buying illegal gold mined in the Amazon.²²⁹

Separately, investigations on gold imported by Swiss refineries found that a fifth of imports came from Brazilian Amazon provinces, most of which, were probably mined illegally. In June 2022, Swiss refineries pledged to take measures not to import illegally mined gold from Indigenous territories,²³⁰ but Canada, the largest importer of gold from the Brazilian Amazon, made no such pledge.²³¹

Identify and map geographical risk exposure

To understand their geographical risk exposure, investors should identify regions in which their investee companies may be involved in adverse impacts through activities that they cause, contribute to, or to which they may be linked by their business relationships. Relevant questions for investors to consider include:

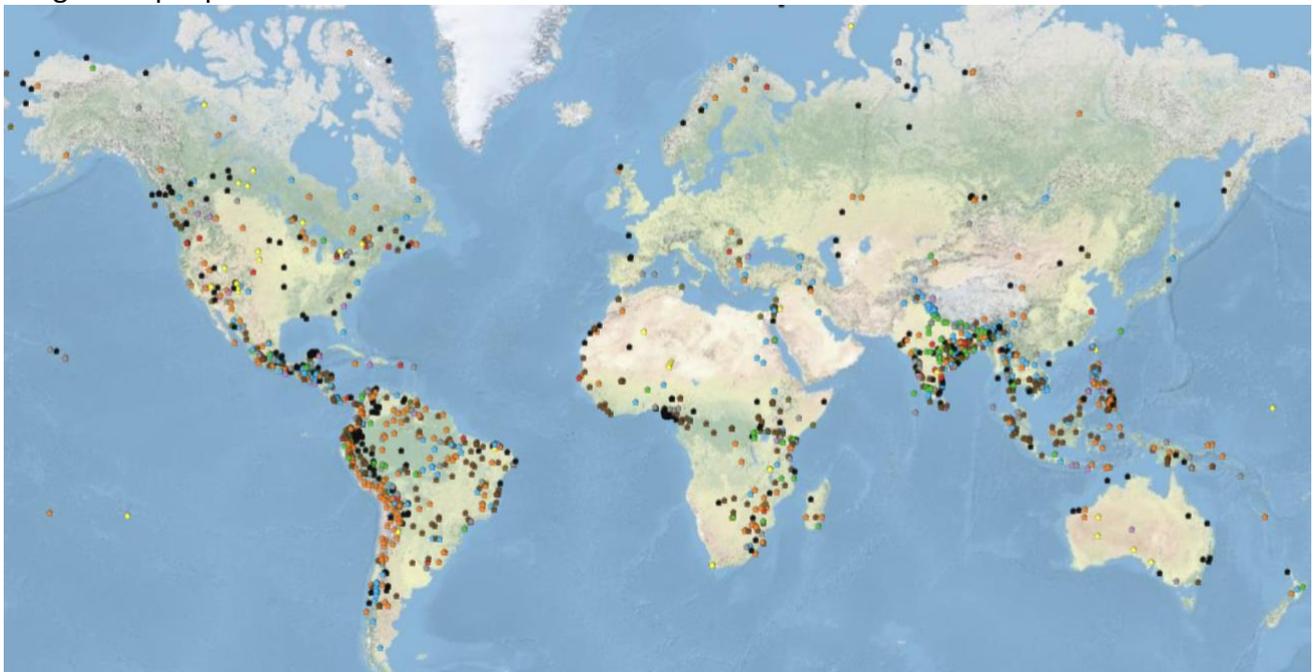
- Do investee companies have own activities or operations in regions where Indigenous peoples may be affected?
- Do investee companies have subsidiaries, or participate in joint ventures that have activities or operations in regions where Indigenous peoples may be affected?
- Do entities in investee companies' value chain have activities in regions where Indigenous peoples may be affected (e.g., in relation to suppliers, downstream value chain, financial transactions)?

Investors should be cautious that in many regions, Indigenous peoples are affected by domestic as well as foreign companies. Many companies affecting Indigenous peoples globally are listed on major stock exchanges, such as the Toronto Stock Exchange²³² and the London Stock Exchange.²³³

According to a report by Indigenous Peoples Rights International (IPRI) and the Business and Human Rights Resource Centre, Latin America (75%) and Asia-Pacific (18%) are the regions with the most attacks against Indigenous human rights defenders (IHRDs).²³⁴ The report finds that:

- *The highest numbers of attacks against IHRDs occurred in Honduras, Peru, Mexico, Guatemala, Brazil, the Philippines, and Colombia.*
- *In the cases companies were publicly linked with attacks against IHRDs, the majority were headquartered in Honduras (72), Guatemala (54), Canada (39), USA (37), Mexico (32), and China (28).*

Figure 3. Overview of Environmental Justice Atlas documented socio-environmental conflicts where Indigenous peoples or traditional communities were affected.



Note. The frequency of cases in northern latitudes looks less concentrated than they are because the map projection distorts areas. Source: EJAtlas. (2022). Atlas of Environmental Justice. <http://ejatlas.org/>.

Examples of tools to conduct high-level mapping of geographical exposure include:

- [EJAtlas](http://ejatlas.org/) allows users to filter for cases of socio-environmental conflicts according to numerous factors such as, cases where Indigenous peoples were affected, and by sector.
- Verisk Maplecroft has developed country-based Indigenous rights industry risk indicators.

7.2 Identify actual or potential impacts

This section includes questions and data sources that investors may use as guidance to assess companies' due diligence processes and to identify actual or potential impacts. This also includes "red flags" that investors may use as signals to further escalate due diligence. While these questions and red flags aim to facilitate due diligence, investors may need to adopt their due diligence as

appropriate to the size of the investee company, risk of severe human rights impacts, and the nature and context of its operations. Data sources to help identify actual or potential impacts are provided in Tables 2, 3, and 4.

Table 2. Resources to help identify actual or potential impacts on Indigenous peoples

Resource	Description	Type	Sector	Region
Sigwatch	Tracks NGO campaigns and reports related to companies and investors, including with a specific focus on Indigenous peoples.	Database	All	Global
Observatorio Latinoamericano de Conflictos Ambientales	News and reports (in Spanish) of socioenvironmental conflicts, including conflicts related to mining, energy, forestry, and agribusiness.	Database; map	Mining; forestry; agribusiness; energy	Latin America
BankTrack Dodgy Deals Map	Database of harmful projects financed by banks.	Map; reports	Various	Global
EJAtlas	Socio-environmental conflicts related to projects and extractive activities.	Map; reports	Various	Global
Latin American Mining Conflicts Observatory	Map of mining-related socio-environmental conflicts in Latin America.	Map	Mining	Latin America
Mapa de Conflictos Socioambientales Chile	Map of mining-related socio-environmental conflicts in Chile (in Spanish).	Map; reports	Various	Chile
Land Conflict Watch	Database of land conflicts in India.	Map; reports	Various	India
Rainforest Action Group	Reports on mining companies and concessions in Ecuador, including overlap with Indigenous territories	Map; reports	Mining	Ecuador
OECD Watch	Cases of complaints with the OECD National Contact Points (NCP) system.	Map; reports	Various	Global
Business & Human Rights Resource Centre	News and allegations relating to the human rights impacts of over 20,000 companies	Reports	Various	Global
Business & Human Rights Resource Centre Weekly Updates	Weekly updates on business and human rights.	Reports	Various	Global
Transition Minerals Tracker	Data on the human rights practices of 103 companies active in producing minerals for the renewable energy and electric vehicle sectors.	Dataset	Mining	Global
Fast & Fair Renewable Investments Accompanying Spreadsheet	The report includes a dataset (Excel-file) of allegations of human rights abuses in the renewable energy sectors between 2010 and 2019.	Dataset	Renewables	Global
Rainforest Action Network (RAN) Reports	Evaluations of major brands on their deforestation and human rights policies and impacts. The <i>Keep Forests Standing Scorecards</i> evaluate the policies and practices of major brands and banks involved in deforestation and human rights impacts.	Reports	Various; food and beverage; banks	Global
ZSL Spott	Assessments of commodity producers, processors, and traders, including with respect to Indigenous rights. It also	Benchmark; reports	Agribusiness	Global

	has a media monitor covering topics related to associated topics, including human rights.			
Complicity in Destruction reports	Reports on companies involved in Indigenous rights violations in the Amazon.	Reports	Various	Amazon region
Forest IQ	Data on deforestation, conversion of natural ecosystems and associated human rights abuses of companies.	Data provider	Financial services; agribusiness; food and beverage; other	Global
RSPO Complaints Tracker	Public list of grievances of the Roundtable on Sustainable Palm Oil (RSPO).	Grievances	Palm oil	Global
Aid Environment Realtime Deforestation Monitoring	Monthly reports on deforestation in global commodity chains, including information on overlapping or nearby Indigenous lands.	Reports	Agribusiness	Brazil
Mining Watch	Research on Canadian mining companies operating in Canada and abroad, with a focus on Indigenous rights.	Reports	Mining	Global
RepRisk	Dataset of ESG risks covering over 200,000 companies, including assessments on incidents related to Indigenous peoples (according to its methodology documents).	Data provider	Various	Global
ISS (Institutional Shareholder Services) Norm-Based Research	Norm-based screening which monitors companies, including with respect to international standards on Indigenous peoples' rights (according to its methodology documents).	Data provider	Various	Global
Google, Twitter, and social media search	Indigenous rights violations are often reported first through Indigenous peoples' own media channels, and then by NGOs. Search strings such as "[Company name] [Indigenous rights]" or "[Company name] [Indigenous rights violations]," as well as searches in local languages can provide detailed and timely information.			

Table 3. Benchmarks to assess companies' due diligence policies

Resource	Description	Type	Sector	Region
Forest 500	Dataset containing indicators on deforestation and human rights commitments of the 500 companies with the greatest exposure to tropical deforestation.	Dataset; benchmark	Financial services; agribusiness; food and beverage; other	Global
Lead the Charge	The Lead the Charge Scorecard assesses automakers' efforts to eliminate fossil fuels, environmental harms, and human rights abuses from their supply chains, including with respect to Indigenous rights.	Benchmark	Automobiles	Global
Renewable Energy & Human Rights Benchmark	Benchmark of the human rights policies and practices of the largest publicly traded wind and solar companies in the world, including with respect to Indigenous rights.	Benchmark	Renewables	Global
Forests and Finance	Evaluates the policies of banks financing 300 companies in forest-risk commodity supply chains, including whether the banks have FPIC requirements.	Dataset; benchmark	Financial services; agribusiness; forestry; mining	Global

ZSL Spott	Assessments of commodity producers, processors, and traders, including with respect to Indigenous rights. It also has a media monitor covering topics related to assessment topics.	Benchmark; reports	Agribusiness	Global
WWF Palm Oil Scorecard	Assessment of palm oil buyers' policies with respect to deforestation and human rights.	Benchmark	Palm oil	Global
Corporate Human Rights Benchmark	Benchmark of companies' human rights policies and due diligence processes.	Benchmark	Various	Global
Responsible Mining Index: Community Well-being	Various indicators on mining companies, including with respect to Indigenous peoples and FPIC.	Benchmark	Mining	Global
BankTrack Human Rights Benchmark	Assessment of the extent to which banks have implemented the UN Guiding Principles on Business and Human Rights.	Benchmark	Banks	Global

Table 4. Additional resources to identify and assess impacts

Resource	Description	Type	Sector	Region
Land Portal Geoportal	Maps of Indigenous lands and territories, and their legal status.	Map		Global
Monitoring of the Andean Amazon Project	Tracks deforestation in the Andean Amazon, including related to Indigenous territories.	Map; reports	Mining; agribusiness; oil and gas	Andean Amazon
Global Forest Watch	Maps of forest change and commodity concessions, including on Indigenous lands.	Map; concessions	Agribusiness; mining; oil and gas	Global
LandMark	Maps of Indigenous lands and territories, and their legal status.	Map		Global
Mined Amazon Dashboard	Map showing real-time applications filed with the Brazilian Mining Agency including overlap with Indigenous lands.	Map; concession	Mining	Amazon region
Amazon Mining Watch	Real-time monitoring of mining impacts in the Amazon, using satellite images and machine learning.	Map	Mining	Amazon region
Nusantra Atlas	Maps of deforestation and commodity concessions in South-East Asia, including deforestation on Indigenous lands.	Map; concessions	Palm oil; forestry; mining; other	South-East Asia
Land Matrix	Global map of agricultural land acquisition, lease, concession, and exploitation permits.	Map; projects	Agribusiness; forestry; mining; oil and gas	Global
ICCA Registry	Map of Indigenous peoples and Community Conserved Territories and Areas (ICCA).	Map		Global
Trase Earth	Information on the supply chains of companies involved in commodity-driven deforestation.	Various	Agribusiness	Various
Trase Finance	Information on the exposure to deforestation risk of financial institutions and funds.	Various	Financial services; agribusiness	Various

Chain Reaction Research Reports	Research on deforestation and human rights risks of companies involved in global commodity value chains.	Reports	Agribusiness	Global
Mighty Earth Reports	Reports on deforestation and climate change related to companies involved in global commodity value chains.	Reports	Various	Global
Global Witness	Reports on corporate environmental and human rights abuses, including attacks against Indigenous human rights defenders.	Reports	Various	Global
Friends of the Earth Reports	Reports on deforestation and climate, including land-grabbing and Indigenous rights.	Reports	Various	Global
Forest Peoples Programme Reports	Reports on human rights abuses in forest-risk value chains.	Reports	Various	Global
InfoAmazonia	Maps of Indigenous territories, deforestation, and business activities in the Amazon.	Reports; maps	Various	Amazon Region
CSR Risk Check	A tool for companies to identify the risks in relation to countries and products/services. The tool uses reports sourced from a variety of different organizations such as the International Work Group on Indigenous Affairs (IWGIA), Amazon Watch as a basis for their results.	Reports	Various	Global
ForestLink Community Alerts Map	Community alerts on illegal activities and human rights issues.	Map; reports	Various	Cameroon; Democratic Republic of Congo; Ghana; Liberia; Côte d'Ivoire; Peru
Mapping for Rights Congo Basin Community Atlas	Maps including land use and presence of Indigenous peoples in the Congo basin.	Map; concessions	Various	Cameroon; Democratic Republic of Congo
Zero Tolerance Initiative –Voices	Reports on attacks against human rights defenders.	Reports	Mining	Global

Note. The various maps provided in this table are provided for indicative purposes and may not necessarily be complete or fully accurate.

Understand the geographical business and human rights context

Where investors have identified exposure to companies associated with high-risk industries and exposure to Indigenous lands and territories, relevant questions to consider include:

- Do Indigenous communities have legal tenure of their lands, territories, and resources in line with international human rights law? Lack of legal tenure indicates heightened risk of violations of their rights.
- Does the country have a legal framework for obtaining Free, Prior, and Informed Consent of Indigenous peoples in accordance with international human rights law?
- Are there signs of adverse impacts on Indigenous peoples or conflicts previously caused by companies or governments in the region?
- Are there other third parties that may affect the rights of Indigenous peoples, such as illegal loggers, wildcat miners, unauthorized settlers, or illicit groups?
- Are there any ongoing land disputes that may be exacerbated by the presence of companies or other third parties?
- Have national laws, such as regulation related to mining, oil and gas, energy, and agribusiness projects, been criticized by Indigenous organizations or NGO reports for failing

to consult with Indigenous peoples about the regulation, or for undermining Indigenous rights?

- Has the government allocated concessions on Indigenous territories to private sector actors without consulting and obtaining consent of Indigenous peoples? Is there a history of land allocations that fail to respect Indigenous peoples' rights in the country?

Guidance on identifying Indigenous peoples has been provided by the Aluminum Stewardship Initiative (ASI) Indigenous Peoples Advisory Forum: [Criteria for the Identification of Indigenous Peoples](#).

Table 6. Resources for understanding the human rights context

Resource	Description
OHCHR Universal Human Rights Index	Allows users to explore observations and recommendations made by the international human rights protection system. Investors may use it, e.g., to filter as follows: <ul style="list-style-type: none"> ▪ Country: Relevant country where actual or potential impacts have been identified ▪ Human Rights Themes: Business and Human Rights ▪ Concerned Persons/Groups: Indigenous peoples
IWGIA: The Indigenous World	Yearly publication of the International Work Group on Indigenous Affairs covering the experiences of Indigenous peoples in over 60 countries over the world.
Indigenous Peoples Rights International	Reports on violations of Indigenous peoples' rights, with a focus on Mexico, Brazil, Colombia, Democratic Republic of Congo, Philippines, and India.
World Directory of Minorities and Indigenous Peoples	Country by country information on minorities and Indigenous peoples.
Land Portal Geoportal	Maps of Indigenous lands and territories, and their legal status.
IWGIA: Countries	Summaries of country reports on the state of Indigenous peoples' rights.
EJAtlas	Interactive map of socio-environmental conflicts related to projects and extractive activities. Out of a total of approximately 3700 cases, 1500 involve Indigenous peoples.
Native Land	Native Land tracks Indigenous territories, treaties, and languages across the world.
Rights and Resources Initiative Tenure Tool	Provides qualitative and quantitative data on the forest tenure rights of Indigenous peoples, Afro-descendant peoples, local communities, and the women within those communities.
CSR Risk Check	A tool for companies to identify the risks in relation to countries and products/services. The tool uses reports sourced from a variety of different organizations such as IWGIA and Amazon Watch as a basis for their results.
Uppsala Conflict Data Program	Dataset and maps of violent conflicts, with local conflict-level information.
Verisk Maplecroft	Industry-specific and geospatial Indigenous rights risk indices.
Special Rapporteur on the Rights of Indigenous Peoples	Thematic and country reports on the situation and rights of Indigenous peoples.
Special Rapporteur on human rights defenders	Country reports on human rights defenders.

Questions and red flags to consider in due diligence

Impacts that a company may cause or contribute to through its own activities

Where investors have identified that a business might cause or contribute to adverse impacts on Indigenous peoples' rights through its own activities, questions to consider in investment due diligence and engagement include:

General

- Does the company have any operations on or near Indigenous lands or territories, or activities that may otherwise affect Indigenous peoples' resources, including lands, air, waters, coastal seas, sea-ice, flora, and fauna?
- Has the company identified and disclosed information on potentially affected Indigenous communities?
- What is the track record of the company's executives, board, and major shareholders with respect to Indigenous peoples' rights?

Policy

- Does the company have a policy commitment to respect the rights of Indigenous peoples, including the right to Free, Prior, and Informed consent, which includes the right to withhold consent? What's the company's policy on situations where a community does not give consent?
- Does its policy set out procedures and responsibilities for implementing human rights due diligence?
- Does the company have a policy on non-retaliation against human rights defenders?

Due diligence

- Does the company have an internal system and clear responsibilities for carrying out due diligence to identify, assess, and mitigate/prevent adverse human rights impacts on Indigenous peoples? Does relevant staff have relevant expertise on Indigenous peoples' rights and relevant geographic context?
- Does the company have a grievance mechanism to receive, investigate, and address complaints of Indigenous peoples? Have potentially impacted communities been consulted about the design and implementation of the grievance mechanism?
- Has the company carried out community-level Human Rights Impact Assessments (HRIA) in partnership and consultation with potentially impacted communities to identify and assess actual or potential impacts on their rights and livelihoods?
- What actions has the company taken to avoid contributing to adverse impacts on Indigenous peoples caused by third parties, such as government agencies, joint venture partners, contractors, and security forces?
- Does the company (or third parties connected to the company) respect Indigenous peoples' own decision-making processes without interfering; without seeking to negotiate agreements in violation of Indigenous peoples' own laws, traditions, or customs?

Consent

- Where the company has entered an agreement with a State or government agency, e.g., about land use permits, have potentially impacted Indigenous peoples been consulted about, and given their consent to the agreement?

- Has the company obtained Free, Prior, and Informed Consent of Indigenous peoples, including a written agreement specifying the terms and conditions of the agreement? Which communities and legitimate representative institutions have given consent?
- Where a company has multiple operational sites, concessions, licenses, or permits that affect Indigenous lands territories and resources, including for exploratory activities, has consent been granted for each of those? Are there any sites, licenses or permits to which consent has not been given?

Response to identified adverse impacts

- Has the company consulted with potentially impacted Indigenous peoples or civil society organizations with regards to appropriate actions to cease, prevent, mitigate impacts, and provide or cooperate in remediation?
- Has the company established a time-bound plan to cease the adverse impact and provide or enable remedy?
- What steps has the company taken to ensure the non-repetition of adverse impacts? Has the company adopted any changes to its policies, processes, management, or board oversight?



IBAMA fire brigade checks a chestnut tree that was burned in a deforested area in the municipality of Apui, Amazonas.
© Bruno Kelly/Amazonia Real

Red flags in policy commitment

Corporate policies often mention Indigenous communities or FPIC; however, they often have loopholes. Moreover, larger companies tend to have more policies in place compared to smaller companies; however, this does not necessarily mean that they are better at respecting rights across their operations and value chain. The following are red flags in policy commitment that investors may look out for to instigate further due diligence:

Lack of due diligence

- Lack of due diligence policy that sets clear responsibilities for oversight and implementation of due diligence processes.
- Lack of policy or process to enable remedy through a grievance mechanism, including steps for receiving, investigating, and providing or enabling remedy.
- Lack of policy that requires business partners to respect human and Indigenous rights.

Omission of Indigenous rights

- Mentioning Indigenous people or communities in policies, but not explicitly recognizing and committing to respect the rights of Indigenous peoples in accordance with internationally recognized standards and instruments on the rights of Indigenous peoples, including the UNDRIP.
- Lack of commitment to respect Indigenous rights and Free, Prior, and Informed Consent, including the right to withhold consent.
- Weak commitment, such as commitment to “free, prior, and informed consultation.”
- Policy that stresses that FPIC “does not require unanimity.” Such language can be divisive, and it suggests that the company may not respect Indigenous peoples’ own decision-making systems.
- Policy that stresses that Indigenous peoples do not have a “veto right.” As the Expert Mechanism on the Right of Indigenous Peoples has noted, such arguments “largely detract from and undermine the legitimacy of the free, prior and informed consent concept.”²³⁵
- Policy that requires the company to only adhere to national legislation, or to industry standards that do not require respect for internationally recognized rights of Indigenous peoples.
- Referring to Indigenous peoples solely as vulnerable groups or stakeholders rather than legitimate rights-holders.

Red flags in impact assessments

Impact assessments should be carried out in a participatory manner with potentially affected Indigenous communities, in a manner that is consistent with international standards on Indigenous rights. Some red flags include:

- Lack of an environmental and social impact assessment (ESIA) or human rights impact assessment (HRIA) or lack of disclosure of impact assessments.
- Relying only on domestic law or industry standards that are not consistent with international human rights standards on Indigenous peoples’ rights.
- Lack of evidence of Indigenous peoples’ involvement in designing the agenda, nature, and timelines of the impact assessments.
- Not including Indigenous rights and perspectives, such as relationship to lands and sacred sites, or cultural and spiritual impacts.

- Lack of assessment on the impacts on the rights and special needs of Indigenous elders, women, youth, children, and persons with disabilities.
- Lack of evidence of Indigenous rights expertise, and local experience among those conducting the assessment (e.g., impact assessment conducted only by engineers).
- Lack of information relevant for understanding whether and how each potentially impacted community has been involved in, and verified, the impact assessment's outcomes.

Red flags in company practice

Examples of red flags in company practice, e.g., as self-reported by companies, reported by media, data providers, NGOs, and Indigenous peoples' own social media channels:

General

- A track record of adverse human rights impacts or allegations of adverse human rights impacts, including allegations of adverse impacts in other geographic locations.
- Company executives, board members, or major individual shareholders that have a track record of being involved in adverse human rights impacts.
- Aggressive public relations campaigns and overt disclosure on charitable activities, community benefits, and development related to potentially impacted Indigenous peoples, which can be a tactic to legitimize activities that fail to respect Indigenous peoples' rights.
- Dismissal of or non-response to the concerns of legitimate Indigenous representatives and decision-making institutions.
- Language that uses Indigenous rights and FPIC only in relation to terms that concern risks to businesses rather than to rightsholders, such as "social license to operate," "land access strategy," or "conflict management."

Due diligence

- Lack of dedicated staff responsible for identifying, assessing, and addressing the company's potential and actual human adverse human rights impacts.
- Lack of a due diligence process to identify, mitigate, or prevent adverse human rights impacts caused by third parties, such as government agencies, contractors, joint venture partners, or security forces.
- Lack of company grievance mechanism to which Indigenous peoples have agreed, which sets out processes to receive, investigate, and remediate actual or potential impacts.
- Reliance solely on domestic standards rather than international human rights law and standards.

Government agreements

- Agreements signed with host States that lack provisions to guarantee respect for human rights.
- Investment contracts signed with host States about which potentially impacted Indigenous peoples have not been consulted in a FPIC process, or to which they have not given their consent.
- Lack of evidence that Indigenous peoples have been consulted about and given their consent *prior* to the allocation of concessions that overlap with Indigenous peoples' lands and territories.

Community agreements

- Widespread use of non-disclosure agreements (NDAs) in “consent” or “memorandum of understanding,” or “benefit sharing” agreements that prevent external verification of FPIC. Such agreements can also prevent Indigenous peoples from exercising their right to FPIC, e.g., by seeking independent expert advice.
- Signs that consent was not freely given, e.g., signs of intimidation, threats of militarization, or presence of public or private security forces during negotiations.
- Signs of “trap-like” agreements that contain provisions that limit Indigenous peoples’ access to their rights and lands, or provisions that limit Indigenous peoples’ ability to exercise self-governance within their territories.
- Contracts or benefit-sharing agreements that impose obligations on Indigenous peoples, but do not impose any obligations for companies (except for benefit-sharing), e.g., agreements where benefits to communities are conditional on giving up their rights.
- Benefit-sharing agreements which are contested by Indigenous peoples’ legitimate representative institutions.

Investments in complex ownership structures

Investors can be exposed to adverse impacts on Indigenous peoples through mergers and acquisitions (M&A) of investee companies, joint venture participations, and investee companies’ subsidiaries. Where a company is involved in a merger or acquisition, the UN Guiding Principles set out that it should conduct human rights due diligence to identify and address actual or potential impacts. When a company is involved in a joint venture, it is expected to have strong legal and other agreements to ensure that human rights are respected.²³⁶

Thus, when investing in companies that may be involved in complex investment chains and ownership structures, investors should also assess investee companies’ due diligence practices and legal agreements to ensure human rights are respected.

Questions to consider

- Does the company have a due diligence process that considers Indigenous rights in relation to minority shareholdings, mergers and acquisitions, and joint ventures?
- What contractual agreements are in place in relation to mergers and acquisitions to ensure Indigenous rights are respected?

Red flags

- No policy commitment to respect the rights of Indigenous peoples, or one that does not explicitly require business partners, such as joint venture partners and subsidiaries, to respect Indigenous rights.
- Lack of a grievance mechanism through which affected people can raise concerns, which also includes complaints related to joint venture partners, subsidiaries, and other business partners.
- Companies that evade their human rights responsibility by selling their stake in subsidiaries without mitigating/preventing impacts and seeking to enable or provide remedy.

Case Study: ArcelorMittal and Ternium Joint Venture

The Peña Colorada Consortium is a joint venture between ArcelorMittal and Ternium, operating the Peña Colorada Mine in Jalisco, Mexico. Several civil society organizations have reported attacks against Indigenous peoples related to their opposition to the Peña Colorada mine. *Mapas Conflictos Mineros en Latinoamérica* (OCMAL) reports that community members have been threatened, assassinated, and disappeared. According to OCMAL, the number of assassinated community members in relation to this conflict amounts to 35.²³⁷

Impacts in the upstream supply chains of downstream companies

Companies that may be linked to impacts in their upstream supply chain include but are not limited to traders of agricultural products and food and beverage companies, and companies in renewable energy value chains such as battery manufacturers and electric vehicle manufacturers.

In some commodity value chains, particularly in the palm oil value chain, NDPE policies have been widely adopted. A growing number of companies have also started to publicly disclose grievances in the value chain and lists of suppliers and (palm) mills from which they source products.

In practice, even companies that score highly on various benchmarks have failed to enable adequate remedy,²³⁸ and those whose human rights are affected rarely if ever have access to just and equitable remedy. Thus, investors can presume that, in most cases investee companies in global commodity value chains currently lack adequate processes to provide or cooperate in effective remediation.

Questions to consider in investment due diligence and engagement include:

- Does the company require its own operators and suppliers to respect Indigenous peoples' rights? Does this requirement apply to all operations and suppliers, across all products and commodities?
- Does the company require its own operators and suppliers to obtain FPIC before commencing any activities on their lands? How does it implement this policy in practice?
- Where a company "expects" suppliers to respect Indigenous rights, what is its process to identify impacts on Indigenous rights, and to exert leverage over suppliers?
- What is the company's policy and operational procedure for when its own operations or suppliers fail to respect Indigenous rights and FPIC?
- What steps has the company taken to ensure traceability in its value chain? Does it impose requirements on direct suppliers to disclose its supply chain and grievances?
- What steps has the company taken to verify, through an independent third party, compliance with FPIC by its own operators, suppliers, subsidiaries, or other business partners?
- What steps has the company taken to ensure its grievance mechanism is accessible to affected people? Is it accessible in all relevant languages?
- What procedure does the company have to handle cases in which complainants are at risk of reprisals?
- Has the company developed a time-bound plan to investigate and enable remedy for unresolved grievances in its value chain?

Impacts in the downstream value chain of companies

Businesses can be involved in adverse impacts in their downstream value chain, e.g., by providing products and services, engineering, equipment, machinery, construction, and other services to projects such as mining, infrastructure, and renewable energy projects.

Questions to consider in investment due diligence and engagement include:

- Does the company provide products or services to customers or projects that operate near or on Indigenous lands? Are projects and project locations publicly disclosed?
- Does the company have a due diligence process to identify and address human rights issues in the downstream value chain?
- How does the company screen potential projects and customers? What is the methodology and scope?
- How does the company identify and assess risks of violations of Indigenous rights? How does the company assess whether a project has obtained FPIC of potentially affected Indigenous communities?
- Does the company have a process to provide for or cooperate in the provision of remedy? Does the process apply to impacts that occur in the downstream value chain?
- Can the company provide examples of cases where an assessment of actual or potential human rights impacts affected its decision to proceed or not with a customer or project?
- Can the company provide examples of cases where it has used its leverage to mitigate or prevent adverse impacts on the human rights of Indigenous peoples in its downstream value chain?

Response to identified adverse impacts:

- What steps has the company taken to cease, prevent, and mitigate actual or potential impacts?
- Has the company made a time-bound plan to use its leverage to cease, prevent, mitigate, and enable remedy regarding the adverse impacts?
- Has the company consulted with potentially impacted Indigenous peoples or civil society organizations with regards to appropriate actions to mitigate/prevent impacts and enable remedy?



Oil waste pool and gas flares between Orellana and Sucumbíos Ecuador. © Acción Ecológica

Investments in banks

Banks can contribute to or be linked to adverse impacts on Indigenous peoples' rights by providing finance to projects or companies that fail to respect Indigenous rights. Questions for investors to ask banks include:

- Does the bank have a commitment to respect Indigenous peoples' rights as articulated in the UNDRIP that applies to all its activities, including all types of finance and corporate finance advisory services?
- Where a bank has a policy that "expects" clients to adhere to e.g., FPIC, or IFC (International Finance Corporation) Performance Standard 7, but does not explicitly require it, how does the bank translate this "expectation" into its due diligence process to use its leverage in cases in which clients do not have FPIC?
- Can the bank set out how it applies this policy in the case of general corporate finance to companies that may require FPIC across a range of projects?
- Can the bank describe, and give an example of, how it applies this policy to corporate finance advisory or other financial services?
- Is the bank able to point to examples of how it has used its leverage in practice to ensure that the rights of Indigenous peoples, including FPIC, is respected? Is the bank able to point to examples of steps it has taken to address the impacts concerned where the bank found out that FPIC was not obtained?
- Does the bank have a grievance mechanism in place or participate in a grievance mechanism for people, to receive and investigate, and enable remedy for human rights impacts, including with respect to Indigenous rights? How does the bank know whether the grievance mechanism is effective?

Case Study: BNP Paribas and the Royal Lestari Utama Project

The Royal Lestari Utama project was set up as a joint venture between tire manufacturer Michelin and Indonesian Barito Pacific Group, which aimed to produce "eco-friendly" rubber. The project was financed by "Sustainability Bonds," for which the French bank BNP Paribas acted as the *arranger, or lead manager*. Investigations by Mighty Earth and Voxeurop found that while the project has been marketed as sustainable, the project failed to consult and obtain consent of Indigenous peoples and destroyed forests home to Indigenous peoples.²³⁹

Investments in real assets or projects

Investors in real assets or projects may have better access to the geographical information of the project and potential impacts compared to companies with geographically diverse operations. Investors investing in real assets or projects may also have greater control over the project or asset, and therefore have heightened due diligence expectations.

Some project developers seeking financing for their projects have policy commitments to conduct due diligence in accordance with the IFC Performance Standards; the Equator Principles; or the World Bank Environment, Health, and Safety (EHS) standards; to address their social and environmental risks, including with respect to Indigenous peoples. While these standards have language on Indigenous peoples' rights, they also have weaknesses, and investors should not assume that the existence of such policies means Indigenous peoples' rights are or will be respected.

Investors should take additional steps, e.g., by using the [FPIC Due Diligence Questionnaire](#) developed by First Peoples Worldwide. Where relevant, investors may, in consultation with potentially impacted Indigenous peoples, commission a Human Rights Impact Assessment (HRIA) using as guidance, for example, the Forest Peoples Programme's [Stepping Up](#) due diligence guidance.

Case Study: Lake Turkana Wind Project in Kenya

The Lake Turkana Wind Project (LTWP) is a wind farm located on Indigenous peoples' land in Kenya. Despite its claims of adhering to the IFC Performance Standard 7 on Indigenous peoples, it has faced opposition by Indigenous people, and the Kenyan Environment and Land court has ruled that the process for acquiring and leasing land was illegal.

- In 2011, a report found that the project was broadly compliant with the IFC Performance Standard 7 on Indigenous peoples.²⁴⁰
- In 2014, representatives of communities filed a lawsuit for illegal land acquisition. Several organizations reported that the project did not have FPIC of Indigenous peoples.²⁴¹
- In 2016, the Business and Human Rights Resource Centre asked Lake Turkana Wind Power company under what circumstances the company commits to seek FPIC to a project. Management responded that they follow the IFC Performance Standards and found that it was not required to undertake FPIC.²⁴²
- In 2021, the Kenyan Environment and Land Court ruled that the process for acquiring and leasing land for the project was illegal.²⁴³

Carbon credit schemes, nature-based solutions, conservation programs

Recent years have seen an increase in the demand of carbon and biodiversity credits, often on Indigenous territories in tropical forests. Those programs, often marketed as sustainable development solutions, can lead to violations of Indigenous rights, e.g., by dispossessing Indigenous peoples of their territories, or using misleading contracts that restrict Indigenous peoples' access to their lands and livelihoods. Questions for investors to consider are provided below.

Companies that produce, certify, or sell carbon or biodiversity credits:

- Has the company committed to respect internationally recognized rights of Indigenous peoples as articulated in the UNDRIP?
- Can the company provide maps demonstrating how proposed and existing projects overlap with territories owned, used, and controlled by Indigenous peoples?
- What is the company's approach to ensuring that FPIC processes are fully informed? Does the company offer financial aid for Indigenous peoples to seek independent expert advice?
- What steps has the company taken to avoid unfair contract terms that may lead to restrictions of Indigenous peoples' livelihoods and access to lands, territories, and resources?
- What mechanisms are available to guarantee Indigenous peoples' right to own, control, and use their lands, territories, and resources? What contractual mechanisms are available for Indigenous peoples to exit contracts if they revoke their consent to the project, e.g., because of not having been fully informed about project implications?
- Is the company transparent with Indigenous peoples about project details, including revenues and benefits arising from the project? Have Indigenous peoples agreed to a benefit-sharing agreement that they find satisfactory?

- What is the company's approach to identifying any actual or potential land conflicts that may exist, which may be exacerbated by carbon or biodiversity offset projects? How does it know that it is not contributing to creating or escalating any conflicts?

Companies that use or purchase carbon or biodiversity credits:

- Does the company have a human right due diligence process that covers purchases of carbon or biodiversity credit schemes?
- What steps has the company taken to identify, and prevent/mitigate/remediate adverse impacts on Indigenous peoples' rights caused by carbon or biodiversity credit schemes?
- From which companies and projects are carbon or biodiversity credits purchased? Do projects overlap with lands that Indigenous peoples own, use, or control by traditional ownership or which they have otherwise acquired?
- Do projects from which carbon or biodiversity credits are purchased use standards that require respect for internationally recognized rights of Indigenous peoples, and to obtain Free, Prior, and Informed Consent of Indigenous peoples, above and beyond compliance with national regulation?
- Do projects from which carbon or biodiversity credits are purchased require fair and equitable benefit-sharing agreements with Indigenous peoples?

For reference, elements of rights-respecting practice could include:

- Engage in projects that genuinely seek to strengthen Indigenous peoples' self-determination, their own decision-making mechanisms and institutions, legal recognition of land rights, and their capacity to protect and restore nature.
- Deliberately develop a process that ensures individual and collective rights of Indigenous peoples are respected throughout the project lifecycle.
- Ensure that project timelines are deliberately designed to give Indigenous peoples time to make decisions according to their own decision-making processes, which may include consulting internally with sub-communities, or externally with neighboring communities, and, where relevant, regional and/or national Indigenous organizations.
- Ensure Indigenous peoples have full, objective, and accessible information about project implications.
- Ensure that, as early as possible in the FPIC process, Indigenous peoples have access to independent expertise advice, including, if requested, capacity-building initiatives.
- Ensure that projects accepted by Indigenous communities are community-led and that benefits are shared equitably and in accordance with community agreements.
- Ensure that projects do not cause or exacerbate conflicts over claims of lands, territories, and resources.
- Transparently disclose the locations of all projects, including maps of overlaps with nearby, or overlapping Indigenous territories.
- Transparently disclose customers or purchasers of carbon or biodiversity credits and enable Indigenous people to choose not to sell carbon or biodiversity credits to traders of carbon credits or companies that fail to respect Indigenous rights.
- Transparently disclose information on revenues and benefits arising from projects, in a manner that is accessible to Indigenous communities, except for information that communities wish to be confidential.

Case Study: LEAF coalition

The LEAF coalition is a public-private partnership that seeks to finance “large scale tropical forest protection” and in return, participants will receive carbon offset credits. In June 2022, Amazon Watch published a briefer highlighting several issues with the initiative, particularly its approach to Indigenous rights and Free, Prior, and Informed Consent.²⁴⁴

The LEAF coalition will purchase credits that are certified and verified against the REDD+ Environmental Excellence Standard (TREES), which does not require adherence to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), does not mandate the development of equitable benefit-sharing programs, and maintains only partial commitments to FPIC with Indigenous peoples.

The standard used by the LEAF coalition allows for the implementation of Indigenous peoples’ rights safeguards to take place in accordance with national legal frameworks, which in many cases fail to include protection of Indigenous peoples’ rights in line with international human rights laws and standards.

7.3 Assess actual or potential human rights impacts

To meet their responsibility to respect human rights, investors are expected to assess their actual or potential human rights impacts. The starting point for assessing those impacts is to seek to understand the perspectives of Indigenous peoples concerned about actual or potential impacts, considering, *inter alia*, cumulative effects of previous encroachments or activities, and historical inequities faced by the Indigenous peoples concerned.²⁴⁵ Particular attention should be given to the rights and needs of individuals or groups within Indigenous communities that may face heightened risk of vulnerability or marginalization, by State and non-State actors, as well as within Indigenous communities.²⁴⁶

While Table 7 provides examples of questions to consider when assessing impacts, First Peoples Worldwide and Forest Peoples Programme have published further guidance for investors:

- [Stepping Up: Protecting collective land rights through corporate due diligence](#): Due diligence guidance, which includes *inter alia*, guidance for community-level human rights impact-assessments, and for verifying whether FPIC has been given.
- [Free, Prior, and Informed Consent Due Diligence Questionnaire](#): List of questions and considerations for investors and project developers to operationalize Free, Prior and Informed Consent.

Additional resources include the [Akwé Kon Guidelines](#), the Danish Institute for Human Rights [HRIA Toolbox](#), and the [Indigenous Navigator Tools Database](#). Furthermore, the [OECD Due Diligence Guidance for Responsible Business conduct](#) (Q29-30) can be used as guidance to assess whether investee companies have caused, contributed to, or are directly linked to actual or potential impacts.

Table 7. Examples of questions to consider for assessing actual or potential impacts

Rights	Questions (non-exhaustive)
Non-discrimination	<ul style="list-style-type: none"> ▪ Does the company or its associated business relationships cause, contribute to, or benefit from discrimination against Indigenous peoples (including systemic discrimination by the State), depriving them of their rights and access to justice, based on their Indigenous origin or identity? ▪ Does the company or its associated business relationships cause, contribute to, or benefit from discrimination against Indigenous people that are heightened risk of vulnerability or marginalization, such as Indigenous elders, women, youth, children, and persons with disabilities, depriving of them of their rights and access to justice? ▪ Does the company or its associated business relationships recognize and respect, without discrimination, the equality of property rights, based on Indigenous customs and traditions? ▪ Does the company or its associated business relationships recognize and respect, without discrimination, Indigenous peoples' institutions, laws, customs, and traditions?
Lands, territories, and resources	<ul style="list-style-type: none"> ▪ What are the impacts on the right to property and the right to own, use, control, and develop their traditionally owned or otherwise occupied and used lands, territories, and other resources? ▪ What are the impacts on the right to culture and cultural identity associated with their way of life, in relation to their traditionally owned or otherwise occupied and used lands, territories, waters, sacred sites and objects, and other resources? ▪ What are the impacts on the right to religion, in relation to their traditionally owned or otherwise occupied and used lands, territories, waters, sacred sites and objects, and other resources? ▪ What are the impacts on the right to maintain and strengthen their spiritual relationship to their traditionally owned, or otherwise occupied and used lands, territories, waters, sacred sites, and objects, and the right to uphold their responsibilities to future generations in this regard? ▪ What are the impacts on the right to means of subsistence, in relation to their traditionally owned or otherwise occupied and used lands, territories, waters, sacred sites, and objects, and other resources?
Physical and mental health, life, security, and integrity	<ul style="list-style-type: none"> ▪ What are the impacts on the right to physical and mental health, in relation to their territories' productive capacity? ▪ What are the impacts on the right to physical and mental health, in relation to the right to a clean, healthy, and sustainable environment? ▪ What are the impacts on the right to life, security, and integrity, in relation to the presence of public or private security forces on their territories? ▪ What are the impacts on the right to life, security, and integrity, in relation to attacks against human rights defenders and community representatives?
Culture and cultural identity	<ul style="list-style-type: none"> ▪ What are the impacts on Indigenous peoples' right to maintain and revitalize their cultural traditions and customs, including ways of life associated with the use of land resources? ▪ What are the impacts on the right to subsistence, in relation to their culturally significant economic activities, and their territories' productive capacity?
Environmental impacts	<ul style="list-style-type: none"> ▪ What are the direct, indirect, and cumulative environmental impacts on Indigenous peoples' lands, territories, and resources, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora, and fauna (considering cumulative impacts of multiple projects, as well as any previous encroachments)?
Consultation, free, prior, and informed consent, and participation	<ul style="list-style-type: none"> ▪ Is the right to good faith consultation and participation, through Indigenous peoples' legitimate representative institutions respected? ▪ Do engagements or FPIC processes meet all the thresholds of being, free, prior, and informed? ▪ Is the right to give or withhold Free, Prior, and Informed Consent in relation to matters affecting their lives, rights, and lands, territories and resources respected?

	<ul style="list-style-type: none"> ▪ Is the right to just and fair redress for any adverse impacts on Indigenous peoples’ lives, including their environment and social, cultural, and spiritual aspects of their lives respected? ▪ Is the right to participate in the benefits arising from activities taking place in their territories respected, and carried out in a manner that is fair and equitable?
Self-determination, self-governance, and autonomy	<ul style="list-style-type: none"> ▪ What are the broader impacts on Indigenous peoples’ right to self-determination, by virtue of which they have the right to pursue their own development priorities? ▪ What are the broader impacts on Indigenous peoples’ right to self-determination, which entails autonomy of decision-making regarding matters affecting their rights and territories, in accordance with their laws, customs and traditions? ▪ What are the broader impacts on Indigenous peoples’ physical and cultural survival, dignity, and well-being?

Note. For an overview of human rights instruments concerning Indigenous peoples’ rights, see Section 3 of this Toolkit.



OCP Pipeline rupture, Ecuadorian Amazon. © Santiago Cornejo

Case Study: Right to cultural identity and property of the Kichwa People of Sarayaku

In 2002, the company Compañía Generales de Combustibles (CGC) and private and public security forces entered the territory of the Kichwa People of Sarayaku, to carry out oil exploration activities and seismic surveys, without the Free, Prior, and Informed Consent of Sarayaku. In response, the Sarayaku people, including elders, women, youth, and children, stopped their traditional way of life for four months, organizing themselves into “peace and life camps,” and expelled the company and security forces from their territories. In 2012, the Inter-American Court of Human Rights ruled that the right of the Sarayaku people to consultation, communal property, and cultural identity had been violated.

The Court considered that the Sarayaku people’s collective use and enjoyment of property based on their culture, practices, customs, and beliefs was necessary to ensure their survival, preservation of their way of life, customs, and language. Furthermore, the Court considered that their special relationship with their territories encompasses not just their subsistence, but rather “their own worldview and cultural and spiritual identity.”²⁴⁷

8. Address Actual or Potential Impacts

This section provides guidance for investors on using their leverage to prevent/mitigate and enable remedy for actual or potential adverse impacts on Indigenous peoples. As a general principle, the starting point for prioritizing actions and using leverage should be to identify the perspectives of the potentially impacted Indigenous communities.

8.1 Using leverage to prevent/mitigate adverse impacts

The UN Guiding Principles and the OECD Guidelines set out that businesses should address all their adverse impacts and where it is not possible to address them simultaneously, businesses should first seek to prevent and mitigate those that are the most severe or where delayed response would make them irremediable.²⁴⁸ This severity of an impact is understood as the *scale, scope, and irremediability* of actual or potential impacts, and should be understood based on the perspectives of Indigenous peoples concerned, taking into account the collective nature on impacts on Indigenous peoples, as well as their cultural and physical survival, dignity, and well-being as peoples.

While exercising shareholder rights is one way to use leverage, leverage can be exercised in a multitude of ways, including via contractual and non-contractual avenues,²⁴⁹ and by addressing systemic human rights issues investors may be exposed to by their business relationships.²⁵⁰ Investors can also use their leverage by engaging with a wide range of stakeholders beyond the first-tier investee company, including companies and financiers throughout the value chain, industry associations, civil society, standard-setting bodies, data providers, and government agencies.

As such, investors can use their leverage both proactively and reactively:

- **Proactively:** By setting clear expectations on investee companies to respect Indigenous peoples' rights and by engaging on systemic human rights issues with a broader range of stakeholders.
- **Reactively:** When investors have identified actual or potential impacts on Indigenous peoples, using their leverage to prevent and/or mitigate the harm and to enable remedy for those impacts by prioritizing the perspectives of the Indigenous peoples concerned.

8.2 Using leverage over investee companies

Prioritize Indigenous perspectives and real-world human rights outcomes

When using leverage to address actual or potential adverse impacts on Indigenous peoples' rights, investors should first seek to understand what affected or potentially impacted Indigenous peoples themselves perceive to be most severe and believe would be a fair outcome. Investors should also be aware that this may change over time as the context shifts or new information becomes known.

For reference, a report published by Forest Peoples Programme identified four general demands of rightsholders to businesses in commodity supply chains:

- *Investigate and verify past and ongoing human rights and environmental impacts through independent assessments validated by communities and their advisors.*
- *Develop time-bound action plans in close consultation with affected rights holders and their freely chosen representatives to agree on essential remedy measures and future actions*

required with suppliers, including decisions on continued engagement or disruption/termination of business relations.

- *Put in place adequately resourced monitoring and implementation frameworks to ensure remediation actions are implemented as per agreements reached through good faith FPIC processes respecting affected community decision-making practices, customary laws, and timeline.*
- *Work with rights holders, government agencies and other actors to enable effective remedy, including land restitution and the settlement of tenorial disputes.*²⁵¹

Case Study: Investor Engagement on the Goldcorp Marlin Mine (Guatemala)

Since the Marlin gold mine began operating in 2004, concerns about the environmental impacts of the Marlin mine escalated into conflicts as Indigenous communities protested the mine. In 2008, various investors, including the Ethical Funds Company (Canada), Public Service Alliance of Canada Staff Pension Fund, and the Fourth Swedish National Pension Fund filed a shareholder resolution, urging the Goldcorp Marlin mine to commission an independent Human Rights Impact Assessment (HRIA) of its operations.

Nonetheless, the shareholder engagement with Goldcorp has been criticized for undermining the agency of Indigenous communities by praising the mining company for engaging with the shareholders, while nothing had changed for the Indigenous communities. Indigenous communities had not expressed a demand for an HRIA, nor were they consulted about it.²⁵²



Traditional house and ancestral tomb, Kampata Wundut, Sumba, Indonesia. © Jeff Conant/Friends of the Earth U.S.

Consult and cooperate with Indigenous peoples through their representatives

To have a better understanding of the impacts, and to increase leverage, investors should seek to consult and cooperate with Indigenous peoples through their freely chosen representatives in accordance with the principles of Free, Prior and Informed Consent. This should include informing affected Indigenous peoples that the investor is committed to consulting and cooperating in good faith with Indigenous peoples to address actual or potential impacts. Engaging directly with Indigenous representatives can also serve as a way to enable a good-faith dialogue and better understanding of Indigenous peoples' perspectives.

Table 5. Indigenous and civil society organizations

Native Land	Native Land tracks Indigenous territories, treaties, and languages across the world, and provides links to local Indigenous organizations' websites.
Zero Tolerance Initiative	A coalition of civil society organizations working to address attacks against human rights defenders.
National Human Rights Institutions	List of National Human Rights Institutions (NHRI)

Case Study: Boston Common Asset Management and Brethren Benefit Trust collaboration with various NGOs and Indigenous organizations

In September 2003, Boston Common Asset Management collaborated with Amazon Watch to initiate shareholder engagement with Burlington Resources regarding its operations on Indigenous lands in Ecuador. The engagement process and shareholder resolutions involved various NGOs and Indigenous communities, including a "fact-finding mission" in which investors traveled to Ecuador to speak with Indigenous representatives. Through this initiative, investors could see with their own eyes the priorities and perspectives of Indigenous peoples.

In 2006, Burlington resources was acquired by ConocoPhillips, and after Boston Common Asset Management and Amazon Watch continued the engagement, ConocoPhillips strengthened its policy on Indigenous rights in 2011.²⁵³

Case Study: Investors & Indigenous Peoples Working Group

The [Investors & Indigenous Peoples Working Group](#) is a coalition of investors and Indigenous peoples that seeks to promote Indigenous peoples' rights through capital markets, including:

- 1) Indigenous peoples' right to FPIC
- 2) Addressing the impact of extractive industries on Indigenous communities and the environment
- 3) Ending the use of racist images, stereotypes, and cultural appropriation
- 4) Building corporate and investor support for Indian Country.

The group hosts monthly calls to bring together investors and Indigenous communities and promotes participation of Indigenous leaders at investment and industry events.

Shareholder resolutions

To support investors filing shareholder resolutions on human rights, the [Investor Toolkit on Human Rights](#) has included templates for filing shareholder resolutions on human rights. Those templates include sample language for “whereas” clauses and sample text for five different “resolved” clauses, including:

- Human rights policy commitment
- Human rights governance
- Assessing real and potential human rights impacts
- Human rights disclosure
- Company grievance mechanisms

The template provided by the Investor Toolkit on Human Rights can also be used to tailor shareholder resolutions specifically on Indigenous rights. For example, in 2022, similar language to the sample text of the Investor Toolkit on Human Rights was used by investors in shareholder resolutions on Indigenous rights at the Annual General Meetings of [Citigroup](#) and [Wells Fargo](#), respectively.

Set thresholds for engagement, voting against board, and exclusion

Investors can use their leverage by setting thresholds for engagement for investee companies in high-risk sectors or regions. This could entail, for example communicating how the investor will respond to the company and its board when it fails to meet specific actions, such as:

- Adopting a policy commitment to respect the rights of Indigenous peoples, including the right to give or withhold Free, Prior, and Informed Consent.
- Adopting a policy requiring suppliers and contractors for high-risk sectors or commodities to have policy commitments to respect Indigenous rights.
- Adopting effective grievance mechanisms that meet the UN Guiding Principles’ effectiveness criteria, in accordance with the recommendations of the [OHCHR](#) and [Forest Peoples Programme](#), and disclosing grievances.
- Adopting policies that require suppliers and contractors in high-risk sectors or commodities to adopt effective grievance mechanisms and disclose grievances.
- Publicly disclosing suppliers in high-risk commodity supply chains, including beyond first tier suppliers.
- Where risks of Indigenous rights violations have been identified, requiring companies to take sufficient measures to cease, prevent, and mitigate any actual or potential violations of Indigenous peoples’ rights.
- Where adverse impacts have occurred, taking sufficient action to provide just and equitable remedy in accordance with the UN Guiding Principles, UNDRIP, and that rightsholders find satisfactory.

Case Study: Storebrand Asset Management Engagement with Eolus Vind

In 2022, Storebrand Asset Management [placed](#) the Swedish company Eolus Vind on its Observation List, due to concerns of significant negative impacts on the Sami people’s right to enjoy their own culture. According to Storebrand’s procedures, it expects companies under observation to show improvement within a predetermined time in order to be removed from the list, or risk being excluded from the investment universe. As such, Storebrand asked Eolus to carry out a new consultation process to seek FPIC, and to adopt a policy on respect for Indigenous peoples’ rights.²⁵⁴

Case Study: Nordea engagement with companies involved in the Dakota Access Pipeline

In 2017, representatives of Nordea visited the Standing Rock, where protests occurred against the Dakota Access Pipeline. After visiting, Nordea announced that if the companies involved in the Dakota Access Pipeline do not meet the demands of the Standing Rock Sioux Tribes, the Nordea Sustainable Finance team would recommend divestment from the companies.²⁵⁵

Engagement with banks

Where investors do not directly hold shares or bonds in companies that cause adverse impacts on Indigenous peoples, they can still be linked to impacts through their investments in banks, which may provide finance to projects or companies causing adverse impacts on Indigenous peoples. In such cases, investors should use their leverage to urge banks to strengthen their policies and due diligence processes with respect to Indigenous rights. This may include urging banks to:

- Adopt a policy commitment to respect internationally recognized rights of Indigenous peoples in accordance with the UNDRIP and the UN Guiding Principles on Business and Human Rights, covering own activities and business relationships.
- Adopt a policy not to provide any new financing to companies that cause, contribute to, and fail to prevent and remediate violations of Indigenous peoples' rights, and that fail to uphold the right to Free, Prior, and Informed Consent.
- Ensure that the policy covers all business relationships, including corporate lending and not just project financing related to Equator Principles requirements.
- Specifically write Free, Prior, and Informed Consent requirements into contracts, to ensure that the bank can exit a project if consent is not obtained.
- Commit to cooperating to enable remedy when adverse human rights impacts occur in relation to companies or projects financed by the bank.
- Adopt human rights grievance mechanisms, which are accessible for affected communities, such as [ANZ's grievance mechanism](#).
- Require consent for disclosure of project and client names in standard contracts with clients. There is little, if any, evidence of legal constraint, as demonstrated by the decade-long existence of the [Equator Principles reporting database](#), or [Triodos Bank disclosure](#) on every organization they lend money to.

Case Study: Shareholder resolution on Citigroup's AGM

In 2022 at the annual general meeting of Citigroup, various shareholders requested that the board of directors at Citigroup provide a report outlining the effectiveness of Citigroup's policies and practices and performance indicators in respecting internationally recognized human rights standards for Indigenous peoples' rights in corporate and project financing. The [shareholder proposal](#) expressed concerns related to Enbridge Line 3, due to significant risks to the land, water, and cultural rights of several Anishinaabe peoples and violations of Free, Prior, and Informed Consent.²⁵⁶ It received the support of 34% of shareholders.²⁵⁷ The proposal was [resubmitted](#) in 2023.²⁵⁸

Asset owners: engagement with asset/investment managers

Asset owners should urge asset/investment managers to align their due diligence practices with international human rights standards, including the UN Guiding Principles, OECD Guidelines, Indigenous peoples' rights as articulated in the UNDRIP, and in line with this Toolkit and emerging best practices.

An additional resource to negotiate investment mandates include the [Model Mandate](#). This should explicitly recognize and require respect for the rights of Indigenous peoples as articulated in the UN Declaration on the Rights of Indigenous Peoples, and in line with this Toolkit.

Communicate due diligence and engagement (including exclusion)

Investors can increase their leverage by communicating their due diligence and engagement efforts, including where investors have excluded companies. Where investors engage or exclude companies from their investment universe, relevant communication to use as a way of exercising leverage include:

- Highlighting engagement over Indigenous rights, including the outcome of the engagement, e.g., in engagement reports, with references to international standards and jurisprudence on the rights of Indigenous peoples.
- Press releases with respect to individual cases, including the outcome of the engagement, with references to international standards and jurisprudence on the rights of Indigenous peoples.
- Public list of excluded companies, with Indigenous rights violations as a specific category. For example, Danica Pension has a public list of [investment restrictions](#), with violations of Indigenous rights as a specific category. As of December 2022, Danica Pension's investment restriction list included 18 companies that were excluded due to violations of Indigenous rights.²⁵⁹

Case Study: KLP exclusion of companies involved in the Dakota Access Pipeline

In 2017, KLP reported that it would exclude four companies involved in the Dakota Access Pipeline, due to "an unacceptable risk of contributing to serious or systematic human rights violations." Excluded companies included Energy Transfer Partners, Phillips 66, Enbridge, and Marathon Petroleum Corporation. KLP's publication includes a detailed description of why the companies were excluded, including an unacceptably high risk of contributing to serious human rights violations with references to KLP's "fact-finding trip" to North Dakota, attempts to engage with the companies, and references to international standards, including the UN Guiding Principles on Business and Human Rights, the UNDRIP, and a statement of the Special Rapporteur on the Rights of Indigenous Peoples.²⁶⁰

8.3 Systemic leverage

Engagement with standard-setting bodies, industry associations, and investor alliances

Indigenous peoples have the right to participate in decision-making in matters that would affect their rights, through representatives chosen by themselves in accordance with their own procedures. Investors can use their leverage by urging standard-setting bodies, industry associations, and investor alliances to:

- Design standards in such a way that they recognize and protect the rights of Indigenous peoples. Avoid designing standards that undermine the rights of Indigenous peoples, including by omission.
- Consult and cooperate with Indigenous peoples to enable their participation in decisions and the development of standards that may affect them. Indigenous peoples' right to participation entitles them to influence the outcome of decision-making that affects them, not merely be involved in such processes.²⁶¹
- From the outset, design processes structured to enable the equal and full participation of Indigenous peoples.
- Recognize that Indigenous peoples often face many, multiple competing pressures on their time, energy, and focus – often by having to respond to competing threats, obligations, and responsibilities at the same time.

Case study: Investor submission to Equator Principles Association

In August 2019, a coalition of investors representing \$2.9 trillion sent a [letter](#) to the Equator Principles Association, urging it to strengthen the standards to avoid community conflict. In particular, the letter urged the Equator Principles to recognize the rights of Indigenous peoples to FPIC regardless of jurisdiction, and to align with the UN Guiding Principles, including by establishing effective grievance mechanisms.²⁶²

Engagement with government agencies

Investors can use their leverage to address human rights risks by engaging with government agencies, urging them to implement human rights due diligence legislation, strengthen the recognition and protection of Indigenous peoples' rights, and adopt legislative measures that enable rights-respecting FPIC processes.

In addition, under the UN Guiding Principles, the business responsibility to respect human rights also applies to political engagement.²⁶³ Thus, when carrying out lobbying activities, e.g., regarding climate and environmental matters, investors should ensure that they avoid contributing to adverse impacts on Indigenous rights, including by omission.

Case study: Investor Policy Dialogue on Deforestation to engage with public agencies and industry associations in selected countries on the issue of deforestation

In 2020, various investors led by Storebrand initiated the [Investor Policy Dialogue on Deforestation](#) (IPDD) aimed at tackling deforestation. One of the concerns of the investors were Indigenous rights violations caused by deforestation. As part of the initiative, working groups have been formed for Brazil, Indonesia, and consumer countries, where the working groups have engaged with relevant government authorities, industry associations and other stakeholders.²⁶⁴

Engagement with sustainability data and index providers

Sustainability data, ratings, and indexes have typically excluded information necessary to understand if companies are involved in adverse impacts of Indigenous peoples' rights.²⁶⁵ Investors can engage with sustainability data and index providers, requesting them to make available data regarding companies' Indigenous rights due diligence, and companies' actual or potential human rights impacts, such as:

- Companies' human rights risks and human rights impacts in their own operations and value chain, as reported by Indigenous peoples, media, NGOs, etc.
- Indigenous peoples' own demands in relation to company activities that affect their rights, lands, territories, and resources.
- Their due diligence and remediation processes with respect to Indigenous peoples' rights.
- Inclusion of Indigenous rights criteria in stock indexes, including sustainability indexes.

The examples below provide some ideas of how Indigenous peoples' rights have previously been addressed or are being addressed by various actors.

- First Peoples Worldwide developed a [method](#) to quantify Indigenous rights risks, based on factors such as country risk, reputation risk, community risk, legal risk, and risk management.²⁶⁶
- Forest Peoples Programme has called for [Ground Truthing](#), a concept referring to "the use of information about the actual situation on the ground, gathered from primary or secondary sources that are independent of companies in the supply chain, as opposed to paper-based compliance indicators and company self-reporting."²⁶⁷
- Global Canopy, with ZSL SPOTT and Trase, created [Forest IQ](#), a database that brings together the partners' data on deforestation and associated human rights issues, connected to other relevant datasets.
- First Peoples Worldwide and Adasina Social Capital developed [Bridge](#), a sustainability data platform that contains an Indigenous rights screen.
- The data platform [Sigwatch](#) tracks NGO campaigns related to companies and investors, with campaigns related to impacts on Indigenous peoples being its own category.
- [Kumacaya](#) allows businesses and investors to fund independent monitoring by communities and civil society organizations.
- [Timby](#) allows communities to monitor and report concerns, anonymously or publicly.

9. Conclusion

Given that the situation of Indigenous peoples varies from region to region, community to community, as well as industry to industry, covering all the unique contexts in one report would not be possible. While this Toolkit seeks to provide investors with tools to develop and implement their own due diligence, investors should take necessary steps to adapt the recommendations to their specific context and investment universe and seek to understand and prioritize the perspective of Indigenous communities potentially affected by their investments. Questions and considerations for investors to assess their due diligence process with respect to Indigenous rights may include:

- Have we adopted and implemented adequate policies and internal due diligence systems with respect to Indigenous rights?
- Have we taken adequate steps to identify Indigenous peoples potentially impacted by our investee companies and their value chains?
- Have we taken adequate steps to identify, understand, and prioritize the perspectives of potentially impacted Indigenous peoples, including by consulting, learning from, and cooperating with Indigenous peoples' representatives?
- Have we taken adequate steps to use our leverage, or increase our leverage, to prevent, mitigate and enable remedy regarding impacts on Indigenous peoples?

This Toolkit is an effort to provide guidance to investors on Indigenous rights. Just as investor engagement and action on Indigenous rights should be iterative, so too should be this guidance. Investors, Indigenous people, and other stakeholders are encouraged to provide feedback.



Juli, an Indigenous activist from Seluma Village Bengkulu, Sumatra, Indonesia. © Jeff Conant/Friends of the Earth U.S.

Annex A: Other Due Diligence Resources

Additional due diligence guidance

Publisher	Resource
Forest Peoples Programme	Stepping up: Protecting collective land through corporate due diligence
Forest Peoples Programme	Non-judicial grievance mechanisms as a route to remedy
Forest Peoples Programme	Resources on Free, Prior and Informed Consent
Investor Alliance for Human Rights	Investor Toolkit on Human Rights
First Peoples Worldwide	Free, Prior, and Informed Consent Due Diligence Questionnaire
Investor Alliance for Human Rights; Business & Human Rights Resource Centre; International Service for Human Rights	Safeguarding human rights defenders: Practical Guidance for Investors
Business & Human Rights Resource Centre	Investing in renewable energy to power a just transition
Business & Human Rights Resource Centre	Fast & Fair Renewable Energy Investments
BankTrack; Oxfam	Developing effective grievance mechanisms in the banking sector
Global Canopy	Deforestation-Free Finance
Banks and Biodiversity	Banks and Biodiversity No Go Areas
SHARE	Energy and Mining Investment: Assessing Accountability for Indigenous Rights in Complex Investment Chains
RIAA	Investor Toolkit: Investor Focus on Indigenous Rights and Cultural Heritage Protection
Reconciliation & Responsible Investment Initiative	Investing for Today, Tomorrow, and Future Generations: A Guide for Indigenous Investors
Friends of the Earth	Forests and Human Rights: Principles for Asset Managers
UN Global Compact	A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples
Accountability Framework	Accountability Framework: Operational Guidance on Respecting the Rights of Indigenous Peoples
HCSA	HCSA Social Requirements

FAO	Respecting Free, Prior and Informed Consent
FAO	Free Prior and Informed Consent: An indigenous peoples' right and a good practice for local communities
Secretariat of the Convention on Biological Diversity	Akwé Kon Guidelines
ASI Indigenous Peoples Advisory Forum	FACT SHEET 1: Criteria for the Identification of Indigenous Peoples
ASI Indigenous Peoples Advisory Forum	FACT SHEET 2: Indigenous Peoples' Free Prior and Informed Consent (FPIC)



Climate and biodiversity march, COP15. © Amazon Watch

Notes

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