

THE RIGHT TO DECIDE

THE IMPORTANCE OF RESPECTING FREE, PRIOR AND INFORMED CONSENT

A growing global demand for energy and natural resources is driving an expansion of extractive and infrastructure projects into some of the most remote areas of the world, and often into the ancestral territories of indigenous peoples. The health, identity and cultural and physical survival of indigenous peoples are at particular risk from this expansion due to their close relationship with the natural world.

Historically, large-scale economic and industrial development has taken place without recognition of and respect for indigenous peoples' rights to lands, territories and resources¹ and has led to their maltreatment, enslavement, malnutrition, disease and outright extermination.² Indigenous people have suffered disproportionately due to the high rates of reckless natural resource exploitation that occurs on their homelands. Recently a growing number of companies have recognized the importance of corporate social responsibility. Despite this, indigenous peoples continue to face deplorable injustices that threaten their physical and cultural survival.

Companies operating in or near indigenous lands need to better assess how their activities affect the rights of indigenous peoples and take steps to prevent and address these impacts. In the 21st century respecting indigenous rights is not just a moral imperative but also a business necessity to avoid financial risks such as reputational damage and negative publicity; operational delay due to social unrest; divestment campaigns; cleanup costs; legal challenges and compensation amounting to billions of dollars; and loss of license to operate.

This briefing paper focuses on the roles and responsibilities of companies, investors and finance institutions to identify, prevent and address the adverse human rights impacts of company operations. It identifies the rights of indigenous peoples that are potentially affected by extractive industry and infrastructure projects and explores the ethical, legal and financial reasons for respecting these rights. This paper highlights the importance of a company operating only where it has the free, prior and informed consent of any indigenous peoples potentially affected by their operations. It identifies some of the key challenges involved in implementing a Free, Prior and Informed Consent (FPIC) policy and makes recommendations for companies and shareholders who engage in business activities or investments in the Amazon.

Indigenous Rights, Territory, and the Environment

Many indigenous peoples live in vast expanses of wilderness in some of the most biodiverse areas of the planet. Their lives and survival are intimately entwined with the natural world: when a river is contaminated or a hunting ground degraded, they have nowhere else to go for food or clean water. Companies operating in such areas need to understand this intimate relationship between indigenous peoples and their territory in order to identify which rights are actually or potentially affected by their activities, and determine their responsibilities to prevent and address these impacts.

Many indigenous peoples, especially forest peoples, do not live as settled agriculturalists on a small plot of land. Their farming systems are often based on rotational agriculture that is spread across extensive areas. Hunter-gatherer peoples spend much of their time in the forest, at camps and farms sometimes several days travel from their communities, where they hunt, fish and gather medicinal plants, building materials, clay for pottery, and countless other resources essential for their way of life. Oil drilling or an infrastructure project in an apparently vacant area far from a community can upset the natural



“Our territory is like our Mother. It is not something that can be bought or sold.”

— Tayujin Shuwi Peas, Achuar elder³

balance and hinder the ability of numerous neighboring families to hunt, fish or access clean water.

For indigenous people land is not merely a possession and a means of production.⁴ Their history and identity are tied to their territory through memories, stories and sacred and archeological sites. Environmental impacts not only affect people's means of sustenance; they also affect people's relationship with their territory and their ability to continue to live as indigenous people and maintain their own identity and customs.

Indigenous peoples have a distinct culture, history and identity, and a collective connection with land, territory and resources that usually pre-dates the existence of the state. As distinct peoples they have the right to choose their own future and maintain their identity as indigenous peoples.⁵ Many indigenous territories are collectively owned and managed, and companies need to navigate complex networks of relationships, usage rights and diverse decision-making structures in order to identify the customary rights holders in their area of operations with whom they need to consult in order to obtain consent to operate.

For indigenous peoples, their territory is their market, pharmacy, hardware store, church, temple, and an integral part of their identity. They are completely dependent on a clean and healthy territory for survival and for the maintenance of their cultural integrity and identity as indigenous peoples. Extractive and infrastructure projects on indigenous lands potentially affect not just their means of sustenance and health, but also their rights to cultural survival and to choose their own future as a distinct people and culture.

DEVELOPMENT IN AMAZON RAINFOREST

An unprecedented increase in oil and gas exploration, hydroelectric dam construction, mining and road building in the Amazon will impact upon the lives of thousands of indigenous peoples, and the accompanying deforestation, flooding, contamination and erosions threaten to push the Amazon over a "tipping point".⁶

In Peru, for example, over three-quarters of the Amazon – almost all indigenous territory – has been opened up to oil drilling⁷ and to date 19 million acres have been leased to logging companies.⁸

In the next 10 years, there are plans for more than 4,500 miles of road building⁹ and the construction of 52 hydroelectric dams in the Peruvian Amazon, the first 15 of which will flood one million acres of forest and adversely impact another seven million acres.¹⁰

TALISMAN ENERGY IN PERU

Talisman Energy's exploratory wells in oil Block 64 in the northern Peruvian Amazon are in a unique flooded forest ecosystem in the middle of the ancestral territory and hunting ground of the *Achuar* indigenous people. *Achuar* families from several miles away rely on this area when game and fish are scarce around their communities. An oil spill in this area would be almost impossible to clean up and would affect the ability of hundreds of people to feed themselves and their families.¹¹

CHEVRON IN ECUADOR

Texaco's (now Chevron's) operations in the Northern Ecuadorian Amazon introduced alcohol, prostitution, and caused rampant contamination. The lives of indigenous peoples who lived there were turned upside down: The oil boomtown Lago Agrio sprawled through hunting grounds and the rivers were left dead and empty of fish. Local people continue to suffer cancer rates and illnesses far higher than other Ecuadorians.¹²

THE PAKITSAPANGO DAM

In the central Peruvian Amazon, a hydroelectric dam is proposed on a steep canyon at the site of "*Pakitsapango*" (house of *Pakitsa*), a tunnel through the cliffs where the *Ashaninka* people believe the mythical half-eagle creature *Pakitsa* once lived. *Pakitsa* plays a key role in the origin myths of the *Ashaninka* and many other indigenous groups in this region of the Amazon. The dam would cause devastating flooding that would desecrate a highly important sacred site, displace a number of *Ashaninka* villages and destroy critical ecosystems.²²

Indigenous Rights and Investor Risk

Many extractive and infrastructure projects take place in countries without the strong institutions and governance systems needed to ensure that projects do not adversely affect local communities and the environment.¹⁴ Many projects are taking place in sensitive ecosystems of high biodiversity and cultural diversity, both extremely vulnerable to the impacts of large-scale projects. In addition, indigenous peoples face systemic discrimination and exclusion from political and economic power, and there is often insufficient local participation and representation in "development" planning.

Operating in these environments exposes companies to significant risk. Society has the basic expectation that companies should do no harm¹⁵, and in a globalized world a toxic dump or an oil spill in a remote corner of the Amazon no longer goes unnoticed. Images

THE RISKS OF IGNORING SOCIAL AND ENVIRONMENTAL ISSUES

From Herbertson et al. 2009¹⁴

Financing Risk – Financial institutions and investors may delay their financing, require more conditions, or decide not to participate.

Construction Risk – The proponent may not be able to complete the project on time or on budget.

Operational Risk – The proponent may not be able to access necessary inputs, produce sufficient output or sell at a sufficient price, which can disrupt operations.

Reputational Risk – The project may harm the proponent's or financial institutions' brand identity, which can translate into loss of market value.

Credit/Corporate Risk – Delays or interruptions to a project may reduce the proponent's profitability and asset values, decreasing the proponent's stock value, lowering its credit rating, and raising the cost of borrowing.

Host Government Risk – The host government may withdraw permits and licenses, commence enforcement actions, impose civil or criminal penalties on the proponent, or tighten requirements.

Host Country Political Risk – Political forces in the host country may threaten the project.

of environmental destruction can cause lasting damage to a company's image and reputation. Indigenous peoples are organizing, travelling to shareholder meetings, speaking to the press, and filing lawsuits. A company's actions in a remote area of rainforest on the other side of the world can directly affect their reputation and ultimately their relationships with customers, shareholders and financial institutions.

Social unrest and conflict caused by disagreement or disaffection with a project can produce significant delays to operations in addition to reputational risk. In many cases, governments fail to consult adequately with affected indigenous peoples prior to auctioning a concession. Even if affected peoples are initially in agreement with a project, negative impacts and a failure to involve affected peoples in decision-making and the participation in benefits throughout operations leads to disaffection that can manifest in protests or actions to block or shut down the company's operations at significant cost to the company. For example, community opposition to the Yanacocha gold mine in Peru, where the proponent invested little in community engagement, cost an estimated US\$1.69 billion in project delays.¹⁶

Companies are also increasingly susceptible to legal actions brought both in their host country and home country. In Ecuador, for example, California-based oil company Chevron faces a potential \$27 billion liability for Texaco's toxic legacy.¹⁷ Los Angeles based oil company Occidental Petroleum (OXY) faces charges in U.S. courts for the contamination and health impacts caused by their operations in Northern Peru. Companies can also be indirectly affected by decisions in international courts against governments. In Suriname, for example, the Inter-American Court of Human Rights has asked the government to annul concessions handed out to mining and logging companies without the *Saramaka* peoples' prior consent.¹⁸ (see box)

Companies cannot rely on the government in the countries where they operate to protect indigenous rights. In order to fulfill their obligation to respect rights and avoid financial, reputational and legal risk companies need a due diligence process to become aware of, prevent and address the adverse human rights impacts of their operations, similar to the information and control systems that many companies already have in place to manage financial and related risks.

CASE STUDY: THE SARAKAMA PEOPLE V. SURINAME

The Inter-American Court of Human Rights (IACHR) case of *Saramaka* People v. Suriname looked into the case of the *Saramaka*, whose customary lands had been handed out to mining and logging companies without any regard for their rights, including the right to free, prior and informed consent.

The judgment affirmed that the property rights of indigenous and tribal peoples derive from custom and not from any act of the state. These property rights are exercised conjointly with the right to self-determination and their right "to freely

dispose of their natural wealth and resources", meaning that indigenous and tribal peoples have the "right to manage, distribute, and effectively control [their]... territory, in accordance with their customary laws and traditional collective land tenure system".

The court ruled that in cases where the state proposes large-scale interventions that may affect indigenous and tribal peoples' lands and natural resources, their free, prior and informed consent is required in accordance with their customs and traditions.

Indigenous Rights and International Law

“Indigenous peoples are arguably among the most disadvantaged and vulnerable groups of people in the world today. The international community now recognizes that special measures are required to protect the rights of the world’s indigenous peoples.”

— United Nations Permanent Forum on Indigenous Issues¹⁹

International law recognizes the rights of indigenous peoples to self-determination, to be treated without discrimination, and not to be deprived of their means of subsistence. These rights are embodied in the Universal Declaration of Human Rights, the International Covenants on Human Rights, and other international agreements that are negotiated and agreed upon by most of the world’s governments.²⁰

Convention No. 169 of the International Labor Organization (ILO), ratified by 20 countries in 1989, explains the unique, collective connection that indigenous peoples have with their land and resources, and asserts their fundamental rights under international law, in particular their rights to territory and to continued survival, well-being and development as distinct peoples and cultures. Signatories are obliged to implement the treaty in domestic law, and it is enforceable through international courts and UN treaty bodies.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was passed by the UN General Assembly in an historic decision on September 13, 2007. It was adopted by an impressive 144 member states. Only four nations – Canada, the United States, Australia and New Zealand – voted against the Declaration. Australia and New Zealand have since adopted the Declaration, while Canada and, finally, the United States have recently announced their intentions to also do so.²¹

MURIEL MINING IN COLOMBIA

In 2009 the Supreme Court of Colombia suspended the operations of Muriel Mining until the company obtained the free, prior and informed consent of the affected communities.²² The court found that Muriel Mining had begun consultation in parallel to exploration activities, and that the consultation process did not include all the affected titled and untitled communities. The court also found the company had formed parallel and fictitious indigenous authorities in order to obtain approval of their exploration plans.

The UNDRIP lays out the minimum standards necessary to ensure the continued survival, dignity and well being of indigenous peoples.²³ It places existing rights already enumerated in international agreements and jurisprudence in one coherent document and lays out how they apply to the world’s 350 million indigenous peoples. The Declaration upholds indigenous peoples’ rights to continue to live as indigenous people, decide what happens on their land and control their own future. In order to guarantee these rights, the Declaration states that any project affecting the lands or territories and other resources of indigenous peoples should only take place with their free, prior and informed consent.²⁴

In its 2007 decision on Suriname, the Inter-American Court of Human Rights ruled that large-scale interventions that may affect indigenous and tribal peoples’ lands and natural resources require their free, prior and informed consent in accordance with their customs and traditions. The court rejected the Government’s suggestion that this could be done through their state-recognized headman, and affirmed the right of the *Saramaka* people to choose their own representatives and make decisions in line with their traditional methods of decision-making (see box for more details). A recent ruling by the African Commission on Human and Peoples’ Rights also vindicates the right of all indigenous peoples to restitution of lands taken without their consent.²⁵

National courts have also ruled in favor of the right of indigenous peoples to give or withhold their free, prior and informed consent, as in the case of Muriel Mining in Colombia (see box) and the *Delgamuukw* case in Canada.²⁶

The private sector is increasingly following these important advances in international law. Companies have a legal obligation to comply with national legislation and international human rights treaties signed by host countries. Companies also have a responsibility to respect the rights of people affected by their operations²⁷, and the UN Declaration and international jurisprudence lay out what these rights are with respect to indigenous peoples.

“...this responsibility to respect exists independently of a State’s duties to protect indigenous rights... Furthermore, ‘doing no harm’ is not merely a passive responsibility for firms but may entail positive steps.”

— UN Special Representative to the Secretary General on Business and Human Rights²⁸

Free, Prior and Informed Consent

The ILO, the UN Declaration and national and international courts all affirm that indigenous peoples are the legitimate owners of their lands, territories and natural resources regardless of whether they possess a title that is issued and registered by the state in question. They recognize indigenous peoples' rights to self-determination and to manage, distribute, and effectively control their territory, in accordance with their customary laws and traditional collective land tenure system.

The UN Declaration and international law and jurisprudence have established that, in order to respect and uphold these rights, activities affecting indigenous peoples' land and resources must only proceed with their free, prior and informed consent.²⁹ The principles of FPIC have been increasingly recognized by development agencies such as the World Bank, the IFC and the International Fund for Agricultural Development, and by industry bodies, such as the Round Table for Sustainable Palm Oil (RSPO) and to some extent the International Council on Mining and Metals (ICMM).³⁰

Free, prior and informed consent (FPIC) *is consent that is given freely, by people fully informed of the consequences, prior to any decision being made, and according to their own decision-making processes.*

Free means that indigenous people are free from coercion or manipulation to make decisions in their own time, in their own ways, in languages of their own choosing and subject to their own norms and customary laws.

Prior means that indigenous people understand and are involved in a decision making process and have the opportunity to give or withhold their consent during the early planning stages (for example, before auctioning exploration concessions) before a project becomes an economic or political inevitability, and this participation and consent process continues through the design and implementation phases of the project.

Informed means that indigenous people have the legal and technical expertise and access to information in forms and languages that allows them to understand the implications of any decision on their lives and their future, and that allows them to make informed choices and decisions and to have the capacity to negotiate with the company should they choose to do so.

If affected peoples choose to withhold their consent or not enter into negotiations with a company or government, then a project cannot go ahead without violating



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their basic rights to decide what happens on their land and control their own future.

In this way, free, prior and informed consent goes far beyond the notion of “consultation” which merely requires companies to simply survey a community. FPIC requires respect for the decisions and priorities of indigenous peoples and enables a new era of development decision-making in which indigenous peoples decide how their lands and resources will be used and what form development will take.

It is primarily the responsibility of government to ensure that policy decisions, development plans and extractive resource or infrastructure development projects have the free, prior and informed consent of indigenous peoples before concessions are granted to multi-national corporations. However, many governments have discriminatory laws and fail to uphold the rights of indigenous peoples. In addition, the FPIC process does not end with the granting of the concession, but continues through each phase and major decision of a project.

The right of indigenous peoples to FPIC has been clearly articulated through national and international law and jurisprudence, and the UN Declaration on the Rights of Indigenous Peoples merely affirms this right.³¹ Operating in an area where indigenous peoples have not given their free, prior and informed consent and are opposed to a company's presence not only makes a company complicit in a serious human rights violation, but it is also bad for business and a risk for operations – as outlined in the previous section. To mitigate these risks, companies need to implement a policy and take their own measures to ensure they operate only with the free, prior and informed consent of indigenous peoples directly or indirectly affected by their operations.

FPIC Challenges

A growing number of companies are recognizing that working where local communities are opposed to their presence is bad for business and a risk to operations, and they have made a public commitment to operate only where they have consent. However, implementing this commitment presents various challenges due to: the pressure on community relations staff to “obtain consent” as quickly as possible so the project can go ahead; the complexities of local political and community dynamics; power imbalances between a company and local communities; the failure to correctly identify which people will be affected; and the failure of states to correctly identify and title indigenous territories.

“Consent” that is not free, prior and informed, and that does not address the challenges above, does not fully represent the decision of people affected by a project, fails to address the underlying business risks, and fails to fulfill the company’s responsibilities to respect indigenous rights.

Unfortunately many companies, under pressure from market demand, shareholders, government and financing institutions, fail to act in good faith when attempting to obtain consent. The International Labor Organization reports that it is common for companies to try to foster mistrust and divisions both between and within communities and their representative organizations, and sidestep the local indigenous federations to negotiate directly with communities.³² Nor are all companies above offering bribes in attempts to corrupt indigenous leaders: *Achuar* leaders in Peru attest they have been offered houses in Lima, education for their children and substantial amounts of cash by representatives of Occidental Petroleum, in exchange for persuading their community to permit oil or gas operations in their territory.

Investors and shareholders need to demand greater transparency and a comprehensive and effective FPIC policy in order to ensure that companies are addressing the underlying business risks associated with operations that affect indigenous peoples rights. Listed below are key challenges that an FPIC policy needs to address in order to ensure that a company truly is only operating where it has free, prior and informed consent. It is beyond the scope of this briefing paper to offer detailed guidelines for implementing an FPIC process³³ but the list below identifies some of the key issues a company must address, particularly with respect to an FPIC process in the Amazon Rainforest.

Who is affected?

In many areas of the Amazon, indigenous peoples do not hold formal titles to their ancestral territory, and what looks like empty forest on a government map may be an important hunting or fishing site several days walk away from communities. Multiple recent court rulings have affirmed indigenous peoples’ territorial rights even in the absence of land titles issued by the state (see box about *Saramaka* case). Companies need to identify ancestral indigenous territory and who will be affected by their operations based on anthropological studies and on participatory maps of indigenous territory.

Who gives consent?

Indigenous people have their own decision-making structures and processes. Governments and companies often convince a chief or leader to sign away consent, without the authority or knowledge of community members who make decisions by consensus. This inevitably leads to problems and surprises in the future. In some cases, traditional decision-making structures are no longer functional or are not adapted to this type of decision. An FPIC policy needs to adapt to, respect and support indigenous peoples’ own participative decision-making processes, and indigenous peoples need the capacity and knowledge in order to make a free and informed decision.

Free from what?

Only consent given without coercion or inappropriate pressure can be considered as legitimate and respectful of the right to free, prior and informed consent. Numerous testimonies from affected indigenous peoples report offers of money, or threats of withholding basic services such as a school or a health post, if they do not agree to a proposed development project. Frequently community relations officers for companies, under pressure from their supervisors to “gain consent,” will go to any measure to get people to agree. In many projects, companies cooperate with the police and sometimes military to “keep the peace and order” around their operations. This generally amounts to an intimidation tactic with an implicit threat to people who might oppose a project. Intimidation can also be more subtle and even unintended, stemming from the inherent power imbalance between a multi-billion dollar oil company and a remote Amazonian community. Companies need to operate in a transparent manner and follow strict policies for good faith engagement with local communities to avoid these problems.

Who informs?

Companies are equally adept at green-washing their operations for local communities as they are to the general public. In order to increase their likelihood of obtaining consent, companies may only inform affected communities of the short-term benefits of a project, with little emphasis on the associated risks or the long-term impact on their health, environment or way of life. Environmental Impact Assessments are often inadequate and fail to communicate in a language understood by local communities. Communities need access to independent advice and information that can enable them to fully understand the consequences and make informed decisions.

Prior to what?

A recent report by Foley Hoag for Talisman Energy³⁴ advises that consent is only required prior to “significant impacts,” and excludes the exploration phase of a project from this category. For many people thousands of miles of seismic lines and explosive charges, hundreds of heliports, and drilling exploratory wells in the middle of a hunting or fishing ground is a significant impact. It also does not make good business sense to invest millions of dollars in an exploration project when the local population might be opposed to project activities. Often project plans are not presented as an option, but rather

as a decision that has already been made: an inevitability that local opposition will not alter. Affected peoples need to be involved before decisions are made and have the right to withhold consent if they choose to do so, and they should have the opportunity to renegotiate any agreement after the exploration phase before any exploitation takes place. FPIC is an ongoing process beyond the initial consent for a project to ensure that a company continues to have the consent of affected peoples at every stage of operations.

Indigenous peoples living in voluntary isolation

In the remote headwaters of the Amazon basin some indigenous groups have chosen to shun direct contact with the outside world and live in voluntary isolation. Any attempt to contact them or operate in their territory would be a violation of their right to self-determination, could force their displacement, and poses a serious health risk: after decades without contact with influenza and other diseases a simple cold could wipe out an entire people.³⁵ Since such peoples often move seasonally through an extensive territory and carefully cover their tracks and hide from outsiders, companies must carefully analyze evidence of their presence and avoid operating in the territory of peoples living in voluntary isolation.



Recommendations

Adopting a Free Prior and Informed Consent policy based on the rights laid out in the UN Declaration is an important tool for a company to identify whose rights might be affected and what responsibilities a company has to respect rights, in particular territorial rights and indigenous peoples' right to self-determination.

As first steps towards implementing policies to ensure that companies respect the rights of indigenous peoples Amazon Watch recommends that companies and shareholders do the following:

For companies:

- Adopt and implement a meaningful FPIC policy at the level of the company's board of directors that takes into account the considerations and challenges expressed in this paper.
- Commission periodic independent reviews of the company's adherence to its policy including a review of actual consultation and community engagement activities, and make these materials available to the public.
- Do not enter into contracts for concessions overlapping indigenous territory where a state does not adequately protect indigenous rights. Make FPIC and other protections for indigenous rights a contractual condition.
- Provide on-going training to all field personnel and third party contractors on the spirit and letter of the company's FPIC policy.

For shareholders:

- Work with organizations such as Amazon Watch who are supporting indigenous peoples in the Amazon to ensure that you have accurate and independent information to measure the performance of a company.
- Request that companies commit to operate only with the free, prior and informed consent of affected indigenous peoples where they operate and challenge companies' implementation to ensure that the commitment is more than just a public relations exercise.
- Demand greater transparency and dialogue about community relations activities and policies.
- File shareholder resolutions recommending that the company adopt a FPIC policy.
- Where companies have adopted a FPIC policy, continue to work with them to ensure that the policy is implemented in a meaningful, legitimate way.

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25. Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, February 2010, at para. 226, available at <http://www.minorityrights.org/download.php?id=748>
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