

Defenders of a threatened world

Indigenous Peoples are disproportionately impacted by the economic, environmental, and social impacts of industrial projects. Nick Pelosi and Ellie Higgins explain how we engage with companies on Indigenous Peoples' rights and community impact.

Setting the scene

Indigenous Peoples are the holders of unique cultures and languages, and invaluable knowledge for the sustainable management of natural resources.¹ This knowledge can provide practical solutions for climate adaptation and mitigation.² However, these groups are threatened by the same activities that drive the climate crisis. Indigenous Peoples may be particularly vulnerable to the negative environmental and social impacts of companies, especially those involved with resource extraction or industrial development.

For this reason, the rights of Indigenous Peoples are protected by a range of national and international legal frameworks that materially impact the operations of companies operating in specific areas. By improving the protection of Indigenous Peoples, companies can also secure long-term shareholder value and achieve sustainable wealth creation.

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Indigenous Peoples are increasingly on the frontline of the climate crisis, and in recent years we have seen major flashpoints erupt between extractives companies and local communities. In Australia, Rio Tinto's destruction of Aboriginal heritage sites at Juukan Gorge damaged the company's social licence to operate and led to the replacement of the CEO and other senior executives.³ In Brazil, Anglo American was forced to withdraw 27 mining research permits, despite approval from the government, following months of campaigning and pressure from impacted Indigenous Peoples.⁴

Several oil and gas projects, especially pipelines, face community opposition, resulting in construction delays. These cases demonstrate the risks that companies face when they do not fully consider Indigenous Peoples' rights in their planning.

¹ Microsoft Word – Factsheet-identity1.doc (un.org)

² The Use of Indigenous Traditional Knowledge in Climate Change Strategies | Wilson Center

³ Juukan Gorge inquiry: Rio Tinto's decision to blow up Indigenous rock shelters 'inexcusable' | Indigenous Australians | The Guardian

⁴ For protecting the rainforest, this Brazilian activist wins Goldman prize : Goats and Soda : NPR

Given the importance of protecting Indigenous Peoples' rights both for long-term shareholder value and improving environmental and social outcomes, EOS prioritises engagement with companies on how they can most appropriately respect the rights of Indigenous Peoples and retain their social licence to operate. EOS has over 30 active engagements related to Indigenous Peoples' rights and is an active member of the steering committee of the Investors and Indigenous Peoples Working Group (IIPWG), to ensure best practices are established across investment portfolios.

The legal framework and the business case

International standards for Indigenous Peoples' rights are documented in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) 2007. UNDRIP, which is endorsed by most countries, recognises Indigenous Peoples' right to give or withhold Free, Prior and Informed Consent (FPIC) to business activities on or near their lands.⁵ FPIC is an avenue through which Indigenous Peoples seek to secure formal recognition of their right to their traditional lands and natural resources.

44% of mining executives ranked the social licence to operate as the biggest risk to their business.

When companies do not obtain FPIC from Indigenous Peoples impacted by their business operations, they increase their likelihood of causing adverse human rights impacts. These impacts can lead to operational, reputational, and regulatory risks for companies and their shareholders. It is estimated that for a typical, large mining project with US\$3bn-\$5bn capex, delays caused by community opposition can cost roughly \$20m-\$30m per week. Some 44% of mining executives ranked the social licence to operate as the biggest risk to their business in 2020, according to EY. And in September 2018, estimated costs incurred by the Dakota Access Pipeline, which faced resistance from Indigenous Peoples along its route, amounted to at least \$7.5bn.⁶

Companies across several sectors still lag on implementing basic FPIC principles where they have impacts on Indigenous Peoples' rights.

Governments play a key role in facilitating the environment for FPIC, and countries without a strong legal framework for Indigenous Peoples' rights can increase the risk of community opposition to companies. We see Canada's Truth and Reconciliation Commission's recommendations to the corporate sector to adopt UNDRIP as a best practice reconciliation framework. The recommendations include:

- Obtaining the FPIC of Indigenous Peoples before proceeding with economic development projects.
- Ensuring that Indigenous Peoples have equitable access to jobs, training, education opportunities, and long-term sustainable benefits from economic development projects.
- Providing education for management and employees on the history of Indigenous Peoples.

Moreover, voluntary industry standards, such as the International Council on Mining and Metals (ICMM), the Forest Stewardship Collective, and the Roundtable on Sustainable Palm Oil, publish guidance for companies on FPIC or require FPIC as a condition for third-party certification. It is important to note that state and industry-led interpretations of FPIC often differ from Indigenous defined best practice.

For example, the ICMM defines FPIC as "a process and an outcome" but caveats that "where consent is not forthcoming despite the best efforts of all parties, in balancing the rights and interests of Indigenous Peoples with the wider population, government might determine that a project should proceed and specify the conditions that should apply". Companies across several sectors still lag on implementing basic FPIC principles where they have impacts on Indigenous Peoples' rights.



⁵ [UNDRIP_E_web.pdf](#)

⁶ [colorado.edu/program/fpw/sites/default/files/attached-files/social_cost_and_material_loss_0.pdf](#)

Our engagement approach

We believe that how a company manages its human rights strategy is of critical importance for its licence to operate, its impact on people's lives and ultimately its ability to create and preserve long-term value. We focus on Indigenous Peoples' rights within our human rights engagement theme. We have set objectives on Indigenous Peoples' rights with more than 30 companies, mostly in the oil and gas, mining, and financial services sectors. Through our collaboration and involvement with the Investors and Indigenous Peoples Working Group, we consider Indigenous perspectives when setting priorities for engagement and researching companies.

Additionally, there is a strong overlap between Indigenous Peoples' rights and some of our other engagement themes, for example, natural resource stewardship. While Indigenous Peoples own, occupy or use 25% of the world's surface area, they safeguard 80% of its remaining biodiversity.⁷ In the Amazon rainforest, Indigenous Peoples can play an important safeguarding role because of their deep knowledge and understanding of the Amazon's ecosystem.⁸ But in recent years this has been undermined by illegal logging, mining and fossil fuel extraction. Therefore, protecting Indigenous Peoples' rights offers strong benefits for biodiversity as well.⁹

In our engagement, we encourage companies to adopt a policy commitment to Indigenous Peoples' rights, separate from or included in its Human Rights Policy, which includes support for FPIC and UNDRIP. For example, we engaged with BHP Billiton to share feedback on its policy for protecting Aboriginal heritage sites in Australia. In 2023, the company published a new reconciliation plan that covered FPIC and laid out a five-year plan for community engagement.

We encourage companies to report on the implementation of their policy commitment to Indigenous Peoples' rights and have suggested the metrics used within the International Sustainability Standards Board standard for mining. The standard requires that companies disclose the percentage and grade of proved and probable reserves located in or near areas considered to be Indigenous Peoples' land, and the due diligence practices and procedures with respect to Indigenous Peoples' rights, including the FPIC processes.

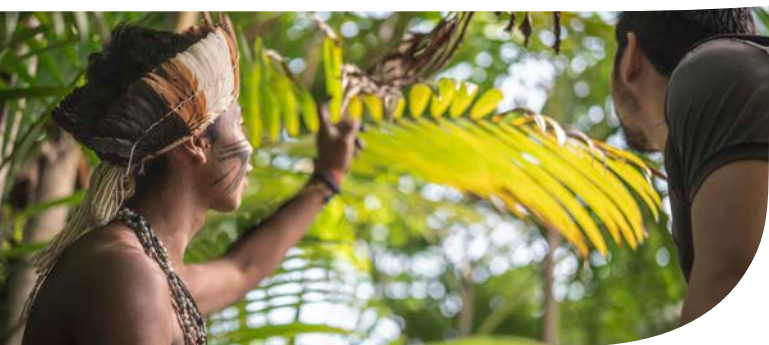


We expect companies to implement human rights due diligence across their operations and undertake human rights impact assessments (HRIAs) at high-risk sites. For example, we asked Freeport-McMoRan to complete an HRIA for its Grasberg Mine in Indonesia, which the company is scheduled to complete this year. More recently, we encouraged Barrick Gold to complete an HRIA for its Donlin Gold Mine in Alaska, which is facing a legal challenge from three tribes in the Kuskokwim River region of Southwest Alaska.¹⁰

Access to remedy is a critical component of FPIC as well as the UNGPs. For this reason, we ask companies to demonstrate evidence of grievance mechanisms that are available to Indigenous Peoples and other impacted communities. We made this request to Posco Holdings following allegations that one of its subsidiaries violated FPIC at palm oil plantations in Indonesia.¹¹ The company has since improved the grievance mechanisms to make them more accessible and effective, committing to disclose key performance indicators showing their effectiveness. Other companies have taken an upfront approach to addressing controversies relating to Indigenous Peoples' rights. For example, Vale published a report of the discussions, disagreements, and management of solutions in previous community disputes.¹²

Best practice is for companies to demonstrate the presence of agreements with Indigenous Peoples that indicate FPIC in relation to proposed developments. These agreements are more likely to be found in certain countries, such as Australia and Canada. One company with an advanced approach, Agnico Eagle Mines, declares a firm commitment to FPIC in its sustainability report, reports on engagement with various First Nations within the vicinity of its business, and has declared no significant community disputes.

The presence of agreements does not automatically guarantee FPIC, but it is an indicator of positive relationships. We continue to engage with Rio Tinto on the importance of community agreements as vehicles for obtaining FPIC. Today, the company has six formal agreements with Indigenous Peoples.¹³ One of these agreements, formed with the Puutu Kunt Kurrama and Pinikura Aboriginal Corporation, created a foundation dedicated to remedying the destruction of the Juukan Gorge. Other criteria help to evaluate the efficacy of agreements, such as levels of transparency and community involvement in negotiations.



⁷ <https://www.worldbank.org/en/topic/indigenouspeoples>

⁸ https://wwf.panda.org/wwf_news/?9463416/Amazon-Summit-Belem

⁹ [Indigenous Communities Protect 80% Of All Biodiversity \(cbd.int\)](https://www.cbd.int/indigenouscommunities)

¹⁰ <https://earthjustice.org/press/2023/southwest-alaska-tribes-sue-in-federal-court-to-halt-the-donlin-gold-mine>

¹¹ <https://www.business-humanrights.org/en/latest-news/ngos-from-korea-and-indonesia-file-oeed-complaint-against-posco-international-for-causing-palm-oil-abuses-and-national-pension-service-and-the-export-import-bank-of-korea-for-financing-the-abuses/>

¹² [Controversies – ESG – Vale \(liferay.com\)](https://www.liferay.com/controversies-esg-vale)

¹³ [Community Agreements \(riotinto.com\)](https://www.riotinto.com/community-agreements)

Financial services companies and Indigenous Peoples' rights



Over the past year, we have increased our engagement with financial services companies on Indigenous Peoples' rights. In 2022, we signed the Investor Statement on Line 3, Oil Sands, and FPIC, calling on six US and five Canadian banks to increase protections for Indigenous Peoples' rights within their oil and gas financing. The Line 3 project was the replacement of an Enbridge Energy oil pipeline running from Alberta, Canada to Wisconsin, US. The original pipeline was built in the 1960s and had deteriorated to the point that capacity had to be reduced to avoid further spills. The new pipeline's proposed route crossed some Native American reservations, and met with years of litigation and costly delays. However, the pipeline was completed in 2021 and is now in operation, notwithstanding this opposition.

While most banks have some consideration of Indigenous Peoples' rights within their environmental and social risk management policies, this is limited to instances of direct project finance rather than general corporate finance. We have encouraged banks, including Bank of America and Wells Fargo, to adopt a financing requirement for FPIC to be applied to all energy and mining industry clients.

We have also urged banks to increase Indigenous Peoples' representation at all levels of their business, including when considering directors. We are engaging with Canadian Imperial Bank of Commerce (CIBC) on Indigenous Peoples' rights, focusing on the financing requirement for FPIC. In our most recent engagement with CIBC, we were pleased to hear that reconciliation is a top priority for the company. Also, it has a specific set of targets and actions to meet government guidelines, including a niche Indigenous banking team led by an Indigenous individual.

On FPIC, the bank said that it follows the rules of the provincial and federal government. As the Canadian government has imposed reconciliation requirements and stronger regulations around financing that impacts Indigenous Peoples, the bank effectively defers to these guidelines in its lending decisions. We will continue to encourage CIBC to go beyond government requirements for FPIC when working with energy and mining companies.

Market leadership and public policy advocacy

EOS is represented on the steering committee of the Investors and Indigenous Peoples Working Group (IIPWG). This group holds monthly calls that serve as a clearinghouse for education, news, and joint action to bring together Indigenous and non-Indigenous communities on issues related to sustainable and responsible investing. IIPWG's work focuses on four priority areas:

- Ensuring Indigenous Peoples' FPIC
- Addressing the impact of extractive industries on Indigenous Peoples and the environment
- Ending the use of racist images, stereotypes, and cultural appropriation
- Building corporate and investor support for Indian Country

In 2023, EOS participated in a panel discussion called "Indigenous-Defined FPIC: Best Practices for Investment and Corporate Governance", hosted by IIPWG. The panel discussed the core values and protocols that Indigenous Peoples require in an FPIC policy, and how shareholders can move the extractives industry and financial institutions to fully integrate Indigenous Peoples' rights risk screening and FPIC due diligence. The panel brought together a range of Indigenous and investment expertise to debate common questions about FPIC and its integration into corporate practice. Through discussion, resource sharing and breakout sessions, participants gained a better understanding of Indigenous-defined FPIC requirements.

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Additionally, we are leading or supporting collaborative engagements on human rights with several mining companies through the PRI Advance initiative. This was launched earlier in 2023 to achieve positive human rights outcomes through investor stewardship. Within these dialogues, we have advocated for Indigenous Peoples' rights to be seen as part of the human rights agenda. These dialogues have offered more opportunities for engagement with Indigenous Peoples – for example, we met with community leaders impacted by one of Rio Tinto's mines to improve our understanding of these impacts.

Outlook

Over the coming year, we will continue to engage with companies on Indigenous Peoples' rights. We will encourage further implementation of FPIC through formal agreements with Indigenous Peoples, stronger safeguards within financing policies, and representation of Indigenous Peoples at all business levels. We will explore new ways to compare company performance in this area and benchmark companies relative to their peers. Finally, we will continue to support Indigenous Peoples' rights in relevant public policy forums and encourage company alignment with existing third-party guidelines such as UNDRIP.

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