



CONSENT IS EVERYBODY'S BUSINESS

WHY BANKS NEED TO ACT ON FREE,
PRIOR AND INFORMED CONSENT

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Cover photo: Cover photo: An irrigation project in Mozambique.
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LIST OF ABBREVIATIONS

ANZ	Australia and New Zealand Banking Group
ASI	Aluminium Stewardship Initiative
BEI	Banking Environment Initiative
CEDAW	UN Committee on the Elimination of Discrimination against Women
ELC	Economic Land Concession
EP III	Equator Principles III
ESF	Environmental and Social Framework (World Bank)
ESG	Environmental, social and governance
CGF	Consumer Goods Forum
DAPL	Dakota Access Pipeline
DFI	Development finance institution
FAO	Food and Agriculture Organization of the UN
FATF	Financial Action Task Force
FPIC	Free, prior and informed consent
FSC	Forest Stewardship Council
HRIA	Human rights impact assessment
IFC	International Finance Corporation
IHRB	Institute for Human Rights and Business
IRMA	Initiative for Responsible Mining Assurance
KPI	Key performance indicator
KYC	Know your customer
NCP	National Contact Point
NPV	Net present value
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the UN High Commissioner for Human Rights
PEP	Politically exposed person
PPS	Phnom Penh Sugar
PRB	Principles for Responsible Banking
RSPO	Roundtable on Sustainable Palm Oil
RTRS	Roundtable on Responsible Soy
SDGs	Sustainable Development Goals
UNDRIP	UN Declaration on the Rights of Indigenous Peoples
UNEP	United Nations Environment Programme
UNGPs	United Nations Guiding Principles on Business and Human Rights
VGGTs	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests

SUMMARY

A community's choice to give, or withhold, their free, prior and informed consent (FPIC) to a project or activity planned to take place on their land is a recognized right of Indigenous peoples under international law.¹ It is also a best practice principle that applies to all communities affected by projects or activities on the land, water and forests that they rely on. Free, prior and informed consent has additional benefits for banks involved in such projects, and their clients, in helping to avoid a diverse array of potential risks.

POTENTIAL RISKS INCLUDE:

- land-related fraud, corruption and money-laundering;
- murder, threats or unlawful arrest of peaceful protestors;
- gender-based discrimination and sexual violence;
- land-related conflict;
- violation of national laws and regulations;
- environmental crime and destruction;
- a host of other human rights abuses including, but not limited to, denying Indigenous peoples their right to self-determination.

Increasingly, the banking sector has recognized the importance of free, prior and informed consent. It is incorporated, at least in part, into guidelines and standards such as the Equator Principles. It is also part of the human rights responsibilities and obligations of banks under the UN Guiding Principles on Business and Human Rights (the UNGPs).² In the USA, the denial of the Standing Rock Sioux people's right to free, prior and informed consent has played a major role in the public backlash against the Dakota Access Pipeline, and as a result cities and tribes have divested over \$4.3bn from banks connected to the project.³

This discussion paper seeks to start a conversation on what banks must do to put commitments on free, prior and informed consent into practice. It acknowledges that there are legitimate questions about how banks can operationalize free, prior and informed consent commitments. It seeks to explain clearly why free, prior and informed consent is important and outlines the forces that are making it a prominent human rights, environmental and governance issue, including, among other aspects, rapidly escalating violence towards people who peacefully speak out on land-related issues. This paper also highlights how free, prior and informed consent can help banks ensure that they have obtained an accurate situational analysis and help them manage operational, legal, financial, compliance and reputational risks. It gives examples of concrete actions that banks can take to get started on operationalizing free, prior and informed consent and outlines priorities for action.

**THIS DISCUSSION
PAPER SEEKS TO START
A CONVERSATION ON
WHAT BANKS MUST DO
TO PUT COMMITMENTS
ON FREE, PRIOR AND
INFORMED CONSENT
INTO PRACTICE.**

However, it is critical to call out an existing culture where banks frequently ignore or fail to prioritize the legal and human rights of marginalized people. The paper also explicitly identifies ‘red lines’ – core commitments that constitute a threshold for assessing banks’ goodwill on land-related human rights, environmental and governance issues.

The paper outlines a range of actions that banks can take to begin to implement free, prior and informed consent. As a priority, they should:

- Write consent requirements into agreements with clients to ensure that banks can publish corporate loan and project finance information related to businesses engaged in high-risk areas. This should include forms of disclosure that allow affected people to know which banks are financing, or planning to finance, activities in their area.
- Collectively, and individually, engage with Indigenous peoples’ organizations, human rights networks and FPIC specialists. Seek their insights and advice on how to create meaningful due diligence and learning networks, and develop a measurable, time-bound roadmap to implement free, prior and informed consent.
- Specifically write free, prior and informed consent into contracts, to ensure that banks can exit a project if consent is not achieved.
- Incorporate measurable human rights performance criteria into staff key performance indicators and recruitment and bonus structures. Adopt a bank policy of mandatory reporting on suspected human rights abuses.
- Require lead arrangers of syndicated loans to provide a due diligence report aligned with the UNGPs to banks considering taking part in a loan.
- Require adherence to banks’ environmental, social and governance (ESG) policies and human rights policies in client contracts.
- Ensure that all stakeholder groups, including communities affected by bank-financed projects and activities, have access to bank grievance mechanisms. Call for the Equator Principles Association to develop an effective grievance mechanism that can assess claims that Equator Principles standards are not being properly applied by banks and project sponsors.

IF THE CONVERSATION IS TO MOVE FORWARD, IT IS ALSO CRITICAL TO CALL OUT AN EXISTING CULTURE WHERE BANKS FREQUENTLY IGNORE OR FAIL TO PRIORITIZE THE LEGAL AND HUMAN RIGHTS OF MARGINALIZED PEOPLE.

1. INTRODUCTION

6 AS SOME OF US EXPERIENCED WITH A RECENT PROJECT LOCATED IN A DESIGNATED COUNTRY, BANKS WERE PUBLICLY AND HARSHLY CRITICIZED FOR SUPPORTING A PROJECT WHERE CONSULTATION WITH AN INDIGENOUS COMMUNITY DID NOT INVOLVE THEIR FREE, PRIOR AND INFORMED CONSENT (FPIC). THEY WERE ALSO CRITICIZED FOR NOT BEING ABLE TO INTERVENE WITH THE SPONSORS IN ORDER TO HELP IDENTIFY A SOLUTION THAT WAS AGREEABLE TO ALL PARTIES IN THIS CONTEXT. 9

A letter from 10 banks to the Equator Principles Association, asking for an upcoming review to prioritize Indigenous rights following global campaigns targeting the Dakota Access Pipeline project in the USA, 22 May 2017⁴

On 2 March 2016, Berta Cáceres was gunned down in the town of La Esperanza in rural Honduras. The Indigenous leader was murdered for her work organizing Lenca communities in opposition to a proposed hydroelectric project on the Gualcarque river.⁵ Her death was not the first connected to the project, but it sparked a global outcry and led to organized protests against the project's financiers, including Dutch development bank FMO and Finnfund.⁶ It was almost unprecedented that the death of a rural, Indigenous woman activist, in a country far from the global stage, could reverberate across the world in this way. Just months later, protests against the Dakota Access Pipeline (DAPL) in the USA would make headlines worldwide, galvanizing a campaign that targeted 17 commercial banks for their failure to respect the rights of Indigenous peoples. As of February 2019, cities and tribes had divested \$4.3bn from banks linked to the project.⁷

These two events mark a tipping point in terms of public, media and investor attention to banks' financing of high-risk projects and operations, and the need to respect and gain the free, prior and informed consent (FPIC) of local people. In simple terms, FPIC is the process leading to, and the result of, a community's choice to give, or withhold, consent for projects or activities taking place on, or otherwise impacting, the land, water or forests that they depend on for their livelihoods or that are culturally important (see section 2).⁸ This discussion paper focuses on sectors at high risk of rights violations where FPIC is particularly important – agribusiness, forestry, oil, gas, mining, dams and infrastructure.⁹ Financial sector analyst TMP Systems, which has extensively analyzed investor approaches to land rights and related conflict, notes that 'current approaches to tenure risk are objectively dysfunctional'.¹⁰

Banks often mistake FPIC as a stand-alone issue. However, the iterative process involved in seeking FPIC can touch upon a broad array of potential rights violations. For Indigenous communities, FPIC is entwined with the recognized right under international law to self-determination. This identifies that Indigenous peoples can and often do face oppression, underpinned by a lack of recognition, from the state or from companies, for pre-existing Indigenous jurisprudence and governance structures. FPIC is also inherently linked to the preservation of Indigenous land-based cultures and knowledge, identities and livelihoods. Other marginalized communities targeted by state-sanctioned violence or company-led human rights abuses have also called for FPIC to be adopted as a best practice more broadly (see Box 1).

BANKS OFTEN MISTAKE FPIC AS A STAND-ALONE ISSUE. HOWEVER, THE ITERATIVE PROCESS INVOLVED IN SEEKING FPIC CAN TOUCH UPON A BROAD ARRAY OF POTENTIAL RIGHTS VIOLATIONS.

Worldwide, communities are calling for free, prior and informed consent commitments and enforcement because, in safeguarding their rights, FPIC is also an effective tool to negate, or outright avoid:

- land-related fraud, corruption and money-laundering;
- murder, threats or unlawful arrest of peaceful protesters;
- gender-based discrimination and sexual violence;
- land-related conflict;
- violation of national laws and regulations;
- environmental crime and destruction;
- a host of other human rights abuses including, but not limited to, abuses of Indigenous peoples' right to self-determination.

The multiple benefits of applying free, prior and informed consent are recognized in a growing number of industries, and are included in standards in sectors ranging from palm oil to mining to forestry. Companies and banks that operate with the FPIC of local communities are better able to avoid exposure to corruption or malpractice, and to identify potential sources of conflict and act early to ascertain whether these can be resolved. As true FPIC processes are iterative, they also embed processes that empower communities to act on concerns at each stage of a project or operation, better enabling issues to be identified and addressed early on. An increasing number of banks and financial sector frameworks include FPIC commitments. However, banks not only have to commit to seeking FPIC: the commitment has to translate into meaningful action, with clear accountabilities.

Until recently, most banks argued that they themselves are not ultimately responsible for ensuring that their financing, or related operations, comply with human rights standards – including FPIC – but that it is their clients who bear sole responsibility for obtaining the FPIC of affected communities. Furthermore, in some cases, banks have maintained that clients who have evicted thousands of people at gunpoint can be reasonably expected simply to hand the land back or pay fair compensation.¹¹ The growing number of public campaigns that target banks on issues relating to land, water and forests shows that this approach is increasingly out of step with consumer and shareholder expectations. In 2017, the Office of the UN High Commissioner for Human Rights (OHCHR) conclusively stated that banks can be linked to adverse human rights impacts through their financing, and also can actively contribute to these impacts if their actions and decisions influence a client in such a way as to make an impact more likely.¹² In such circumstances, under international human rights law the bank may be responsible for remediating the human rights impact, together with its client.¹³

This paper seeks to start a conversation on what banks must do to show that they take FPIC seriously. It acknowledges that there are legitimate questions about how banks can adopt and operationalize FPIC. It provides a brief introduction to FPIC (section 2) and outlines the forces that are making it a prominent human rights, environmental and governance issue. It also highlights how human rights responsibilities correlate with managing operational, legal, financial, compliance and reputational risks – something that is increasingly recognized by banks themselves (section 3 and 4). Sections 6 and 7 give examples of concrete actions that banks can take to start operationalizing FPIC, while section 8 lists priorities for action.

COMPANIES AND BANKS THAT OPERATE WITH THE FPIC OF LOCAL COMMUNITIES ARE BETTER ABLE TO AVOID EXPOSURE TO CORRUPTION OR MALPRACTICE, AND TO IDENTIFY POTENTIAL SOURCES OF CONFLICT AND ACT EARLY TO ASCERTAIN WHETHER THESE CAN BE RESOLVED.

However, if the conversation is to move forward, it is also critical to call out an existing culture in which banks frequently ignore or fail to prioritize the legal and human rights of Indigenous peoples and other marginalized groups. Section 5 explicitly identifies seven 'red lines' which, if not met, throw into doubt the sincerity of banks' efforts on FPIC. This follows reports of banks repeatedly financing companies or projects linked to human rights abuses, environmental crime and illegal, corrupt or fraudulent land acquisitions.

As the world transitions from an oil-based to a land-based global economy, power is shifting in unpredictable and often turbulent ways. Leadership is more polarized, the rule of law is unstable and justice can be a rapidly swinging pendulum, while financiers are increasingly distanced, both physically and socially, from the on-the-ground realities of the decisions they make. Real resilience in the face of these changes, along with a changing climate and the rapid social revaluing of nature, rests on the social contract. Businesses that tacitly or implicitly support activities that oppress or cause outright harm to communities will increasingly be singled out for criticism. Businesses that harness the trust, goodwill and mutual respect of communities where they work, on the other hand, will survive. It is not extraordinary or exceptional to expect that banks act with respect for the dignity of marginalized people and the land, forests and waters that they rely on. It is neither unreasonable nor idealistic to demand that community consent be the cornerstone on which business, and our economy, is built.

6 OVER 700,000 PEOPLE HAVE SIGNED ONE OF SIX PETITIONS TO BANKS FINANCING THE DAPL [A PROJECT WHICH FAILED TO SEEK THE CONSENT OF THE STANDING ROCK SIOUX PEOPLES]. THE FIGURE INCLUDES INDIVIDUALS WHO COLLECTIVELY REPORT HAVING OVER USD\$2.3 BILLION INVESTED IN THESE BANKS THROUGH CHECKING, MORTGAGE AND CREDIT CARD ACCOUNTS, WHICH THEY ARE READY TO DIVEST IF THE BANKS CONTINUE FINANCING DAPL. THOUSANDS HAVE ALREADY CLOSED THEIR ACCOUNTS AND DEFUNDED OVER USD\$55 MILLION AND COUNTING.9

BankTrack, 3 February 2017¹⁴

BOX 1: THE RAPID INCREASE IN LAND-RELATED HUMAN RIGHTS ABUSES

Over the past 15 years, it has become increasingly dangerous for people to peacefully speak out on land, forest and water issues. In 2018, 321 people active on human rights were murdered; 77% of those killed worked on land, environment or Indigenous issues.* In 2018, on average, three land and environmental defenders are killed each week, and in 2016 almost 40% of those murdered were Indigenous people.** In 2018, the deadliest industries were agribusiness, mining, logging and poaching. Rape and other sexual violence is widely used to try to silence defenders, particularly women.*** These killings represent the extreme end of a spectrum of violence and threats directed at land rights defenders. Today, the call for banks to respect FPIC comes from increasingly unified Indigenous, human rights, women's rights and climate movements working on a diverse array of campaigns.

* Frontline Defenders (2019). *Global Analysis 2018*. <https://www.frontlinedefenders.org/en/resource-publication/global-analysis-2018>

** Other statistics from Global Witness's monitoring of the killings of land and environmental defenders. 'Defenders' are persons who peacefully speak out on land and environmental issues.

*** Frontline Defenders (2019). *Global Analysis 2018*, op. cit.

FIGURE 1:

THE NUMBERS

93% of land concessions in agriculture, mining, forestry/ logging or oil and gas **are inhabited** — based on an analysis of 73,000 concessions in eight countries.¹⁵

This underlines the importance of engaging with local people.



2.5 BILLION
PEOPLE LIVE ON
INDIGENOUS AND
COMMUNITY LANDS.¹⁶

90% 

of Indigenous and community lands **do not have secure legal tenure rights** — highlighting the need for strong processes on FPIC to avoid conflict or rights violations.¹⁷

97 

financial institutions have signed on to the **Equator Principles**, which includes FPIC commitments for project-related finance.¹⁸



Three people are **murdered each week** for speaking out on land and environmental issues.¹⁹

77% 

of human rights defenders murdered in 2018 **focused on land, environmental or Indigenous rights issues** — highlighting why FPIC is a priority issue.²⁰

70,347,793
HECTARES

have **changed hands through large-scale land acquisitions** since 2000.²¹ This represents a total land mass equivalent in size to the United Kingdom, Germany, Belgium and the Netherlands combined.²² Large-scale land deals that involve a transfer or control of land from communities to companies are particularly vulnerable to land-related human rights abuses.



Millennials are **twice as likely as older people to invest** in companies based on their reputation on social and environmental outcomes.²³

USD\$4.3 BILLION

was **divested by cities and tribes** from banks supporting the Dakota Access Pipe Line.²⁴

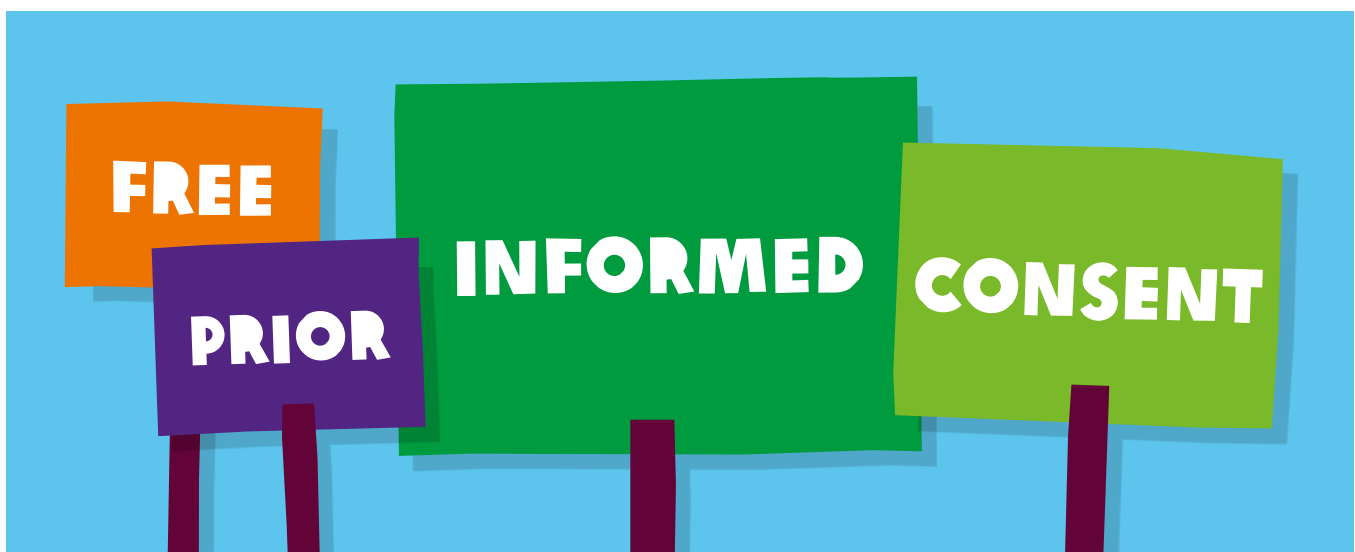


 **3.4 MILLION**
PEOPLE

were **physically or economically displaced** by projects financed by the World Bank Group between 2004 and 2013, including those financed via commercial banks.²⁵ This is likely to be just the tip of the iceberg of financial sector exposure to land-related issues; no systematic data are collected for commercial banks.

2. WHAT IS FREE, PRIOR AND INFORMED CONSENT?

FPIC has three dimensions: as a right under international law, as a best practice principle and as a process. To realise FPIC, Indigenous peoples and local communities must be adequately informed about projects or company activities in a timely manner and must be given the opportunity to approve or reject the project or activities before operations begin, through an appropriate process of community decision making that is free from coercion and intimidation. This includes participation in setting terms and conditions that address the economic, social and environmental impacts of all stages of a project or company operation.



FREE means that consent, if given, is given voluntarily and without coercion, intimidation or manipulation.

PRIOR means that community consent for activities to go ahead is achieved before any authorization of future activities.²⁶ This requires that initial consultation processes to determine if the community consents (or not) are undertaken before projects or operations are approved. Investors and governments must respect local decision-making processes and timelines for decision making. The FPIC process continues throughout the lifecycle of the project or company operation.

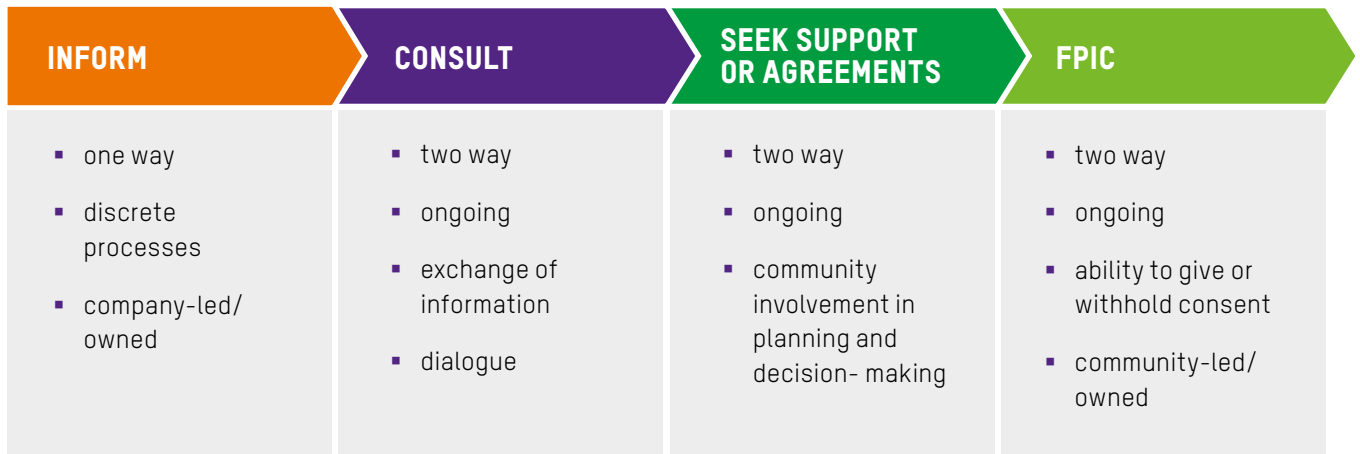
INFORMED implies that communities have objective, accurate and accessible information, presented in a manner and form that is understandable to Indigenous peoples and other affected communities. This ensures that communities are not misled, deceived or misinformed before making a decision. Information should include the nature, size, purpose and scope of the proposed venture, as well as any likely economic, social, human rights, gender, culture or environmental impacts and risks. Communities' participation in the identification of potential risks (such as impact assessments) is critical to ensure that cultural, social and other risks that are perhaps invisible to outsiders are included in project documents. Communities should have access to independent third parties who can provide unbiased technical and legal information and should be provided with opportunities to visit similar projects.

Indigenous peoples, and other local communities affected by large-scale land-based operations, are increasingly vocal that they expect to know which bank or investor is involved in financing activities or companies active in their area.

CONSENT is the right to approve or reject a project or operations and key decisions throughout the project cycle. It includes the right to say 'no'.

The right of Indigenous peoples to FPIC is specifically enshrined in international law (see section 3). FPIC is also increasingly recognized as a principle of best practice for other affected communities and linked to the realization of diverse human rights. FPIC applies to activities that have an impact on the land, territories or natural resources of Indigenous peoples and local communities. It does not require that their commonly recognized rights to use, own or control decisions about land have been formally registered, demarcated or recognized by the state.

FIGURE 2: FREE, PRIOR AND INFORMED CONSENT IS NOT SIMPLY ‘COMMUNITY ENGAGEMENT’



Source: The Oxfam Community Consent Index 2015.²⁷

This diagram, taken from an extractive industries report, shows that the spectrum of community engagement ranges from low compliance (one-way information sharing) to high compliance (FPIC).

Six key facts about free, prior and informed consent:

1. FPIC has three dimensions. First, it is a *right* guaranteed under law. Second, it is a broader principle of good practice. Third, it is achieved through an iterative FPIC process. This involves staged steps throughout a project or the life of an operation.
2. FPIC as a *right*, a *principle* and a *process* is articulated in a detailed body of literature, practitioner guidance and case law that has evolved over three decades.
3. The *right* of FPIC was developed, fought for and ultimately achieved by Indigenous peoples themselves,²⁸ in contrast to terms such as ‘broad community support’ which have been promoted by lenders and which have been critiqued by UN bodies as ‘an ambiguous concept with no legal basis under international law and without a clear understanding or meaning’.²⁹
4. A decision to give, or withhold, FPIC is determined through a community’s own governance processes and institutions.
5. FPIC does not mean that a single individual has the right to veto a project, unless a community’s own governance processes are based on unanimous consensus.

6. FPIC is often described in technical terms; however, one of its key functions is as a tool to build mutual respect.³⁰ This recognizes Indigenous peoples' unique cultures and connections to land, forests and water and sets the conditions under which decisions are made about their lands and territories. More broadly, it serves to avoid the exploitation of marginalized people by ensuring that communities themselves drive decisions over the land, forests and waters that they rely on.³¹ It also seeks to rebalance the wide inequalities of power that exist between governments, companies and communities. FPIC practitioners also emphasize that it is important to ensure that the concerns and voices of marginalized people within communities, such as women, are equally heard. This ensures that one part of the community is not encouraged to turn against another, and bring benefits for some while others bear the greatest burden.

“COMMUNITIES” ARE NOT A HOMOGENOUS GROUP; THEY INCLUDE GROUPS WITH DIFFERENT PRIORITIES, CONSTRAINTS AND POWER. SOME GROUPS WITHIN COMMUNITIES MAY BE CULTURALLY OR SOCIALLY MARGINALIZED, SUCH AS RURAL WOMEN OR THE PARTICULARLY VULNERABLE. EFFORTS TO IDENTIFY AND RESPECT THE TENURE RIGHTS OF COMMUNITIES MUST INCLUDE PARTICULAR ATTENTION TO MARGINALIZED AND VULNERABLE GROUPS.9

Responsible governance of tenure: a technical guide for investors, FAO³²



Women watering mukau sapplings in Kenya's arid Eastern Province. Photo: Flore de Preneuf/World Bank

3. FREE, PRIOR AND INFORMED CONSENT IN LAW, INDUSTRY STANDARDS AND FINANCIAL SECTOR COMMITMENTS

This section examines free, prior and informed consent as a specifically articulated standard under international human rights law, national laws and industry standards.

RELEVANT LAWS

The right of Indigenous peoples to free, prior and informed consent (FPIC) is enshrined in international law through their right to self-determination. This includes the International Labor Organization's Indigenous and Tribal Peoples Convention No. 169 (1989) and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007), as well as other legal instruments.³³ In 2007, 144 countries voted in support of UNDRIP at the UN General Assembly. While not a legally binding instrument itself, UNDRIP is often understood as articulating the rights of Indigenous peoples under existing international human rights instruments.³⁴ Article 32(2) emphasizes the need for states to consult with Indigenous peoples and seek their 'free and informed consent prior to the approval of any project affecting their lands or territories and other resources'.³⁵ FPIC is also increasingly recognized as an important principle for the realization of human rights for non-Indigenous communities. In 2016, the UN Committee on the Elimination of Discrimination against Women (CEDAW) highlighted that FPIC is critical to the realization of rural women's rights, and that rural women's FPIC should be obtained for development projects.³⁶ On making recommendations on large-scale land acquisitions, Olivier De Schutter, then Special Rapporteur on the right to food, recommended in 2009 that 'in principle, any shifts in land use can only take place with the free, prior and informed consent of the local communities concerned'.³⁷

Laws or regulations requiring FPIC also exist at the national level.³⁸ Most states in Latin America have ratified international law on FPIC under ILO Convention 169. In some contexts, FPIC commitments for Indigenous peoples, or customary communities more broadly, are explicitly written into national laws or regulations or in court decisions. For example, in the Philippines FPIC appears in national law and in Papua New Guinea it is required for Special Agriculture and Business Leases (SABLs) – although in both cases the law is poorly enforced.³⁹ In the Northern Territory of Australia, FPIC rights stretch back as far as 1976.⁴⁰ An Oxfam case study of an International Finance Corporation (IFC) project in Kenya observed that FPIC principles could be incorporated into national laws in less explicit ways. It noted: 'Kenya's legal framework does not explicitly use the key terms used in FPIC – "free, prior, and informed consent". However, the country has some existing laws and constitutional protections that can be used to emphasize fundamental FPIC principles. These also provide a foundation that could be used to bring more explicit attention to FPIC into the legal framework'.⁴¹

There are also a growing number of legal actions centred on FPIC. In Papua New Guinea in 2013, a government commission found that of 42 SABLs examined only four had bona fide land owner legal consent, which has led to numerous court cases and

THE RIGHT OF INDIGENOUS PEOPLES TO FREE, PRIOR AND INFORMED CONSENT (FPIC) IS ENSHRINED IN INTERNATIONAL LAW THROUGH THEIR RIGHT TO SELF-DETERMINATION.

public campaigns targeting banks.⁴² In the USA, a failure to respect the treaty rights of Sioux peoples, including FPIC, was central to the DAPL case. In Australia, the lack of rights to FPIC under national law has led the Wangan and Jagalingou peoples to pursue alternative legal strategies as well as campaigns targeting global banks to withhold financing from the proposed Carmichael coal mine in Central Queensland.⁴³ In both the US and Australian cases, and also that of the Agua Zarca hydroelectricity project in Honduras, the state actively progressed these projects against the stated wishes of Indigenous peoples. FPIC has also featured in recent court decisions on extractive industries, with impacts on company operations. In September 2018, the constitutional court in Guatemala issued an injunction that suspended mining operations by Tahoe Resources (since acquired by Pan American Silver). This found that the case presented by the Xinca Parliament had legal merit and that the Xinca are an Indigenous people, and ordered the government to undertake a legitimate community consultation.⁴⁴ In South Africa in 2018, the High Court in Pretoria ruled that the Minister of Mineral Resources needed to obtain the FPIC of local communities in Xolobeni before being able to grant any mining rights on their land to the company Transworld Energy and Mineral Resources.⁴⁵ In future, FPIC is also likely to be a key issue in how emergent laws in Europe evolve to regulate the obligations of companies and investors to conduct human rights due diligence, given the level of impunity seen in severe land-related violations in countries targeted by investors, including killings of land defenders.⁴⁶

INDUSTRY STANDARDS

Table 1 provides a brief summary of FPIC requirements in a selection of industry standards. Adherence to these standards is not yet a reliable indication that a company has complied with FPIC, and banks cannot default to certification for due diligence. However, the growing prevalence of FPIC requirements indicates its growing importance to both businesses and potentially affected communities, and therefore to the banks that finance these industries.

There is a vast literature of guidelines, reports and academic articles on how to implement these standards, as well as independent monitoring that examines whether accredited companies and operations have actually achieved FPIC. FPIC is also a key issue in grievances registered with certification bodies.

TABLE 1: FREE, PRIOR AND INFORMED CONSENT REQUIREMENTS IN INDUSTRY STANDARDS

FPIC commitment	Compliance	Materiality of land-, water- and forest-related disputes for business
Industry: Extractives		
<p>Mining: the Initiative for Responsible Mining Assurance (IRMA)</p> <p>Chapter 2.2 of the IRMA standard focuses on FPIC and Indigenous peoples. It explicitly states: 'For new mines, IRMA certification is not possible if a mining project does not obtain free, prior and informed consent from indigenous peoples.'⁴⁷</p>	<p>IRMA is developing an independent, third party mechanism to audit and verify implementation of its standard.⁴⁸ This is just one example of FPIC being referenced in the extractives sector.</p>	<p>TMP Systems analysed 108 land-related mining disputes in 29 countries. Of these, 51% involved Indigenous peoples.⁴⁹ Of the 108 cases, 76% had materially significant impacts (costing \$500,000 or having operations suspended for five or more days). A Harvard Kennedy School study found that company-community conflict could cost up to \$20m a week in terms of net present value (NPV) due to delayed production, and costs could occur in the exploratory stage.⁵⁰</p>

<p>Aluminium: the Aluminium Stewardship Initiative</p> <p>The ASI Performance Standard, section 9.3 notes that ‘the Entity’ (i.e. company) will ‘respect the rights and interests of Indigenous peoples’ consistent with the ILO Convention 169 and UNDRIP.⁵¹</p> <p>Section 9.4 notes: ‘Where new projects or major changes to existing projects may have significant impacts on the Indigenous Peoples associated culturally with and living on the relevant lands, the Entity shall ... obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources.’</p> <p>Section 9.2 notes: ‘The Entity shall implement policies and processes to ensure respect for the rights and interests of women, consistent with international standards, including the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW).’ Here the CEDAW committee’s 2016 statement on the necessity of FPIC to uphold rural women’s rights is also relevant.</p>	<p>The ASI has accredited independent auditors to conduct third party audits to certify ASI members against the standard.</p>	
Industry: Agribusiness		
<p>Palm oil: Roundtable on Sustainable Palm Oil (RSPO)</p> <p>The RSPO Principles and Criteria prohibit any land acquisition without FPIC and any clearance of high conservation value forest after 2005. The RSPO has clear indicators requiring operators to engage with Indigenous peoples and local communities to carry out participatory mapping to establish the extent of customary rights prior to agreements about acquiring lands.⁵² The RSPO has also endorsed guidance on FPIC for members.⁵³</p> <p>However, SPOTT and Aviva Investors note that ‘even as an increasing number of companies, buyers and investors have adopted more stringent sustainability policies, implementation is still slow and palm oil remains a high risk industry with ongoing and emerging scandals’.⁵⁴</p>	<p>Chain Reaction Research has warned financiers that the ‘stranded assets’⁵⁵ analysis for fossil fuels could equally apply to palm oil concessions that are increasingly locked out of markets, because supply chains are calling for FPIC (and other) compliance, such as RSPO certification.⁵⁶</p> <p>Central to the credibility of RSPO is the need for strong and reliable compliance. BankTrack’s Dodgy Deals database lists various companies and their financiers linked to credible allegations of repeated violations of RSPO policies, including FPIC. It is therefore important for banks themselves to require clear and accountable compliance by potential palm oil customers.</p> <p>In 2018, 19% of global palm oil was certified under the RSPO.⁵⁷</p>	<p>Some research has found that in conflicts involving palm oil, operational disruptions can cost up to \$2.8m for a medium-sized, 1,000-hectare palm oil estate.⁵⁸</p>
<p>Sugar: Bonsucro</p> <p>Core indicator 1.2.1 of the Bonsucro standard includes FPIC and requires that the ‘right to use land and water can be demonstrated’. Another core indicator, 5.7.1, relates to greenfield expansion or new sugarcane projects.⁵⁹ This applies to all parties with ‘statutory, customary or use rights’ whose land is transferred to sugar operation – but is only required over a percentage, not all, of a company’s greenfield expansion.</p> <p>FPIC also appears in criterion 5.8, which is a standard indicator. In 5.8, Bonsucro looks for the ‘percentage of projects involving multi-stakeholders where agreement has been reached by consensus driven process based on Free, Prior and Informed Consent’. To achieve certification, companies must meet the core indicators and 80% of other indicators.⁶⁰</p>	<p>A recent complaint highlights how gaps can occur between FPIC in language and its realization in practice.</p> <p>A March 2019 complaint submitted to the UK National Contact Point under the OECD Guidelines on Multinational Enterprises against Bonsucro targeted its 2015 reinstatement of sugar company Mitr Phol Group as a member of the platform without addressing a 2011 grievance filed with Bonsucro. The complaint specifically highlights gaps in Bonsucro’s articulation and application of FPIC, and how these fail to protect communities against forced evictions, which constitute a gross violation of human rights.⁶¹</p> <p>Currently 27% of the world’s sugarcane-growing lands are engaged in the Bonsucro initiative, with 4% already having received Bonsucro certification.⁶²</p>	<p>A study of land-related disputes by TMP Systems found that operational disruption can cost sugar producers approximately \$26,000 per hectare.</p>

<p>Soy: Roundtable on Responsible Soy (RTRS)</p> <p>The standard includes reference to ILO 169 but also privileges documented land rights. Marginalized people often lack documentation of their land rights, pointing to a gap (or potential bias) in the standard.</p>	<p>As soy is widely used as animal feed, it has yet to attract the same direct consumer attention as other soft commodities. However, growing attention to the soy industry's links to deforestation and unethical land acquisitions makes it likely that soy-related cases will become increasingly visible.</p> <p>Only 1–2% of global soy production is currently certified.</p>	<p>Case studies by TMP Systems have found that operational disruption can cost soy producers approximately \$1,260 per hectare.</p>
<p>General: Rainforest Alliance Sustainable Agriculture Standard⁶³</p> <p>Critical criterion 4.20 of the 2017 Standard notes: 'The right of indigenous peoples and other local communities to make free and informed choices about the use or development of their lands and resources. FPIC is implemented through a participatory process involving all affected groups that is carried out prior to the finalization or implementation of any development plans.'</p> <p>FPIC applies for activities that involve direct or downstream changes to use or control of land and waters, as well as related economic, religious or cultural activities.</p>		
<p>Industry: Forestry</p>		
<p>Forest Stewardship Council (FSC)</p> <p>FPIC is integral to the FSC's principles 3 and 4.⁶⁴ The right to FPIC for Indigenous and local communities with legal or customary rights to land is specifically articulated in FSC indicators.⁶⁵</p> <p>However, the FSC does not require FPIC before concessions are issued over Indigenous and local communities' lands, only prior to management. This undermines the bargaining position of communities critical to the 'prior' aspect of FPIC. FSC is currently reviewing its approach and it is anticipated that it will strengthen FPIC requirements.</p>	<p>A 2018 analysis suggests that FSC-certified forests account for approximately 23% of world industrial roundwood production.⁶⁶</p>	<p>TMP systems analysed 51 cases of tenure-related forestry disputes in 16 countries. 90% involved Indigenous peoples and 49% of disputes had 'materially significant' costs. Eighteen cases involved violence, resulting in deaths in nine of these cases.⁶⁷</p>
<p>Industry: Dams</p>		
<p>The 2000 World Commission on Dams report <i>Dams and Development: A New Framework for Decision-Making</i> called for FPIC when projects affect Indigenous or tribal peoples. It also recommends that 'adversely affected people need to show acceptance of the dam project by consenting to the process and to the mitigation and development measures. These measures should include a share in project benefits and redress and recourse mechanisms.'⁶⁸</p>		<p>TMP systems examined 64 cases of tenure-related disputes in hydropower. 70% of cases involved minorities or Indigenous peoples. In 64% of cases there were materially significant impacts – mostly through project delays, which can last for decades. Of the cases, 32 involved violence, while 11 saw fatalities.⁶⁹</p>

6 WE FOUND OUT THAT COMPANIES IGNORING PRE-EXISTING OR CUSTOMARY LOCAL LAND RIGHTS IN THEIR ACQUISITION PROCESS EXPERIENCED FINANCIAL DAMAGE RANGING FROM OPERATING COSTS INCREASED BY AS MUCH AS 29 TIMES TO OUTRIGHT ABANDONMENT OF OPERATIONS. 9

FPIC IN STANDARDS THAT APPLY TO THE BANKING SECTOR

TABLE 2: FREE, PRIOR AND INFORMED CONSENT IN STANDARDS THAT APPLY TO THE BANKING SECTOR

FPIC commitment	Notes
UN Guiding Principles on Business and Human Rights (UNGPs)	
<p>Under the UNGPs, companies have a responsibility to ‘respect’ human rights by conducting due diligence to identify, prevent, mitigate and account for how they address their impacts on human rights. This applies irrespective of whether or not the state upholds its human rights obligations.</p> <p>Human rights due diligence should prioritize risks and impacts by severity, addressing the most severe first. This is relevant for FPIC, given that Indigenous peoples are often targeted for extreme rights abuses.</p> <p>The UNGPs apply to all banking operations.</p>	<p>The Office of the High Commissioner on Human Rights (OHCHR) has outlined that banks themselves, not just their clients, can contribute or be linked to adverse human rights impacts through their finance. In the case of contribution, a bank has a responsibility, together with its client, to contribute to remedy.⁷¹ In its communication on the responsibilities of banks, OHCHR gave a specific example of how this might apply in cases of forced resettlement.</p>
International Finance Corporation (IFC) Performance Standards (1, 5 and 7)	
<p>The IFC’s 2012 Performance Standards (PS) apply to all IFC investment and advisory clients and outline their responsibilities for managing social and environmental risks. Several other development finance institutions (DFIs) apply the IFC PS and many non-client banks adopt them as a de facto standard.</p> <p>PS 1 applies to all projects that potentially have social and environmental impacts. It describes a process of ‘informed consultation and participation’. According to the Guidance Note, this must achieve ‘Broad Community Support’ (BCS) where there are potentially serious negative impacts for any affected community. This requires: (i) integrated assessment to identify the environmental and social impacts, risks and opportunities of projects; (ii) effective community engagement through disclosure of project-related information and consultation with local communities on matters that directly affect them; and (iii) the client’s management of environmental and social performance throughout the life of the project. PS 5 outlines processes of consultation for communities who will be physically or economically displaced. Compensation should be equal or greater than their current living standard and/or value of their property, and applies to all those displaced, not just those with legal titles. Individuals have the right to choose from various compensation options. PS 7 outlines specifically where FPIC must be achieved. This includes (in paragraphs 13–17): (i) impacts on lands and natural resources subject to traditional or customary use by Indigenous peoples; (ii) relocation of Indigenous peoples from traditional or customary lands or natural resources; or (iii) significant impacts on Indigenous peoples’ critical cultural heritage, or proposed commercial use of their cultural heritage.</p> <p>The IFC PS explicitly highlight that FPIC processes need to capture the perspectives of both women and men.</p>	<p>The IFC PS are contractually required and communities can access a grievance mechanism through the IFC Compliance Advisor/Ombudsman.⁷² Several other DFIs applying the IFC PS also have grievance mechanisms.</p> <p>Where projects are financed via IFC financial intermediaries, a lack of transparency prevents communities from knowing about the IFC’s involvement. Oxfam and others have documented financial intermediary lending linkages to extreme land-related human rights abuses.</p> <p>Between fiscal years 2015 and 2018 the IFC committed \$23bn to financing through financial intermediaries — over half its total investment portfolio.⁷³ Some other DFIs similarly have financial intermediary lending approaching 40–50% of their portfolios.⁷⁴</p>
Equator Principles III	
<p>The Equator Principles (EP) III are voluntary guidelines that have been adopted by almost 97 financial institutions in 37 countries.⁷⁵ The guidelines apply to project finance and advisory services valued at or above \$10m, to bridging loans and to project-related corporate loans valued at or above \$100m.</p> <p>The Equator Principles adopt the IFC PS, but do not apply FPIC to ‘non-designated’ countries, which are broadly the same as OECD countries.</p> <p>Banks that have adopted EP III cover the majority of international project finance debt in developing and emerging markets.⁷⁶</p>	<p>The current Equator Principles review designates Indigenous rights as a priority. Indigenous organizations and NGOs have emphasized that a lack of transparency and accountability is a key issue around FPIC and land governance.</p> <p>The EPs do not have a grievance mechanism or independent verification of whether financial institutions are meeting IFC PS.</p>

World Bank Environmental and Social Framework (ESF)	
<p>Under Environmental and Social Standard 7 (ESS7), projects that may have a significant impact on Indigenous peoples or 'Sub-Saharan African Historically Underserved Traditional Local Communities' cannot proceed without the FPIC of these communities.</p> <p>This applies to any project that will have:</p> <ul style="list-style-type: none"> a) 'adverse impacts on land and natural resources subject to traditional ownership or under customary use or occupation'; b) cause relocation from land and natural resources subject to traditional ownership or under customary use of occupation; c) 'have significant impacts ... that [are] material to the identify and/or cultural, ceremonial, or spiritual aspects of the affected Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities'.⁷⁷ <p>ESS1, 5 and 10 relate to decision making for other potentially affected communities, including procedures related to land acquisitions, physical or economic displacement of communities and compensation arrangements.</p>	<p>The ESF came into effect in 2018, and also applies to World Bank financing delivered through financial intermediaries.</p> <p>ESF compliance is contractually required and communities have access to a grievance mechanism.</p>
Dutch Banking Sector Agreement	
<p>As part of the Dutch National Action Plan on Business and Human Rights, the Dutch government has initiated a series of voluntary sector agreements.⁷⁸ For the banking sector agreement, there are 13 adhering banks. Under the agreement, these banks 'require clients in project finance to ensure that ... FPIC is carried out where and how the IFC PS or the [VGGTS] require this'.⁷⁹ Banks commit to actively promote to their clients in corporate loans to ensure in situations where there is a fair possibility of land rights violations that FPIC is carried out where the IFS PS or the VGGTs require this. Banks also commit to reporting annually to the Steering Committee on their efforts and results in this area. The NVB (Dutch Banking Association), also signatory to the agreement, commits to 'promote adhering banks to ... do their utmost to pilot the implementation of a broader application of FPIC [i.e. beyond Indigenous peoples] in their policies and processes if and when practically feasible'.</p>	<p>To date, there have been no publicly available reports from banks or the NVB on how FPIC commitments are applied. Dutch banks were among those who called for the Equator Principles to review their FPIC principles to include 'non-designated countries', but they have not raised the broader application of FPIC.</p> <p>Structures for monitoring and enforcement of the agreement are still evolving.</p>
Banking Environment Initiative (BEI) Soft Commodities Compact	
<p>The BEI is an industry group established by CEOs of global banks and convened through a Cambridge University initiative. In 2014, together with the Consumer Goods Forum, the BEI launched the Soft Commodities Compact. Under the Compact, banks commit to 'prioritize the establishment of the internal mechanisms such that by 2020 all corporate and investment banking customers whose operations include significant production or processing of palm oil, timber products or soy in markets at high risk of tropical deforestation can verify that these operations are consistent with zero net deforestation'.⁸⁰</p> <p>Alongside their own due diligence processes, Compact banks commit to confirming that their customers' operations achieve the same internationally recognized means of verification as the RSPO, the FSC and the RTRS. FPIC is included in several of the verification frameworks.</p> <p>The 12 global banks that have adopted the Compact account for approximately 50% of global trade finance.⁸¹ They include Deutsche Bank, JP Morgan, Standard Chartered and Rabobank.</p>	<p>The BEI has no monitoring or enforcement process. Several banks have aligned their policies on soft commodities to specifically include FPIC for Indigenous peoples and local communities.</p> <p>A progress update on the initiative's website notes: 'A recent seminar on deforestation led to the conclusion that the Soft Commodities Compact between the Consumer Goods Forum and global banks needs to be restructured. In order for the Compact to be effective, more effort needs to be put into connecting global banks with local level producers, buyers and financiers in producer countries...'.⁸² Among the issues to be tackled, land rights are first on the list. While factors influencing the inability to realize the Compact's 2020 goal are complex, it appears that a stronger approach to FPIC would help address some of these barriers.</p>
OECD Guidelines on Multinational Enterprises	
<p>The OECD Guidelines are government-backed recommendations on responsible business conduct to encourage sustainable development and social progress.⁸³</p> <p>FPIC falls under the Guidelines policy to 'respect the internationally recognized human rights of those affected'. This applies to all OECD-domiciled companies.</p>	<p>Grievances can be taken to government-established and funded OECD National Contact Points (NCPs) that operate in 48 countries. NCP processes are varied across countries and are relatively weak. Cases against banks are brought in the country where their headquarters are domiciled. NCPs' willingness to accept cases involving banks appears to be evolving. In 2018 the Australian NCP issued a rare rebuke to ANZ bank for its financing of a Cambodian sugar company connected to large-scale forced evictions, and called for ANZ to develop a grievance mechanism.</p>

Food and Agriculture Organization of the UN (FAO) Voluntary Guidelines on the Responsible Governance of Tenure (VGGTs)	
<p>The VGGTs were finalized in 2012 through intergovernmental negotiations. While non-binding, the VGGTs outline measures to achieve the progressive realization of the right to food. This includes precedents that states can adopt in developing laws and administration, and guidance for the private sector.</p> <p>The VGGTs are referenced in the Dutch Banking Sector Agreement. Relevant sections include: ‘(9.9) Identifies that states and other parties need to obtain the FPIC of indigenous peoples; as well as (3B6) Outlines the principle of consultation and participation for broader communities.’ The FAO technical guide notes that under the VGGTs, ‘FPIC can fairly be interpreted as applying to all self-identified peoples who maintain customary relationships with their lands and natural resources, implying it is enjoyed widely in rural Africa and Asia, and by many rural Afro-American societies’.⁸⁴</p>	<p>Among other things, the VGGTs promote principles of land administration to address issues such as corruption and the inability of marginalized people to have their tenure rights recognized in statutory systems.</p> <p>The VGGTs encourage states to set up or use multi-stakeholder platforms to help implement the guidelines.</p> <p>Arguably, the best way that banks can contribute to the VGGTs is by ensuring that they are not profiting from, or legitimizing, weak or unaccountable land administration practices – which a strong FPIC process will prevent.</p>
UN Global Compact	
<p>The UN Global Compact is a voluntary initiative based on CEO commitments to implement universal sustainability principles.</p> <p>In 2014, the UN Global Compact published a best practice note on <i>Indigenous peoples and the role of Free, Prior and Informed Consent</i>.</p> <p>FPIC is relevant to two of the Global Compact’s 10 principles – Principle 1: ‘Businesses should support and respect the protection of internationally proclaimed human rights’ and Principle 2: ‘Businesses should make sure that they are not complicit in human rights abuses.’</p> <p>Thousands of companies participate in the Global Compact, with 88 entries currently listed under ‘banks’ in its participant database. This includes banks from countries as diverse as Nigeria, Israel, Serbia and Paraguay.⁸⁵</p>	<p>The Global Compact is a voluntary initiative. There are no procedures for enforcement or implementation, although companies have been delisted for failing to submit successive annual <i>Communication on Progress</i> reports.</p> <p>At least one bank, ABN Amro, has reported on FPIC in its <i>Communication on Progress</i> under the Global Compact.⁸⁶</p>
Sustainable Development Goals (SDGs)	
<p>While FPIC is not specifically listed in the SDGs, it aligns with almost all of the SDG goals.</p>	<p>The Fair Finance Guide International methodology details how FPIC aligns with various SDGs.⁸⁷</p>
UN Environment Programme Principles for Responsible Banking (PRB)	
<p>As a framework, the PRB include few specific or measurable commitments. FPIC is, however, consistent with the identified principles.⁸⁸</p>	<p>No clearly defined implementation or standardization process.</p>

6 A BANK THAT PROVIDES FINANCING TO A CLIENT FOR AN INFRASTRUCTURE PROJECT THAT ENTAILS CLEAR RISKS OF FORCED DISPLACEMENTS MAY BE CONSIDERED TO HAVE FACILITATED – AND THUS CONTRIBUTED TO – ANY DISPLACEMENTS THAT OCCUR, IF THE BANK KNEW OR SHOULD HAVE KNOWN THAT RISKS OF DISPLACEMENT WERE PRESENT, YET IT TOOK NO STEPS TO SEEK TO GET ITS CLIENT TO PREVENT OR MITIGATE THEM.9

Office of the UN High Commissioner on Human Rights⁸⁹

4. BEYOND HUMAN RIGHTS: FREE, PRIOR AND INFORMED CONSENT CAN HELP SAFEGUARD AGAINST DIVERSE RISKS

6 [L]AND GOVERNANCE AT A NATIONAL AND LOCAL LEVEL IS HIGHLY CORRUPTION-PRONE. NOT ONLY DO ORDINARY LAND USERS FACE ADDITIONAL COSTS IN BRIBES AND INFORMAL PAYMENTS IN OBTAINING RIGHTS TO LAND AND ACCESS TO LAND SERVICES, BUT ALSO WIDER ISSUES OF POLITICAL PATRONAGE AND IMPUNITY THROUGHOUT SOCIETY COMPOUND LAND GOVERNANCE. 9

LEGEND (2016). Tackling corruption in land governance⁹⁰

Section 1 highlighted the fact that communities are calling for FPIC commitments and implementation to address a range of issues that co-exist with, or underpin, human rights abuses. Sections 2 and 3 then explicitly outlined how FPIC – as a specific standard – is articulated in law and in industry standards. This section highlights how, if put into practice, FPIC can address a broader array of risks. It highlights how improper acquisitions of land, forest, resources or waters, whether through lease agreements or ownership, can indicate a failure of situational analysis and expose banks to compliance, political, regulatory, operational and reputational risks.⁹¹ This reinforces the point that FPIC is important not only for Indigenous peoples and local communities but is also a critical material issue for banks.

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FAILURE OF SITUATIONAL ANALYSIS

Land sits at the nexus of human rights, the environment and governance, making it one of the most complex areas of analysis to undertake. TMP Systems highlights that financiers are usually far removed from on-the-ground aspects of supply chains and infrastructure projects and have little knowledge of the local context.⁹² This speaks to the challenge of risk assessment and can underpin a failure of situational analysis. Communities typically have detailed knowledge of tenure disputes, labour abuses, corruption and militia or state violence in their own area. Outsiders may not be aware of these issues, or concerns may be dismissed because of a cultural dissonance where an individual's experience comes from a point of privilege rather than oppression (see Box 3). Communities can choose to reject projects or activities for a range of reasons, including how new activities may exacerbate existing issues or undermine community resilience to them. The benefit of banks adopting a clear and systematic approach to FPIC is that they can apply a single standard across diverse contexts and jurisdictions to ensure strong risk analysis and avoidance.

COMPLIANCE AND CORRUPTION RISKS

This section explores the relationship between FPIC and compliance risk, as well as corruption. ‘Compliance risk’ here follows the definition of ANZ bank as being ‘the probability of an event that results in a failure to act in accordance with laws, regulations, industry standards and codes, internal policies and procedures and principles of good governance to [the bank’s] business’.⁹³

Failure to comply with local law: Many countries recognize multiple forms of land tenure, such as state land, freehold and customary land. There may be specific rules on expropriation, inheritance, evictions and restitution, as well as leases, development planning, overlapping land use and tendering. It may be difficult to accurately interpret laws or understand tenure rights. Banks need to be knowledgeable about anti-corruption laws and the relationships between elite actors and companies. Where FPIC is specifically articulated in national legal frameworks, banks also have to be alert to whether the state respects, or routinely violates, these rights. Banks need to be aware of potential civil rights issues that may prevent people from accessing their legal rights, such as discrimination against Indigenous peoples and the non-prosecution of crimes committed by the state. Banks should be able to show the specific steps they are taking to ensure full due diligence and legal compliance on every loan or financing arrangement.

The New York Declaration on Forests Progress Assessment, referencing 2018 data from Nature Economy and People Connected, notes: ‘[I]n 75% of major timber-producing countries – and all of the largest palm oil, soy, and beef producing countries in tropical regions – there are significant risks of one, or usually multiple, laws being broken in producing these commodities.’ It also draws attention to land tenure risks.⁹⁴

Exposure to ‘politically exposed persons’: Under best practice outlined by the Financial Action Task Force (FATF), as well as by many national laws, banks are required to screen politicians or government officials (politically exposed persons, or PEPs) and their families. This is to ensure that they are not profiting from corrupt or illegal abuse of their position.⁹⁵ Bank financing to companies linked to improper land acquisitions and PEPs is documented by various groups.⁹⁶ Olivier De Schutter highlights the point that PEPs linked to land grabs are likely to try to launder money out of the country.⁹⁷ In March 2019, the Mission to Support the Fight against Corruption and Impunity in Honduras (a mission sponsored by the Organization of American States) announced charges against 16 individuals for acts of corruption in the approval of contracts for the Agua Zarca hydroelectric project. The charges related to the abuse of authority, violation of the responsibilities of public officials, falsification of documents and fraud. Those charged included the former executive president of the company overseeing construction of the project, who is also facing separate charges related to the 2016 murder of indigenous rights defender Berta Cáceres and who was working for the Honduran government department overseeing hydroelectricity at the same time as heading the private company contracted to undertake the hydroelectric project.⁹⁸ The corruption charges in this case raise new questions about the robustness of legal compliance and anti-bribery and anti-corruption checks conducted by backers FMO and FinnFund before they initially financed the project.

Failure to ‘know your customer’ (KYC): Principles on global anti-money laundering and counter-terrorism financing highlight that banks have a responsibility to know who their customer is and to ensure that their wealth is legitimate. To date, regulators have focused on tracking unexplained wealth, such as bribes. However, KYC principles should also apply to illegitimate wealth. Banks should be able to identify if companies whose core business relies on land or forest assets (or access to them) have obtained those rights legally.

Proceeds of crime: Under criminal law it may be possible for communities to pursue proceeds of crime cases in a bank's home country, arguing that in receiving fees and interests the bank has profited from a crime.⁹⁹ In at least some jurisdictions, e.g. Australia, this does not require a legal finding that a land-related crime has occurred (which is hard to achieve in corrupt states), only credible evidence of a crime.

Unjust enrichment: Under tort law in common law systems, where it can be shown that one party has been unjustly enriched, and to another's detriment, they can be required to pay restitution. A similar precedent on the 'absence of basis' applies to civil law systems. This could be applied to the fees and interest that banks receive.¹⁰⁰

Misrepresentation: A bank that fails to comply with its own policies on human rights or corruption opens itself up to action by customers, shareholders or other governance bodies for misrepresentation.¹⁰¹

Emerging precedents on prosecution: The compliance context for financial institutions and human rights is rapidly evolving. Many stock exchanges now require reporting on how banks address social and environmental risks. A 2016 report by the UN Environmental Programme (UNEP) and the Institute on Human Rights and Business (IHRB) notes: '[I]t is likely that jurisprudence on the liability of financial institutions for the action of the clients would develop from national jurisprudence around aiding and abetting (a concept under criminal law) or other theories of liability, such as tort law.... Other jurisdictions, such as the UK and Brazil provide lender liability for environmental harm...'¹⁰² There are also efforts to create a legally binding UN treaty on transnational corporations and human rights.

POLITICAL RISK

Political risk generally refers to the risk to returns on an investment as a result of political changes or instability in a country. However, a new dynamic of political risk may be emerging as the lines between public and private finance increasingly blur. Over half of IFC's financing is delivered via financial intermediaries.¹⁰³ Conversely, the Dutch development bank FMO is 42% owned by Dutch banks.¹⁰⁴ This shift has an impact on the pressure that banks may come under from their own governments regarding links to land-related human rights abuses overseas.

OPERATIONAL RISK

Activities that rely on land, water, forests or other natural resources can incur a range of operational risks that can be avoided or managed through strong FPIC processes. Analysis by TMP Systems of tenure-related disputes shows that tenure risk can increase operational costs by up to 29 times.¹⁰⁵ A significant proportion of outcomes were what the consultancy described as 'materially significant' – involving a delay of five days or more, or costs of \$500,000. Of the disputes studied, this applied to 76% in mining, 49% in forestry and 64 involving dams. TMP Systems cited research showing that disruptions in palm oil operations can cost up to \$2.8m for a medium-sized, 1,000-hectare palm oil estate, or for sugar producers \$26,000 per hectare.¹⁰⁶ The high proportion of cases examined by TMP Systems that involved violence and killings is alarming.¹⁰⁷ As the world transitions away from a carbon-based economy, the oversupply of fossil fuels means that mining operations face an increased risk of becoming 'stranded assets', and operations that involve corruption, illegal activities or human rights abuses are most likely to be shut out of the market and be unable to recoup their costs. Palm oil concessions can also be 'stranded' – locked out of commodity markets that increasingly demand FPIC compliance.¹⁰⁸ There are also examples of bank defaults as a result of environmental risk.¹⁰⁹

REGULATORY RISK

Community opposition to projects or company activities was a driving factor behind recent changes such as Indonesia's Palm Oil Moratorium and review of existing plantations (2018), Liberia's Rights Act which, in addressing customary land rights, newly recognizes the land rights of 70% of the population (2018) and the EU's current review of its trade agreement with Cambodia, specifically tariff-free sugar imports.¹¹⁰ Organizations in Europe are also campaigning for 'binding rules that require investors and companies to check their investments and their supply chains. This means we can better ensure they are not contributing to deforestation, forest degradation or land grabbing' – highlighting that Europe imports a third of all export timber produced from land clearing for livestock or new cropping.¹¹¹

REPUTATIONAL RISK

Digital disruption makes it easier for communities to raise awareness of improper land acquisitions (see Box 2). Bank approaches to FPIC are also increasingly quantified in rankings, for example on FPIC policies (Fair Finance Guides) or total financing to sectors with rampant FPIC violations, such as palm oil (TuK-Indonesia, BankTrack, Profundo, Forests and Finance) or fossil fuels (BankTrack). This is making it easier for consumers, clients, investors and shareholders to incorporate human rights performance into decision making when choosing financial products and services.

6 DIVESTING FROM WELLS FARGO IS A MEANINGFUL STEP WE CAN TAKE TO MAKE IT CLEAR THAT THIS IS UNACCEPTABLE CORPORATE BEHAVIOR. THE MILLE LACS BAND UNDERSTANDS THE NATURE OF FINANCE AND LENDING PRACTICES BY U.S. BANKS. IN MANY INSTANCES, BANKING RELATIONSHIPS ARE UNAVOIDABLE. HOWEVER, THE BAND MUST WORK WITH FINANCIAL INSTITUTIONS WITH MUCH STRONGER SOCIAL JUSTICE CRITERIA.9

Melanie Benjamin, Chief Executive of the Mille Lacs Band of Ojibwe Indians Band Assembly, announcing its divestment and citing bank financing of DAPL as a key reason, 13 January 2017¹¹²

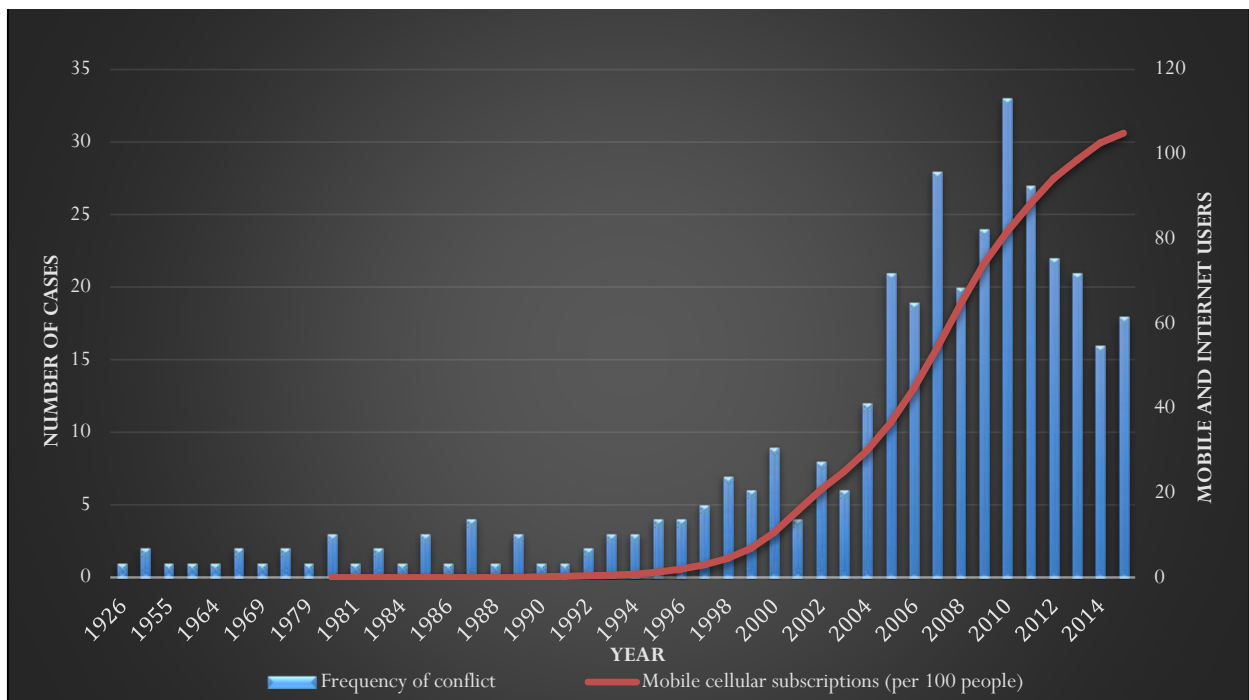
6 THESE COMPANIES MAY NOT LISTEN TO MORALITY, BUT THEY DO LISTEN TO MONEY... MANY OF THESE BANKS ALREADY HAVE HUMAN RIGHTS DIRECTIVES IN PLACE AND ALL SHOULD HAVE POLICIES RESPECTING INDIGENOUS COMMUNITIES. FINANCIERS SHOULD FOLLOW THEIR OWN RULES. PASSING THE BLAME ONTO COMPANIES COMMITTING ATROCITIES AND A FEDERAL GOVERNMENT WILLING TO OVERRUN ITS CITIZENS' RIGHTS FOR PROFIT IS UNACCEPTABLE – WE ARE CONSUMERS, WE HAVE AGENCY AND WE HAVE A SAY IN HOW OUR MONEY IS INVESTED.9

Tara Houska, National Campaigns Director of Honor the Earth, at the launch of Mazaska Talks (Money Talks), an Indigenous-led divestment movement that is targeting 61 banks providing financing to four companies behind the DAPL and four (now five) proposed North American/Turtle Island tar sands pipelines.¹¹³ This is in line with the historic Treaty Against Tar Sands Expansion, signed by 121 First Nations and tribes.

BOX 2: THE RISE OF DIY DISCLOSURE – DIGITAL DISRUPTION AND THE DRIVE FOR BANK TRANSPARENCY

Within a relatively short timeframe, bank transparency has moved from being unimaginable to, at least for some, almost inevitable. NGOs and investigative journalists have rapidly moved from developing tools to track financing links to a single problematic project to publishing whole databases listing the exposure of financial institutions to dozens of illegal or highly problematic projects. Examples include the Rainforest Alliance’s Forest and Finance database, Inclusive Development International’s Follow the Money initiative and Friends of the Earth’s Deforestation Free Funds (all established in 2016). BankTrack’s Dodgy Deals database has grown substantially; screening service RepRisk now includes banks in its analysis; and Dutch consultancy Profundo specializes in researching financial institutions’ exposure to human rights abuses and environmental issues, producing dozens of reports. These practices are spreading rapidly, through online digital workshops and seminars on how to use financial sector databases for research or through joint initiatives such as the Fair Finance Guide.

TMP Systems also observes that the number of reported tenure disputes is increasing, noting that ‘the penetration [of mobile communications technology] is making it easier to report abuses and for local groups to organize themselves’, at the same time as major land use projects are being pushed to more remote locations. Satellite tracking, drone technology and spatial databases are also used to track company operations and to identify where concessions overlap with pre-existing community lands and Indigenous territories.



From TMP Systems (2016). *IAN: Managing Tenure Risk*. http://rightsandresources.org/wp-content/uploads/RRI_IAN_Managing-Tenure-Risk.pdf

<http://forestsandfinance.org/>

<https://www.followingthemoney.org/>

<https://deforestationfreefunds.org/>

BOX 3: WHY MARGINALIZED PEOPLE MAY NOT BE ABLE TO ACCESS THEIR LEGAL RIGHTS

Bankers unfamiliar with human rights may assume that a lack of legal action or a court finding in favour of a company show that its activities are lawful and appropriate. However, this is not necessarily so. As legal empowerment NGO Namati writes: ‘Law is supposed to be a sacred thread that ties us together and protects each one of us. But for billions of people around the world the law is broken. It’s an abstraction, or worse, a threat, but not something we can use to exercise our basic rights.’

People living in poverty often cannot access or protect their rights because of the high cost of defending a legal case. They cannot afford surveyors, notaries and application fees to have their tenure recognized. They cannot afford fees to file court cases or legal services to inform them of their rights or contest fraudulent land claims by others. Rural peoples often cannot afford time away from farming tasks, and those forced off their land may depend on unreliable day labour just to buy food. Women are particularly vulnerable. States frequently fail to recognize the territorial rights of Indigenous peoples and pass or uphold laws that dispossess them and undermine their rights to control their traditional lands, forests and waters.

Unjust laws or biased policing may criminalize people for exercising free speech, even when they are speaking out against illegal practices.** They can be arrested on unfounded charges, such as trespassing on land they legally own. Without access to lawyers, land defenders face barriers to justice in court, risking prison time, gag orders or fines. Those speaking out may be blacklisted for employment, vilified, surveilled, beaten, raped or have their property destroyed. Local gangs, organized crime, militia, police or military forces may enact this violence – or even community members formerly involved in the land case who have been bribed or coerced by others.

Judicial systems may be skewed to favour those with money, political connections or power. Police may not prioritize the rights of Indigenous people and other marginalized communities, fail to document abuses or register when people want to file charges. Public prosecutors may refuse to pursue cases against influential people or companies. Cases filed with the courts may never be heard or judges may fail to declare a conflict of interest. Corruption in land deals may never be pursued. New laws may be passed that appear to legalize the transfer of land to elites, with little or no consultation, but which contradict fundamental protections laid down in national constitutions.

* <http://www.namati.org>

** Companies and investors themselves are also increasingly recognizing this as a risk; for example, see the statement *Supporting Civic Freedoms, Human Rights Defenders and the Rule of Law*. https://www.business-humanrights.org/sites/default/files/Statement_Public_v2.pdf

5. RED LINES

Similar to other standards and policies, respecting free, prior and informed consent (FPIC) involves an iterative process of continuous learning. As has occurred in other industries, banks will refine and build tools as they push forward, and even banks that work hard to apply FPIC may not get it right at first. However, all too often, banks systematically fail to take even the most basic steps to avoid contributing to land-related human rights abuses – this points to problems that are not due to the complexity of FPIC, but a fundamental lack of commitment to uphold its most basic tenants.

ACCEPT ‘NO’ FOR AN ANSWER

A fundamental aspect of FPIC is that companies and financiers must respect a community’s decision if they choose to say ‘no’ to project and company proposals. However, too often banks fail to respect communities’ decision; the DAPL is one such example.

FPIC IS NOT POSSIBLE WHERE PEOPLE CANNOT SPEAK FREELY

In certain contexts, it is simply not possible to know if consent is free and given without coercion, threats or violence. Banks would be well advised to steer clear of financing major infrastructure projects or large-scale land-related company operations in countries or communities where there is ongoing conflict or extreme oppression – for example, countries with high rates of killings and oppression of land rights defenders.

6 USING DEFERENCE TO LOCAL LAWS AS AN EXCUSE FOR FAILING TO PROTECT THE RIGHTS OF COMMUNITIES AND [LAND] DEFENDERS IS UNACCEPTABLE, BECAUSE THOSE LAWS MAY LACK SUFFICIENT PROTECTIONS WITHIN THEM. COMPANIES AND INVESTORS MUST GUARANTEE THAT PRIVATE SECURITY FIRMS, CONTRACTORS, SUBSIDIARIES OR ANYBODY ALONG THEIR SUPPLY CHAIN ARE NOT IMPEDING THE RIGHTS OF [LAND] DEFENDERS AND LOCAL COMMUNITIES, BUT ARE RATHER PROPERLY ENGAGING THEM, AS RECOMMENDED BY THE GUIDING PRINCIPLES.9

Global Witness¹¹⁴

ACT ON COMMUNITY CONCERNS

Indigenous peoples, rural peoples and grassroots organizations that advocate to companies and financiers do not take such action lightly. When people speak out, they often face serious risks for doing so. Banks should assume that community concerns are valid and real unless proven otherwise. Banks have a responsibility to act when they are informed of possible human rights abuses.

**WHEN PEOPLE
SPEAK OUT, THEY
OFTEN FACE
SERIOUS RISKS
FOR DOING SO.**

DO NOT CO-OPT FPIC LANGUAGE

FPIC as a right for Indigenous peoples is extensively documented and clearly defined. Banks should not use FPIC terminology when describing practices or standards that do not meet these criteria.

Examples of bank practices that actively undermine or co-opt FPIC include:

- substituting 'consent' with free, prior and informed 'consultation'¹¹⁵
- exemptions for certain parties, such as claims that FPIC does not apply to state land¹¹⁶
- presenting terms such as 'broad community support' as being equivalent to FPIC.

FPIC is first and foremost a *right* of Indigenous peoples, and it is Indigenous peoples themselves who determine if consent is achieved. As argued in this paper, the *principle* of FPIC as best practice is also important for local communities and affected people. In contrast, the poorly defined term 'broad community support' has been coined by lenders, who themselves decide if it has been achieved. While for a bank a commitment to 'broad community support' may be an interim step towards FPIC, it should not be misrepresented as its equivalent. In 2016, the leading UN bodies on Indigenous peoples' rights wrote to the World Bank criticizing its promotion of 'broad community support', pointing out that the term is vague and unactionable and that the Bank's own internal review had found that it failed to ensure consultation in good faith.¹¹⁷

GOOGLE IT...

Time and time again, banks fail to act on credible evidence of severe rights violations that could be picked up with a basic Internet search. While there are legitimate questions on how banks do due diligence, there are many cases where banks have simply failed to act on readily identifiable issues.

THE AUSTRALIAN NATIONAL CONTACT POINT CONSIDERS THAT IN THIS CASE IT IS DIFFICULT TO RECONCILE ANZ'S DECISION TO TAKE ON PHNOM PENH SUGAR AS A CLIENT WITH ITS OWN INTERNAL POLICIES AND PROCEDURES – WHICH APPEAR TO ACCORD WITH THE OECD GUIDELINES [ON MULTINATIONAL ENTERPRISES] – AS THE POTENTIAL RISKS ASSOCIATED WITH THIS DECISION WOULD LIKELY HAVE BEEN READILY APPARENT.

Australian National Contact Point for the OECD Guidelines¹¹⁸

DO NOT MISREPRESENT FPIC AS ILLEGAL

If state officials claim that gaining the consent of Indigenous communities and other local people for a project or operation is illegal or inappropriate, this should raise a red flag for banks. In any country it operates in, a bank can choose to apply a higher standard than the legal minimum – as they frequently do on corruption measures.

BE CLEAR ON HOW, AND WHEN, A BANK CAN MOST IMPACTFULLY EXERCISE ITS FINANCIAL POWER

One of the most forceful things that a bank can do is to withhold its financial power and require evidence that a company is complying with its human rights responsibilities before it issues a loan.¹¹⁹ Once this point is passed the bank's negotiating power is reduced, and should a client be unwilling to improve the way it acts then there are limits on the action that a bank can take before it is exposed to lender liability.¹²⁰ When banks operate with all goodwill in their human rights responsibilities but come across unforeseen problems and adverse impacts, of course they should take all possible action to leverage a positive outcome. However, the most powerful way to effect change is to withhold finance from companies that are at high likelihood of committing or being complicit in human rights abuses.

THE MOST POWERFUL WAY TO EFFECT CHANGE IS TO WITHHOLD FINANCE FROM COMPANIES THAT ARE AT HIGH LIKELIHOOD OF COMMITTING OR BEING COMPLICIT IN HUMAN RIGHTS ABUSES.

6 BY RENEWING ENBRIDGE'S CREDIT FACILITY, CRÉDIT AGRICOLE WOULD BE FACING REPUTATIONAL RISKS SIMILAR TO THOSE FACED BY THE DAKOTA ACCESS PIPELINE. THE NEW LINE 3 PIPELINE DIRECTLY THREATENS THE CULTURAL SURVIVAL OF THE CULTURE OF OJIBWE INDIGENOUS PEOPLES. THE ROUTE WOULD PIERCE THE HEART OF THE 1855 TREATY TERRITORY, WHERE THE MEMBERS OF OJIBWE BANDS RETAIN THE RIGHTS TO HUNT, FISH, HARVEST WILD RICE, CONDUCT RELIGIOUS CEREMONIES, AND TRAVEL. WILD RICE LIES AT THE CORE OF OJIBWE IDENTITY AND CULTURE – BECAUSE OF ITS CRITICAL NATURE, WILD RICE HARVESTING IS EXPLICITLY DEFINED AS A RIGHT IN THE TREATIES OF SEVERAL BANDS OF OJIBWE WITH THE U.S. GOVERNMENT. 9

Honor The Earth letter to Crédit Agricole, 8 October 2018¹²¹



Rice paddy in Rwanda. Photo: A Melody Lee/World Bank

BOX 4: FPIC AND THE ENVIRONMENTAL MOVEMENT

Some of the world's best-known environmental organizations – such as Greenpeace, Friends of the Earth and Rainforest Action Network – are running campaigns targeting the financial sector and calling for respect of FPIC among their key asks. Similar campaigns can be found across many regions and contexts. For example, in May 2019, thirty African and international civil society organisations highlighted concerns about failure to respect Indigenous peoples' right to FPIC in a letter calling for South Africa's Standard Bank and Japan's Sumitomo Mitsui Banking Corp (SMBC) to withdraw from their role as lead arrangers for the East Africa Crude Oil Pipeline under construction in Uganda in Tanzania.* This is reflective of the growing prominence of FPIC in environmental discussions more broadly. For example, in March 2019 the UN Human Rights Council specifically referenced the importance of FPIC in a resolution expressing concerns about violence towards environmental human rights defenders.** In May 2019, a joint civil society submission to the UN Environmental Programme Finance Initiative on its proposed 'Principles for Responsible Banking' specifically raised concerns about the lack of reference to FPIC, among other issues. The submission was coordinated by BankTrack and signed by 45 organisations – including Indigenous Environmental Network, Women's Earth and Climate Network International, 350.org, Amazon Watch and Earthworks. A forthcoming 2019 Intergovernmental Panel on Climate Change report on climate change and land is also expected to highlight the important role of Indigenous peoples and local communities in safeguarding climate-critical ecosystems – again turning attention to ways to protect their rights, such as respecting FPIC.



Human Rights Council. 'Recognizing the contribution of environmental human rights defenders to the enjoyment of human rights, environmental protection and sustainable development'. A/HRC/40/L.22/Rev.1 20th March 2019. 40th Session. Accessed 17 June 2019 at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/40/L.22/Rev.1

* BankTrack (2019). 'International call on Banks: Don't finance the East Africa Crude Oil Pipeline: African international groups voice opposition to pipeline development'. 28 May 2019.

** BankTrack (2019) 'We seek commitments, not just principles: 45 civil society organisations seek rewrite of Principles for Responsible Banking'. 29 May 2019. Accessed 17 June 2019 at: https://www.banktrack.org/article/we_seek_commitments_not_just_more_principles

Graphic from Rights and Resources Initiative, based on: <https://rightsandresources.org/en/publication/globalcarbonbaseline2018/>

6. MEASURABLE STEPS: PATHWAYS TO PUT FREE, PRIOR AND INFORMED CONSENT INTO PRACTICE

This section highlights time-bound, measurable steps that either directly advance free, prior and informed consent (FPIC) or improve underlying human rights or governance measures that create the framework in which it can be strengthened. The time-bound and measurable nature of these steps allows banks, and others, to monitor progress.

CREATE CLEAR INCENTIVES AND CONSEQUENCES

As BankTrack highlights, many of the banks that have experienced negative publicity linked to the DAPL in the USA are now financing the Trans-Mountain Pipeline expansion in Canada – a similar project with comparable issues, including Indigenous peoples clearly communicating that they do not consent to the project. If banks are to translate commitments into action, they need to show clear incentives and consequences if staff are to respect FPIC. Some examples are listed below.

Human rights commitments, including FPIC, should be explicitly worded in client contracts: Banks state that they expect their clients to respect and abide by their policies. Human rights commitments, including FPIC, should be explicitly stated in bank contracts. This would do three things: identify clients with commitment and goodwill on FPIC, enable a bank to exit a project if consent is not given and give the bank additional leverage to address concerns if they do arise.

Staff should be accountable to clearly articulated human rights performance measures: Any perceived conflict between how staff performance is assessed and respecting human rights is a barrier to change. Human rights performance should be written into key performance indicators, position descriptions, bonus structures, staff reviews, disciplinary measures and recruitment processes.

Adopt mandatory reporting on human rights abuses: Banks should alert regulators and police in both host countries and home countries to any credible allegations of human rights abuses, committed by any party, that they uncover. This contributes to a fairer commercial environment that allows more ethical financing to thrive. Ideally, banks should publicly report if they have referred a matter to police or regulators, as this shows shareholders how they are adhering to their legal and risk management obligations.

Bank CEOs and board members should publicly state their human rights accountabilities: Human rights practitioners have observed the positive, or negative, changes that a new CEO and new board members can make to a bank's human rights approach. Bank CEOs and board members should make public statements on human rights such as FPIC. This signals to staff that there is a mandate to act on human rights and raises bank standards by inviting external accountability.

MAKE CLEAR COMMITMENTS

Set aspirational, time-bound targets on FPIC: Targets that are not aspirational merely institutionalize the status quo. Development and commercial banks should broaden and deepen their FPIC requirements. This motivates and encourages staff to evolve their approach to FPIC compliance.

Set out time-bound, resourced and measurable roadmaps to operationalize FPIC: FPIC commitments need time-specific targets and roadmaps and dedicated resources to enable implementation. These should be publicly communicated and independently verifiable, allowing outsiders to independently monitor the bank's progress.

BUILD BANK-TO-BANK COLLABORATION

Assign responsibility: As highlighted in the DAPL case, banks may implicitly understand that lead arrangers for syndicated corporate loans have screened companies for compliance with legal requirements and voluntary standards. However, these expectations should be explicit and formalized, and reports on the findings of the lead arranger's human rights due diligence should be supplied to banks considering taking part in the loan. Banks should then do their own due diligence on top of this. Ideally, a due diligence process should be inbuilt throughout the loan – particularly when projects enter different phases, and therefore have different potential risks or benefits to communities.

Share resources: Banks should consider how they can develop shared due diligence resources. This could include, for example, working with external groups to create a shared database of consultants with relevant Indigenous rights and human rights expertise or a list of PEPs relevant to district-level land governance. Banks could also combine forces to engage collectively with Indigenous-led initiatives that focus on the financial sector – such as First Peoples Worldwide.

Promote learning between banks: Development banks and export credit agencies meet every 6–12 months to discuss human rights, environmental, social and governance issues. Commercial banks should convene similar events to share information. This could include workshops with Indigenous organizations, leading practitioners in development or commercial lending, human rights experts or companies speaking under Chatham House rules about their success or challenges relating to FPIC. This would also help to identify shared challenges and unify action to address challenging areas for policy or practice.

Transparency and accountability: As a recent statement from the Equator Principles review noted, transparency and accountability are central aspects of ensuring that banks uphold their human rights and other commitments.¹²² Oxfam has referred to this relationship between transparency, accountability and policy commitments as a mutually reinforcing 'responsibility triangle'.¹²³ The conversation on transparency and accountability is rapidly evolving, even within the financial sector itself, and includes cross-cutting issues relevant not only to FPIC but to a host of social, environmental and governance issues.

THE CONVERSATION ON TRANSPARENCY AND ACCOUNTABILITY IS RAPIDLY EVOLVING, EVEN WITHIN THE FINANCIAL SECTOR ITSELF, AND INCLUDES CROSS-CUTTING ISSUES RELEVANT NOT ONLY TO FPIC BUT TO A HOST OF SOCIAL, ENVIRONMENTAL AND GOVERNANCE ISSUES.

FIGURE 3: THE RESPONSIBILITY TRIANGLE



Source: Oxfam

Create grievance mechanisms: Under the UNGPs banks have a responsibility to provide grievance mechanisms capable of addressing human rights concerns.¹²⁴ A 2018 finding under the OECD Guidelines on Multinational Enterprises explicitly required Australia's ANZ Banking Group to introduce a grievance mechanism, highlighting increasing expectations of the sector. As noted in a joint paper by BankTrack and Oxfam, this could involve shared, industry-based grievance mechanisms or individual bank processes. Grievance mechanisms should be seen as legitimate, accessible, predictable, equitable, transparent and rights-compatible, a source of continuous learning and based on engagement and dialogue.¹²⁵

6 FINANCIERS ARE DECISIVE ENABLERS – OR INHIBITORS – OF ILLEGAL AND DESTRUCTIVE BEHAVIOURS OF CLIENTS. TO COMPLY WITH NEW INDONESIAN FINANCIAL SECTOR REGULATIONS, BANKS SUCH AS BNI [BANK NEGARA INDONESIA] ARE OBLIGED TO ADDRESS MAJOR SOCIAL AND ENVIRONMENTAL ISSUES CONNECTED TO [THEIR] LENDING. BANKS THAT IGNORE THESE FUNDAMENTALS, AS BNI APPEARS TO HAVE DONE IN RELATION TO [ITS CLIENT] KORINDO, PUT THEMSELVES AT A HEIGHTENED REPUTATIONAL AND FINANCIAL RISK, AS WELL AS BEING AT RISK OF REGULATORY NON- COMPLIANCE.9

Perilous: Korindo, Land Grabbing & Banks report by Rainforest Action Network, TuK-Indonesia, WALHI and Profundo (2018)¹²⁶

BOX 5: ANZ AND PHNOM PENH SUGAR – KEEPING UP THE PRESSURE

Between 2011–2014 ANZ Royal Bank in Cambodia loaned an estimated \$40m to Phnom Penh Sugar (PPS).¹²⁷ PPS's core operation is a sugar plantation and refinery on 23,000 hectares provided as Economic Land Concessions (ELCs) and an additional 18,000 hectares as privately owned by PPS in Kampong Speu. The 23,000 hectares of land was granted by the state to companies headed by a local senator and tycoon, and his wife.¹²⁸ The Senator is linked to two other companies granted Economic Land Concessions.¹²⁹ To establish the plantation and refinery, local and Australian media have reported that PPS evicted local families from the land at gunpoint in 2010–11.¹³⁰ Up to 7,000 people are affected, with community losses estimated at over \$11m.¹³¹ Irregularities in the concession appear to contravene local laws – including the recognition of local people's tenure rights and limits on the size of ELCs.¹³²

The then majority owner (55%) of ANZ Royal Bank was ANZ Banking Group, headquartered in Australia. Affected communities in Kampong Speu highlight that ANZ should not profit from a deal so closely connected to human rights abuses, but should instead direct this money to help address harms to affected communities. The bank argues that it is not responsible for redress, as the loan to PPS was for a refinery and not to acquire land.¹³³ This argument does not appear to resonate with persistent, and growing, calls for ANZ to take action. What ANZ does not contest is that it facilitated a loan that enabled PPS to build a refinery on concession lands seized by violent evictions, in order to process and profit from sugarcane plantations that replaced household farms, impoverishing evictees. If the bank did a routine PEP screening, this should have raised questions about PPS's right to operate on the concession lands, and not just the initial acquisition. In October 2018 ANZ's CEO told an Australian Parliament hearing that it was a 'dreadful situation' and that the bank would 'look to do the right thing' with the profits made from the loan – but then at its December AGM it opted to keep the profits.¹³⁴

Half a decade after ANZ's financing to PPS was first revealed, the bank continues to face negative media attention, shareholder questions, parliamentary scrutiny and calls for action by communities, unions, faith groups and NGOs for it to return its profits to affected communities. In 2018 alone, the case was referenced in reports by BankTrack, Fairfax Media, *Responsible Investor*, *The Phnom Penh Post* and the Australian Broadcasting Commission, and in the Australian Parliament.¹³⁵ In 2018, the Australian National Contact Point under the OECD Guidelines on Multinational Enterprises released a finding that ANZ had failed to meet its own human rights standards. In a 2014 letter to the CEO of ANZ, the Uniting Church in Australia, whose shareholder arm invests in the bank, wrote: 'We accept the argument that if ANZ had not loaned the funds to Phnom Penh Sugar, the company would have gained finance from elsewhere, as it now has. However, this does not mean it was acceptable for the ANZ to have made the loan and we regard the loan as a breach of the bank's own high standards... We do not believe the efforts by ANZ to have the problems addressed by [Phnom Penh Sugar] justify the ANZ holding onto the profits of the loan.'¹³⁶ While banks have historically escaped scrutiny once they exit a loan, this is a landmark case in that reputational and potentially other risks to the bank have continued long after the loan has ended. This case demonstrates how civil society approaches to advocating across the investment chain are evolving.

6 HAS THE BANK POCKETED THE PROFIT? OR HAS IT GONE BACK INTO TRYING TO HELP THOSE THAT WERE DISPLACED FROM THEIR HOMES AS A RESULT? [...] I WOULD ARGUE THAT THERE IS A MORAL OBLIGATION FOR YOU TO AT LEAST LOOK AT COMPENSATING PEOPLE. I MET WITH SOME OF THESE PEOPLE WHEN THEY CAME TO AUSTRALIA, AND THE CIRCUMSTANCES WERE QUITE SHOCKING. THEY WERE BASICALLY BOOTED OFF THEIR LAND, GIVEN THE EQUIVALENT OF \$100.9

MP Matt Thistlethwaite questions ANZ's CEO in a 2018 Australian parliamentary hearing¹³⁷

Adopt forms of disclosure that allow local communities to know and access their rights under bank FPIC commitments: Banks have real and legitimate concerns about if and how to disclose their relationships to land-based activities ethically and legally. However, the severity of human rights abuses that can occur in land-related activities compels them to find a way forward. The most critical barrier on FPIC is that Indigenous peoples and other local communities have no way of finding out who is financing projects linked to their lands, forests and waters. Therefore, if client companies or projects fail to adequately engage with affected communities, they cannot alert the bank. FPIC commitments will fail to mitigate relevant risks if communities cannot access financiers' policies and protections. Arguably disclosure is the easiest possible mechanism to enable communities and others to alert banks to violations of their own policies (see Box 6). In its advice to the Equator Principles Association, the non-profit organization Shift recently highlighted that on transparency 'the financial sector is well behind others on its alignment with the expectations of human rights due diligence'.¹³⁸

BOX 6: CULTURE ON BANK TRANSPARENCY IS RAPIDLY SHIFTING

Just five years ago, few if any banks were disclosing any disaggregated reporting at all. In fact, some would not publish any substantial information about their policies in sensitive sectors. However, much has now changed. Today many Equator Principles banks are publishing the names, locations and sectors of projects that they finance, based on the principle that such disclosure is a positive part of risk management. While just a few years ago banks described disaggregated disclosure as unilaterally illegal, citing privacy concerns, today there are numerous examples of disclosure that can be applied globally. In response to repeated allegations of rights violations and deforestation by customers it financed in the palm oil sector, HSBC has announced in its updated palm oil policy that it will require future clients' approval to disclose the relationship *before* financial close. This is a model of corporate loan disclosure that is compliant with UK privacy laws, although it is yet to be seen how HSBC will put it into practice. In October 2018 the IFC announced a pilot project on disclosure for its financial intermediary lending, highlighting how disclosure culture, even within the financial sector, is spreading rapidly.

Transparency is a prerequisite for the full realization of FPIC. A growing number of NGOs are calling on banks to make new corporate lending and project finance contingent on clients consenting to the disclosure of key details, including client or projects names, names of project sponsors where applicable, sector, use of proceeds, amount and duration of the financial commitment, host country and the country in which the proceeds are used.*

These figures are derived from IFC annual reports for fiscal years 2015, 2016, 2017 and 2018, in C. Donaldson and S. Hawkes (2018). *Open Books: How development finance institutions can be transparent in their financial intermediary lending, and why they should be*, p.7. Washington DC: Oxfam International.

* BankTrack (2019). "We are unable to comment on specific customers...": *Challenging Banks on Client Confidentiality*. Nijmegen: BankTrack. https://www.banktrack.org/download/we_are_unable_to_comment_on_specific_clients/190326clientconfidentiality.pdf

IN RESPONSE TO REPEATED ALLEGATIONS OF RIGHTS VIOLATIONS AND DEFORESTATION BY CUSTOMERS IT FINANCED IN THE PALM OIL SECTOR, HSBC HAS ANNOUNCED IN ITS UPDATED PALM OIL POLICY THAT IT WILL REQUIRE FUTURE CLIENTS' APPROVAL TO DISCLOSE THE RELATIONSHIP BEFORE FINANCIAL CLOSE.

7. ADDITIONAL TOOLS

This section focuses on tools that banks can use to build their culture on FPIC; such tools are useful, although their impacts cannot be systematically measured. A key part of progress will be trialling ideas, identifying knowledge gaps and encouraging continuous learning.

OHCHR IS CLEAR ON THE MEASURES THAT BANKS SHOULD TAKE, AND NOTES:

'[A] bank's human rights policies and systems should be developed with an aim to provide a minimum level of screening for all types of activities, with the more detailed analysis prioritized for high-risk clients and transactions. Where possible, a bank would be expected to first develop an understanding of its overall risk picture, including which areas (e.g. activities/sectors, relationships/clients, countries) are likely to pose the most severe risks, and then to prioritize those areas for more detailed analysis. In some cases, however, especially where severe risks are clearly present, it may be necessary to start with obvious high-risk areas without first conducting an overall analysis.'¹³⁹

The organization Shift emphasizes that key to human rights due diligence is understanding the type of relationship that companies have with the communities where they work. Problems will always occur; however, strong relationships built on trust, respect and action increase the likelihood that communities and companies can work together to find solutions. Hostile relationships escalate problems and trigger conflict.

PILOTS AND POSITIVE CASE STUDIES

Case studies on banks' approaches to FPIC (or other human rights) tend to focus on human rights due diligence and the activities of their clients.¹⁴⁰ As yet, they have not examined what steps banks themselves take to verify information provided by clients, understand systemic risks in a given context or ensure that clients' operations are legally compliant – particularly where land issues are complex. Pilot projects and case studies are needed to understand how banks should screen their potential clients; determine if the information clients provide is accurate; assess client or project risk; and engage with Indigenous organizations and local communities. When banks do describe their due diligence processes, this appears to rely heavily on documents or information provided by client companies. However, companies implicated in illegal activities or human rights abuses will not volunteer this information to potential financiers. A lack of transparency means that the only case studies available on how banks apply FPIC policies are those highlighting failure. Banks need to offer examples where they believe they have taken every available measure on FPIC. Case studies can then be assessed by Indigenous organizations and human rights experts, or ideally communities themselves, with weaknesses highlighted and improvements suggested. This should include

BANKS NEED TO OFFER EXAMPLES WHERE THEY BELIEVE THEY HAVE TAKEN EVERY AVAILABLE MEASURE ON FPIC.

consulting independent experts as well as inviting assessments by external Indigenous organizations and rights-based NGOs. Of all available tools, trialling pilots and examining practices through real case studies will likely have the most impact on how banks develop and implement their FPIC commitments.

Build internal human rights expertise

Banks need to build a strong FPIC culture internally. This culture should:

- **Break the silo:** ESG departments tend to be detached from other bank operations. This signals to staff that human rights can be externalized or outsourced to the ESG unit – although few cases ever reach it. Even where ESG staff identify human rights abuses, they may be given little weight.
- **Skill up ESG staff:** Human rights expertise is a specific skill set that is not covered under the frameworks of ESG issues. Banks should also designate plans to recruit staff who have worked directly with communities affected by human rights abuses, particularly Indigenous peoples.
- **Teach ESG staff about banking practices across the bank:** Often, ESG staff do not understand the wide range of activities undertaken across a modern banking group. This is important to identify how to build specific processes for human rights due diligence.
- **Ensure that all bank staff know about human rights:** Bankers need to know why human rights are important, how to integrate them into their work and how to build empathy for victims of human rights abuses.
- **Skill up human rights champions across departments:** Staff should have a contact point to help them answer questions on human rights.
- **Embed human rights in leadership.**
- **Engage external, and independent, experts:** This should include creating meaningful relationships and structured engagement with Indigenous-led initiatives

Targeted learning initiatives could include study leave and financial support for staff to study human rights; mentoring that challenges staff on their knowledge of putting human rights into practice; exposure to people targeted by human rights abuses; and trainings provided by Indigenous peoples themselves.¹⁴¹

PRE-SCREENING

Pre-screening of clients should not only apply to high-risk project finance, but should be incorporated into all aspects of analysis by banks. This practice is relevant to the range of issues that FPIC safeguards can address.

Diagnostic questions

Shift, which has worked with financial institutions on human rights implementation, suggests using a diagram of overlapping risks, and including the involvement of marginalized communities.¹⁴² Shift has worked with banks on their human rights approaches to corporate lending – and a given bank may have to screen thousands of loans in a year. Shift has also helped develop diagnostic questions for specific industries, which target the highest-risk rights violations for the sector. How companies answer these questions signals whether further due diligence is needed.¹⁴³ Specific measures of this kind that help banks assess and act on human rights should be supported by a nuanced and qualitative understanding of human rights risks.

Questionnaires

Banks often use client questionnaires to identify potential due diligence issues. However, if these are to incorporate human rights due diligence, they need to be reworked and must be used within a context where banking staff properly understand human rights risks.

Links to anti-corruption screening

There is much to be gained by having bank staff with human rights expertise undertake a skill-share exercise with staff overseeing anti-money laundering, corruption and bribery screening. Tools used in anti-corruption screening could be adapted to help identify human rights issues (including FPIC).

The 2016 report by UNEP and IHRB notes that some banks use Know Your Customer' and anti-money laundering due diligence and legal compliance checks to identify human rights risks.¹⁴⁴ It notes: 'However, to the extent these types of due diligence are used only to address risks to the bank, they do not serve the full purpose of human rights due diligence as spelled out in the UNGPs. The processes could be improved to align with the UNGPs; for example, [...] They can add certain human rights-related search words to their "Know Your Customer" systems to flag actors involved in human rights abuses to which they will not provide services, using reports by the UN and NGOs to identify actors that are allegedly involved in human rights abuses, including pillage, as well as other war crimes and crimes against humanity.'¹⁴⁵

Find the right consultants

Civil society advocates on finance and human rights highlight the importance of banks using human rights-specific tools in contexts where there is a risk of human rights violations. Vital to this process is effective planning to ensure that timelines for what is required for a sound FPIC process are aligned with community decision-making structures, rather than having unrealistic expectations that banks can assess whether FPIC (and broader human rights compliance) has been achieved in the space of a week's consultation, or less.¹⁴⁶

Part of establishing sound FPIC processes includes recruiting the right consultants to conduct bank due diligence. For such consultants, requirements should include:

- respect as an independent, unbiased researcher;
- a track record that includes showing where Indigenous peoples and other affected communities have not given their consent;
- specialist Indigenous rights and human rights knowledge and expertise; this is not the same as ESG expertise;
- specific expertise in the local context and the international context;
- local language skills;
- capacity to identify cross-cultural issues or coercion that can be misinterpreted as consent;
- proven capacity to work with women and a commitment to provide data that show women's equal participation in consultation processes;
- references from Indigenous peoples' organizations on the consultant's track record for working collaboratively and respectfully with them;
- experience in verifying research findings with communities.

In November 2016 the OECD issued a Guidance Note on Good Practice in the use of Consultants by Export Credit Agencies, as relates to environmental and social due diligence.¹⁴⁷ Many of its recommendations could be extrapolated to human rights due diligence (such as human rights impact assessments (HRIAs)) for development or commercial banks.¹⁴⁸

Currently much bank assessment of company or project land-related risk relies on company self-reporting or, at most, presenting copies of land-based agreements and FPIC processes. This will not identify if these documents are fraudulent, have been obtained illegally or have failed to engage with the real rights holders. It will also fail to capture other nuances: for example, if land expropriation for projects 'in the public interest' are disproportionately and discriminately targeting Indigenous land. In recent years environmental and/or social impact assessments have been integrated into bank due diligence procedures and have proved useful. However, these tools on their own are inadequate, either because identifying human rights-specific abuses is beyond their mandate and/or because consultants lack the specialist skills required. Specialist HRIAs, undertaken by independent experts, are needed, and best practice is community-driven HRIAs.

Oxfam's 2017 report, *Testing Community Consent: Tullow Oil project in Kenya*, which examines an IFC-financed project, is an in-depth case study of how FPIC-related performance standards are applied. In its findings and recommendations, it gives concrete examples of why community-led processes, across the various stages of a project or operation, are important to identify where performance standards have not been met.¹⁴⁹

6 INDIGENOUS PEOPLES ARE ALSO ESTABLISHING THEIR OWN PROTOCOLS FOR FREE, PRIOR AND INFORMED CONSENT, PARTICULARLY IN NORTH AMERICA AND LATIN AMERICA, INCLUDING IN BELIZE, BOLIVIA (THE PLURINATIONAL STATE OF), BRAZIL, CANADA, COLOMBIA, GUATEMALA, HONDURAS, PARAGUAY, SURINAME AND THE UNITED STATES OF AMERICA. THESE PROTOCOLS ARE AN IMPORTANT TOOL IN PREPARING INDIGENOUS PEOPLES, STATES AND OTHER PARTIES TO ENGAGE IN A CONSULTATION OR FREE, PRIOR AND INFORMED CONSENT PROCESS, SETTING OUT HOW, WHEN, WHY AND WHOM TO CONSULT. 9

UN Human Rights Council Expert Mechanism on the Rights of Indigenous Peoples¹⁵⁰

Understand the limitations of industry certification on FPIC

It is vital for banks to understand the nuanced debate around certification standards. For example, Bonsucro includes FPIC in its certification methodology but it is not universally required, just one of several ways that companies can meet the certification threshold. Certification bodies may have weak processes for monitoring or investigating FPIC compliance, or reliance on certification income may make certifying groups reluctant to suspend members.

Do not rely exclusively on reputational databases

Many banks rely on reputational risk databases such as RepRisk or EIRIS as a primary form of ESG due diligence. While reputational databases can provide useful information, however, they are inadequate as a human rights due diligence tool.

The limitations of databases include the following:

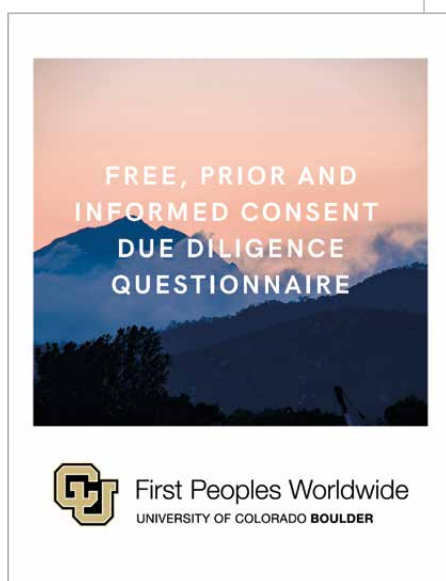
- Indigenous peoples and other grassroots communities cannot file, see, assess or respond to database claims to verify their accuracy.
- Databases are often limited to English-language media and high-profile NGO reports.
- Database information is time-bound and sometimes is years out of date.
- Databases document problems only after they happen.
- Reports do not cover companies' activities in different country/ community contexts.
- Databases often do not include information on suppliers or sub-contractors.
- Databases are not designed to address human rights risk.

BOX 7: INDIGENOUS-LED INITIATIVES ON FINANCIAL SECTOR APPROACHES TO FPIC

First Peoples Worldwide have produced a valuable resource that enables investors to walk, step by step, through a sound FPIC due diligence process.* This draws on a rich base of knowledge, from Indigenous peoples themselves, about common pitfalls in how FPIC processes are applied and what appropriate terms of reference for Indigenous peoples look like, and includes a strong legal analysis of FPIC.

This is one of a small but growing number of Indigenous-led initiatives seeking to define how the financial sector engages with Indigenous peoples on their own terms. This includes harnessing the power of Indigenous-led campaigns like 'Mazaska Talks', creating First Nations banks or harnessing the investment power of First Nations themselves.

* More information on First Peoples Worldwide, including a copy of the due diligence questionnaire, at: <https://www.colorado.edu/program/fpw/>



PART 3: OPTIMAL DATA ON IMPACTED INDIGENOUS PEOPLES

1. Provide information about the legal regime in the host country specific to indigenous peoples.
 - a. Specify whether the host country:
 - i. is a signatory to International Labour Organization Convention 169 or the United Nations Declaration on the Rights of Indigenous Peoples; or,
 - ii. provides indigenous peoples' representatives with a formal seat or status within the host country's government.
2. Provide current maps of impacted indigenous peoples' land.
 - a. Ensure that mapping has taken place in coordination with impacted indigenous peoples.
 - b. Specify whether there are unresolved land disputes in the project area. Inquire with both the government and the indigenous peoples. If there are disputes, inquire as to the status of these disputes and verify whether the project runs through or adjacent to disputed areas.
 - c. Ensure that mapping exercises are inclusive of land use within and outside of official territorial boundaries, for example hunting and fishing uses, cultural and spiritual uses, and ancestral and historical sites, among others.
 - d. Ensure that mapping exercises are inclusive of practices by impacted indigenous peoples and potentially impacted indigenous peoples.
3. Provide information regarding impacted indigenous peoples' governance structures.
 - a. Provide a list of current leaders. Specify whether the formal leadership is designated by the community, by the host country, or by some other entity.
 - b. Besides formal leadership (e.g. tribal councils), determine whether there are informal decision makers or influencers within the community.
 - c. Provide information as to whether identified indigenous peoples have their own protocol for providing free, prior, and informed consent (FPIC) on projects that affect them and their rights.
4. Provide information regarding impacted indigenous peoples' plans for development as to their lands, territories and resources.
 - a. Provide information as to how impacted indigenous peoples' plans have been accounted for as to the current and future impacts of the planned project.

8. PRIORITIES FOR ACTION

This discussion paper highlights a range of actions that banks can take to start putting their FPIC commitments and responsibilities into action. It also makes the human rights, legal and business case for why FPIC is, in fact, beneficial to banks and why it is vital to transform a current culture that has failed to put the human rights of Indigenous peoples and other local communities at the forefront.

AS A PRIORITY, BANKS SHOULD:

- Write consent requirements into agreements with clients to ensure that banks can publish corporate loan and project finance information related to businesses engaged in high-risk areas. This should include forms of disclosure that allow affected people to know which banks are financing, or planning to finance, activities in their area.
- Collectively, and individually, engage with Indigenous peoples' organizations, human rights networks and FPIC specialists. Seek their insights and advice on how to create meaningful due diligence and learning networks, and develop a measurable, time-bound roadmap to implement FPIC.
- Specifically write FPIC into contracts, to ensure that banks can exit a project if consent is not achieved.
- Incorporate measurable human rights performance criteria into staff key performance indicators and recruitment and bonus structures. Adopt a bank policy of mandatory reporting on suspected human rights abuses.
- Require lead arrangers for syndicated loans to provide a due diligence report aligned with the UN Guiding Principles on Business and Human Rights to banks considering taking part in the loan.
- Require adherence to bank ESG and human rights policies in client contracts.
- Ensure that all stakeholder groups, including communities affected by bank-financed projects and activities, have access to bank grievance mechanisms. Call for the Equator Principles Association to develop an effective grievance mechanism that can assess claims that Equator Principles standards are not being properly applied by banks and project sponsors.



“THEY HAVE GUARDS [WHO] HAVE MADE DEATH THREATS AGAINST US. THEY’VE BEEN ON THE POINT OF SHOOTING US. I’VE RECEIVED THREATS AND HAVE MY VEHICLE FOLLOWED. NOT JUST ME BUT OTHERS FROM [MY ORGANIZATION] COPINH TOO. THEY EVEN HAVE A GANG OF MEN PUTTING UP ROAD BLOCKS AND CHECKING CARS TO SEE IF I’M TRAVELLING IN THEM.”

From a 2015 interview with Berta Cáceres (above), quoted in a Global Witness report spotlighting the murders of land and environment defenders in Honduras.¹⁵¹ She was murdered less than a year later. Photo Credit: Goldman Prize.

NOTES

- 1 See section 3.
- 2 The UNGPs do not reference individual human rights but establish a framework for approaching human rights responsibilities. United Nations (2011). *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*. https://www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf
- 3 This figure includes annual cash flow through terminated accounts. Stop the Dakota Access Pipeline website. <https://www.defunddapl.org/> (accessed 12 February 2019)
- 4 Letter from 10 Equator Principles banks to the Equator Principles Association, 22 May 2017. The banks were: ABN Amro, BNP Paribas, BBVA, Crédit Agricole CIB, FMO, Intesa SanPaolo, Natixis, NIVC, Rabobank and Société Générale. https://www.banktrack.org/download/letter_from_10_banks_to_epa_secretariat_on_designated_countries_eps/170522_letter_banks_on_designated_countries.pdf. See also BankTrack (2017). *Ten Equator Banks demand decisive action on Indigenous peoples following DAPL debacle*. https://www.banktrack.org/news/ten_equator_banks_demand_decisive_action_on_indigenous_peoples_following_dapl_debacle
- 5 International human rights instruments use the term 'indigenous'. However, communities claiming their rights may self-identify using alternate terms such as 'tribe', 'traditional community' or 'first nation'.
- 6 FMO is 51% owned by the Dutch government and 42% owned by private Dutch banks: <https://www.fmo.nl/invest-with-us/funding>. FinnFund is 94% owned by the Finnish state: <https://www.finnfund.fi/en/finnfund/>
- 7 Figure includes annual cash flows in and out of terminated accounts. Defund DAPL reports this as \$4,325,000,000. <https://www.defunddapl.org/> (accessed 12 February 2019)
- 8 Many Indigenous people prefer the term 'territory' to 'land' or even land, water and forests – as it better captures the idea of interconnected relationships. FPIC applies irrespective of whether communities' rights have been formally recognized by the state. This also extends to sub-soil resources.
- 9 FPIC also applies to Indigenous peoples' rights to seeds, plant species, land-based knowledge and culture, but these are beyond the scope of this report.
- 10 TMP Systems (2019). *What is Tenure Risk*. <https://www.tmpsystems.net/new-page-1> (accessed 12 February 2019)
- 11 For example, Australia and New Zealand Banking Group (ANZ) told the 60 Minutes TV programme in Australia, regarding a controversial loan that it made to Phnom Penh Sugar in Cambodia, that 'compensation is a matter for the sugar mill and not them'. 60 Minutes Australia (2014). *Dirty Business*. <https://www.9now.com.au/60-minutes/2014/clip-cini8x4dq0dq0hmxvgwmn32m> (accessed 6 March 2019)
- 12 UN OHCHR (2017). *OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector*. <https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>. The section on 'facilitation' specifically mentions that this can apply to clients or projects.
- 13 Ibid.
- 14 BankTrack (2017). *Over 700,000 people demand banks stop financing the Dakota Access Pipeline*. https://www.banktrack.org/news/global_coalition_stages_protests_and_bank_closures_across_the_globe_to_defund_dakota_access_pipeline (accessed 12 February 2019)
- 15 Communities as Counterparties: Preliminary Review of Concessions and Conflict in Emerging and Frontier Market Concessions. Prepared for the Rights and Resources Initiative. 2014. https://rightsandresources.org/wp-content/uploads/Communities-as-Counterparties-FINAL_Oct-21.pdf
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- 17 Specifically, only 10% of Indigenous and community lands are legally owned.
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- 19 In 2017, a total of 201 land and environmental defenders were killed worldwide. Global Witness (2018). *At What Cost? Irresponsible business and the murder of land and environmental defenders in 2017 (updated)*. London: Global Witness. <https://www.globalwitness.org/en/campaigns/environmental-activists/at-what-cost/>
- 20 Frontline Defenders (2019). *Global Analysis 2018*, p.7. <https://www.frontlinedefenders.org/en/resource-publication/global-analysis-2018> (accessed 20 May 2019)
- 21 Deals involving 200 hectares or more. Land Matrix. *'Concluded deals' transnational and domestic*. <https://landmatrix.org/en/get-the-idea/big-deal/> (accessed 12 February 2019)
- 22 The size of the UK is 24,249,500 hectares, Germany 35,738,600 hectares, the Netherlands 4,154,300 hectares and Belgium 3,052,800 hectares.
- 23 C. O'Connor and S. Labowitz (2017). *Putting the "S" in ESG: Measuring Human Rights Performance for Investors*, p.6. NYU Stern Center for Business and Human Rights. <https://static1.squarespace.com/static/547df270e4b0ba184dfc490e/t/58cad912e58c6274180b58b6/1489688854754/Metrics-Report-final-1.pdf>
- 24 \$4,324,000,000. <https://www.defunddapl.org/> (accessed 12 February 2019)
- 25 International Consortium of Investigative Journalists (ICIJ) (2015). *Evicted and Abandoned* investigation. <https://www.icij.org/investigations/world-bank/explore-10-years-world-bank-resettlement-data/> (accessed 12 February 2019)

- 26 While this paper focuses on land-related projects or operations, FPIC is also required for legislative measures, governmental decrees and policies that affect Indigenous peoples' rights and interests.
- 27 See: <https://www.oxfam.org/en/research/community-consent-index-2015>
- 28 See, for example, C.F. Fredericks (2017). *Operationalizing Free, Prior and Informed Consent*. *Albany Law Review*, Vol. 80(2), pp.429-482. http://www.albanylawreview.org/Articles/vol80_2/429-Fredericks-Production.pdf
- 29 Letter to the President of the World Bank Group from the UN Special Rapporteur on the rights of indigenous peoples, Chairperson of the Expert Mechanism on the Rights of Indigenous Peoples and Chairperson of the UN Permanent Forum on Indigenous Issues, 20 May 2016.
- 30 UN Special Rapporteur on the rights of indigenous peoples, Chairperson of the Expert Mechanism on the Rights of Indigenous Peoples and Chairperson of the UN Permanent Forum on Indigenous Issues (2016).
- 31 This includes traditional territories that they may have responsibilities to care for and to maintain a spiritual or historic connection.
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- 33 For further references to FPIC in international law, see E. Greenspan (2014). *Free, Prior and Informed Consent in Africa: An emerging standard for extractive industry projects*. Oxfam America. <https://www.oxfamamerica.org/static/media/files/community-consent-in-africa-jan-2014-oxfam-americaAA.PDF>; and C. Doyle (2015). *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent*. London: Routledge.
- 34 United Nations (n.d.). *Declaration on the Rights of Indigenous Peoples: Frequently Asked Questions*. https://www.un.org/esa/socdev/unpfii/documents/faq_drips_en.pdf
- 35 UN Declaration on the Rights of Indigenous Peoples (2007). https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf
- 36 Committee on the Elimination of Discrimination against Women (2016). *General recommendation No. 34 (2016) on the rights of rural women*. CEDAW/C.GC/23. [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared Documents/1_Global/INT_CEDAW_GEC_7933_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_7933_E.pdf)
- 37 O. De Schutter, Special Rapporteur on the right to food (2009). *Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge*, pp.13-14. <https://www.oecd.org/site/swacmali2010/44031283.pdf>
- 38 Or even at the city level. A recent UN report noted: 'During its technical cooperation mission to Mexico City, the Expert Mechanism welcomed the inclusion of free, prior and informed consent in the City's Constitution....' UN Human Rights Council (2018). *Free, prior and informed consent: a human rights-based approach. Study of the Expert Mechanism on the Rights of Indigenous Peoples*. A/HRC/39/62, p.16. <https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/StudyFPIC.aspx>
- 39 John Numapo (2013) *Commission of Inquiry into the Special Agriculture and Business Leases (SABL): Final Report*. Commission of Inquiry into Special Agriculture and Business Leases. <http://www.coi.gov.pg/documents/COI%20SABL/Numapo%20SABL%20Final%20Report.pdf>
- Nicholas Mirou (2013) *Commission of Inquiry into the Special Agriculture and Business Leases (SABL): Final Report*. Commission of Inquiry into Special Agriculture and Business Leases. <http://www.coi.gov.pg/documents/COI%20SABL/Mirou%20SABL%20Final%20Report.pdf>
- 40 Mark Rumler (2011) *Free Prior and Informed Consent: A review of free, prior and informed consent in Australia*. Oxfam Australia.
- 41 Oxfam America (2017). *Testing Community Consent: Tullow Oil project in Kenya*, p.19. <https://www.oxfamamerica.org/explore/research-publications/testing-community-consent/>
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- FPIC can appear in a range of rules governing land. *The Legal Companion to the UN-REDD Programme Guidelines on Free, Prior and Informed Consent (FPIC): International Law and Jurisprudence Affirming the Requirement of FPIC* gives further examples of FPIC under national laws.
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- 45 Oxfam South Africa (2018). *Court ruling on Xolobeni a victory for mining-affected communities*. Media statement, 22 November 2018. <http://www.oxfam.org.za/wp-content/uploads/2016/06/MEDIA-STATEMENT-xolo.pdf>
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- 47 Initiative for Responsible Mining Assurance (IRMA) (2018). *IRMA Standard for Responsible Mining. IRMA-STD-001*. Chapter 2.2: 'Free, Prior and Informed Consent', p.53. https://responsiblemining.net/wp-content/uploads/2018/07/IRMA_STANDARD_v.1.0_FINAL_2018.pdf

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- 50 R. Davis and D. Franks (2014). *Costs of Company-Community Conflict in the Extractive Sector*. Corporate Social Responsibility Initiative Report No.66. Cambridge MA: Harvard Kennedy School. https://www.csr.uq.edu.au/media/docs/603/Costs_of_Conflict_Davis-Franks.pdf
- 51 See: <https://aluminium-stewardship.org/asi-standards/asi-performance-standard/>
- 52 This paragraph is based on M. Colchester (2016). *Do Commodity Certification Systems uphold Indigenous peoples' rights? Lessons from the Roundtable on Sustainable Palm Oil and the Forest Stewardship Council*. In Policy Matters. IUCN Commission on Environmental, Economic and Social Policy. Issue 21, September 2016, pp.150-165. https://www.iucn.org/sites/dev/files/policy_matters_21_chapter_10_do_commodity_certification_systems_uphold_indigenous_peoples_rights_lessons_from_the_roundtable_on_sustainable_palm_oil_and_forest_stewardship_council.pdf
- 53 <https://rspo.org/news-and-events/announcements/free-prior-and-informed-consent-guide-for-rspo-members-2015-endorsed>
- 54 SPOTT and Aviva Investors (2018). Sustainable Palm Oil & Responsible Investment, p.2. <https://www.spott.org/wp-content/uploads/sites/3/2018/01/Aviva-ZSL-SPOTT-Report-Sustainable-Palm-Oil-Responsible-Investment.pdf>
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- 57 RSP0 (2019). *Our Impacts*. <https://www.rspo.org/impacts>
- 58 M. Rhein (2015). *Industrial Oil Palm Development: Liberia's Path to Sustained Economic Development and Shared Prosperity?* Washington: Rights and Resources Institute. http://www.rightsandresources.org/wp-content/uploads/RRIRReport_Liberia_web2.pdf. Medium-sized palm oil estates attached to large conglomerates in Sumatra usually operate with holdings of 1,000 hectares on average. TMP Systems (2015). *IAN Diligence: Agriculture Analysis*.
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- 60 Bonsucro (2015). *Bonsucro Production Standard*, p.14. <https://www.bonsucro.com/wp-content/uploads/2017/01/Bonsucro-Production-Standard-4.1.pdf>
- 61 OECD Watch (2019). 'Specific instance under the OECD Guidelines for Multinational Enterprises submitted to the United Kingdom of Great Britain and Northern Ireland National Contact Point (NCP) for the OECD Guidelines Against Bonsucro Ltd concerning its conduct in relation to its member, Mitr Phol Group submitted by Inclusive Development International, Equitable Cambodia and the Cambodian League for the Promotion and Defense of Human Rights'. 11 March 2019. https://complaints.oecdwatch.org/cases/Case_534
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- 64 See: <https://ic.fsc.org/en/what-is-fsc-certification/principles-criteria>
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- 101 The legal ramifications of failing to comply with one's own policies vary by jurisdiction, as do the standards for what qualifies as 'misrepresentation' and the particular ways that a suit or other action could proceed. In the USA, customers have filed lawsuits against companies for branding themselves as 'sustainable' and 'socially responsible' while simultaneously sourcing from suppliers that commit human rights abuses. Aggrieved shareholders can also hold banks to account: shareholders who believe that a director has harmed the company's bottom line, perhaps by failing to protect it from the financial fall-out of being tied to a human rights public relations disaster, may sue that director by filing 'shareholder derivative suits' on the company's behalf. Other court systems offer different avenues for filing lawsuits grounded in claims of misrepresentation.
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- 105 The Munden Project (2012). *The Financial Risks of Insecure Land Tenure*, op. cit.
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- 112 Mille Lacs Band (2017). *Mille Lacs Band divests from Wells Fargo*. <https://www.millelacsband.com/news/mille-lacs-band-divests-from-wells-fargo> (accessed 10 April 2019)
- When provided with an opportunity to comment, Wells Fargo replied: 'Wells Fargo recognizes that native tribal communities are some of the most marginalized in American society, and we acknowledge that in connection with the Dakota Access Pipeline (DAPL), the Standing Rock Sioux tribe believes it wasn't consulted properly at the outset of the process. As a result of issues that arose in that case:
- In 2016 we enhanced our due diligence in sectors subject to our Environmental and Social Risk Management (ESRM) policies to include more focused research into whether or not indigenous communities are impacted and efforts have been made to consult with the community and stakeholders.
 - Developed an Indigenous Peoples Statement (IPS) in consultation with tribal leaders, indigenous stakeholders and their representatives, that helps guide our decision-making for projects where proceeds of Wells Fargo financing may potentially impact Native American, Native Alaska, or other indigenous communities, which was implemented in early 2017. Based on the IPS, for project-finance opportunities where we can identify that the use of proceeds may potentially impact ... indigenous communities, we now require the customer to demonstrate alignment with the objectives and requirements of International Finance Corporation Performance Standard 7 on Indigenous People, including with respect to circumstances requiring Free, Prior and Informed Consent (FPIC). Additional detail regarding Wells Fargo's IPS can be found on p. 6 of our 2016-2017 Environmental And Social Risk Management Report, and a brief case study on our DAPL experience can be found on p. 8 of that report.
- Wells Fargo believes that these policies should lead one to conclude that its practices align with international best practice.'
- 113 Mazaska Talks (2017). *Indigenous Leaders Launch New Campaign To Defund All Four Proposed Tar Sands Pipelines*. Press release, 9 May 2017. <https://mazaskatalks.org/blog/2017/5/10/indigenous-leaders-launch-new-campaign-to-defundall-four-proposed-tar-sands-pipelines>
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- 115 In the banking sector in particular, free, prior and informed 'consultation' is often presented as the same as free, prior and informed 'consent'. 'Consent' is particularly relevant for banks, as financing is most likely required once projects or operations have, or will soon have, approvals to start activities. BankTrack researchers provided the author with examples where the term 'free, prior and informed consultation' can be found in bank policies.
- 116 Inherent within FPIC is recognition that the state is a key actor in taking Indigenous peoples' lands.
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- 131 Based on research by Equitable Cambodia. The \$11m figure is based on losses to 681 households, as catalogued in the IDI and Equitable Cambodia complaint to the NCP.
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- 137 Standing Committee on Economics, House of Representatives, Parliament of Australia (2018). *Review of Australia's four major banks*, op. cit.
- 138 Shift (2018). *Enhancing the Alignment of the Equator Principles with the UN Guiding Principles on Business and Human Rights: A Public Summary of Shift's Advice to the Equator Principles Association*. <https://equator-principles.com/ep4/> (accessed 6 March 2019)
- 139 UN OHCHR (2017), op. cit. p.4
- 140 Today there are extensive policies and guidance on FPIC at an operational level. There are also emerging tools on how to integrate FPIC into higher-level certification standards across supply chains. However, there are few independent case studies that examine a company's efforts to achieve FPIC if they are successful and to provide concrete recommendations for improvement. Nevertheless, the need is increasingly recognized: for example, the FSC is undertaking case studies on FPIC to see how its methodology and guidance work in practice. See also Oxfam America (2017). *Oxfam America (2017). Testing Community Consent: Tullow Oil project in Kenya*, op. cit. Still, much more is needed in this area.

- 141 For example, in Australia the BlackCard accreditation programme provides training to organizations, companies (including banks) and individuals based on an Indigenous Terms of Reference. This improves cross-cultural literacy and value for Indigenous knowledge and perspectives. See: <http://theblackcardlearningportal.com.au/>
- 142 See Shift (2015). *Human Rights Due Diligence in High-Risk Circumstances: Practical Strategies for Business*. https://www.shiftproject.org/media/resources/docs/Shift_HRDDinhighriskcircumstances_Mar2015.pdf. This publication discusses Shift's framework for identifying risk. Additional sources relevant to extreme land rights violations include: Global Witness database and annual reporting on the killings of land rights defenders; BankTrack database of Dodgy Deals; Freedom House data on freedom of speech; Transparency International Corruption Perceptions Index; The Land Matrix database of large-scale land acquisitions; and UN Special Rapporteurs on Indigenous Rights and Human Rights Defenders.
- 143 For examples of Shift's approach, including diagnostic questions, see Shift (2015). *Human Rights Due Diligence in High-Risk Circumstances*, op. cit.
- 144 M. Wachenfeld, M. Aizawa and M. Dowell-Jones (2016). *Human Rights and Sustainable Finance*, op. cit., p.53.
- 145 Ibid.
- 146 This, for example, was one of the issues highlighted in Oxfam's analysis of the IFC compliance monitoring of the Turkana project in Kenya. Oxfam America (2017). *Testing Community Consent: Tullow Oil project in Kenya*, op. cit.
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- 148 For example: a) banks should be listed on contracts appointing consultants; b) human rights due diligence should not be carried out and reviewed by the same party; c) findings of consultants should not be changed, particularly those that compromise the consultant's professional opinion or the output's comprehensiveness, accuracy or independence. Banks should be wary of consultancy firms or individual consultants who have previously worked for the project sponsor and/or are based in a geography where other consultancy resources are limited. FPIC certification is not conclusive on FPIC.
- 149 The paper is accessible at: <https://www.oxfam.org/en/research/testing-community-consent-tullow-oil-project-kenya>
- 150 UN Human Rights Council (2018). *Free, prior and informed consent: a human rights-based approach*, op. cit.
- 151 Global Witness (2015). *How Many More? 2014's deadly environment: the killing and intimidation of environmental and land activists, with a spotlight on Honduras*, p.20. The photo of Berta Cáceres was credited in the report to the Goldman Prize. <https://www.globalwitness.org/en/campaigns/environmental-activists/how-many-more/>

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ENDORSEMENTS

'Removal from the place one is dependent on for livelihood nearly always goes with dissent and the accompanied social unrest. Banks need to know not only the financial, but also the human risks of the projects and companies they invest in and be transparent and take responsibilities herein. This paper shows how this can be done.'

Gine Zwart, Coordinator Fair Finance Guide International

'Time and again, we have documented appalling cases where communities who should benefit from development are instead suffering eviction, human rights abuses or destruction of the forests and lands they rely on for their livelihoods. Banks have a duty to respect people's rights, and a crucial first step is to ensure communities know about projects and can influence the developments that affect their lives.'

Kate Geary, Co-Director of Bank Information Centre Europe.

'This paper provides clear direction for banks who truly seek to respect the rights of indigenous peoples. It points toward the urgent need for banks to design their internal processes with the understanding that indigenous communities have a right to withhold their consent as set forth in international human rights law.'

Carla Fredericks, First Peoples Worldwide

BANKTRACK

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