
Stepping up: Protecting collective land rights through corporate due diligence

A guide for global businesses, investors and
policy makers

JUNE 2021

STEPPING UP: PROTECTING COLLECTIVE LAND
RIGHTS THROUGH CORPORATE DUE DILIGENCE



Forest
Peoples
Programme

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NICFI Norway's
International Climate
and Forest Initiative

Front cover: View of Mahlemu
mountain from Phillipai Village,
Akawaio territory, Guyana
Credit: Lan Mei / FPP

Contents

Summary	5
Abbreviations	7
Definitions	8
How to use this Guide	10
Introduction and context	12
Rights of indigenous peoples	15
Core principles to respect throughout HRDD process	24
The human rights due diligence process	25
Dynamic due diligence	27
Identify impacts on collective land and associated rights	32
Address impacts on collective land and associated rights	55
Track impacts on collective land and associated rights	80
Report impacts on collective land and associated rights	89
Annexes	92
Endnotes	103

List of tables

Table 1. Core principles for effective HRDD process	24
Table 2. Examples of dynamic approach to due diligence	29
Table 3. Information to collect for contextual scoping	36
Table 4. Questions to consider in HRIA	46
Table 5. Measures to protect rights defenders	77
Table 6. Relationship between environmental monitoring and human rights monitoring	83
Table 7. Key elements of effective community-level monitoring systems	84
Table 8. Monitoring organisational human rights compliance	86
Table 9. Scenarios for excluding information from reporting	91

List of figures

Figure 1. Interconnectedness of rights	23
Figure 2. HRDD process	26
Figure 3. Dynamic due diligence	31
Figure 4. Red flags that may indicate improper HRIA process	44
Figure 5. Red flags that may indicate improper FPIC process	47
Figure 6. FPIC process	50
Figure 7. Identification of impacts	54
Figure 8. Stepwise approach to addressing specific rights impacts	58
Figure 9. Systemic factors that may drive human rights violations	64
Figure 10. Address impacts	79

Summary

Global commodities value chains are coming under increasing scrutiny for harms caused to human rights and the environment. In particular, commodities extraction and production are linked to dispossession of and damage to lands traditionally owned, occupied, and used by indigenous peoples, as well as harassment, threats, and violence against indigenous peoples.

Businesses that do not directly extract or produce commodities but that directly or indirectly source or invest in them (referred to in this Guide as “downstream and investor companies”) are part of these commodity value chains and have a responsibility to conduct human rights due diligence (HRDD) to identify and prevent infringements of human rights and to ensure remedy where harms have already occurred. HRDD is a process that is dynamic and requires the identifying, addressing, tracking, and reporting of rights impacts.

Dynamic due diligence refers to the process of improving human rights outcomes by progressively improving HRDD. Specifically, although in the short term, businesses might prioritise certain HRDD actions over others, in the longer term, businesses are expected to:

- Conduct comprehensive HRDD across all of their value chains.
- Take actions to adjust their business model, strategies, operations, relationships, practices, and policies as needed to prevent systemic drivers of negative human rights impacts.

In the longer term, a business’s legal responsibilities related to HRDD and human rights outcomes may change. Failure to do comprehensive HRDD may lead to civil or criminal liability in and of itself, while a failure by a business directly linked or contributing to human rights violations to appropriately address known harms may mean that business could be considered to be contributing to or causing, by omission, those harms.

Identifying impacts refers to the process of researching and evaluating the actual and potential human rights impacts of the business’s operations and value chains. For downstream and investor companies, effective identification of adverse impacts on indigenous peoples requires the company to:

- Establish an assessment team with expertise in indigenous peoples’ rights and in the relevant sectors and geographies and with sufficient resources to carry out the research.
- Conduct contextual scoping, or background research on the relevant business, sectoral, geographic, legal, human rights, and indigenous peoples’ rights contexts.
- Assess the human rights practices and outcomes of direct and indirect suppliers/investees, including via review of community-level human rights impact assessments they have conducted.

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, businesses should carry out human rights due diligence. The process includes assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.

- Where necessary, commission independent community-level human rights impact assessments, which may be jointly financed with other actors as appropriate.
- Avoid relying exclusively on self-reporting by suppliers/investees and certification schemes. This requires the company to:
 - Triangulate research with reports and opinions or decisions from indigenous peoples' communities, associations, NGOs, judicial bodies, news media, and human rights treaty bodies.
 - Engage independent, third-party verification of information where necessary and appropriate.

Addressing impacts means preventing, mitigating, and remedying actual and potential rights violations. Downstream and investor companies are expected to:

- Exercise leverage over suppliers/investees to address specific identified violations of the rights of particular indigenous peoples or communities.
 - Leverage can be positive (e.g., commercial incentives, provision of trainings, offers of technical or financial support to the supplier/investee or to the rightsholder community) or negative (e.g., commercial disincentives, including suspension or termination of commercial relations)
- Review how their business model, practices, and policies may contribute to, incentivise, facilitate, or otherwise permit rights violations, and take action to address such systemic drivers of rights violations.
- Address inherited, continuing violations that may have commenced prior to their involvement in a given value chain.
- Take specific measures to protect indigenous rights defenders.

Tracking impacts refers to the process of monitoring the effectiveness of measures the company has taken to address impacts. For downstream and investor companies, effective tracking requires the company to:

- Assess whether measures the company has taken to address impacts are achieving their goal, and if not, taking additional measures as necessary. This applies to both specific identified impacts as well as systemic drivers of violations.
- Ensure that the company has updated and valid information about the adverse human rights impacts of its operations and value chains. This can include some of the same types of actions the company would have taken to identify impacts.
- Ensure that producer companies have site-level human rights impacts monitoring systems in place that had been developed in collaboration and with the consent of rightsholders.
- Monitor the implementation of the company's human rights policies and practices and assess their effectiveness in promoting good human rights outcomes.

Reporting impacts refers to the process of documenting and publishing the company's HRDD work. Downstream and investor companies are expected to:

- Be transparent and publish reports in plain language and in local languages so they can be reviewed by rightsholders and stakeholders. Exceptions would be where there is sensitive information, such as information that could expose a human rights defender to harassment or violence or information about an indigenous community's sacred sites.

Abbreviations

ACHPR or African Charter	African Charter on Human and Peoples' Rights
ACHR or American Convention	American Convention on Human Rights
ADRIP	American Declaration on the Rights of Indigenous Peoples
AfCHPR	African Commission on Human and Peoples' Rights
AfCtHPR	African Court on Human and Peoples' Rights
AFi	Accountability Framework Initiative
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
CSO	Civil society organisation
EMRIP	Expert Mechanism on the Rights of Indigenous Peoples
ESG	Environmental and social governance
ESIA	Environmental and social impact assessment
FAO	Food and Agriculture Organisation
FPIC	Free, prior, and informed consent
FSC	Forestry Stewardship Council
HRDD	Human rights due diligence
HRIA	Human rights impact assessment
IACHR	Inter-American Commission of Human Rights
IACTHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ILO 169	International Labour Convention No. 169, Indigenous and Tribal Peoples Convention, 1989
IPs	Indigenous peoples
NGO	Non-governmental organisation
OHCHR	Office of the High Commissioner for Human Rights
RSPO	Roundtable on Sustainable Palm Oil
SME	Small- and medium-sized enterprise
SRIP	Special Rapporteur on the Rights of Indigenous Peoples
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNGPs	UN Guiding Principles on Business and Human Rights

Definitions

The following definitions are provided to help the reader understand how key terms are being used throughout the Guide. Terms marked with an asterisk (*) are defined in the same way as in the [Accountability Framework Initiative](#).

Applicable law	<p>International, national, and customary laws that are in effect and govern in any given context or situation.[*]</p> <ul style="list-style-type: none"> • International laws include customary international law as well as those treaties that a state has ratified or acceded to, regardless of the direct effect of the international law. • National laws include the laws and regulations of all jurisdictions within a nation (local, regional, and national). • Customary laws include those laws a given indigenous people or community have adopted. Customary laws typically only have effect within the traditional territory or lands of the relevant indigenous people or community, and they may or may not be recognised as part of national law. <p>[*] Adapted from the AFI definition</p>
Audit/auditing*	Systematic and documented process for obtaining records, statements of fact, or other relevant information and assessing them objectively to determine the extent to which specified requirements are fulfilled.
Business	See definition for “Company”
Business relationships	The relationships a business has with direct and indirect business partners, including suppliers, buyers, investors (including lenders) and other financial service providers, other entities in its value chain, and any other non-State or State entity directly linked to its operations, products, or services.
Buyer*	A company that purchases raw materials, processed materials, or finished products from a supplier.
Company*	An enterprise, firm, or other organisational and legal entity involved in the production, provision, trade, or sale of goods and services (including financial services). This definition encompasses all company ownership structures, including privately held, publicly traded, and state-owned companies as well as companies in which states hold an interest. For the purpose of [this Guide], a company is defined to include the corporate group[] of which it is part. This includes the company’s subsidiaries, affiliates, joint ventures, and majority holdings.
Consideration	The negotiated and agreed benefit (which may include ongoing benefits) and/or compensation to be received by a rightsholder people or community in exchange for granting a producer company certain property rights or interests, such as a right to operate on their traditional lands.
Corporate group*	<p>The totality of legal entities to which the company is affiliated in a relationship in which either party controls the actions or performance of the other. Factors that are used to determine whether a company is part of a broader corporate group include:</p> <ul style="list-style-type: none"> • Formality of relationship: Is there formal ownership, such as through an investment holding structure? • Declared as a group: Has the group publicly declared the companies are linked? • Family control: Are the companies owned or run by members of the same family? • Financial control: Are there contractual or other financial arrangements that indicate one party controls the performance of another? • Management control: Is there extensive overlap in officials between companies? • Operational control: Are landholdings under a group’s operational control? • Beneficial ownership: Is ultimate ownership hidden in offshore companies or by use of nominees? • Shared resources: Do companies share a registered address, land or other physical assets, or provision of company functions or services?

Cultural heritage*	<p>The legacy of physical and intangible assets that a group or society inherits from past generations, maintains in the present, and preserves for future generations. This may include (i) tangible forms of cultural heritage, such as moveable or immovable objects, property sites, or structures having archaeological, paleontological, historical, cultural, artistic, or religious values; (ii) unique natural features that embody cultural values, such as sacred groves, rocks, lakes, and waterfalls; and (iii) intangible forms of culture, defined as the practices, innovations, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts, and cultural spaces associated therewith.</p> <p>Source: UNDP SES Standard 4: Cultural Heritage</p>
Downstream	<p>A position in the supply chain further from raw material origin and closer to the stage of final sale and consumption as compared to another company.[*]</p> <p>[*] Adapted from the AFI definition</p>
Environmental and human rights defenders*	<p>Individuals or groups who, in their personal or professional capacity and in a peaceful manner, act to protect and promote human rights, eliminate human rights violations, or protect the environment, including water, air, land, flora, and fauna.</p>
Human rights impact assessment	<p>The identification and evaluation of actual and potential impacts on human rights of a given project or operation. Although this term is used in varying contexts, for the sake of clarity, this Guide uses the term primarily to refer to community- or site-level human rights impact assessments.</p>
Impacts evaluation	<p>The evaluation of the actual and potential impacts on human rights of a company's value chains. This Guide uses the term to refer to the review of supplier/investee human rights policies and practices and review of community- or site-level human rights impact assessments.</p>
Indigenous peoples' lands	<p>The lands, territories, and resources customarily owned by an indigenous people or community, whether or not such customary ownership is recognised by the relevant national government. Such customary ownership is recognised under international human rights law.</p> <p>Also referred to as "indigenous peoples' traditional lands" or "indigenous peoples' customary lands".</p>
Investor company	<p>A company that provides finance or financial services to another with the expectation of receiving financial returns. This Guide does not provide an exhaustive list of financial activities that may fall in this category, but this definition would include, for example: banks and other lending institutions, private equity firms, investment management firms, and insurers.</p>
Monitoring	<p>The ongoing and systematic collection of data to assess and document the extent to which actions, progress, performance, and compliance are being carried out or achieved.[*]</p> <p>[*] Adapted from the AFI definition</p>
Producer company	<p>A company that owns or manages a farm, estate, plantation, or ranch used to produce agricultural products, or a forest that is managed at least in part for the harvest of forest products, or a mine that is managed to extract minerals.[*]</p> <p>[*] Adapted from the AFI definition</p>
Remediation and remedy*	<p>Terms used interchangeably or in combination with one another to refer to both the process of providing redress for a negative impact and the substantive outcomes that can counteract, or make good, the negative impact. These outcomes may take a range of forms such as apologies, restitution, rehabilitation, restoration, financial or non-financial compensation, and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.[*]</p> <p>[*] Adapted from the UN Guiding Principles Reporting Framework</p>
Supplier*	<p>A producer or company that supplies raw materials, processed materials, or finished products to a buyer.</p>
Upstream*	<p>A position in the supply chain closer to the raw material origin.</p>
Value chain	<p>All activities, operations, and business relationships, upstream and downstream, needed to create a product or service, and includes, among other things, direct and indirect suppliers, downstream companies or buyers, investor companies, and producer companies.</p>
Verification*	<p>Assessment and validation of compliance, performance, and/or actions relative to a stated commitment, standard, or target. Verification processes typically utilise monitoring data but may also include other sources of information and analysis.</p>

How to use this Guide

Purpose and target audiences of this Guide

This Guide provides resources, recommended steps, and practical tools for the conduct of effective human rights due diligence by downstream and investor companies in order to meet corporate responsibilities to uphold and protect indigenous peoples' rights, particularly collective land and associated rights.¹ Indigenous peoples' collective land rights are most likely to be directly affected by land-intensive commodities sectors, such as agriculture, mining, oil and gas, and infrastructural development. However, other sectors may also generate impacts, and a wide range of sectors are likely to use commodities products and therefore may contain these impacts within their value chains.

The information in this Guide is specifically targeted for use by the following audiences:

- *Downstream and investor companies whose value chains affect indigenous peoples' lands:* For such actors, this Guide offers minimum steps to take to ensure that the company is doing human rights due diligence properly and is able to use due diligence to ensure respect for indigenous peoples' rights throughout its operations and value chains. Some of the guidance provided may be more appropriate for larger companies who have more resources. However, small- and medium-sized enterprises may find some recommendations applicable and may additionally find it useful to understand the expectations of larger companies that may be part of their value chains.
- *Policymakers:* The recommended steps for human rights due diligence in this Guide are suggested minimum requirements to consider incorporating into human rights due diligence policies and legislation. The Guide may additionally be a useful tool to assist future enforcement agencies in assessing companies' compliance with such legislation.
- *Indigenous peoples' organisations and NGOs:* It is hoped that the information set out in this Guide provides useful information about what affected rightsholders should expect of downstream and investor companies in conducting proper human rights due diligence.

How to work through the Guide

The Guide begins by setting out some background information that downstream and investor companies should understand that is relevant to their human rights due diligence responsibilities. Specifically, the first three sections offer information about:

- The [international human rights context](#) in which businesses are expected to operate;
- The [rights of indigenous peoples](#) that are most often affected by land-intensive business operations and value chains; and
- The [core principles](#) that companies should be respecting throughout their due diligence work.

The body of the Guide focuses on the stages of the human rights due diligence process. Each section includes the following:

- Explanations of the purpose of each stage of human rights due diligence;
- Resources companies can refer to for broader guidance on human rights due diligence;
- Descriptions of the steps companies should take to effectively carry out that stage of due diligence; and
- Tools that will assist companies in conducting due diligence on their impacts on indigenous peoples' collective land and associated rights.

Readers should refer to the [Definitions](#) section of the Guide to understand the terms used throughout the Guide.

Throughout the Guide, look out for:



Boxes labeled with this icon will highlight the importance of various elements of the HRDD process from the perspective of affected indigenous peoples and communities.



These icons will indicate suggested tips for the conduct of effective human rights due diligence.



This will refer readers to the [Dynamic due diligence](#) section of this Guide, indicating areas where companies should re-evaluate and upgrade their current practices to enable credible and effective human rights due diligence.



Throughout the Guide, there will be examples to illustrate concepts described in the explanatory text. These may be examples of rights violations indigenous communities are experiencing, with brief commentary on how downstream or investor companies could have detected such violations; or of current corporate practices and where these practices can be improved.

Introduction and context

The global demand for commodities is having devastating impacts on the environment and on indigenous and other peoples and communities whose customary lands are being exploited for the extraction and production of these resources. These negative impacts can be seen in the gold, diamond, other minerals, oil, gas, palm oil, soybean, cocoa, beef, banana, cotton, rubber, timber and other commodities sectors. The environmental and human rights harms associated with these activities can additionally cause reputational damage to companies sourcing or investing in such commodities. Effective human rights due diligence by downstream and investor companies has the potential to generate positive transformational changes that will lead to improved environmental, human rights, and business outcomes.

International human rights context

It is well established that businesses have a responsibility to adhere to international human rights norms and standards. This responsibility exists independently of state obligations with respect to human rights, meaning that businesses are expected to respect human rights even in the absence of relevant national laws or enforcement of such laws.² At the same time, state obligations under international human rights law include ensuring business compliance with these norms and standards.³ This means that human rights obligations can be transferred by states onto corporate actors. Many such laws exist already (*see Box 1*), and states are coming under increasing pressure to enact legislation – including laws that apply to companies' extraterritorial impacts – to that end.



Wampis Village of Soledad, Peru, 2019. The territory of the Wampis Nation is affected by illegal land invasions and imposed hydrocarbon concessions, while legal land title remains outstanding over much of their 1.3 million ha territory. Credit: Vicki Brown / FPP

Effective human rights due diligence by downstream and investor companies has the potential to generate positive transformational changes that will lead to improved environmental, human rights, and business outcomes.

Box 1. Examples of existing and proposed laws imposing forms of human rights due diligence obligations on businesses

US, [Dodd-Frank Act, Section 1502](#)

California, [Transparency in Supply Chains Act](#)

UK, [Modern Slavery Act](#)

France, [Loi Relative au Devoir de Vigilance](#) (Duty of Vigilance Law)

EU, [Regulation 2017/821](#) on Supply Chain Due Diligence Obligations for Importers of [Minerals] from Conflict-Affected and High-Risk Areas

Australia, [Modern Slavery Act](#)

Netherlands, [Wet Zorgplicht Kinderarbeid](#) (Child Labour Due Diligence Act)

Canada, [Modern Slavery Bill S-216](#), *proposed*

Norway, [Supply chain transparency bill](#), *proposed*

Germany, [Supply Chain Bill](#), *proposed*

EU, [Human rights and environmental due diligence legislation](#), *proposed*

Businesses are expected to conduct human rights due diligence in order to identify, prevent, and mitigate potential human rights violations, and address negative human rights impacts in their business operations or their value chains.⁴ Businesses can be held responsible for human rights violations committed by others that they are linked to, even where they did not themselves commit or intend the violation. For example, UN human rights experts have considered that where extractive companies abuse indigenous peoples' rights, private military and security companies that "provide the conditions that allow extractive companies to operate" can be "complicit in those abuses".⁵



Sugarcane plantations, N. Cauca, Colombia affecting the lands and territory of Black Communities
Credit: Palenke Alto Cauca



Although this Guide will primarily refer to indigenous peoples, some of the rights elaborated upon herein may be equally relevant for non-indigenous peoples and communities. Some other guides refer to peoples and communities with collective land and associated rights as “indigenous peoples and local communities”, but the term “local communities” is not well-defined in international law and can be unhelpful. An explanation of the rightsholders and rights that this Guide focuses on can be found in the section on the [Rights of indigenous peoples](#).

Specific expectations in the context of indigenous peoples’ rights

Businesses are expected to respect *all* human rights, including the specific rights of indigenous peoples. These specific rights have been defined under international human rights law to protect the particular characteristics of indigenous peoples. One important feature of these rights, and one of the focuses of this Guide, is that they are primarily collective in nature, meaning that they are rights belonging to a group as opposed to an individual person. In some cases, collective rights similar to those applying to indigenous peoples will also apply to some non-indigenous peoples and communities.

In practice, one of the most important rights of indigenous peoples (and some non-indigenous peoples or communities) is their right to the collective ownership of and control over the lands, territories, and resources they have traditionally owned, occupied or otherwise used and acquired. Businesses are expected to respect this right *even when, as is frequently the case,⁶ these customary forms of tenure are not recognised under national laws*. Respect for collective tenure rights and the associated right of self-determination of indigenous peoples includes seeking the free, prior, and informed consent (FPIC) of the potentially affected people/s and community/ies in relation to any activity which could affect their rights.⁷

International human rights bodies and courts consider the right to FPIC to be a critical safeguard for the protection of indigenous peoples’ rights. They have explained that respecting this gateway right requires a process that includes, at minimum: good faith consultations through the community’s own chosen representative institutions⁸; conduct of independent impact assessments, designed in consultation with the affected indigenous people or community, which then inform the consultations process;⁹ and discussions on benefit-sharing.¹⁰

Translating legal expectations into practice

Although international human rights law has already set some clear standards and expectations for businesses, including for business respect for indigenous peoples’ rights, these have yet to be properly implemented in practice. The complexity and length of value chains from the sourcing of raw materials to consumers likely contributes to this lack of implementation. While upstream and producer companies feel less consumer- and demand-side pressure because of the opacity of value chains, downstream and investor companies may consider that they have lower levels of responsibility towards indigenous peoples and communities because they do not operate directly on indigenous peoples’ lands.

It is clear, however, that international standards do not absolve downstream and investor companies of responsibility for rights abuses simply because their involvement in the processes leading to that abuse is less immediate. This Guide acknowledges certain challenges downstream and investor companies may face in conducting due diligence to identify and address their impacts on indigenous peoples’ rights. It therefore focuses on providing practical guidance to aid downstream and investor companies in effectively fulfilling their due diligence responsibilities and improving human rights outcomes for indigenous peoples.

Rights of indigenous peoples

This Guide aims to equip downstream and investor companies with tools to help them conduct effective human rights due diligence on the actual and potential impacts of their business operations and value chains on the rights of indigenous peoples. Effective use of this Guide requires companies to understand, first, the identity and characteristics of the rightsholders who are the focus of this Guide, and second, the nature of the rights held by those groups that are most likely to be impacted by global commodities value chains and related investments or infrastructural or other developments.

Who are the rightsholders this Guide focuses on?

This Guide focuses on the collective land and associated rights of indigenous peoples and other peoples who share similar rights as indigenous peoples ([see Box 2](#)). “Indigenous peoples” [refers to](#) peoples who, among other characteristics:

- have strong cultural and physical relationships with particular lands, territories, and resources;
- have their own distinct social, economic, cultural, and political institutions and traditions;
- self-identify as a distinct people; and
- commonly are marginalised and experience systemic discrimination by more dominant sectors of society.

Indigenous individuals have all of the same human rights as other individuals, but indigenous peoples as a group also hold specific rights which are collective in nature. The collective nature of these rights means that these rights do not belong to individuals but rather to a people as a group. The specific rights of indigenous peoples are grounded in the collective right to self-determination and notably include the collective right to own, control, manage, use, and develop their traditional lands, territories, and resources ([see Box 3](#)).



Patrolling Long Isun's ancestral lands, Indonesia 2017
Credit: Angus MacInnes / FPP

Box 2. Non-indigenous peoples or communities sharing similar rights as indigenous peoples

Because the rights of indigenous peoples have been defined in relation to their characteristics and the challenges they face, it is important not to conflate non-indigenous peoples or communities with indigenous peoples.¹¹ However, different sources of international law may, in different contexts, extend similar rights protections to non-indigenous peoples and communities. For example, although the content of the right has been most well-elaborated in the context of indigenous peoples, the right to self-determination is a right of all peoples. ILO Convention No. 169 and certain rights elaborated upon by the Inter-American Court apply to both indigenous and tribal peoples. The Inter-American Court has indicated for example that Afro-descendant peoples with a customary collective tradition and characteristics similar to indigenous peoples also benefit from similar protection of collective customary rights to lands, territories, and natural resources.¹² Several rights in the African Charter are collective rights of all peoples, and the African Commission and Court have both suggested that the right to property includes customary communal tenure rights (not limited to indigenous peoples).¹³ This is not an exhaustive list. The takeaway message is that wherever a people or community maintain traditions of collective customary tenure, strong ties to their land, and distinct cultural traditions, collective land and associated rights protections may be applicable – and in case of doubt, should be applied.

Other reports and resources have used the term “local communities” to refer (apparently) to non-indigenous collective rightsholders. However, this term is not well-defined in international law nor used consistently, and it can lead to confusion about the nature and applicability of collective rights. To avoid this issue, this Guide will primarily refer to “indigenous peoples”, “rightsholders”, and “collective land and associated rights”. However, companies should keep in mind that there may be non-indigenous peoples or communities who hold collective rights to lands, territories, and resources and to whom this Guide applies equally.

Note that although this Guide focuses on peoples and communities who hold collective rights, businesses cannot ignore the rights, including property rights, of other peoples and communities, and many tools in this Guide may be equally applicable for consideration of those rights. Companies should refer to [The UN Declaration on the Rights of Peasants \(UNDROP\)](#) and this [Guide on the Right to Land and the UNDROP](#) for some additional guidance on the practical application of land and resource rights to those local communities whose characteristics are not such as to attract protection as collective rightsholders.

Businesses are expected to respect indigenous peoples' traditional land rights even when, as is frequently the case, their customary forms of tenure are not recognised under national laws.

Box 3. What are “traditional” or “customary” lands, territories, and resources?

Indigenous peoples’ “traditional” or “customary” lands, territories, and resources are those lands, territories, and resources that indigenous peoples own by right. This right may or may not be recognised by national laws and by a legal title, but it is recognised by international human rights law and must be respected by commercial actors. These may include farming, hunting, fishing, or gathering grounds that indigenous peoples depend upon for their subsistence, medicines, or livelihoods; mining areas indigenous peoples source materials from for tool- or craft-making or livelihoods; religious or sacred sites; areas maintained by indigenous communities for conservation purposes; or other important cultural heritage sites or networks of sites.

Even where national laws recognise the existence of customary tenure, the extent of a people’s or community’s traditional lands, territories, and resources may be contested. For indigenous peoples, the lands, territories, and resources they own as of right are those governed by a system of “customary land tenure”, which refers to the set of rules and norms that a people or community have developed that govern the use, occupation, allocation, access to, and management of lands and natural resources. Note that non-indigenous peoples or communities may also have systems of customary land tenure and may hold similar land rights.

Systems of customary land tenure vary by peoples and communities and any understanding of traditional or customary land rights must begin with research in that specific context. To provide just one example, [Our Land, Our Life: A Participatory Assessment of The Land Tenure Situation of Indigenous Peoples in Guyana: Report for Region 7](#) illustrates several important concepts:

- Akawaio and Arecuna indigenous peoples in Guyana understand that they have a shared territory, and that within that territory, there are both common areas owned by all communities as well as lands owned by individual Akawaio and Arecuna communities.
- The government of Guyana partially recognises indigenous peoples’ right to own their traditional lands and has issued titles to individual communities, but this recognition is inadequate because it both does not recognise collective territories and does not recognise the full extent of individual communities’ customary lands.
- The Akawaio and Arecuna peoples know the full extent of their customary territories, lands, and resources, which includes farming grounds, fishing areas, hunting areas, gathering sites, sacred sites, and other cultural heritage sites.

To identify and understand the impact of commercial operations on indigenous peoples, companies must ask indigenous peoples to identify their traditional lands, territories, and resources. Companies should be prepared to offer financial support for affected rightsholders to carry out a land tenure study to enable them to define the extent of their lands, territories, and resources.

What rights are most likely to be impacted?

When business activities involve development or resource extraction on lands traditionally owned, occupied, or used by indigenous peoples or other peoples or communities, they will affect the rights of those peoples and communities. This Guide focuses on the impact upon collective land rights and the rights associated therewith. The following list of rights is not exhaustive, but it should provide companies with a baseline understanding of the rights they must learn about and respect. *Box 4* lists some of the primary sources of law on indigenous peoples’ rights and collective rights, while [Annex 1](#) provides some selected sources to refer to for further elaboration of the rights discussed here.

Box 4. Primary sources of law on indigenous peoples' and collective rights

[UN Declaration on the Rights of Indigenous Peoples \(UNDRIP\)](#)
[International Labour Convention 169, Indigenous and Tribal Peoples Convention \(ILO 169\)](#)
[International Convention on the Elimination of All Forms of Racial Discrimination \(ICERD\)](#)
[International Covenant on Economic, Social, and Cultural Rights \(ICESCR\)](#)
[International Covenant on Civil and Political Rights \(ICCPR\)](#)
[Convention on the Elimination of All Forms of Discrimination Against Women \(CEDAW\)](#)
[Convention on the Rights of the Child \(CRC\)](#)
[American Convention on Human Rights \(ACHR\)](#)
[American Declaration on the Rights of Indigenous Peoples \(ADRIP\)](#)
[African Charter on Human and Peoples' Rights \(AfCHPR\)](#)
Judicial and treaty body decisions and communications interpreting the rights listed in the
aforementioned treaties and declarations
National constitutions
National laws
National judicial decisions

Note that where national laws fall short of international standards, companies are expected to respect the internationally-recognised rights.

Right to self-determination

The collective right to self-determination is a right of all peoples, but it is also a foundational right for indigenous peoples. Component rights include the following:

- **Right to autonomy or self-governance.** This is the right of indigenous peoples to govern their own affairs through their own institutions, systems, and laws. Respect for this right means consulting with indigenous peoples through their chosen representative institution/s and in accordance with their decision-making procedures.

Common violations of this right

A common scenario in which this right is violated is when the government has imposed, by law, policy, or practice, a form of governance on indigenous communities that is different from their traditional system of governance. This may result in indigenous communities having two parallel governing institutions. One example is that Maya communities in Toledo, Belize, are governed by both government-imposed village councils and traditional alcaldes. In countries where indigenous peoples have recognised land rights, this may additionally result in the fragmentation of indigenous territories across communities. For example, each of several Akawaio villages may be recognised as landowners in Guyana, but the government does not recognise the villages together as collective owners of Akawaio territory.

What this means for companies

Downstream and investor companies need to pay particular care in identifying the representative institutions of rightsholders. Where a supplier/investee reports having secured the consent of the relevant rightsholders, the downstream or investor company should independently verify with the community whether the consent process was undertaken with the appropriate representative/s. It is important to check, for example, whether persons held out as traditional leaders were freely chosen by the community or were instead leaders appointed by the government.

- **Right to effective participation in decision-making.** This includes the right to consultation and the right of indigenous peoples to give or withhold their FPIC. Respect for this right helps to safeguard the other rights of indigenous peoples (and other non-indigenous peoples and communities), and indeed, a common formulation of a rights violation is that of a decision to deprive an indigenous people of a right without their effective participation of the people in making that decision. This right to effective participation is only respected when companies also respect the right to autonomy and engage with the community's/ies' freely chosen representatives.

Common violations of this right

As a 'gateway' right, this right is frequently violated by states and companies every time they make a decision about business operations on or affecting indigenous peoples' lands without the effective participation of rightsholders.

What this means for companies

Downstream and investor companies must make rightsholders' effective participation in decision-making central to their due diligence work and ensure that it is respected by their direct and indirect suppliers/investees. *This is the case even if there are structural barriers limiting or preventing that participation that are not caused by companies.* For example, even if a government failed to obtain rightsholder consent to grant a concession, the producer company must nonetheless seek consent to operate in that concession.

- **Right to define and pursue their own development priorities.** Indigenous communities' development priorities may not be what companies and states are accustomed to thinking of as "development". They may include, for example, integration of modern technology with traditional land management practices; developing curricula to teach indigenous languages and practices in schools; empowering community women's groups to start small businesses making and selling crafts; or forestry management that involves the re-planting of native species. Self-determined development may exclude certain types of activities and operations, like large-scale monocultures or commercial mining, because of incompatibility with customary law or for other cultural reasons.

Common violations of this right

Three common scenarios in which this right can be infringed upon are: 1) when impact assessment teams simplistically assume that infrastructural developments (e.g., road building) will have positive impacts for an indigenous community; 2) when companies make assumptions about the types of outcomes that are acceptable local "benefits" for a commercial operation; and 3) when companies assume that development that offers better financial returns for the community is automatically a positive impact.

What this means for companies

Downstream and investor companies should verify whether any agreements their suppliers/investees purportedly have with affected indigenous peoples adequately respect this right. Some potential red flags may be agreements in which the only consideration communities receive for granting companies a right to operate on their lands is contributions to local schools, funding for 'community projects', or small cash payments. The Annex to the [Nagoya Protocol](#) offers some examples of different types of consideration that producer companies could discuss with indigenous communities, but companies should ultimately be guided by the priorities expressed by the affected communities themselves.

Right to property

Indigenous peoples have the right to own, control, use, manage and develop the lands, territories, and resources that they have traditionally owned or otherwise used and occupied. Indigenous peoples hold this right on a collective basis,¹⁴ and it exists whether or not the state within which the indigenous people/s reside has legally recognised said property, for example, through a land title. Non-indigenous communities that have collective customary tenure systems have similar property rights protected via mechanisms in several of the aforementioned treaties (*see Box 4*). Specific component rights include:

- **Right not to be forcibly or involuntarily relocated or resettled.** The right to own their traditional lands inherently means that indigenous peoples should not be forcibly evicted, involuntarily relocated, or otherwise physically or economically displaced from their lands.

Common violations of this right

Common scenarios companies may face are that indigenous peoples have already been involuntarily relocated either by the government or by prior commercial operations on their lands. The relocation may have occurred either prior to the issuance of concessions or as a result of commodity production operations or associated infrastructural or facilities building. Physical and/or economic displacement may have been either direct and deliberate, or as an indirect consequence of destruction of important community lands (including forests) or other livelihood and cultural resources.

What this means for companies

Downstream and investor companies should be prepared to investigate violations that may have commenced in the past in order to identify affected rightsholders in the first instance. They would then need to develop appropriate plans to provide remedy if possible, or to take action to enable remedy, and prevent continuing violation.

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- **Right to withhold consent from projects affecting their lands and resources.** The right to withhold consent is inherent to the rights of ownership and control of property and to self-determination (see above). FPIC is required prior to the granting of a concession by the government as well as prior to the commencement of operations by a company. A company's responsibility to seek FPIC exists independently of the state's, and companies must respect this right even where the state has already violated it by granting the concession without consent.

Common violations of this right

Two common scenarios in which this right is violated are: 1) when companies proceed with operations on indigenous peoples' lands without FPIC; and 2) when companies have a signed agreement with a rightsholders community, but it was not based on informed consent and/or not agreed by the community's own chosen representatives.

What this means for companies

Downstream and investor companies should consider independently verifying with affected indigenous peoples whether FPIC had been granted (particularly in cases where are indications that there may have been a flawed FPIC process). If it appears that FPIC has been granted, they should confirm whether the consent given was founded on a good faith *free, prior, and informed* process and agreement. There should at a minimum have been a prior impact assessment, discussions and negotiations, and signing of an agreement with the community's/ies' freely chosen representative/s that covers consent, consideration, impacts management, and monitoring of impacts and compliance with the agreement.



This Guide uses the term “consideration” to describe what is commonly termed as “compensation and benefit-sharing”. This is to reflect the fact that indigenous peoples or communities are owed compensation and benefits *as of right*. Companies often mistakenly view these as *ex gratia* schemes, but in the same way that an individual private landlord is entitled as of right to rent for leasing out land she owns, indigenous communities are entitled as of right to negotiated and agreed consideration for granting producer companies a right to use their traditional lands. The failure to negotiate and agree upon consideration vitiates consent. In addition, it is important to remember that consideration sought by indigenous peoples may not be solely monetary.

Right to culture

The aspects of the right to culture that are mostly likely to be affected by commercial operations on indigenous peoples’ lands include the rights to cultural practices and heritage. Cultural practices may include traditional livelihoods activities, such as hunting, fishing, farming, or gathering practices, or religious and spiritual practices. They also include processes of decision-making and means of communication. Cultural heritage may include humanmade and natural tangible objects or sites, such as artefacts, monuments, mountains, pools, or rivers, that have cultural, religious, or spiritual importance. It may also include intangible cultural expressions, such as language, music, stories, and prayers, or traditional knowledge, such as healing practices.

Common violations of this right

Two common violations of indigenous peoples’ cultural rights are: 1) when companies fail to engage in culturally appropriate means of communication and consultation; and 2) destruction of important cultural sites by commercial operations.

What this means for companies

Downstream and investor companies should verify whether their suppliers/investees agreed on a consultation and engagement protocol with the affected indigenous community/s to ensure that they are respecting the community’s/ies’ cultural practices in the consultation process. They should also verify whether the producer company conducted an impact assessment that assessed the impact of the commercial operation on the community’s/ies’ cultural practices and tangible and intangible cultural heritage.

Rights to life, security, and physical and mental integrity

These are both individual rights of all persons, as well as collective rights of indigenous peoples to live in freedom and peace as distinct peoples. This set of rights is often formulated in the negative, as rights not to experience harassment, threats, torture, or unlawful killing. These rights are closely interconnected with the rights to equal protection of the law and access to justice. For indigenous peoples in particular, the remoteness of their communities and their marginalisation by dominant sectors of society can both embolden perpetrators of harassment and violence as well as lead to difficulties in investigating and prosecuting such abuses.

Common violations of this right

These rights are commonly violated when actors directly or indirectly supporting a company's operations intimidate, threaten, harass, extort, torture, or kill indigenous community members and rights defenders (sometimes grouped into the broader category of "human rights defenders" or "human, environmental, and land rights defenders"). For indigenous peoples, the target of such incidents is often not confined to particular individuals but rather entire communities. Such incidents may occur to silence opposition to the project; to repress public demonstration and peaceful protest by communities; to prevent public allegations of rights violations; to intimidate communities into ceasing or withdrawing formal legal actions; to force communities to sign manufactured FPIC agreements; or to force communities to relocate and clear the land for company operations. Note that where there is intimidation or other coercion, any consent obtained from the affected communities is not freely given and is thus not FPIC. *The source of such conditions is irrelevant; even if the producer company played no role in causing intimidation or coercion of the affected indigenous communities or community members, the company cannot proceed with operations without FPIC.* The producer company has a responsibility to consider in advance the likelihood that, in the context as a whole, its engagement may give rise to these kinds of consequences, and to take steps to prevent or mitigate them as necessary.

What this means for companies

Downstream and investor companies should analyse and be aware of the risks to indigenous and human rights defenders in different contexts and undertake additional due diligence and apply heightened safeguards and precautions where necessary. Where they identify risks to indigenous rights defenders, they should implement safeguarding measures to ensure indigenous communities and rights defenders are not subject to harm or threats of harm; ensure that any plans to address such abuses do not give rise to reprisals or additional rights violations; and initiate or cooperate in investigations and provisions of remedy for past harms.

Rights to health, food, water, housing, and a healthy environment

These are individual rights of all persons, and they also have collective aspects that are specific to indigenous peoples. All persons have the right to the highest attainable standard of physical and mental health; to adequate and accessible food, water, and housing; and to a safe, healthy, and sustainable environment. In the context of indigenous peoples, these rights include the right to maintain traditional health practices; have access to culturally appropriate food, water, and housing; to be actively involved in developing social programmes affecting them; and to conserve and protect the productive capacity of their lands and territories.

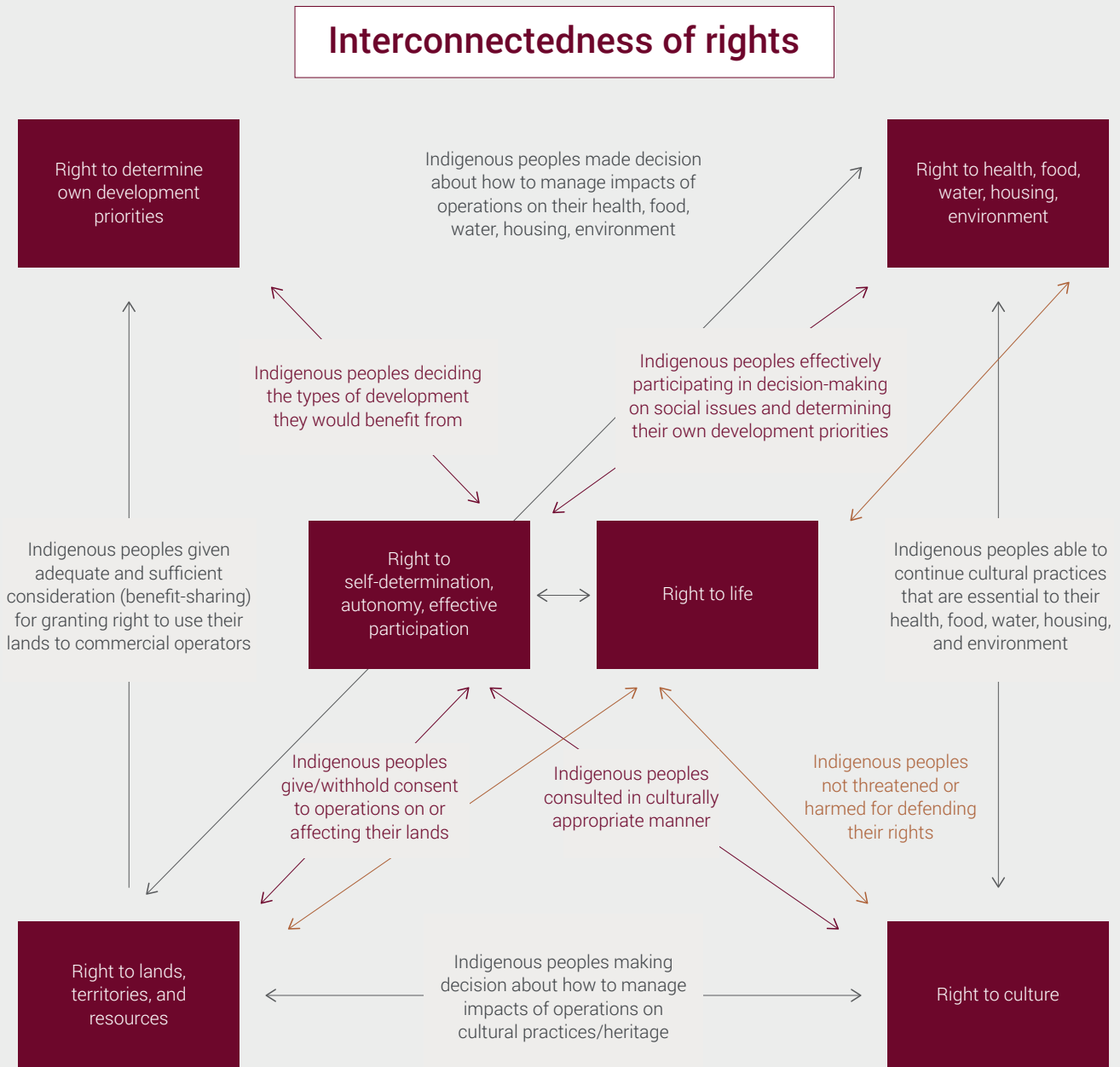
Common violations of this right

Because of the close collective relationship that indigenous peoples have with their lands and resources, these rights are often violated when commercial operations disrupt this relationship through harmful impacts on indigenous peoples' lands. One example of this is that indigenous peoples, particularly in communities that have limited access to formal healthcare, may depend upon traditional medicines gathered from their lands to maintain their health. Communities may also rely upon particular rivers or creeks as sources of water for drinking, cooking, and washing. Indigenous communities may also have traditions of farming, hunting, fishing, or gathering specific foods in their lands. Damage by commercial operations could cause differing negative impacts, such as a loss of particular types of plants used for medicine or food; a loss of habitat for animals valued as a source of food or for other cultural reasons; or pollution of water sources.

What this means for companies

Downstream and investor companies should review whether the producer company conducted an impact assessment that assessed the impact of the commercial operation on the community's/ies' rights to health, food, water, housing, and a healthy environment.

Figure 1. Interconnectedness of rights



Core principles to respect throughout HRDD process

To ensure that the rights of indigenous peoples are respected, companies should adhere to the following principles throughout their HRDD process:

Table 1. Core principles for effective HRDD process

<p>Human rights-based approach</p>	<p>HRDD cannot effectively identify and address actual and potential rights violations unless the process of HRDD itself is rights-based. For indigenous peoples, this means respecting their rights as recognised in international human rights law. <i>It is not sufficient to take a national law-based approach, as national laws often do not meet minimum international human rights standards.</i> Adopting a rights-based approach in practice may include, for example, respecting the decision of rightsholders that the only acceptable remedy for an unlawful dispossession of lands is the restitution of their lands and termination of operations.</p>
<p>Effective participation of indigenous peoples</p>	<p>The effective participation of indigenous peoples as equal partners in decision-making that affects them is a core component of their right to self-determination. The nested processes of consultation and FPIC are embedded within this right. Respecting this right requires addressing power imbalances that in practice deny indigenous peoples the ability to exercise equal agency in decision-making. One example is that companies should ensure that indigenous communities have access to independent legal advice in negotiating any agreements about commercial operations on their lands.</p>
<p>Appropriate and responsive remedy</p>	<p>The provision of remedy is a fundamental right. Appropriate and responsive remedies must be agreed upon with affected rightsholders. These may include restitution of lands, remediation of lands, monetary compensation, apology, and guarantees of non-repetition. Companies should ensure that the departments or personnel involved in HRDD have the authority to provide appropriate remedies (or, where appropriate remedy requires state action, to take the necessary actions that would enable remedy) to address any rights violations they identify.</p>
<p>Repeated and continual improvement</p>	<p>HRDD is a process that is self-evaluative and <i>dynamic</i>. It requires thinking through how the business's structure, value chains, and operations may need to change in the medium and long term to effectively address systemic or systematic drivers of harmful human rights impacts that are identified by due diligence, as well as to address gaps in due diligence systems that may allow abuses to go unnoticed. Companies should ensure that executives at the highest levels of governance work in tandem with their human rights teams and have the authority and responsibility for making such changes as necessary to meet their human rights commitments.</p>
<p>Transparency and information-sharing</p>	<p>Transparency and the sharing of information with other companies and rightsholders is key to effective HRDD. This includes information about the company's value chains, human rights policies, implementation plans, HRDD actions, and the effectiveness of such actions. Information should be accessible and in culturally appropriate languages and formats.</p>

The human rights due diligence process

Human rights due diligence for downstream and investor companies involves identifying, addressing, tracking, and reporting on the human rights impacts of both the company's own operations as well as those of its business partners throughout its value chains. It is a dynamic process that requires companies to be adaptive and to improve their due diligence methods, coverage, and response, enabling them to achieve continually improved human rights outcomes over time.

Even if downstream and investor companies' own operations do not involve direct impacts on indigenous peoples, their sourcing and investment practices influence their immediate and indirect suppliers/investees whose operations do have direct impacts on indigenous peoples. Downstream and investor company HRDD thus involves and necessitates due diligence over their direct and indirect suppliers/investees. This is in addition to the due diligence they are expected to perform in relation to their own operations. This includes reviewing reports from suppliers/investees to help identify and track impacts; independent verification of supplier/investee reports; and using their leverage to push human rights commitments and best practices up the value chain.

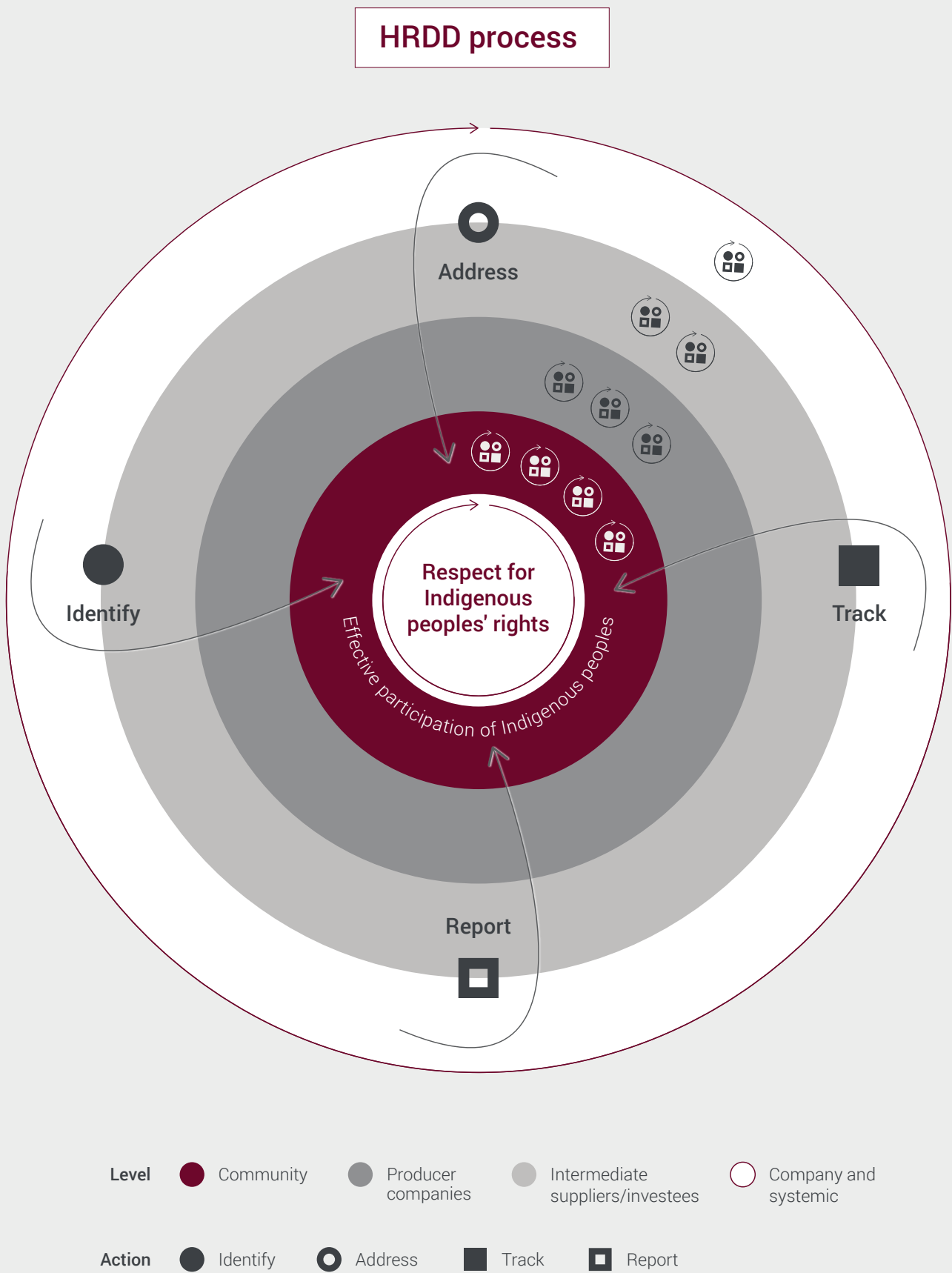


Leverage will be discussed further in the section on how to Address impacts. Some additional resources on how to exercise leverage to influence business partners to respect human rights include: the UNWG Companion Note II on Human Rights Due Diligence; the OHCHR Interpretative Guide on the Corporate Responsibility to Respect Human Rights; the OECD Due Diligence Guidance for Responsible Business Conduct; and the Shift Guide on Using Leverage in Business Relationships to Reduce Human Rights Risk.

The next sections of this Guide provide more detail on each stage of the HRDD process as relevant for indigenous peoples' collective land and associated rights:

- Dynamic due diligence: This section explains the expectations on businesses to continually improve human rights outcomes by improving their HRDD practices and offers some examples of short-term and longer-term solutions businesses should be considering in this regard.
- Identify impacts: This section provides an overview of the component steps required for a downstream or investor company to effectively identify its impacts on indigenous peoples' rights and provides some tools to assist companies in scoping and evaluating its impacts.
- Address impacts: This section explains the various ways in which companies are expected to address their human rights impacts, namely, preventing, mitigating, and remedying impacts. It discusses how companies should address specific identified violations as well as how companies need to consider and address the systemic drivers of impacts by their business. It includes additional information about addressing inherited rights violations as well as harms to indigenous rights defenders.
- Track impacts: This section provides an overview of how companies should be tracking their impacts and the effectiveness of actions they have taken to address their impacts.
- Report impacts: This section provides some pointers for good reporting practice in the context of HRDD on indigenous peoples' rights.

Figure 2. HRDD process



Dynamic due diligence

Summary

- Dynamic due diligence refers to the process of improving human rights outcomes by progressively improving HRDD to (a) comprehensively review the business's human rights impacts and associated responses and (b) inform broader changes to business operations, strategies or models in the longer term to promote improved human rights outcomes.
- In the short term, the length and complexity of value chains may mean that companies prioritise HRDD actions.
- In the longer term, failure to do comprehensive HRDD or to take effective measures to address human rights violations is a failure to conduct adequate due diligence and respect human rights and could change the company's legal responsibility for human rights violations.

Human rights due diligence is a dynamic process that should evolve to incorporate lessons learned and knowledge gained in order to take better and more effective steps to address human rights impacts linked to business operations and value chains. This means that in the medium and long term, businesses may need to make broader changes to their operations and business model, practices, strategies, and policies in order to ensure respect for human rights and to promote improved human rights outcomes.

The concept of dynamic due diligence reflects the fact that companies' responsibilities to respect human rights – and their potential liability for failure to do so – are not static. In the longer term, higher standards are expected both in respect of the scope and extent of HRDD a company conducts (coverage) and the nature of the steps it takes to address human rights impacts that are identified (response).

The *coverage* element of dynamic due diligence refers to the progressive improvement of the scale and scope of a company's HRDD. The UN Guiding Principles recognise that when starting out and faced with particularly complex or long value chains, companies may not be able to carry out comprehensive HRDD immediately across all value chains. In the short term, then, companies may prioritise areas for HRDD action based on the seriousness of actual and potential human rights violations, the likelihood of adverse impacts, the company's leverage over relevant actors, or other relevant factors.

However, companies cannot use the size and complexity of their value chains as a permanent excuse to avoid undertaking comprehensive HRDD. Prioritisation is a step to progressive implementation of a comprehensive due diligence system. In the longer term, even companies with long and complex value chains must conduct full HRDD across *all* their value chains. A failure to establish comprehensive HRDD processes within a reasonable timetable would mean the company has not met its responsibilities. This could potentially make the company liable for negligence under emerging HRDD laws or in some circumstances amount to an omission that results in the company being liable for contributing to human rights violations.

The *response* element of dynamic due diligence refers to the adoption of more effective, far-reaching, and/or systemic steps where required to address human rights violations that continue to be identified in its value chains and that are not being adequately addressed by measures taken to date. It may be that a company has little leverage over relevant actors and limited options for

significantly influencing an improved human rights outcome in the short term. This may even mean that the company prioritises other areas where it has more leverage to take effective action to address impacts.

However, remembering that the main purpose of HRDD is the prevention of adverse impacts on people, in the longer term, companies are expected to continually improve their response to human rights impacts *until they achieve respect for human rights* – that is, until there is a satisfactory human rights outcome. This means that where a company is consistently identifying the same types of adverse impacts in its value chains, it cannot repeatedly rely on the same measures to address these, when these are proving ineffective to prevent rights violations.

Where a company continues to engage, either directly or indirectly, with the business partners but takes no or insufficient action to address violations linked to those relationships, the company would be failing its responsibility to respect human rights. This may have implications for a company's legal responsibility for those rights violations. A company that knows (or should know) that its activities are directly linked to human rights violations, but that fails to take effective action within a reasonable time, may be considered to be contributing, by omission, to those violations. Similarly, where a company has been contributing to violations, failure to take adequate measures within a reasonable time may in some circumstances mean that the company could be considered to be causing, by omission, those violations.

Taking a dynamic approach to due diligence means that the company needs to keep an open mind to making changes to specific relationships with business partners or to doing a wider review of its business model, practices, strategies, or policies. Some of these wider systemic considerations are discussed further in the [Address Impacts](#) section of this Guide. The following table provides some examples of what it might look like to take a dynamic approach to due diligence:

In the longer term, higher standards are expected both in respect of the scope and extent of HRDD a company conducts (coverage) and the nature of the steps it takes to address human rights impacts that are identified (response).

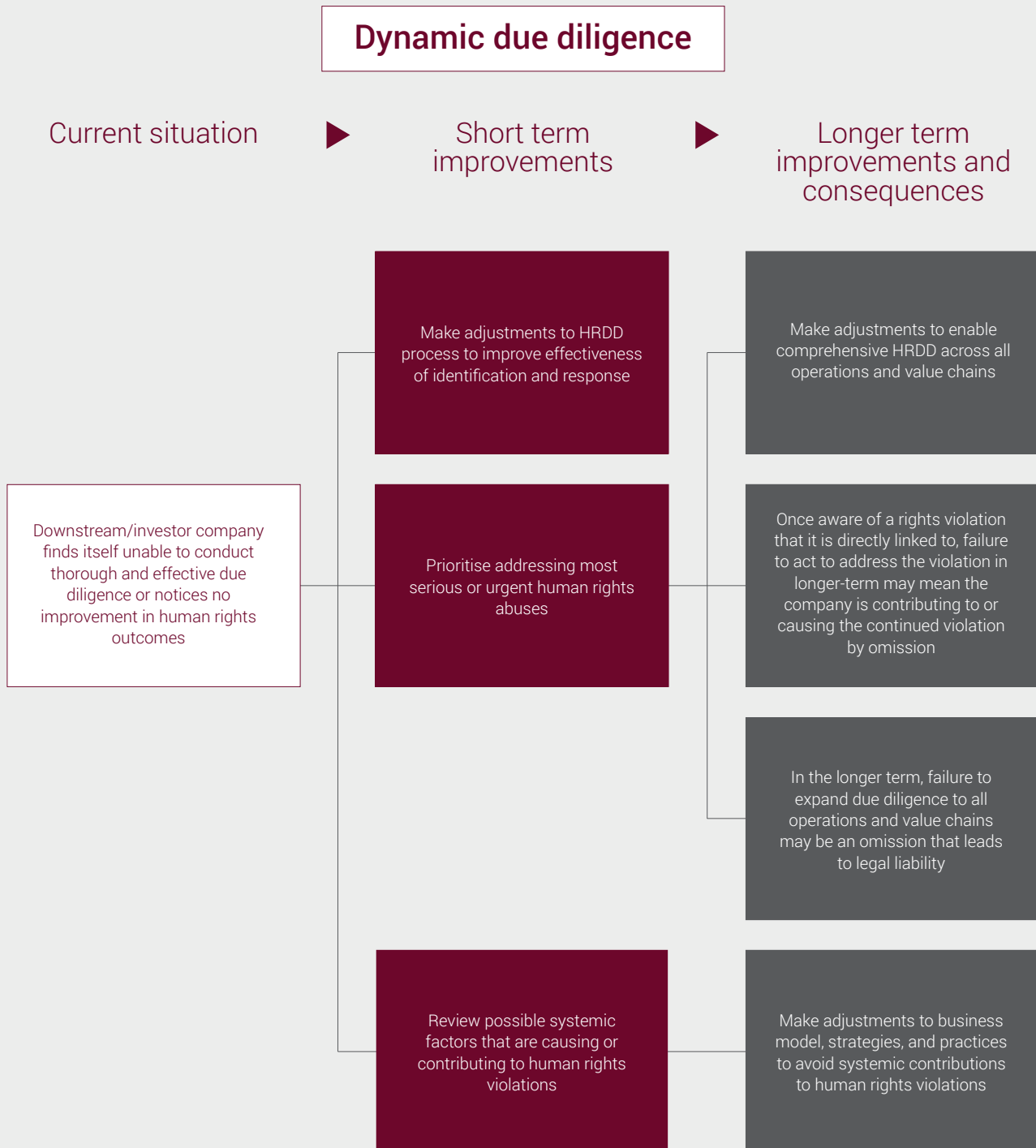
Table 2. Examples of dynamic approach to due diligence

Problem/s identified in past or current HRDD processes	Short term solution	Some longer term solutions to consider
<p>Company finds out through independent sources that an indigenous community has a land conflict with one of its direct or indirect suppliers/investees, when it did not previously know that community was affected by its value chains</p>	<ul style="list-style-type: none"> • Add information about the community and the alleged impact to its HRDD databases • Request supplier/investee to investigate (or where appropriate, commission investigation directly) • Request supplier/investee to commence consultations with the community with a view to reaching a negotiated solution based on their free, prior and informed consent 	<ul style="list-style-type: none"> • Identify gaps in the identification process that led to the oversight of the affected community and improve the identification process accordingly • Consider whether the same issue may affect other value chains in the same country or globally and take steps to rectify this problem where necessary
<p>Company is unable to map all its value chains</p>	<ul style="list-style-type: none"> • Map its value chains to the extent possible • Work with suppliers/investees to help them undertake proper value chain mapping • Develop a time-bound plan to map all its value chains 	<ul style="list-style-type: none"> • Collaborate with other companies to encourage greater value chain transparency • Support greater corporate transparency in consumer and producer countries, including by supporting value chain transparency legislation • Reduce and simplify value chains where this can be done without negative human rights consequences
<p>Company is unable to respond effectively to all complaints filed with its grievance mechanism</p>	<ul style="list-style-type: none"> • Hire more staff and allocate additional resources to grievance mechanism • Prioritise addressing the complaints that present more urgent or serious human rights abuses and that the company has more leverage to address • Where the company cannot address a complaint, ask complainants if the company can assist by forwarding the complaint to other relevant corporate actors 	<ul style="list-style-type: none"> • Follow up on complaints the company had previously not addressed, to avoid contributing to the continuation or exacerbation of the alleged rights infringements • Prioritise funding needed to conduct effective HRDD in the company's operational budgets • Reduce and simplify value chains where this can be done without negative human rights consequences
<p>Company feels that its value chains are too long and/or too complex to be able to conduct a comprehensive identification of rights impacts across all of it</p>	<ul style="list-style-type: none"> • Hire more staff and allocate additional resources to the human rights team • Prioritise detailed impacts evaluation in those geographies and sectors that present more urgent or serious human rights abuses and where the company has more leverage • Collaborate with other actors as relevant on impacts identification, e.g., through jurisdictional initiatives 	<ul style="list-style-type: none"> • Reduce and simplify value chains where this can be done without negative human rights consequences • Avoid short-term contracting and prioritise long-term relationships with suppliers/investees • Develop more direct supply/investment arrangements with smaller-scale, community-led production initiatives

For resources on jurisdictional initiatives, companies should consult the [Jurisdictional Approaches Resources Hub](#) and this [paper on Upholding Human Rights in Jurisdictional Approaches](#).

<p>Despite attempts to improve engagement with rightsholders, there are complaints that the company or its (direct or indirect) suppliers/ investees are failing to respect indigenous peoples' participation rights</p>	<ul style="list-style-type: none"> • Hire staff, or consult external experts, with expertise in indigenous peoples' rights • Conduct trainings for staff and suppliers/investees on indigenous peoples' participation rights • Consult rightsholders and seek to establish agreements on their participation in HRDD processes 	<ul style="list-style-type: none"> • Allocate positions on the company's advisory board for indigenous peoples' representatives • Establish independent accountability bodies, with representation from indigenous peoples and experts on indigenous peoples' rights, to guide implementation of the company's indigenous peoples' rights policies • Investigate any systemic factors that may be incentivising producer companies to ignore indigenous peoples' participation rights and take action to address those factors
<p>Company is far down the value chain (e.g., retail companies) and does not feel that it has the leverage or ability to address impacts on indigenous peoples' rights</p>	<ul style="list-style-type: none"> • Prioritise engagement with indigenous peoples' rights issues in particular geographies or sectors that have more urgent or serious rights impacts and in which the company has more leverage • Seek to increase leverage by engaging with suppliers/ investees and offering technical, financial, or other support in addressing human rights impacts • Collaborate with intermediate suppliers/investees to exercise joint leverage to address adverse impacts in their value chains, e.g., through collaborative trainings or oversight of FPIC processes • Consider, in consultation with rightsholders, suspending business relationships with suppliers/investees over which the company has no leverage and where there are repeated significant adverse rights impacts 	<ul style="list-style-type: none"> • Develop longer-term collaborations with intermediate suppliers/investees and producer companies to address adverse rights impacts in their value chains • Collaborate with other downstream and investor companies and with intermediate suppliers/ investees to exercise collective leverage over producer companies to ensure respect for indigenous peoples' rights • Engage more directly with producers, or support producer-led marketing initiatives • Support certification schemes and jurisdictional initiatives to enhance their human rights certification and verification requirements and standards • Consider pricing and other systemic factors that may be affecting supplier/investee behaviour and/or that could increase leverage
<p>Company finds that a particular type of rights violation (e.g., unlawful dispossession of lands) is common across a given sector and/or geography (e.g., palm oil sector in country X)</p>	<ul style="list-style-type: none"> • Exercise leverage to influence suppliers/investees to provide remedy for the rights violation and to implement measures to prevent further violations • Conduct or commission further research as necessary, including through engagement with rightsholders and with producer companies, to understand the systemic drivers of the rights violation 	<ul style="list-style-type: none"> • Change the company's business model, strategies, and practices as necessary to address the systemic drivers of the rights violation (e.g., paying higher prices; committing to longer-term contracts and relationships with suppliers)

Figure 3. Dynamic due diligence



Identify impacts on collective land and associated rights

Summary

There are three core steps to impacts identification:

1. Establishing an assessment team (or teams) with the requisite expertise and resources.
2. Contextual scoping, or background research.
3. Carrying out impacts evaluation, which includes assessments of supplier/investee human rights policies and practices, review of community-level human rights impact assessments, and other engagement with relevant actors to better identify impacts and possible systemic factors and solutions.

Downstream and investor companies should avoid relying on self-reporting by suppliers/investees and certification schemes. To ensure accurate identification of impacts, they should:

- Triangulate research with reports and opinions or decisions from indigenous peoples' communities, associations, NGOs, judicial bodies, news media, and human rights treaty bodies.
- Engage independent, third-party verification of information where necessary and appropriate.

Purpose of identifying impacts on collective land and associated rights

A downstream or investor company's HRDD should begin with the identification of the actual and potential rights impacts of a company's operations and value chains. In the context of the collective land and associated rights of indigenous peoples (and some non-indigenous peoples and communities), the "identification" component of HRDD, at its core, serves two key objectives:

1. Identifying the indigenous peoples whose collective land and associated rights may be affected by the company's operations and value chains.
2. Identifying and assessing the actual and potential human rights impacts felt by indigenous peoples in relation to their collective land and associated rights, so that the company can take action to prevent, mitigate, and remedy those rights violations.

How downstream and investor companies should identify rights impacts



Although described as comprised of three steps, as with HRDD more broadly, identification is a non-linear process. For example, as rightsholders are identified during the contextual scoping, or as additional actual and/or potential impacts are identified, additional members may need to be added to the assessment team so that there is relevant expertise to assess the impacts effectively.

Identification of adverse human rights impacts is a necessary precondition to effectively addressing those impacts. While downstream and investor companies may conduct their own identification processes, there are circumstances in which independent, third-party verification of information may be important or necessary.

The following subsections will provide guidance on:

- Criteria for establishing a team that can identify impacts on indigenous peoples' rights
- How to conduct contextual scoping to plan the impacts evaluation
- How to conduct impacts evaluation
- Independent verification and when to seek independent third-party verification

Establish assessment team

Downstream and investor companies should establish an assessment team (this may be the company's human rights team) to conduct the human rights impacts scoping and evaluation. For downstream and investor companies that have particularly long or complex value chains, it may be helpful to establish several assessment teams who are each tasked with identifying the human rights impacts associated with, for example, particular value chains, sectors, or geographies. As best practice, companies may also seek independent third-party verification of the results of their identification process.



Assessment teams may wish to refer to resources such as the Danish Institute for Human Rights' [HRIA Toolbox: Phase 1 and Scoping Practitioner Supplement](#) for broader guidance on the impacts identification process, and then use this Guide to ensure that the elements important for assessing impacts on indigenous peoples' rights are included.

In order to ensure effective identification of impacts on indigenous peoples' rights, some important factors to consider in forming the team include:

- *Relevant expertise:* The team should have, or have the resources to consult, necessary expertise on indigenous peoples' rights, preferably in the relevant geographic contexts. It can be helpful if team members are knowledgeable in human rights law; anthropology; sociology; GIS; and environmental and biological sciences. It can additionally be helpful if at least some team members have connections or established relationships with affected indigenous communities or with local organisations.
- *Integrity:* The company should ensure that the assessment team has independence within the corporate structure and is shielded from repercussions for identifying negative impacts from the company's operations or value chains. Where the team is conducting site visits, the team should be seen as unbiased and trusted by all parties.

- *Diversity*: The team should either include or have the resources to consult experts on gender relations and dynamics and experts from the geographies affected by the company's operations and value chains.
- *Communication*: Team members should either understand or have the resources to consult experts in the relevant cultural context/s. The team should have the resources to consult interpreters and translators who speak the relevant indigenous communities' preferred local languages where necessary.

Contextual scoping

The contextual scoping is background, primarily desk-based, research that serves to help the assessment team plan the human rights impacts evaluation. The assessment team should scope:

- *The business's operations and value chains* to identify where these may impact indigenous peoples' traditional lands. This includes, for example, researching the particular sectors or geographies that the business's value chains are linked to.
- *The indigenous rightsholders and relevant stakeholders* likely to be affected by or interested in the company's operations and value chains.
- *The indigenous rights context* to identify the status of enjoyment of rights, including collective rights, by indigenous peoples and analogous non-indigenous peoples or communities in the localities, countries, and regions to which the company's operations and value chains reach.
- *The business context* to understand the effectiveness of the HRDD processes of the company's suppliers/investees.
- *The general political, security, and socio-economic context in different sectors, products, or geographies* to identify other relevant factors that may impact the enjoyment of rights by indigenous communities. For example, in certain sectors and geographies, there have been regular and increasing numbers of attacks against human rights defenders, which likely undermines the integrity of any consultation and FPIC processes and also requires the implementation of measures during the HRDD process to protect human rights defenders.

In the short term, downstream or investor companies with particularly complex and opaque value chains may find it difficult to be able to even do full contextual scoping across all their value chains. Where this is the case, companies with limited resources may need to prioritise actions for those value chains or those parts of their value chains that require the most urgent attention (*see Box 5*). This may include, in the short term, prioritising the value chains or parts of value chains to fully map first. However, in the medium and long term, companies are expected to know their full value chains and to conduct full HRDD across all of their value chains.



In 2020-21, Indigenous peoples' territories in the Colombian Amazon continue to be impacted by the expansion of the cattle ranching frontier in Caquetá, Putumayo and Guaviare departments
Credit: Tom Griffiths / FPP

The following table recommends important information to collect during the scoping process. An expanded table in [Annex 2](#) offers possible sources of information for assessment teams for refer to.

Box 5. Prioritisation

Downstream and investor companies with particularly complex and opaque value chains may find it difficult when they initially do HRDD to identify and address the human rights impacts across all their value chains. This may mean that they have to, in the short term, prioritise where they focus their resources.



However, in the longer term, a company must be able to identify and address its human rights impacts across all its value chains. A company's failure to know its value chains, identify its impacts, and appropriately address those impacts in the long term may render the company liable for failure to conduct adequate due diligence and may change its liability for human rights violations.

There is no one way of prioritising that will work for all types of companies. However, because the goal of HRDD is to prevent adverse human rights impacts, companies should generally prioritise based on the severity and likelihood of human rights harms. For example, a company with little visibility into its value chains might prioritise fully mapping the value chains and understanding and addressing its impacts in those sectors and geographies where its contextual scoping indicates there are more serious human rights abuses.

In practice, human rights abuses are pervasive, so companies may also need to prioritise based on the amount of leverage they have. A few examples of this might be prioritising based on the geographies that the company sources the majority of its raw materials from; the types of commodities that the company depends upon the most; or the suppliers/investees that the company has larger contracts with.

Several factors weigh in favour of a high prioritisation of identifying and addressing impacts on indigenous peoples' rights. One is that a number of the common violations of indigenous peoples' rights are especially difficult to remedy and could become irremediable. Some violations of this type include forced eviction or involuntary resettlement, loss or destruction of lands, or violations of rights to cultural identity and cultural survival. Many of these violations are continuing and severe violations, and companies should prioritise taking action to cease the violations and to enable or assist in providing remedy. Companies should also prioritise preventing such violations where such impacts are more likely to occur but have not yet occurred.

A second is that indigenous peoples very often experience systemic discrimination and can have their rights violated by states. This can make it both more difficult to identify violations (e.g., where an indigenous community does not have recognised rights to their traditional lands) as well as to remedy those violations (e.g., where the state is unwilling to provide restitution of lands to a community). A third is that there have been increasing cases of violence against indigenous and other environmental or land rights defenders, who are amongst the most vulnerable human rights defender groups. These factors may mean that companies have to prioritise allocating sufficient resources to identify and address these impacts, and that such actions should include a focus on systemic drivers of violations.

Remember that making the decision to prioritise one type of impact, geographic region, or sector over others does not absolve the company of responsibility for impacts that are occurring or may occur in other areas.

Table 3. Information to collect for contextual scoping

<p>Business's value chains</p>	<p>Information to collect</p> <p><i>Value chain mapping:</i> Being able to identify a business's human rights impacts starts with knowing the global scale of the company's operations and business relationships. This means mapping out where the company's own operations are; who their direct and indirect suppliers/investees are; and where those suppliers/investees operate. The goal is to trace the company's value chains upstream to the point of local production, processing, and sourcing of raw materials.</p> <p>Where a company finds it is unable to, in the short term, fully map its value chain, other information gathered during contextual scoping (e.g., information about enjoyment of rights in different geographies) may assist in deciding the parts of its value chains to prioritise mapping out first.</p> <div style="display: flex; align-items: flex-start; margin-top: 10px;"> <div style="margin-right: 10px;">  </div> <div> <p>Some companies are taking steps in the right direction by publishing the results of their supply chain mapping. L'Oréal, for instance, which uses palm oil derivatives as ingredients, published a list of palm oil mills it potentially sources from. However, L'Oréal acknowledges that it has only been able to trace 27% of its palm oil derivative ingredients back to plantations, and it has not published information about the indirect suppliers and plantations it sources from. Downstream companies should conduct the research necessary to trace 100% of their materials to the source or consider changing their sourcing practices in a responsible manner to enable 100% traceability to production of the raw material.</p> </div> </div> <div style="margin-top: 10px;">  </div>
<p>Rightsholders and relevant stakeholders</p>	<p>Information to collect</p> <ul style="list-style-type: none"> • <i>Indigenous peoples in the countries that the company (directly or indirectly) sources from or invests in.</i> This includes indigenous peoples or communities who may not be directly affected by the company's value chains. • <i>Indigenous peoples affected by the company's value chains.</i> This information may not be possible to determine if the company cannot fully trace its value chains to the point of sourcing of raw materials. <p>If the company is unable to fully trace its value chains, it should seek to engage with communities who may be representative of those in its value chains to better understand the types of impacts that may exist in its value chains as well as systemic drivers of rights violations.</p> <ul style="list-style-type: none"> • <i>Other relevant stakeholders.</i> These may include indigenous peoples' associations, indigenous rights CSOs or NGOs, or government ministries or commissions. <p>In addition to being sources of information about specific rights violations, indigenous peoples and local organisations may have information about systemic drivers of rights violations in the company's value chains. They may additionally have knowledge about a company's suppliers/investees that can assist the company in fully mapping its value chains.</p>
<p>Indigenous peoples' rights context</p>	<p>Information to collect</p> <ul style="list-style-type: none"> • <i>Ratification and endorsement of international treaties and declarations.</i> This includes ratification of ILO Convention No. 169 and endorsement of the UNDRIP, as well as of the core UN human rights treaties and other human rights instruments. • <i>National laws and policies relevant to indigenous peoples' rights, and domestic implementation in law and practice of human rights treaty obligations as related to those rights.</i> Companies should conduct an applicable law assessment (see Box 6) so they can identify the international and national laws and policies that apply to their operations or those of other actors in their value chains. This includes the relevant state's implementation of their international human rights obligations, and the enjoyment of rights by indigenous peoples in practice. • <i>Reports of violations of indigenous peoples' rights in the company's value chains.</i> Where such information is obtained through, for example, press releases from NGOs or CSOs, it may additionally assist the company in mapping its value chain and in triangulating information obtained from its suppliers/investees.

<p>Business context</p>	<p>Information to collect</p> <ul style="list-style-type: none"> • <i>Supplier/investee human rights due diligence practices.</i> This includes policies, commitments, action plans, monitoring, and reporting mechanisms that the supplier/investees may have in place. • <i>Certification standards or industry practices that suppliers/investees have adopted.</i> This includes whether suppliers/investees have been certified by the relevant certification or industry body. Companies should further obtain information about complaints lodged with the relevant certification or industry body against their suppliers/investees and investigations conducted into those complaints.
<p>General political, security, and socio-economic context</p>	<p>Information to collect</p> <ul style="list-style-type: none"> • <i>The openness of civic space in the jurisdictions the company (directly or indirectly) sources from or invests in.</i> This refers to whether, in law and in practice, indigenous communities and CSOs are able to voice their opposition to commercial operations without fear of harassment, intimidation, or violence. • <i>Systemic drivers of rights violations in particular sectors or geographies.</i> This can include a variety of factors. For example, if a country's economy depends heavily upon income from a particular commodity, that may mean there is greater pressure to enable the advancement of commercial operations, at a cost to the rights of indigenous peoples. Laws and state practices may also indicate that a government prioritises facilitating commercial operations over and above its responsibilities to protect its citizens from corporate human rights abuses.

Box 6. What are applicable law assessments?

An applicable law assessment is, as its name suggests, an assessment of the laws relevant to the company's business. For downstream and investor companies, this includes the laws that are applicable in the jurisdictions in which it operates and in which its (direct and indirect) suppliers/investees operate. As relevant in the context of indigenous peoples' rights, applicable laws include human rights treaty obligations; protections for indigenous peoples' rights in the national constitution; any national laws specifically protecting indigenous rights; and laws related to the granting of the concessions and permits needed for the company's or its suppliers'/investees' business operations.

In particular, it is important to gather information about domestic implementation of human rights obligations. This information is important to gather because a country's domestic laws and treatment of indigenous peoples (who may not be recognised as such in national law) may not meet the international human rights law standards that the country has committed to. Alternatively, a country may have laws in place that protect indigenous peoples' rights but not actually enforce those laws in practice. It is especially important here to seek information from indigenous peoples themselves as well as NGOs or CSOs to gain a full understanding of the rights situation in the country.

Beyond helping companies understand their legal obligations, the applicable law assessment – especially the comparative analysis of national laws against international human rights standards – can help companies identify geographies in which human rights are not effectively protected and thus adverse impacts are more likely to occur.

More guidance on how to conduct such an assessment can be found in the [AFI Operational Guidance on Voluntary Commitments and Applicable Law](#).



Independence of Corporate Responsibility to Respect Human Rights

It is important keep in mind that a company's responsibility to respect human rights exists independently of any other actor's. This means that if national, subregional, or local laws do not adhere to international human rights law standards, it is not enough for the company or its suppliers/investees merely to comply with those local laws. The company must also understand the international human rights laws and standards that are applicable in the country the company is sourcing from/investing in and take steps to ensure it and its suppliers/investees comply with those laws and standards.

In situations where strict compliance with a national, regional, or local law would entail a violation of human rights, the company should explain to the relevant authority that it must respect human rights, and that it may have to consider ceasing engagement or operations if it cannot. This should be something that downstream and investor companies also expect of their suppliers/investees to do.



New Omnibus Law in Indonesia

Civil society organisations submitted and published a [complaint to the CERD Committee](#) in November 2020 detailing concerns about regressive provisions in the new Omnibus Law in Indonesia that scale back already weak protections for indigenous peoples' rights in the country. Companies with operations in or value chains extending to Indonesia should review the new law carefully to understand what it might mean for the enjoyment of rights by indigenous peoples in the country. For example, the law enables the compulsory acquisition of indigenous peoples' lands without FPIC and without fair and just compensation. The law also loosens requirements to conduct environmental impact assessments, only requiring them for projects with "significant impacts" on the environment or society and removing the independent oversight body. The changes promulgated in this new law make violations of indigenous peoples' rights even more likely to occur in Indonesia. Companies that source from or invest in value chains originating in Indonesia will have to recognise that compliance with national laws by their suppliers/investees is insufficient to demonstrate respect for indigenous peoples' rights and may indeed be a red flag that rights violations are occurring.



Omnibus Law protests in Padang, Indonesia
Credit: Wikimedia Commons, Creative Commons

Impacts evaluation

The impacts evaluation is the process the company undertakes to assess the specific impacts and systemic drivers of violations in its value chains. It involves a more detailed gathering and review of information than the contextual scoping would have provided. For downstream and investor companies, this will require reviewing information to gain an understanding of harms occurring at the indigenous community level. Specifically, the following subsections will provide guidance on:

- Assessing the human rights policies and practices of suppliers/investees
- How to review community- or site-level impact assessments
- How to identify whether there are violations of the right to FPIC
- Evaluating systemic drivers of human rights violations in the company's business



The term “human rights impact assessment” (HRIA) has been used to describe community- or site-level impact assessments, as well as company- or country-level impact assessments. To avoid confusion, this Guide uses the term solely to refer to community- or site-level human rights impact assessments. A community- or site-level HRIA refers to the identification of actual and potential human rights impacts of a commercial operation (that is taking place on an indigenous people’s traditional lands) and the assessment of possible prevention or mitigation and acceptable remedy measures.

Assessing supplier/investee collective land and associated rights policies and practices

In order to understand the specific impacts of their value chains, downstream and investor companies must assess their suppliers’/investees’ human rights policies and practices. This evaluation of suppliers/investees should be conducted when a company is doing HRDD for the first time, prior to the establishment of any new business relationship, and otherwise regularly monitored during the course of a business relationship.

When done prior to entering into a new business relationship, this information serves to inform the company whether it should be entering into that relationship in the first place. For example, where there are identified negative human rights outcomes linked to a particular actor, the company should likely not enter into a business relationship with that actor. This is especially true where the business relationship being contemplated is of a temporary or short-term nature. On the other hand, information about existing suppliers/investees helps the downstream or investor company know what adverse impacts it needs to address.

When assessing the human rights policies and practices of suppliers/investees, downstream and investor companies and their assessment teams must: (1) request suppliers/investees to provide relevant information and (2) triangulate and review third-party sources of information about the supplier’s/investee’s human rights practices and impacts.



Purpose of community-level HRIA

A proper HRIA at the community- or site-level is not only necessary for a producer company's own HRDD, it serves to provide affected indigenous peoples and communities with full information regarding the proposed operations, thus enabling their informed and effective participation in decision-making on the proposed operations. Communities should also have access to full information about the human rights performance of the producer company that would be conducting operations or activities on its lands. Participatory impact assessments are considered an essential element of obtaining FPIC and part of the gateway to respecting indigenous peoples' rights.¹⁵

Self-reported information: Downstream and investor companies may find it difficult to require information or reports from indirect suppliers/investees. They should therefore require their direct suppliers/investees to themselves require information from their suppliers/investees (particularly HRIAs or other impact assessments and evidence of FPIC processes), and to share that with the downstream or investor company. Information that downstream and investor companies should ask suppliers/investees to provide include the following:

- The supplier's/investee's value chain maps, on a regularly updated basis where these change regularly
- Community- or site-level HRIAs conducted by the supplier/investee
- Other impact assessments (ESIAs) conducted by the supplier/investee
- Reports on the supplier's/investee's human rights impacts and on their HRDD practices
- Where the supplier/investee is a producer company, evidence of legitimate FPIC processes and agreement (or not) by affected indigenous peoples (or non-indigenous peoples or communities) to the operations
- Policies and commitments to respect the rights of indigenous peoples
- Action plans that define the specific actions that will be taken to prevent, mitigate, and remedy actual and potential violations of indigenous peoples' rights
- Evidence to indicate whether the above-mentioned policies and action plans have been implemented
- Whether the company has an established human rights team with the relevant expertise and resources to address the company's human rights impacts
- Whether the company has a grievance mechanism to receive, investigate and address complaints of violations of indigenous peoples' rights
- Whether indigenous peoples or communities have used the grievance mechanism and whether it has satisfactorily addressed rights violations
- If the company is certified, evidence of the certification and copies of any associated audits by and complaints to the certification body

Many of the above are elements of organisational human rights compliance that the downstream or investor company is itself expected to have in place and will be discussed further in the [Address](#) section of the Guide.



Human rights are interrelated and interdependent, meaning that any given rights violation is often accompanied by other rights violations. One particular situation to be alert for is where a community- or site-level HRIA has identified (or there are otherwise allegations of) harms to an indigenous community's culture, health, or livelihoods. Because a legitimate FPIC process would likely include agreement on appropriate prevention and mitigation measures, the existence of such harms may indicate an underlying failure to respect property and participation rights.

Triangulation imperative: Effective and credible HRDD requires the downstream or investor company not to rely exclusively or predominantly on self-reported information from suppliers/ investees. They must instead verify that information to determine whether in practice, their direct or indirect supplier/investee may be causing or contributing to indigenous peoples' rights violations. Some ways the downstream or investor company can verify information include:

- Review third-party sources of information (some of which may have already been obtained during the contextual scoping) about land or resource conflicts and human rights abuses by specific suppliers/investees, including:
 - Reports by indigenous communities or indigenous peoples' federations or associations;
 - Reports by local, national, and international CSOs and NGOs;
 - Decisions, opinions, or other communications by international, national, and local courts and treaty bodies; and/or
 - News and media reports.
- Conduct unannounced human rights audits of the supplier/investee by visiting their offices and/or operations sites and interviewing personnel in the human rights team.
- Conduct targeted field investigations by visiting affected indigenous communities that are within the area of influence of production and processing sites or otherwise affected by supplier/investee operations. These field investigations should involve individual and/or group interviews with community members, ensuring application of safety protocols to protect identities where requested and where there are known risks to human rights.
- Commissioning a community-level HRIA in certain situations. One example of where this might be necessary is where a producer company in the company's value chains has failed to conduct a community- or site-level HRIA and third-party information alleges or indicates potential severe human rights impacts. The community- or site-level HRIA in this scenario can help to properly identify the impacts and also assist the company in understanding what actions it can take to appropriately address the violations.



Companies may consider collaborating with other actors whose value chains impact the same indigenous communities to jointly finance identification activities, such as independent community- or site-level HRIAs. This may even include jointly financing community- or site-level HRIAs with the producer company. SMEs in particular may find such collaboration helpful if they have limited resources.



Illegal logging in Wampis territory, Peru¹⁶

The Wampis Nation's Autonomous Territorial Government in Peru in November 2020 issued a public condemnation of illegal logging that was causing destruction of their forests. The Wampis have their own monitoring programme which has been tracking this illegal resource extraction and reporting it to relevant authorities. They have found that the timber has often been transported directly into neighbouring Ecuador. Indigenous communities and local organisations often have information about producer companies that can be useful in helping to trace a company's value chain and to triangulate information provided by the supplier/investee themselves.



Sikuani territory impacted by oil palm plantations and illegal land acquisition in Mapiripán, Colombia
Credit: Inter-ecclesiastical Justice and Peace Commission (CIJP)

Key elements of a community-level HRIA in the context of collective land rights



One recognised set of guidelines for the conduct of environmental, cultural, and social impact assessments of projects proposed to take place (or already taking place) on indigenous peoples' lands is the [Akwé:Kon Guidelines](#).¹⁷ Another useful guide for conducting assessments, outlining best practice from the pre-assessment through the assessment and negotiating of agreements phase, is the [HCSA Social Requirements Guide](#) and its accompanying [Implementation Guide](#). This Guide supplements those guidelines by highlighting some best practices and some red flags to look out for in both the process by which the community-level impact assessment is conducted and the substance of impacts that should be assessed.

Downstream and investor companies will have to review community- or site-level HRIAs (or other impact assessments) conducted by their (direct or indirect) suppliers/investees. When reviewing one (or commissioning one itself), it is important to understand some of the best practices for the conduct of a community- or site-level HRIA. (Note that it is not necessarily common practice for producer companies to conduct community- or site-level HRIAs, but they are likely required by national law to conduct some form of ESIA. In such cases, downstream and investor companies should review the ESIA and ensure it is adhering to applicable human rights standards.) Assessment teams should look at both whether the *process* of conducting the impact assessment respected indigenous peoples' rights and whether the *substance* of the impact assessment comprehensively evaluates actual and potential impacts on indigenous peoples' rights.



HRIAs vs ESIAs

Environmental and social (and cultural and/or health) impact assessments (ESIA) are often required by national laws as preconditions to commencing operations, although the precise requirements may differ across jurisdictions. A community- or site-level HRIA may include some of the same information as an ESIA, because social, cultural, health, and environmental impacts are often also human rights impacts, and so it is possible that these assessments can be integrated. One important thing to note, however, is that HRIAs are measured against the normative framework of international human rights law as laid out in international treaties, declarations, and judicial and treaty body decisions and opinions.

For indigenous peoples in particular, this means that the assessment must consider their rights as set forth in international human rights instruments, as well as any other applicable law. For this reason, HRIAs require either that there be an applicable law assessment as a component part of the HRIA or as an assessment conducted prior to the HRIA. Properly assessing rights impacts necessitates the participation of indigenous peoples in the impact assessment process. This is not only because this is a right of indigenous peoples under international law, but because only the rightsholders themselves can effectively identify and assess the potential or actual impacts on their rights from proposed or ongoing operations, as well as advise on the best ways to prevent, mitigate, and remediate these impacts.

Companies may wish to refer to presentations by the Danish Institute of Human Rights for more considerations in the differences between ESIA and HRIA and integration of those assessments.



View from Phillipai Village, Akawaio Territory, Guyana. Much of Akawaio traditional territory remains without legal land title and most of the customary land under claim is adversely affected by mining concessions and mineral properties imposed without free, prior and informed consent
Credit: Lan Mei / FPP

Process considerations in conducting a community-level HRIA

Respect for indigenous peoples' right to effective participation begins with the design of the community- or site-level HRIA process itself. Some red flags to watch out for that may indicate a failure to respect indigenous peoples' participation rights include (see [Annex 3](#) for an elaboration of the corresponding best practices):

Figure 4. Red flags that may indicate improper HRIA process

	Time spent on HRIA is too short to have enabled effective consultation and participation of rightsholders. Although there is no set amount of time that must be spent on an HRIA process, just a few weeks is very likely too short.
	There is no evidence that consultation has taken place with a variety of sources to identify rightsholders in the area.
	There is no evidence of an agreed process for the conduct of the HRIA. There is no evidence that the indigenous community fully understood the process or their rights.
	There appears to be no land tenure and land use study or other reliable document showing customary land tenure.
	There is no evidence that the community had independent advice and support during the process.
	The HRIA is being done on an existing project but there is no evidence that it took into account previously raised impacts.
	The project methodology only mentions questionnaires handed out to community members or single community visits.
	There appears to be no version of the HRIA in the relevant indigenous or local language and/or in an understandable format.
	There is no assessment of possible prevention and mitigation measures.



Flawed ESIA of gold mining project in Wapichan territory, Guyana

Romanex Guyana owns a gold mining concession on Marudi Mountain, Guyana, which is located in the indigenous Wapichan people's territory. The company hired a consultant, Ground Structures Engineering, to conduct an ESIA as part of the process of seeking an environmental authorisation to commence mining. The Wapichan people, through their representative institution, the South Rupununi District Council (SRDC), raised numerous objections to the ESIA process, including that: the consultants ignored communities' demands for them to engage with the SRDC as the villages' collective representative institution; the SRDC was afforded no opportunity to participate in designing the terms of reference for the ESIA despite its requests to this end; the consultants held too-short one-day meetings to hand out surveys in a handful of villages without providing translation services and without properly explaining the purpose of their visit; and that the draft impact assessment report failed to assess important negative impacts of the proposed project, such as those on Wapichan cultural heritage.

Investors in Romanex Guyana and any companies sourcing gold from Guyana could have identified this failure to respect indigenous rights in the impact assessment process through desk-based research. For example, a simple Google search for the terms "Marudi Guyana indigenous" would have turned up a [Mining Watch Canada press release](#) about the SRDC's rejection of the ESIA process and a [CERD communication](#) from May 2018 about the ESIA process within the first five results. These results would enable the researcher to discover that the representative institution complaining about the ESIA process is the SRDC, and a Google search for "South Rupununi District Council" would within the first five results turn up the SRDC's [website](#), which in the Documents page, links to an [Environmental Monitoring Report](#) published by the SRDC that document some of the SRDC's concerns about the impact assessment process and the negative impacts of gold mining activities on Marudi Mountain. The SRDC observes that these downstream and investor companies should have introduced themselves to the SRDC and used their influence to ensure that the rights of the Wapichan were respected in the ESIA process.



Destructive gold mining operations at Marudi Mountain in SW Guyana are associated with land expropriation, multiple rights abuses and severe damage to waters and forests in the territory of the Wapichan people
Credit: Vicki Brown / FPP



Downstream and investor companies may wish to familiarise themselves with broader guidance on the process of rightsholder engagement and share such information with their suppliers/ investees. Some such resources include the [DIHR Toolbox Phase 2: Cross-Cutting Stakeholder Engagement](#); [Practitioner Supplement: Stakeholder Engagement](#); the [OECD-FAO Guidance for Responsible Agricultural Supply Chains](#); and the [OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector](#).

Substance considerations in conducting a community-level HRIA

When reviewing community-level HRIAs, a downstream or investor company should check whether the following questions have been considered (see [Annex 4](#) for an elaboration of these questions and considerations):



Companies may wish to refer back to the section of this Guide on the [Rights of indigenous peoples](#) for a baseline set of rights that the community- or site-level HRIA should assess where indigenous peoples are involved. Resources that can be useful for downstream and investor companies to be aware of (and to share with their suppliers/investees) include:

- broader guidance on data collection in an HRIA: the [DIHR Toolbox Phase 2: Data Collection and Baseline Development](#) and the [Phase 2 Practitioner Supplement](#)
- resources for understanding the types of impacts companies may have on indigenous peoples' rights and in developing indicators for assessing those impacts: the [Indigenous Navigator Tools Database](#), [AFI Guidance on Respecting the Rights of Indigenous Peoples and Local Communities](#), and the [IFC Performance Standard 7 on Indigenous Peoples](#)

Table 4. Questions to consider in HRIA

<p>Land rights</p>	<ul style="list-style-type: none"> • Are there indigenous peoples or communities who claim rights over the lands and/ or resources being affected by the producer company's operations? • What land rights do indigenous peoples or communities have over the land under national law? What customary land rights protected by international law are claimed by indigenous peoples or communities but not recognised in national law?
<p>Land and self-determination rights</p>	<ul style="list-style-type: none"> • Did the producer company already apply for and obtain a land concession? Did the government obtain the prior consent of the affected communities to grant a third-party concession over their lands? • If operations have already commenced, did the affected communities give their FPIC to the operations? Was there a participatory impact assessment conducted prior to the operations commencing? • Who are the producer company communicating with as the representatives of the indigenous communities? • How does each indigenous community manage and administer its lands and resources, and what are their development plans and priorities?
<p>Land and environmental rights</p>	<ul style="list-style-type: none"> • Will the producer company's operations result, or have they already resulted, in damage to the land or environment? Is that damage irreparable?

<p>Land and cultural rights</p>	<ul style="list-style-type: none"> • What elements make up the indigenous communities' cultural heritage? How may these be affected by the operations?
<p>Land, livelihood, and development rights</p>	<ul style="list-style-type: none"> • How do the affected communities earn their livelihoods and how has/will the operations affect this? Do the proposed or current operations interfere with the communities' vision for their own development?




The answers to these questions would enable the assessment team to identify the impacts that its value chain is having on particular indigenous communities. In addition to reviewing the identified impacts, the assessment team should check the impacts management assessment in the HRIA. This should include an evaluation of possible prevention, mitigation, and remedy measures.

Identifying violations of the right to FPIC

Because the right to effective participation is one of the key safeguards for protecting other rights of indigenous peoples, it is vital that downstream and investor companies verify whether their (direct or indirect) suppliers/investees sought and obtained FPIC prior to commencing operations on indigenous peoples' lands. In practice, FPIC requirements are not met in the vast majority of cases. Quite frequently, so-called "FPIC agreements" provided as evidence of FPIC to downstream/investor companies have been procured by coercion, manipulation, partial information, bad faith, or are otherwise not representative of the community's views, concerns, priorities, and inputs.

If a downstream or investor company is provided with an FPIC agreement as evidence of compliance with this requirement, some red flags to look out for that may indicate a failed or improper FPIC process or a need for the company to investigate further include:

Figure 5. Red flags that may indicate improper FPIC process

	<p>Complaints by the indigenous community that the FPIC process was insufficient and the so-called FPIC agreement is not valid.</p>
	<p>Opposition by the indigenous community to operations on their lands despite the apparent existence of an FPIC agreement.</p>
	<p>Lack of substance in the FPIC agreement, for example:</p> <ul style="list-style-type: none"> • No agreement on consideration (compensation or benefit-sharing), or very weak or uncertain provision of consideration. In an appropriate process, an indigenous community's grant of FPIC is likely to be conditioned on adequate and clear consideration, and the agreement of compensation and/or benefit-sharing measures is a recognised safeguard for indigenous peoples' rights under international human rights law. • No agreement on a project impacts management plan. An indigenous community's genuine grant of FPIC is likely to be conditioned upon the company's adoption of specified prevention, mitigation, and remedy measures, determined based upon the results of the impact assessment. • No agreement on a monitoring plan. Just as an indigenous community's grant of FPIC is likely to be conditioned upon specified measures to address impacts, it is likely to require monitoring of impacts. • No agreement on consequences of violation of the agreed-upon terms. • Lack of explicit recognition in the agreement of the rights that form the basis of the negotiations, and the rights that the indigenous community would be granting to the producer company in exchange for consideration.



Indications that the consultations and FPIC process did not engage the effective participation of the indigenous rightsholders, for example:

- Indications that the entire consultations and FPIC process took an unrealistically short amount of time.
- Lack of evidence of discussions or negotiations over a project impacts management plan following the completion of the impact assessment by an independent team.
- No substantial evidence available of either the existence or contents of a series of consultations in the lead-up to the FPIC agreement.
- The language and form of the FPIC agreement, in light of the linguistic and educational context of indigenous communities in the country, suggest the agreement may not have been comprehensible to the community alleged to have agreed to it.



No indication that the community received independent technical (including legal) advice or support (e.g., from qualified experts, NGOs), including, for example:

- Agreements suggest that the rightsholders are giving up their rights in perpetuity or for lengthy periods of time in return for limited consideration.
- All FPIC agreements secured in a given area from a series of indigenous communities look virtually identical, suggesting that communities were unable to meaningfully negotiate the agreements.



Indications that the alleged consent may not have been freely given, for example:

- Indications or reasonable possibility of military or other security service presence during consultations or at the point an agreement is finalised.
- Signatures on the final agreement of powerful or influential actors in whose presence the community may not have felt free to do other than acquiesce to the agreement.
- Indications or reasonable possibility of harassment, intimidation, and violence against indigenous or other land or environmental rights defenders, e.g., because of known or alleged threats to human rights defenders in the relevant country or subregion.
- Indications that some community members were promised jobs (whether in concrete or general terms) before FPIC was granted, leading to divisions within the community. Some evidence of this might be in complaints about this problem raised by NGOs in the media or to human rights bodies; or the producer company's site-level HRIA or corporate social responsibility page that discusses its role in providing jobs without discussing traditional livelihoods.



A history of inadequate FPIC and/or land allocation processes that do not respect indigenous rights in the country in question, as indicated by NGO reports, grievances raised to companies and other mechanisms (e.g., sector certification bodies, UN human rights bodies, regional human rights courts, national courts).



Indications that the signatory to the alleged FPIC agreement is not a representative of the rightsholder community (for example, NGO or other reports that indicate community divisions; the signatory is not a community leader and there is no substantial evidence that the community chose them as their representative in the process).



Other resources on FPIC include the [Accountability Framework Initiative Operational Guidance on FPIC](#), the [FAO Guide on Respecting free, prior, and informed consent](#), and the [University of Colorado's FPIC Due Diligence Questionnaire](#).



Improper FPIC process by palm oil company in Liberia¹⁸

Golden Veroleum (Liberia) Incorporated (GVL) was awarded a 65-year palm oil concession that encompasses lands owned, occupied, and used by Kru, Sapo, and Grebo communities for generations. GVL entered into Memoranda of Understanding with several local communities, but both the process of reaching the MOUs and the substance of the MOUs themselves indicated that these were manufactured agreements and did not represent the result of a credible and legitimate FPIC process.

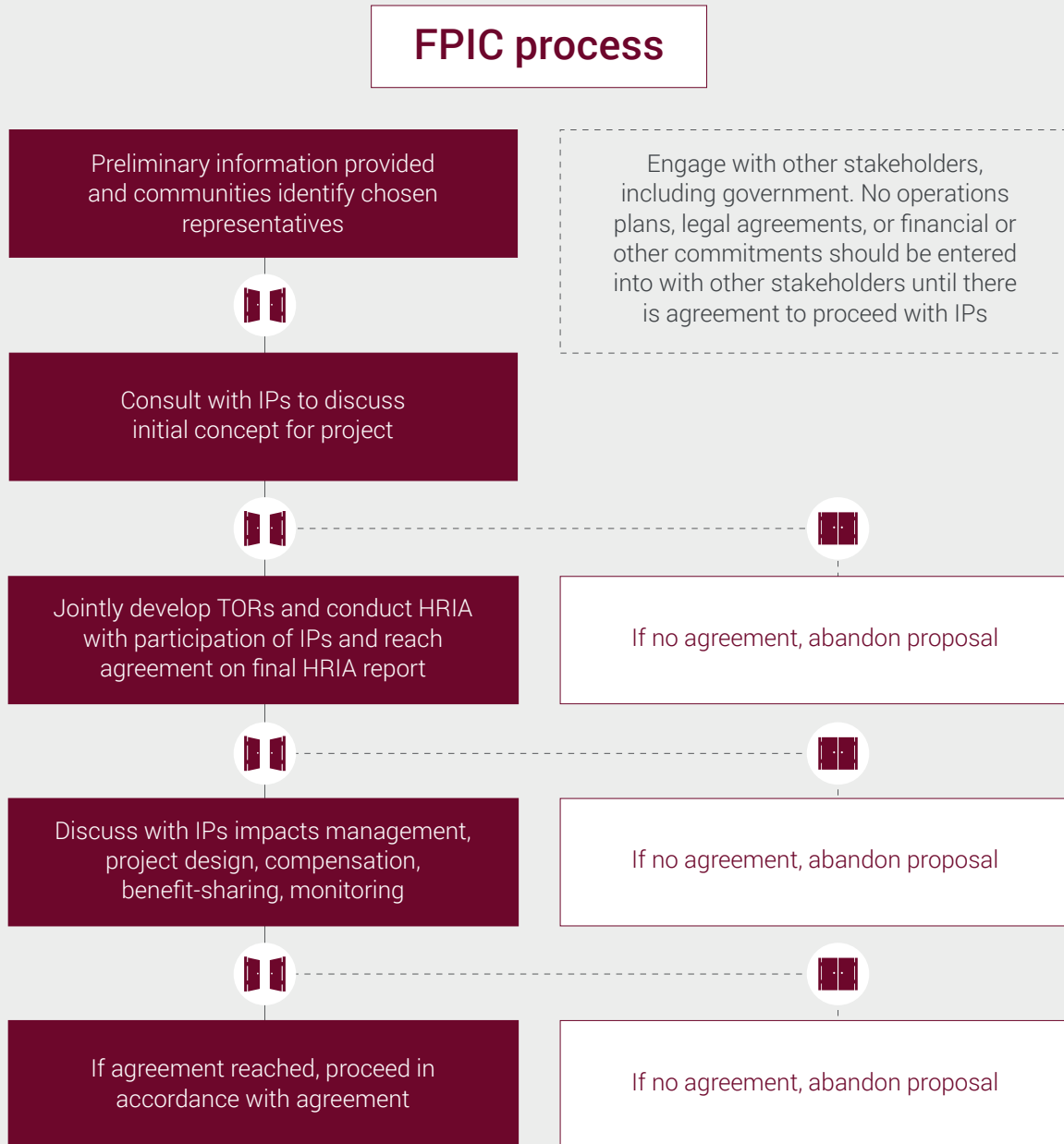
Some of the process failures included: exploitation of anxieties about jobs, livelihoods, and development to pressure communities into signing agreements; not providing communities with adequate information, such as the size and location of areas of land proposed to be used by the company, or information about the impact of oil palm farming on the productive value of the land; and the communities' lack of access to independent legal advice.

Some of the substantive red flags in the MOUs included: the fact that the company framed these agreements as "MOUs" rather than full-fledged, legally-binding contracts; vague benefit-sharing measures with no contractual force, such as offering "preference" to community members who applied for jobs with the company; supposed benefit-sharing measures that are in fact necessary activities for the company's operations, such as building roads and bridges; and using language like "hand[ing] over of land" without a clear description of the legal rights being transferred or granted and without adequate and sufficient consideration.



Liberia deforestation by Golden Veroleum (palm oil) 2013
Credit: Justin Kenrick / FPP

Figure 6. FPIC process



Evaluating systemic impacts on collective land and associated rights

Downstream or investor companies should seek to do deeper research and analysis to identify systemic drivers of human rights violations in their operations and value chains, and to analyse the different ways they could address these impacts. This may include:

- Analysing trends and patterns (e.g., in particular geographies or sectors) or recurring problems in information aggregated across their value chains.
- Engaging with (direct and indirect) suppliers/investees, as well as producer companies and smallholders – even if these particular companies or smallholders may not be part of the company's value chains – to understand whether there are any systemic pressures placed on them that make it more difficult for them to comply with human rights requirements (e.g., low prices that may make it impossible to pay labourers fair wages or to pay for the conduct of FPIC processes).
- Engage with indigenous rightsholders affected by or representative of those likely affected by the company's value chains – even if it is not clear that they are directly linked to the company's value chains – and seek their guidance and recommendations on what downstream and investor companies can do to better support positive human rights outcomes.
- Engage with NGOs and CSOs with experience working in relevant sectors or geographies and seek their input on possible systemic drivers of violations and recommendations on actions to take to improve human rights outcomes in their value chains.
- Commissioning independent studies to do any of the above.

Independent verification

Downstream and investor companies cannot rely exclusively on self-reporting to identify the adverse human rights impacts of their value chains. This means the company must independently verify the information they receive from their suppliers/investees. This can include verification the company does itself (second-party verification), but it may also include work done by third parties. When considering verification, companies should (1) avoid relying on certification schemes; and (2) consider some best practices in regards to third-party verification.

Avoiding reliance on certification schemes

While a useful starting point, downstream and investor companies should not rely solely on certification schemes to decide either that they do not need to further investigate impacts on indigenous rights at the point of origin or that they do not need to assess their suppliers'/investees' human rights systems. Importantly, there are few, if any, comprehensive human rights certification schemes, and different certification schemes use different standards for granting certification or for auditing compliance. There is also a systematic problem of inadequate auditing of human rights elements in certification schemes. Companies should research different certification schemes to understand how a certification may aid the company's own HRDD processes and the limitations of different certification schemes.

There are numerous instances in which certification schemes have continued to certify companies as compliant despite allegations of abuse of indigenous rights. A couple examples are provided here to highlight the dangers of reliance on certification standards to determine the human rights performance of a company.



Land grabbing by RSPO-certified Extractora la Gloria¹⁹

Extractora la Gloria is a palm oil company that bought about 8000 acres of land in hacienda Bellacruz, Colombia, in 2009. The company became an Roundtable on Sustainable Palm Oil (RSPO) member in 2014. In 1996, before the company bought the land, dozens of families had been forcibly expelled from those lands, and those families have been seeking restitution ever since. In 2015, a case was filed before the RSPO on behalf of those families. The following year, the Colombian Constitutional Court ordered land restitution to the families. Despite that court order, the RSPO complaints system has yet to decide the case. The RSPO informed advocates that it could not decide the case because national authorities had not yet implemented the court decision. This case is just one of a pattern of failure by the RSPO to effectively address violations of indigenous land rights by certified companies in Colombia.

Revocation without remedy of logging company FSC certification²⁰

In 2012, the Forest Stewardship Council (FSC) granted certification to logging company PT Kemakmuran Berkah Timber (PT KBT), which held a forestry concession overlapping the traditional lands of indigenous Dayak communities in Indonesia. The Dayak Bahau community of Long Isun had begun raising public objections to the company's activities as far back as 2009. In 2013, it began public demonstrations when the company began extracting timber from the community's conservation area, located within their customary lands. When they sought to engage in dialogue with the company, community members faced intimidation, with one village representative being arrested and held without charge in 2014 for 109 days. Despite these human rights concerns, certification body Rainforest Alliance and its auditors renewed PT KBT's FSC certification twice. It took until 2017 for the FSC to revoke the certification granted to PT KBT, following a formal complaint and investigation into the company's human rights abuses.

Despite the termination of certification, the company did not – and FSC did not require it to – compensate the community for the violation of their rights. Additionally, Roda Mas of the Harita Group, which owns a majority stake in PT KBT, continues to hold FSC certification. A formal complaint about the parent company Roda Mas is currently pending resolution by the FSC.²¹ Though some punitive action was ultimately taken by FSC in this case, it is representative of: (i) the inadequate nature of the audits conducted by certification bodies; (ii) the failure of certification schemes to ensure provision of remedy; and (iii) the ability of corporate groups to maintain certification for some group members despite clear violations of standards by other group members.



Many other reports and analyses document the weaknesses in existing certification schemes. A couple of examples include the Environmental Investigation Agency report on RSPO assurance systems [Who Watches the Watchmen? 2](#) and the [Greenpeace statement](#) on its 2018 decision not to renew its membership in the Forest Stewardship Council.

Dayak Bahau Busaang celebrate their annual harvest thanksgiving festival, Mahakam Ulu, East Kalimantan, Indonesia
Credit: Angus MacInnes / FPP

Independent third-party verification

Downstream and investor companies will sometimes need to conduct independent, third-party verification of supplier/investee information or of the results of their own identification or monitoring processes. Companies are already conducting second-party verification of supplier/investee information when they conduct their own audits of their suppliers/investees. Triangulation of supplier/investee self-reporting against independent sources, including new reports, indigenous peoples' association or NGO reports, is also second-party verification.

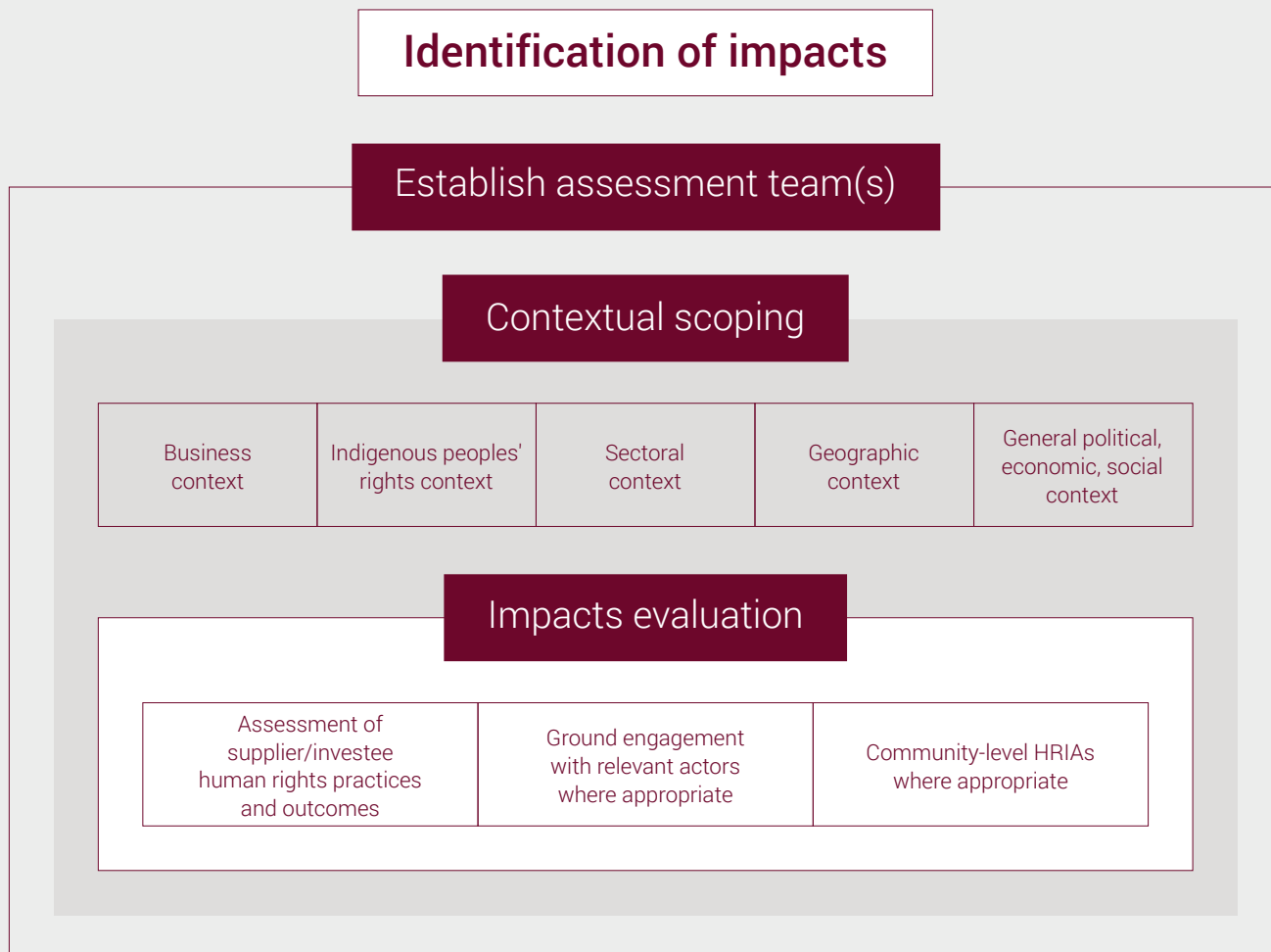
Third-party verification is necessary where it is important that there is an independent, external entity conducting verification. This may include, for example, situations in which actual and perceived independence in conducting an investigation into alleged rights abuses is particularly important. Third-party verification can also be especially useful where the company's own human rights or assessment teams do not have the resources (e.g., time or expertise) to conduct second-party verification. It is also best practice to invite occasional third-party verification of the company's HRDD processes to ensure their credibility and validity.

Sometimes third-party verification exercises are known as human rights audits. *Note, however, that any human rights audit should involve a verification against international human rights standards, and not typical audits against the audited company's own internal policies (which are frequently less demanding).*

Where an independent third-party verification is being conducted, important elements to ensure effective independent verification of human rights compliance, particularly in the context of indigenous peoples, include:

- **Independence of verifier:** Companies should ensure that the verifier they engage has the independence necessary to conduct an unbiased verification. There is a risk that developing 'clientelist' relationships with auditing organisations can compromise the independence of the human rights audits. Companies should utilise different strategies to ensure the independence of the verifier. They should make clear in the terms of reference for the verification that they expect the verifier to identify negative human rights impacts. They could also consider collaborating with other companies and contributing to a collective fund managed by an independent entity that would both select and pay the verifier (similar to an escrow account).
- **Expertise in indigenous peoples' rights:** Companies should ensure that the verifier they engage have expertise in indigenous rights where this is a possible human rights impact. Companies can consider engaging different experts or organisations to conduct audits of different aspects of their adherence to human rights standards. They should consider, for instance, engaging indigenous rights experts to audit their performance on indigenous rights and labour rights experts to assess their performance on labour rights.
- **Verifiers provided with open access:** Companies should ensure that the verifier has access to company personnel to seek information, as well as to all company documents relevant to the company's human rights practices. Where a company is engaging the verifier to assess the human rights performance of a supplier/investee, it should provide the verifier with all relevant information it has about the supplier/investee. Where appropriate to do so, companies may try to facilitate the introduction of the verifier to affected indigenous communities so they can seek information directly from rightsholders.
- **Verifiers allowed to maintain confidentiality:** Companies should ensure that the verifier is given the opportunity to seek information in a confidential manner, meaning that they do not impose an obligation on the verifier to reveal details about a whistle-blower or rights defender. This gives the verifier the opportunity to decide with an informant the information that may be kept confidential and the amount of detail that should be revealed to enable a response and action to address any violation.
- **Transparent publication of verification report:** The company should be transparent and publish any verification report, along with the terms of reference under which the report was produced. This level of transparency demonstrates the company's commitment to continual improvement of its human rights practices and enables rightsholders and stakeholders to better understand the status of the company's operationalisation of its human rights commitments.

Figure 7. Identification of impacts



Address impacts on collective land and associated rights

Summary

- “Addressing” impacts means preventing, mitigating, and remedying actual and potential rights violations.
- Downstream and investor companies should exercise leverage over suppliers/ investees to address specific identified violations of indigenous peoples’ rights.
 - Leverage can be positive (e.g., commercial incentives, provision of trainings, offers of technical or financial support to the supplier/investee or to the rightsholder community) or negative (e.g., commercial disincentives, including suspension or termination of commercial relations).
- Downstream and investor companies need to address systemic drivers of rights violations in their business, for example by making changes to their business model, practices, strategies, and policies, such that it is not incentivising, facilitating, or permitting rights violations.
- Downstream and investor companies have a responsibility to address inherited, continuing violations that may have commenced prior to their involvement in a given value chain.
- Companies need to take specific measures to protect indigenous rights defenders.

Purpose of addressing impacts on collective land and associated rights

Once a company has identified its human rights impacts, it needs to address the rights impacts it has determined exist in its operations and value chains. The “address” component is the most important aspect of HRDD for rightsholders. For downstream and investor companies, in the context of the collective land and associated rights of indigenous peoples (and some non-indigenous peoples and communities), the main objectives of this component of HRDD are:

1. Preventing adverse impacts from the company’s operations and value chains on indigenous communities.
2. Where prevention is not possible, mitigating adverse impacts on particular indigenous communities, in a manner agreed upon with the affected community/ies.
3. Remedying specific rights violations that the company has caused or contributed to in a manner agreed upon with the affected community/ies, and otherwise acting to encourage, facilitate, or enable the provision of remedy and to prevent continuing or further violations.
4. Ensure the company is not incentivising, facilitating, or permitting rights violations through its business model, practices, strategies, and policies.



For indigenous communities, a failure by the government or by the producer company to include them in decision-making about the land concession or project from the outset is already a failure to recognise their land rights and an infringement of their participation rights. If there is a legitimate FPIC process and a community has granted its FPIC, then specific community-level prevention, mitigation, and remedy actions are likely to have been conditions upon which the community gave consent to the operations.

From the community perspective, downstream and investor companies are important actors that incentivise and facilitate the (good or bad) behaviour of producer companies. As such, downstream and investor companies have a responsibility to ensure that producer companies they are buying from or investing in are respecting indigenous peoples' rights, including by providing remedy for any violations that have already occurred. Measures to remedy rights violations should be negotiated and agreed on the basis of effective participation and must acknowledge and be appropriate to the underlying rights that are infringed (e.g., restitution of lands may be necessary).

How downstream and investor companies should address rights impacts

'Addressing' rights violations means preventing impacts, mitigating impacts where prevention is not possible, and remedying rights violations that have already occurred. Prevention and mitigation measures can address specific cases of (actual or potential) violations or systemic drivers of violations, whereas measures for remedy relate to specific existing violations.

Companies are expected to provide or cooperate in providing and enabling appropriate remedy when they have caused or contributed to rights violations, and otherwise to take actions to prevent or mitigate impacts linked to their business operations and value chains. Downstream and investor companies should keep in mind that their obligation to provide remedy may change over time in accordance with the concept of [dynamic due diligence](#). 

The following subsections will provide guidance on:

- Addressing specific impacts on particular indigenous peoples or communities
- Addressing systemic drivers of impacts on indigenous peoples in the company's business model, operations, strategies, practices, or policies
- Addressing inherited violations of indigenous rights
- Specific measures to protect indigenous rights defenders

Addressing specific identified impacts on collective land and associated rights

Where they become aware of specific impacts on particular indigenous communities, downstream and investor companies are expected to take action to address those impacts.

The types of measures encompassed within the notion of 'address' may differ depending on the downstream or investor company's relationship to the harmful impacts. Some downstream and investor companies that are closely engaged with producer companies may be directly causing or contributing to certain impacts. Examples of these types of companies might be companies that directly source raw materials such as palm oil; minerals traders; or private equity firms that actively manage investees who operate on indigenous lands. Such companies have a responsibility to remedy, or cooperate in the remedy of, existing rights violations as well as to prevent and mitigate potential violations.

Initially, downstream and investor companies that are further removed in the value chain may not be causing or contributing to specific rights violations; rather, indigenous rights violations are directly linked to their activities through their business relationships. Where this is the case, they will not generally be obliged to provide remedy. In these cases, downstream and investor companies should nonetheless exert leverage to encourage the provision of remedy by their suppliers/investees.

The fact that a company may not initially be responsible for remedy does not mean it has no responsibilities at all. When a downstream or investor company becomes aware of human rights impacts linked to its activities, it has a responsibility to take steps to cease or mitigate those impacts and to prevent future recurrence of violations. Effective prevention and mitigation measures may require actions to enable or support the provision of appropriate remedy (e.g., actions to facilitate land restitution to prevent further land rights violations).

Where a downstream or investor company knows or should know about a violation linked to its value chains, and they do not take effective steps to address that violation within a reasonable time, this omission may amount to a contribution by the company to the violation, and consequently give rise to an obligation to remedy. ↻

Downstream and investor companies should take a stepwise approach to addressing identified impacts on particular indigenous communities.



Workers handloading harvested fresh fruit bunches from oil palm plantations, Sanggau, West Kalimantan, Indonesia
Credit: Marcus Colchester / FPP

Figure 8. Stepwise approach to addressing specific rights impacts

Stepwise approach to addressing specific rights impacts

- Where there is a minor or isolated rights violation, and unless there are concerns for the safety of indigenous rights defenders or community members, inform the (direct or indirect) supplier/investee about the rights impact and give them a deadline by which to put in place appropriate prevention/mitigation measures and/or to remedy the violation, as appropriate
- If the producer company is an indirect supplier/investee, request or require the direct supplier/investee to also exercise their leverage to help address the rights impact
- Exercise positive leverage by offering assistance to the producer company (e.g., through trainings or financial support) in implementing prevention and mitigation measures and/or providing remedy

- Verify whether appropriate prevention/mitigation measures have been implemented or whether the rights violation has been appropriately remedied

- Where there are repeated or serious violations or failures to address impacts, engage with the affected indigenous community, through independent consultants as necessary, to (1) inform the community that the downstream/investor company is aware of the rights impact and is committed to addressing it; (2) provide the community with a communication channel to report on the progress of measures to address the impact; and (3) seek feedback and input from the rightsholders regarding the measures the downstream/investor company should be taking to address the impact
- Downstream and investor companies should, where possible and appropriate, coordinate their response with other companies in the same value chain

- Exercise positive or negative leverage, as guided by the rightsholders, to pressure the supplier/investee to address the rights violation
- Positive leverage can include measures such as the provision of commercial incentives, trainings, technical support, or financial assistance
- Negative leverage can range from:
 - triggering relevant consequential clauses in the contract with the supplier/investee threatening (and implementing) temporary suspension of business relationship until violation is remedied
 - if non-compliance continues, terminating the business relationship and issuing a public statement explaining the reason for such termination
- Assign an agreed staff member or independent consultant to monitor the situation

The following hypotheticals of common adverse impacts to indigenous peoples' land rights offer some suggestions for the types of leverage that downstream or investor companies can exercise to address those specific impacts.

Hypothetical 1. Involuntary resettlement in contemplation

Scenario: A (direct or indirect) supplier/investee has not commenced operations, but the operations plan contemplates resettlement of an indigenous community.

Role of downstream/investor company: To implement measures to prevent involuntarily resettlement of the affected community by the producer company.

Key end results to keep in mind: An involuntary resettlement is any physical or economic displacement of community members without a legitimate FPIC process and a resulting FPIC agreement that includes a resettlement plan and agreed compensation measures, such as the provision of alternative lands. The producer company should explore with the community whether the operations plan can be revised to avoid resettlement. Where resettlement cannot be avoided and a community withholds FPIC, the producer company should cancel its planned operations.

Prevention measures for downstream/investor company to take: Verify whether there is a resettlement plan and if so, whether there had been a legitimate FPIC process and agreement to the plan. If not, exercise positive leverage to ensure that the producer company suspends operations until it has engaged in a proper process to discuss options and sought FPIC. Examples of such leverage include:

- Offer commercial incentives (e.g., a higher purchasing price) for the conduct of a proper FPIC process
- Offer trainings for the producer company on how to conduct an FPIC process
- Offer expert support to review the operations plan and propose revisions that may avoid the need for resettlement
- Offer financial assistance to enable the affected indigenous community to engage independent experts, including legal advisors, to advise them throughout the FPIC process
- Offer financial or other support in providing possible compensation measures, such as paying for the provision of alternative lands (where this is possible) and/or paying cash compensation

If positive leverage fails to achieve an acceptable rights outcome, the downstream or investor company should engage the affected community to understand the actions they desire the company to take and seek to respect those decisions. This can include exercising negative leverage and indicating to the producer company that if involuntary resettlement takes place, it will terminate its relationship with the producer company.

Mitigation measures for downstream/investor company to take: Mitigation is not an option here. If an involuntarily resettlement cannot be prevented, there will be a violation of indigenous peoples' rights.

The downstream or investor company should again be guided by the community in their response. This may include providing the community with financial assistance to support legal actions they may take to stop and remedy the rights violation. It may also include disengaging from the producer company and publicly announcing the reason for such disengagement.

Challenges: Resettlement of an indigenous community is an extremely serious step and should generally be avoided as a matter of principle (and therefore rejected at the planning stage). Where an indigenous community is willing to consent to resettlement – and very often it will not consent, because of the cultural and spiritual importance of its specific lands – it is likely to condition its willingness to relocate on the provision of alternative lands. In practice, this is a form of compensation that companies are unlikely to be able to provide on their own, because land ownership depends on government recognition. Companies may attempt to enter into multiparty negotiations with the government, producer company, and affected community to facilitate the provision of alternative lands to the community. However, companies should ensure the community is aware of the challenges in the provision of this remedy. Where a community's FPIC to resettlement is conditioned upon provision of alternative lands, the producer company should not sign an FPIC agreement unless it has already secured a binding commitment from the government for provision of such alternative lands. It should also not proceed with resettlement plans until the alternative lands have been secured.



Another scenario to look out for is where a producer company's concession agreement with the government permits or anticipates involuntary resettlement. One example of this is Golden Veroleum (Liberia) Incorporated (GVL)'s palm oil concession agreement with the Government of Liberia. The agreement allows GVL to request the resettlement of communities and to deduct costs associated with that resettlement from taxes or fees owed to the government. In such a situation, the downstream or investor company should consider whether it has sufficient leverage to pressure the company in GVL's position to renegotiate the concession agreement to remove those provisions and ensure alignment with human rights laws and standards, including those on the rights of indigenous peoples.



Festival de la Memoria, in commemoration of the displaced and disappeared from the armed conflict, Dabeiba, Colombia 2019 Credit: Vicki Brown / FPP



Hypothetical 2. Lack of or inadequate FPIC process

Scenario: Identification phase of HRDD found that a (direct or indirect) supplier/investee is operating without FPIC or with a manufactured FPIC agreement.

Role of downstream/investor company: To implement measures to pressure the producer company to suspend operations, engage in a proper FPIC process, and provide any other appropriate remedy.

Key end results to keep in mind: A manufactured FPIC agreement is one that was not the result of a legitimate FPIC process but that was procured by coercion or is otherwise not representative of the community's view and inputs (see the section on [Identifying violations of the right to FPIC](#)). A producer company should cancel operations where a community withholds FPIC.

Prevention measures for downstream/investor company to take: Exercise positive leverage to ensure that the producer company suspends operations, engages in a proper FPIC process, and provides any other appropriate remedy (which must include the possibility of permanent cessation of operations). Examples of such leverage include:

- Offer commercial incentives for the conduct of a proper FPIC process
- Offer trainings for the producer company on how to conduct an FPIC process, noting that this includes the conduct of a participatory impact assessment and consultations and negotiations over consideration (i.e., compensation and benefit-sharing) and impacts management and monitoring measures
- Offer financial support in conducting an impact assessment, and offer relevant portions of its own identification reports to contribute to the impact assessment process
- Offer financial assistance to enable the affected indigenous community to engage independent experts, including legal advisors, to advise them throughout the FPIC process

If positive leverage fails to achieve an acceptable rights outcome, the downstream or investor company should engage the affected community to understand the actions they desire the company to take and seek to respect those decisions. This can include exercising negative leverage and indicating to the producer company that if it continues to operate without FPIC, it will terminate its relationship with the producer company.

Mitigation measures for downstream/investor company to take: Where a community withholds FPIC, but the producer company refuses to terminate the operations, there will be a continuing violation of rights. The downstream or investor company should be guided by the affected community in their response. Actions taken in response could range from, for example, the provision of financial support or other form of compensation to the community; exercising leverage to ensure the producer company prevents the most serious potential impacts identified in the HRIA; or disengaging entirely and terminating its relationship with the supplier/investee.

Challenges: FPIC processes that are compliant with human rights standards take time, and suspension of operations in the meantime may have negative financial consequences for the producer company, downstream/investor company, and employees of the producer company. The downstream/investor and producer companies should consider appropriate measures to compensate workers. However, these consequences should never be a reason to accept a continuing rights violation. On the other hand, transparent reporting about the reason for suspension of operations and the evidence of its commitment to fulfilling its human rights responsibilities may result in longer-term positive goodwill towards the company.

Where FPIC is withheld, the producer will have to terminate operations and provide restitution of lands, unless they can agree on an alternative form of compensation with the community (this would likely include provision of alternative lands).



Other resources discussing impacts management planning more generally include the [DIHR Phase 4 on Impact Management and Planning](#) and the [HCSA Implementation Guide](#).

In practice, other types of rights violations – including impacts to cultural heritage from disturbance of sacred sites or of spirit beings; harms to health from pollution of a community's lands; or negative impacts on livelihoods from damage to community farming, fishing, or hunting grounds – are highly likely to be accompanied by a violation of property and participation rights. That is, they are very likely to be occurring because the producer company had not respected the right of the indigenous community to control their customary lands and resources and to engage in decision-making around the use of such. In such cases, assuming there was a legitimate FPIC process and there is an agreed impacts management plan, the downstream or investor company's role should be to try and encourage adherence to that plan. (If not, an antecedent step would be to exercise leverage to ensure either conduct of a proper FPIC process or to encourage the termination of operations and restitution of lands.)



Downstream and investor companies should keep in mind that it is possible that the only option acceptable to indigenous peoples or communities for addressing a rights impact is termination of the operations. Where a downstream or investor company is aware that this is the case, they should use the leverage they have to pressure the supplier/investee to terminate their operations on a particular site and to provide land restitution. The downstream or investor company could, for example, offer to assist the producer company in the withdrawal and transition process or provide financial assistance to the producer company in the process.

It is possible that given the (often significant) economic consequences that termination of operations may have, downstream and investor companies may frequently not be able to leverage this change, but this should not prevent it from trying – and there will be some circumstances (e.g., where the site is only one of many owned by the producer, and the downstream company is a major buyer; or where the investor's financing is key to the ongoing operations) where such leverage may exist.

Addressing systemic drivers of impacts on collective land and associated rights

In addition to addressing identified impacts on the rights of particular communities, downstream and investor companies also need to take action to address underlying causes and systemic drivers of rights impacts. Downstream and investor companies often have the advantage of having access to aggregated information across geographies or sectors, which enables them to identify and analyse trends, patterns, and recurring problems. They should seek to understand what role their own business may play in generating, facilitating, or permitting systemic drivers that lead to violations of indigenous peoples' rights.

Actions that downstream and investor companies should take to address systemic drivers of rights violations include:

- Promoting respect for indigenous rights in sectors and geographies
- Reviewing the company's business model, strategies, and practices
- Embedding a culture of respect for indigenous peoples' rights throughout the company's operations and value chains

Promoting respect for indigenous rights in sectors and geographies

All companies can take action to promote respect for indigenous rights in particular sectors and geographies. This is true even if a downstream or investor company does not know its full value chain in the short term. Two violations of collective land and associated rights that are common across all sectors and geographies where there is the extraction or production of commodities are: (1) operations taking place on indigenous peoples' lands without FPIC; and (2) the direct and indirect dispossession of lands. Important underlying causes of such violations are the lack of protections for indigenous rights in national laws and policies and flawed, and often corrupt, land use and environmental licensing practices. In addressing these issues, downstream and investor companies should take the following actions:

- Offer commercial incentives to suppliers/investees who can demonstrate respect for indigenous peoples' collective land and associated rights
- Support advocacy efforts for enhanced legal and policy protections for indigenous peoples' rights in the relevant geographies
- Support collective efforts to improve human rights outcomes in the relevant sector
- Engage with producer companies that may be representative of the types of producers in its value chains to better understand possible causes for failure to seek FPIC or dispossession of lands and whether there are systemic factors that disincentivise respect for indigenous peoples' rights
- Engage with indigenous communities that may be representative of those affected by its value chains to better understand factors that may be contributing to the rights violations and how downstream or investor companies can support respect for indigenous peoples' rights

Reviewing business model, strategies, and practices

Addressing human rights violations in global value chains ultimately requires companies, particularly downstream and investor companies, to review their business model, strategies, and practices to assess whether and how these can be linked to human rights violations. This includes reviewing pricing models, sourcing practices, and their volume of demand for or reliance on particular resources.

A few questions that may help downstream or investor companies begin thinking about these systemic factors are (these are not exhaustive):



View from Phillipai Village,
Akawaio territory, Guyana
Credit: Lan Mei / FPP

Figure 9. Systemic factors that may drive human rights violations





Addressing systemic drivers of child labour in the cocoa industry

Research on the use of child labour in the cocoa industry reveals that one of the systemic factors contributing to the abuse of children's rights in the sector is the low prices paid by buyers of cocoa, which are insufficient for small farmers to cover household needs and to hire adult labour.²² The research indicates that paying a cocoa price premium could help address the problem of child labour. Some companies have made commitments to paying higher prices for cocoa to ensure that farmers can earn living wages and reduce their dependence on child labour. One example is [Tony's Chocolonely](#), a Dutch chocolate company that has a five-strategy commitment to 100% slave-free chocolate, including paying a higher price for cocoa, full traceability of cocoa beans, investment in farmers' cooperatives, establishing long-term relationships with farmers, and helping farmers reduce their dependency on cocoa.

Some of these systemic drivers influencing human rights outcomes can be addressed directly by a company; others may not be able to be addressed by one company acting alone. However, downstream or investor companies can and should take the lead in their particular industry/ies or sector/s and build a coalition of companies willing to take collective action to address these problems.



Collective corporate action to address workplace safety

More than 200 companies signed the [Accord on Fire and Building Safety in Bangladesh](#) in 2013 to address the problem of safety in apparel buildings in Bangladesh. The Accord is a legally binding agreement that commits signatory companies to actions aimed at improving fire safety, including: disclosure of their suppliers; requiring suppliers to participate in inspection, remediation, and health and safety activities described in the Accord; and ensuring that it is financially feasible for their suppliers to maintain safe workplaces through appropriate types of commercial arrangements.

Embedding a culture of respect for indigenous peoples' rights

Companies must embed a culture of respect for human rights throughout their organisation and value chains. Building a rights-respecting culture in the organisation should help to prevent rights violations from occurring or at the very least make staff more aware and alert to actual or potential violations and drivers of violations in the company's operations and value chains.

Embedding a culture of respect for rights includes working to ensure that the company does not value profit maximisation at the expense of human rights. This means, for example, that a company should not segment its product lines so that some (premium) products are human rights-respecting, and other (lower priced) products are not – respect for human rights should be integrated across *all* its products. It also means that the company must review its business model, strategies, practices, and policies to ensure that they are not linked to and do not incentivise, facilitate, permit, contribute to, or cause human rights violations (see previous section).

Creating this shift in company culture requires at least the following elements: adoption and implementation of clear company policies on respect for indigenous rights; hiring of staff members with the relevant rights expertise; trainings of staff; establishment of an effective grievance mechanism; and management of suppliers/investees to push commitments up the value chain.

Where downstream or investor companies are involved in land-intensive commodities value chains (e.g., agricultural commodities, minerals, oil and gas), their organisational human rights compliance must include a clear focus on indigenous peoples' rights. The following subsections aim to provide such companies with guidance regarding best practices to follow to embed a culture of respect for indigenous peoples' rights throughout their organisation.

Corporate policies

Companies should adopt policies expressing their commitment to respect human rights, including indigenous peoples' rights.

These policy commitments should adhere to the [AFi Core Principle on Company Commitments](#). Companies should either include a specific section in a general human rights policy on indigenous peoples' collective land and associated rights or a separate policy on indigenous peoples' rights.

Some specific commitments the company's policies should include are:

- To respect the rights of indigenous peoples, as protected by the [core international human rights treaties](#) and outlined in the [UN Declaration on the Rights of Indigenous Peoples](#), including:
 - To respect the right to self-determination and only operate where the company has received Free, Prior and Informed Consent (FPIC) granted by any affected indigenous people/s or community/ies
 - To respect indigenous peoples' property rights, specifically:
 - Recognising that indigenous peoples' cultures and identities are intricately tied to their lands, territories, and resources and that operations on indigenous peoples' lands inherently infringe upon those rights
 - Acknowledging that many governments do not formally recognise indigenous peoples' rights to their customary lands, or even their existence, but that these rights are inherent and are not lost by virtue of lack of recognition by state authorities
 - Acknowledging that many indigenous communities have been involuntarily dispossessed of their lands but still claim and have rights to those lands
 - Acknowledging that indigenous peoples are often subject to systemic discrimination, making them more vulnerable to harassment, intimidation, and violence when defending their rights to their customary lands, territories and resources
- To urge and work with national or subregional governments to protect indigenous peoples' rights
- To take actions within its power to ensure the protection of indigenous peoples' rights, including by addressing continuing harms that the company itself may not have caused, contributed to, or been directly linked to, but has inherited and is now in a position to remedy
- To hire staff with expertise on indigenous peoples' rights
- To assign responsibilities for overseeing implementation of the company's policies to specific staff members, including at the management levels
- To periodically train staff on indigenous peoples' rights
- To reward/incentivise respect for indigenous peoples' rights among its staff and suppliers/investees
- To use all measures possible to ensure its suppliers/investees also commit to respecting indigenous peoples' rights
- To conduct [dynamic due diligence](#) to continually improve its human rights performance

The policy should be accompanied by a timebound and monitored plan with specific actions to implement the policy.

If a company already has a policy on respect for indigenous peoples' rights, it should periodically review the policy to ensure that it is in line with international human rights standards and that it addresses any scenarios of rights violations that the company's human rights due diligence processes may have revealed.



Global mining company's policies relating to indigenous peoples' rights

Newmont Corporation is a global mining company that has adopted policies and standards on [human rights](#), [indigenous peoples](#), [land acquisition](#), and [stakeholder engagement and relationship management](#), among others. These policies are available on the Newmont [website](#) in English, Dutch, French, and Spanish. Other companies should follow Newmont's example in adopting human rights policies, including on indigenous peoples' rights, and making them publicly available and accessible to rightsholders, e.g., by translating them in different languages. Newmont should, however, review these policies and standards to ensure that they are fully in line with international human rights standards. Some examples of ways that Newmont's policies and standards could be improved are:

Relevant standard/policy	Existing language	Suggested improvement
Indigenous Peoples Standard, Scope	That the policy "may" apply to Newmont's business partners "where explicitly stated in an applicable contract".	That Newmont "shall seek to ensure that business partners adhere to this policy or a more stringent one, including by incorporating in applicable contracts a requirement that business partners adopt this policy, or an acceptable equivalent policy".
Indigenous Peoples Standard, para 1.1.1	That the determination of whether indigenous peoples or areas of cultural significance to indigenous peoples will be impacted by the site and operations must be approved by the Regional Senior Vice President.	That a corporate human rights team shall investigate and seek information from the government, civil society, and local and national indigenous peoples' organisations, to determine whether indigenous peoples might be impacted by the proposed site and operations.
Indigenous Peoples Standard, para 1.3 and Stakeholder Relationship Standard, para 1.2	That sites shall offer capacity-building support for affected communities to participate in discussions; and to design and implement a stakeholder engagement plan that is culturally appropriate.	That sites shall offer capacity-building support and/or financing to enable indigenous communities to engage their own independent experts to advise them; and to work with the indigenous community to develop an engagement plan that is culturally-appropriate (such a plan could be formalised through an agreement between the company and the community's chosen representative/s).
Indigenous Peoples Standard, paras 2.1.2, 2.1.4, 2.2.1, and 2.2.2	That sites shall "inform" indigenous peoples about expected timeframes; work to avoid/minimise impacts and identify appropriate restoration or compensation measures; and work to obtain and formalise consent for the project to proceed.	That sites shall seek consent to conduct an impact assessment and identify possible prevention, mitigation, remediation, and compensation measures; engage in decision-making with indigenous peoples to discuss options for proceeding with the project; respect any decision not to proceed with the project; and, should consent be granted, negotiate agreement on consent, benefit-sharing, compensation, impacts management, and monitoring.

Land Acquisition & Involuntary Resettlement Standard, paras 1.2.2, 1.3.3

That displaced persons shall be offered resettlement options, including replacement housing or cash compensation, to be determined on a fair market value basis.

That involuntary resettlement of indigenous peoples is prohibited; any resettlement of indigenous peoples shall only take place with their free, prior, and informed consent. Any displaced persons and communities shall be offered resettlement options, including replacement housing, alternative lands, and/or cash compensation. For indigenous communities, cash compensation shall be determined according to the cultural, spiritual, social, and economic value of the land to the community.

The above is by no means a complete list of proposals for improvements to Newmont's policies. It merely aims to provide illustrative examples of how one mining company's policies and standards could be improved to ensure respect for indigenous peoples' rights.



View from Kàyik Tùwùk (Kaieteur) Falls, a sacred place to the Patamona people, Guyana
Credit: Lan Mei / FPP

Communication of company policy on indigenous rights



Company directors should avoid falling into the trap of thinking that respect for human rights (and associated increased costs) is necessarily incompatible with a fiduciary duty to maximise shareholder profit. In many jurisdictions, there is no fiduciary duty to maximise profit at the expense of all else – rather, the core fiduciary duty is to act in the best interests of the company. This requires the company to consider legal, reputational, and other risks associated with a failure to ensure respect for human rights in the company's operations and value chains.

The company's policy on indigenous rights should be endorsed by its board and shareholders to get maximum possible support from the highest levels of corporate governance. The policy must be communicated to all actors within the company's operations and value chains. For example, the policy must be clearly communicated to asset managers or to procurement staff to guide their decision-making on investments and procurement. The policy should also be accessible to rightsholders along the company's value chains, for example, by being available in relevant local languages and via a clearly visible link on the company's website.

Establish a human rights team

Downstream and investor companies should establish, if they do not already have one, a human rights team that is responsible for helping to ensure that the company is respecting human rights and implementing its policy commitments on human rights. This team should include sufficient staff members with expertise on indigenous rights. This could include lawyers, anthropologists, or advocates with other backgrounds who have worked on indigenous rights and have worked directly with communities.

As a part of this, the company should assign responsibilities to executives for ensuring that the company's policies and operations are consistent with applicable international human rights norms and standards, including as related to indigenous rights.

Ensuring indigenous representation on the company's board and staff

Downstream and investor companies should make space to appoint indigenous persons to their advisory board or to hire them as staff members. The company should consider asking indigenous communities affected by their value chains to nominate representatives to be on the company's advisory board.

Staff trainings

Downstream or investor companies should conduct periodic staff trainings on indigenous peoples' collective land and associated rights. The company should invite independent experts with expertise on indigenous rights to conduct these trainings. New employees should be required to undergo such trainings when they first join. It is particularly important for staff who manage suppliers/investees or make sourcing or investment decisions, as well as the staff of the company's ESG and human rights teams, to undergo such trainings.

Where a company's HRDD process reveals that the company has caused, contributed to, or been directly linked to specifically identified violations of indigenous rights, such scenarios should be incorporated into future staff trainings. Staff should understand what happened and what actions the company was recommended to take, and did take, to address violations.

Grievance mechanisms



The [UNGPs](#) and [UNWG Report on the Right to and Access to Remedy](#) provide important guidance regarding the minimum international human rights standards that grievance mechanisms should adhere to. Companies should also consult the [AFi Operational Guidance on Remediation and Access to Remedy](#) and this [FPP briefing on non-judicial grievance mechanisms](#) for additional guidance on the topic.

Downstream and investor companies should establish grievance mechanisms that are available to indigenous communities affected by their operations and value chains. Such mechanisms are one way to enable rightsholders to bring the company's attention to rights violations in its operations and along its value chains.

Importantly, grievance mechanisms should be accessible, affordable, adequate, and timely for rightsholders. Best practices in this regard, and in the context of indigenous peoples' rights, include:

- Ensuring that the grievance mechanism is publicly available and easy to find and navigate on the company website, with options for offline submissions.
- Ensuring that the availability of its grievance mechanism to rightsholders is well-publicised. This should include ensuring that suppliers/investees pass information about the grievance mechanism up their value chains and to indigenous communities, including at the outset of any proposed operations prior even to the conduct of an impact assessment.
- Ensuring that the types of actions that the grievance mechanism may take in response to grievances are well-publicised to manage expectations and to ensure accountability.
- Allowing communities to use multiple methods to file complaints with the grievance mechanism, including phone, written communications, and online submissions.
- Allowing receipt and processing of grievances in local languages (including provision of translation/interpretation services where necessary), and being clear about the languages in which the grievance mechanism has the ability to receive communications.
- Providing an option to protect the identity of complainants where there are fears of reprisals.
- Updating complainants about the status of the company's response to their grievance in a culturally appropriate manner (considering, for example, the language and method of communication).
- Hiring experts with expertise in indigenous rights to review complaints filed with the grievance mechanism.
- Hiring qualified community liaisons to work with indigenous complainants throughout the grievance process.
- Granting the grievance mechanism the authority to address complaints in an appropriate way, including by offering commercial (dis)incentives to suppliers/investees to compel them to act, or, where appropriate, to offer appropriate remedy.

Supplier/investee contracts



Companies are encouraged to review the [AFi Operational Guidance on Supply Chain Management](#) for a broader overview of supply chain management, and to use this Guide as a supplement that provides specific guidance related to indigenous peoples' rights.

Downstream and investor companies should seek to ensure they have leverage to influence their suppliers/investees to achieve better human rights outcomes. This Guide has referenced the need to, for example, conduct unannounced on-site audits of supplier/investee operations or to pursue various actions to influence a supplier/investee to address a specific violation of indigenous peoples' rights. For downstream or investor companies, these actions can be facilitated if there are specific contractual clauses that contemplate or enable them.

Downstream and investor companies should therefore engage human rights legal experts as well as experts in contract law to draft clauses into contracts with suppliers/investees that cover the following:

- Requiring the supplier/investee to abide by (at a minimum) the human rights, including specifically indigenous rights, commitments of the downstream/investor company.
- Requiring the supplier/investee to disclose its value chains.
- Requiring the supplier/investee to disclose any concession agreements it already has or that it may be negotiating.
- Requiring the supplier/investee to report on its human rights due diligence practices, including specific methods and practices used to ensure respect for indigenous peoples' rights.
- Requiring the supplier/investee to have specific policies and measures in place to protect human rights defenders.
- Requiring the supplier/investee to provide human rights impact assessment reports, including of assessments conducted of operations on indigenous lands.
- Requiring the supplier/investee to provide evidence of independently verified FPIC processes and agreements, as appropriate.
- Reserving a right to the downstream/investor company to commission on-site human rights impacts assessments and to conduct on-site audits of the supplier's/investee's operations to verify compliance with the company's human rights commitments and international human rights standards.
- Requiring the above provisions to be incorporated, in a similar manner as a flow-down clause, in the supplier's/investee's contracts with its own suppliers/investees.
- Requiring that the supplier/investee notify the company in the event of any incident, grievance, or allegation of a human rights violation connected to its value chain.
- Consequences of breaches of the above provisions. Considerations in this regard include:
 - Providing for opportunities to cure the breach (e.g., by remedying an identified rights violation) within a reasonable time period.
 - Providing for rights for the company to, in the event of breach, suspend the contract, cancel or change the terms of future purchases and/or financial provisions, terminate the contract, and/or other consequences appropriate to the circumstance

Addressing inherited violations

Companies may sometimes inherit human rights violations that occurred or commenced prior to their involvement in a given value chain and which have not yet been remedied or are still continuing when the company becomes involved. These are sometimes referred to as “legacy harms” or “historical violations”, and they are especially common in (post-)conflict states and jurisdictions with a high incidence of land conflicts.

In a downstream or investor company's value chains, an inherited violation may have been caused or commenced by a supplier/investee before the company entered its value chain, a previous company that sold its interests to the current supplier/investee, a previous company operating on the same lands or concession as the current producer company, a government, or other third party. As a couple examples, a company may inherit harms in the following scenarios: when a downstream buyer, such as a jewellery company, enters into a business relationship with a new supplier, such as a gold production company, who has been mining in indigenous peoples' lands without FPIC; or when an investor invests in a company, such as a palm oil company, that acquired its concessions from a previous producer company that had caused the involuntarily resettlement of the affected community.



Why address inherited violations?

An inherited, continuing violation taints the value chain in which the downstream or investor company is now involved. The most common example of this is a past unlawful dispossession of indigenous peoples' customary lands, which is an ongoing violation which continues until it is remedied, namely, until those lands are returned (or, in some cases, until an acceptable alternative is agreed by the rightsholders). As a result, where ongoing violations of this nature are present, a downstream or investor company that engages with a (direct or indirect) supplier/investee on these lands will be linked to human rights violations.

Moreover, if operations in an area are to be expanded or changed, affected indigenous communities may also consider the discontinuation and remedy of historical harms to be a precondition to any possible grant of FPIC for continued or new operations or investments.

Where an inherited violation is not a continuing harm, a downstream or investor company's action to help provide or enable the provision of remedy can demonstrate the company's commitment to human rights and help build trust with the affected indigenous community. If the inherited violation was caused by the current producer company, the downstream or investor company should exercise leverage to encourage, facilitate, or enable remedy. In addition, companies should keep in mind that indigenous communities may validly request remedy or assistance in providing remedy for a legacy violation as a precondition to a grant of FPIC.

Downstream or investor companies have a responsibility to address inherited, continuing violations. Where the violation is ongoing, it is in effect no different from other violations the company may identify in its value chains. The following hypothetical provides an example of a possible violation of this type and actions the downstream or investor company can take to address it.

Hypothetical 3. Unlawful expropriation of lands

Scenario: Identification phase of HRDD found that a (direct or indirect) supplier/investee is operating on lands that were unlawfully expropriated from an indigenous community before the supplier/investee acquired the land concession.

Role of downstream/investor company: To implement measures to prevent or mitigate continuation of this rights violation.

Key end results to keep in mind: An unlawful expropriation of lands is an ongoing rights violation. The violation must cease and/or an alternative resolution acceptable to the affected indigenous community must be agreed. Although neither the downstream or investor company nor its supplier/investee commenced the original violation, they have a responsibility to address the continuing violation.

Prevention and remedy measures for downstream/investor company to take: Exercise leverage to ensure that the producer company discontinues the rights violation. This means suspending operations and engaging the affected community in consultations to discuss the desired remedy for the violation (which may require ceasing operations and returning lands if another satisfactory resolution cannot be agreed). Examples of such leverage include:

- Make clear to the affected indigenous community and relevant government authorities that the downstream or investor company has a commitment to respect human rights in its value chain, which requires it to address this ongoing violation of lands rights
- Offer expert support to review the project design and propose revisions that may enable the indigenous community to settle back and regain access to their lands
- Offer financial or other support in providing possible compensation measures, such as paying for remediation, for the provision of alternative lands, and/or paying cash compensation
- If requested by the indigenous community, facilitate multiparty dialogues between the community, state authorities, and supplier/investee to discuss remedial actions, such as the restitution of lands
- Offer financial support for the conduct of a land use and land tenure study to identify the areas of lands that the indigenous community previously settled and used
- Where the indigenous community is willing to discuss possible alternatives to restitution as a form of remedy, offer financial support to the producer company to suspend operations on the affected lands in order to engage in an FPIC process
- Offer trainings for the producer company on how to conduct an FPIC process
- Offer financial assistance to enable the rightsholders to engage independent experts, including legal advisors, to advise them throughout the FPIC process
- Assign an agreed staff member or independent observer to monitor the conduct of the consultations process

If the producer company continues the rights violation, the downstream or investor company should engage the affected community to understand the actions they desire the company to take and seek to respect those decisions. This can include exercising negative leverage and indicating to the producer company that if the violation continues, it will terminate its relationship with the producer company.

Mitigation measures for downstream/investor company to take: Mitigation is not an option here. An ongoing unlawful dispossession of lands is an ongoing violation of indigenous peoples' rights. Where the producer company refuses to discontinue the violation, the downstream or investor company should again be guided by the community in their response. This may include providing the community with financial assistance to support legal actions they may take to stop and remedy the rights violation. It may also include disengaging from the producer company and publicly announcing the reason for such disengagement.



Some additional resources for guidance on addressing inherited violations, particularly from the perspective of a producer company or other company with direct and/or significant control over an operation, include the [Interlaken Group Guide on Respecting Land and Forest Rights](#), the [CDC and DEG Guidance Note on Managing Legacy Land Issues in Agribusiness Investments](#), and [Land Portal's Guide on Addressing 'Legacy' Land Issues in Agribusiness Investments](#).



Eviction and dispossession of Semunying Bongkang community

In 2010, the residents of the Semunying Bongkang community in Indonesia were evicted from their customary lands and had their homes burned down by the oil palm company PT Ledo Lestari. 11 families are still living in company camps and do not have permanent homes. The company's use of pesticides in their operations has caused river pollution and a depletion in fish stocks, which combined with the lack of access to their lands is depriving community members of their ability to meet basic water and subsistence needs. The community took their case to court in 2014, seeking compensation and restitution of their lands. In 2018, the District Court rejected their claims on the grounds that the community was not a legally recognised indigenous group and had no rights to the land in question.²³

This case both illustrates the types of ongoing violations of rights that companies must address, as well as the dangers of relying on national laws or interpretations of rights. The District Court decision in this case is incompatible with Indonesia's human rights treaty obligations, and it in fact means the company would be unable to provide full remedy for the rights violation. Any company sourcing from or investing in PT Ledo Lestari should engage with the Semunying Bongkang community and ask what they can do to assist the community in asserting their rights. This may include exercising their leverage to pressure PT Ledo Lestari to suspend operations and return lands to the community, to provide homes for community members, or to provide financial compensation; or it may result in the downstream company disengaging with the oil palm company entirely.

Specific measures to protect human rights defenders



Companies should consult the [AFi Operational Guidance on Respecting the Rights of Indigenous Peoples and Local Communities](#); the Zero Tolerance Initiative report [Enough! Pledging Zero Tolerance to Attacks against Environmental and Human Rights Defenders](#); and the [RSPO Human Rights Defender Policy](#) for key principles and effective measures companies should take to protect human rights defenders.

Downstream and investor companies should implement specific measures to help protect human rights defenders. The company should adopt a policy on human rights defenders and commit to implementing that policy. This policy should at a minimum:

- Recognise that rights defenders may be groups of individuals or even entire indigenous communities;
- Commit to protecting whistle-blowers and rights defenders from reprisals, including by maintaining their anonymity and seeking their consent prior to taking any actions that may risk reprisal;
- Commit to enabling confidential complaints to be submitted to the company's grievance mechanism; and
- Commit to offering financial or other support to rights defenders to protect themselves and pursue investigations and accountability when they have experienced harassment, intimidation, or violence.



Shipibo leaders from Santa Clara de Uchunya and FECONAU protest outside the Ucayali Regional Government to demand the titling of the community's lands during the Covid-19 pandemic. 2020
Credit: FECONAU



Why implement specific measures to address the situation of human rights defenders?

According to Global Witness, 2019 saw more than 200 documented targeted killings of land and environmental rights defenders – the highest number of such killings recorded in a single year. The increase in intimidation of, violence against, and criminalisation of human rights defenders suggests a backlash against increasing attention to human rights and prompts an urgent need for business and state actors to adopt and implement policies to better protect human rights defenders.

The Front Line Defenders Global Analysis 2019 report observes that land, environmental, and indigenous peoples' rights are the "most dangerous sector of human rights defence". Indigenous communities are particularly vulnerable to this increase in violence against human rights defenders for several reasons, including that: (1) the goal of harassment and intimidation is often to force the relocation of communities to clear land for operations; (2) relatedly, entire communities may be threatened; and (3) the remoteness of many indigenous communities often means they have less access to national law enforcement and justice systems.

Downstream and investor companies can take the lead in committing to protecting the rights of human rights defenders. They can use their leverage to push these commitments up the value chain and normalise within the business community condemnation for abuses of human rights defenders. For indigenous communities who have experienced harassment, intimidation, or violence, evidence of a company's commitment to protecting the rights of human rights defenders may be important to building the trust necessary to enable a proper consultation and FPIC process.



Protest against deforestation by oil palm plantations funded by US investors. "Where will we live"? Santa Clara de Uchunya, Peru, 2018
Credit: FECONAU

Some examples of other specific measures the company may consider taking to help protect rights defenders include:

Table 5. Measures to protect rights defenders

Identified impact	Possible measures to take to address the identified impact
<p>A country that the downstream or investor company sources from or invests in has recorded high numbers of incidences of violence against or criminalisation of human rights defenders.</p>	<p>Engage with relevant suppliers/investees and indigenous rightsholders to develop and implement security protocols to prevent intimidation of and violence against human rights defenders, including interventions that the companies will make with the government and applicable human rights defender schemes (if these exist) to protect rights defenders.</p>
<p>There are allegations of intimidation by a supplier/investee against indigenous rights defenders.</p>	<p>Engage with the rightsholder community to determine the actions they would like the downstream or investor company to take. The company should offer to support independent investigations into instances of intimidation and/or mediation efforts between the community and supplier/investee. It should also exercise its leverage to ensure the supplier/investee adopts policies that protect human rights defenders. This could include providing human rights experts to the supplier/investee to advise them on the drafting of the policy and actions to take to implement the policy, as well as conducting human rights capacity building trainings with the supplier/investee company.</p> <p>Where there is continued non-compliance and the rightsholders so request, the company should suspend or terminate the commercial relationship and publicly announce the reason for such action.</p>
<p>A supplier/investee has been found responsible for targeted violence against indigenous rights defenders. The government has investigated and prosecuted the individual perpetrator/s.</p>	<p>Engage with the rightsholder community to determine the actions they would like the downstream or investor company to take. These may include exercising leverage to support an internal review of the supplier's/investee's policies and practices; offering trainings supplier/investee staff; and suspension or termination of the commercial relationship, with a public announcement of the reason for such action.</p>
<p>A supplier/investee has been found responsible for or been accused of targeted violence against indigenous rights defenders. The government has not investigated or prosecuted the perpetrator/s.</p>	<p>Engage with the affected community to determine the actions they would like the downstream or investor company to take. Such actions could include supporting the community in petitioning the government and human rights bodies to commence an investigation; providing financial support for the community to engage legal or other support in pursuing redress; exercising leverage to pressure its supplier/investee in cooperating with the investigation; and suspension or termination of the commercial relationship, with a public announcement of the reason for such action.</p>

Two particular challenges in protecting indigenous rights defenders may arise when (1) governments are complicit in the harassment, intimidation, or violence, for example by criminalising rights defenders; or (2) when third parties, unsolicited by the producer company, engage in harassment, intimidation, or violence against indigenous rights defenders. If a downstream or investor company has identified such situations in their value chains, they should consult the affected communities to determine whether and how they can assist. This could perhaps be in the form of financial support for legal assistance or a public statement denouncing the rights abuses.



Criminalisation of indigenous rights defenders in Indonesia

The Dayak Bahau Busaang indigenous community of Long Isun, in Mahakam Ulu District, East Kalimantan, Indonesia, were not consulted prior to forestry operations commencing in their lands in 2014. One forestry concession incorporates 13,000 hectares of the community's ancestral lands. Community members' complaints led to the arrests of several village representatives, with one community member being imprisoned for three months.²⁴



Spiritual leader of the Dayak Bahau Busaang community of Long Isun, East Kalimantan, Indonesia

Credit: Angus MacInnes / FPP

Figure 10. Address impacts

Address impacts

Address **systemic** drivers of impacts

- review and adjust business model and practices to prevent systemic causes or contributions to harms
- embed culture of respect for human rights in company operations and value chains

Address **specific** impacts

Prevent specific identified potential impacts

- Use leverage to ensure producer company seeks FPIC and jointly develops impacts management plan with rightsholders
- Use leverage to ensure producer company adheres to impacts management plans



Mitigate* specific identified potential impacts

- Use leverage to ensure producer company adheres to impacts management plans

**Only where prevention is not possible and rightsholders agree*



Remedy specific identified existing impacts

- Provide or cooperate in providing remedy where possible
- Take action to enable provision of remedy otherwise

Track impacts on collective land and associated rights

Summary

- Downstream and investor companies should track the implementation of measures they have taken to address specific human rights impacts as well as systemic drivers of violations. This includes assessing the effectiveness of the measures taken and taking additional measures where necessary.
- Companies should ensure that they have updated and valid information about the adverse human rights impacts of their operations and value chains. This can include some of the same types of actions the company would have taken to identify impacts.
- Companies should additionally monitor their own implementation of human rights policies and practices and assess their effectiveness in promoting good human rights outcomes.

Purpose of this component of HRDD

Once companies have implemented measures to address their identified human rights impacts, they must then track the effectiveness of those measures. In the context of indigenous peoples' collective land and associated rights, the "tracking" component of HRDD serves several key objectives:

1. Ensuring that the company's information about actual and potential impacts remains valid and updated, i.e., alerting the company to new impacts, previously unidentified impacts, and potential impacts that have become actual impacts.
2. Ensuring that the actions the company has taken to address adverse impacts are implemented in an appropriate and timely manner and that they are effective.
3. Ensuring that there are continual improvements in the company's HRDD coverage and response.




Mapping exercise in Wampis Territory, Peru. 2019
Credit: Vicki Brown / FPP



From the perspective of indigenous peoples, best practice would entail the producer company seeking FPIC, and if FPIC is granted, jointly developing a plan to monitor impacts and compliance with provisions of the FPIC agreement. Downstream and investor companies can play an important role in influencing producer companies to develop these monitoring plans together with affected rightsholders and to implement them.

Downstream and investor companies' tracking of impacts on indigenous peoples can also help alleviate some of the burden of raising awareness about negative impacts from the rightsholders. Their attention to the progression of impacts can also mean faster response times to addressing the impacts.

How downstream and investor companies should track rights impacts

Once a company has identified and taken measures to address adverse impacts in its operations and value chains, it then needs to track the effectiveness of its response. This includes regularly monitoring and verifying whether the measures it has taken are being implemented appropriately and in a reasonable time, and whether they are achieving their intended purpose in addressing impacts. Understanding the effectiveness of the company's response requires monitoring to ensure that the company's identification information is still valid and updated. Tracking also involves monitoring of the company's HRDD actions more broadly to ensure there is continual improvement to its HRDD coverage and response, and ultimately, to human rights outcomes.  This is particularly important if in the short term the company is prioritising because it cannot conduct comprehensive HRDD.

The following subsections will provide guidance on:

- Monitoring the implementation of measures taken to address specific impacts and systemic drivers of impacts on indigenous peoples
- Maintaining updated and valid information about impacts
- Monitoring the company's organisational human rights compliance systems



Companies are recommended to refer to other resources, such as the [AFi Operational Guidance on Monitoring and Verification](#), for more general guidance on tracking impacts before using this Guide to supplement with specific guidance on monitoring impacts on indigenous rights.

Monitoring implementation of measures taken to address impacts

Where a company is taking actions to address its adverse impacts, the company has to track the effectiveness of those measures. This will include tracking both actions to address specific impacts on particular communities, as well as those taken to address systemic drivers of violations.

Tracking the company's response to a specific impact should include assigning a staff member the responsibility of monitoring the situation. Monitoring the situation may involve regular communication with the affected rightsholders and/or the (direct or indirect) suppliers/investees, as relevant, to determine the effectiveness and appropriateness of its response so far. Where the impact is not appropriately addressed or the rights violation continues, monitoring enables the staff member to determine the next step/s that should be taken to address the rights violation.

Tracking the company's response to systemic drivers of impacts will involve continuing to aggregate information to understand patterns, trends, or recurring human rights issues in the company's value chains. This continual monitoring must be an integral component of the company's review of its business model, practices, strategies, and policies. It might involve, for instance, adjusting a particular business model in one value chain in one geography and monitoring its effect, including any unintended consequences, and then implementing effective measures across other geographies and value chains.

Updated impacts identification information

In order to track the effectiveness of their responses to impacts, companies must also ensure they have valid and updated impacts identification information. This will include contextual and ad hoc monitoring, as well as review of supplier/investee reports, particularly their monitoring reports. This extension of the identification process ensures that the company will be alert to new impacts, previously unidentified impacts, as well as previously identified potential impacts that have turned into actual impacts.

Contextual monitoring is a continual gathering of the same types of information gathered during the contextual scoping part of the identification phase of HRDD. For example, contextual monitoring may reveal news alerts that a given country is enacting new laws or policies that would place indigenous peoples at increased risk of rights violations.

Ad hoc monitoring refers to information that may come to the company's attention in an unplanned way. The most common example of this would be a grievance submitted to the company through its grievance mechanism or directly as a communication to the company.

In addition, companies can sometimes monitor impacts on indigenous peoples' rights through their environmental impacts monitoring work, which may be a proxy for likely rights violations. It is important to note, though, that this requires that companies have information about where indigenous peoples' lands are and can compare that against their monitoring data. (Where companies do not know the indigenous communities affected by their value chains, remote satellite imagery may also provide indications that there are communities in the areas of influence of the operations being monitored.)



Monitoring deforestation in palm oil sector using satellite data

A coalition of companies engaged in the oil palm sector announced a collaboration to use a radar-based forest monitoring system to monitor deforestation in their operations and supply chains. Unilever additionally uses satellite imagery to help them trace their oil palm supply chain to plantation. These companies should consider how they can use deploy these same tools to help them monitor the human rights impacts of their supply chains.

Table 6. Relationship between environmental monitoring and human rights monitoring

Environmental impacts monitoring	Potential relationship to indigenous rights impacts	Associated monitoring of indigenous rights
<p>Level of deforestation</p>	<p>Where it is taking place on their customary lands, deforestation can have significant impacts on the rights of indigenous peoples. Examples of such impacts include associated loss of wildlife habitat or loss of particular plant species that could lead to impacts on access to food, medicine, and livelihoods.</p> <p>As such, deforestation may represent a violation of property rights unless FPIC has been granted.</p>	<p>Check whether there is an indigenous community that has land rights in the area. If so, check whether an impact assessment had been conducted and whether the community had been engaged in discussions and negotiations to reach a legitimate FPIC agreement.</p> <p>If there is a rightsholder community and they have granted FPIC, check if the impacts management agreement includes zoning of any particular areas for food or livelihoods purposes. If so, check whether the area of deforestation encroaches upon those zones.</p>
<p>Level of pollution</p>	<p>Remote sensing technologies may be able to detect different types of pollution. Such pollution may indicate problems with air or water quality, or other environmental issues, that could lead to detrimental health impacts.</p>	<p>Depending on the type of pollution being monitored through remote sensing technology, the company should assess the health risks associated with various levels of pollutants. If the affected community has granted FPIC, check for compliance with agreed-upon pollution prevention and mitigation measures in the impacts management agreement. Further investigation and monitoring of possible health impacts may be warranted. Note that where there is no FPIC, the company should address that rights violation.</p>



The outskirts of Nimba Point town where the town meets the surrounding Sime Darby oil palm plantation, in Grand Cape Mount county, Liberia. In 2009 Sime Darby was granted a 220,000 hectares concession in north-western Liberia. In failing to recognise local communities' pre-existing customary rights over the land itself, the company's initial clearing and planting activities extended right up to the edge of the built areas of many villages, leaving little or no remaining adjacent farm and forest land. As a result Nimba Point lost a great deal of its customary land to the plantation without their free, prior and informed consent, including an area of forest used exclusively by the town's women for ceremonial and health-related activities, a town gravesite, and extensive areas of farmland, forest and wetlands. Credit: Tom Lomax / FPP, 2012

As emphasised elsewhere in the Guide, HRDD is a non-linear process. This means that information companies receive through contextual and ad hoc monitoring, as well as information from environmental monitoring, may indicate the need for further evaluation of impacts. This is especially true if the company in the short term has been prioritising and finds that there are serious human rights violations occurring in a part of its value chains on which it had not previously done comprehensive HRDD. Follow-up actions to take may include:

- Unannounced on-site audits of supplier/investee offices and/or operations sites.
- Field investigations in communities affected by their value chains, involving individual and group interviews with community members.
- In certain situations, community-level HRIAs may be needed to better understand impacts that are new or were previously unidentified.
- Where a company has not previously done HRDD on the relevant part of its value chains, it may need to undertake a full impacts evaluation.
- Where the company receives complaints or other substantiated information about an infringement of rights that is directly linked to its value chains, the company should, individually or jointly with other actors, engage with the complainants to determine the best course of action to address the rights violation.

Key elements of effective and credible community-level monitoring systems

As part of their monitoring process, downstream and investor companies should be regularly reviewing reports from their suppliers/investees and ensure that there is effective and credible monitoring of impacts at the community- or site-level. (Recall that the absence of monitoring at the community- or site-level may indicate a failed or illegitimate FPIC process.) A downstream or investor company may review community- or site-level monitoring reports to maintain updated information about impacts linked to its value chains.

When reviewing the community- or site-level monitoring systems that producer companies have in place, the downstream or investor company should check for the following key elements:

Table 7. Key elements of effective community-level monitoring systems

Key element	Reason for its importance
Existence of indigenous peoples impacts monitoring plan	Producer companies, or those otherwise causing or contributing to indigenous rights impacts, are expected to monitor their impacts directly and regularly. Effective monitoring of impacts on indigenous rights requires institutional mechanisms for monitoring. This includes staff members assigned responsibility for overseeing monitoring work and a monitoring plan developed in collaboration with the rightsholder community.
Existence of indigenous community's own monitoring systems	Where indigenous communities already have their own community monitoring systems, the producer company operating on their lands should discuss with the community what role, if any, they see their existing monitoring system playing in monitoring the company's rights impacts. It is possible, for example, that the communities may suggest sharing data from their existing monitoring system with the company; or that they may want to keep their existing monitoring programme separate from the company's monitoring system and simply use their data as evidence for any grievances they may raise.
Scope of the producer company's monitoring	This refers to the impacts that the company is monitoring. This should include at minimum the impacts determined by the indigenous community/ies as priorities during the impact assessment.

<p>Timeframe for the producer company's monitoring work</p>	<p>Monitoring should be done regularly and systematically. It can include ad hoc monitoring, e.g., through complaints addressed to a grievance mechanism, but ad hoc monitoring should only serve to supplement a scheduled monitoring programme. The company and community may agree to target the monitoring schedules around other regulatory requirements or voluntary certifications that the company has commitment to. The monitoring schedules should also consider times of year that may be inconvenient for indigenous communities to collect particular types of data, such as times of cultural significance, harvest times, particular hunting or gathering seasons, or times of heavy rains.</p>
<p>Personnel responsible for collecting data</p>	<p>The personnel involved in the monitoring work may include both company staff as well as members of the indigenous community. Where a community has a monitoring programme of their own, they may have agreed with the company simply that they would continue their own monitoring work, perhaps with funding support from the company, and that the company shall accept their monitoring data. In such scenarios, the company may have its own staff conducting its own monitoring separately. In other cases, the community may have agreed with the company that members of the community will participate in a joint monitoring programme.</p> <p>Whatever the case, there should be personnel who have assigned responsibilities for collecting and reporting data.</p>
<p>Metrics and indicators used to assess impacts on indigenous peoples</p>	<p>Monitoring cannot be effective unless the community and company have agreed upon a set of indicators against which to measure rights impacts. For example, the monitoring programme may decide to use satellite imagery of deforestation to track land change impacts and compare against agreed upon protected zones to track whether company operations have incurred upon protected zones in contravention of an agreement.</p>

Monitoring company-level organisational human rights compliance

In addition to tracking the effectiveness of their response to identified human rights impacts, companies should monitor their progress towards embedding human rights throughout their organisation. To do this effectively, companies should establish a monitoring and review plan, which would include timelines for review of the human rights systems the company should have in place. The company should ensure that it has dedicated staff with responsibility for monitoring implementation of its human rights commitments, and that they have the authority to act on their findings.

For downstream or investor companies with substantial links to activities affecting indigenous peoples' land rights, the broad outlines of the monitoring plan should include at a minimum the following:

Table 8. Monitoring organisational human rights compliance

What to monitor	How frequently to monitor	Possible indicators to assess progress	Follow-up actions to take
<p>Implementation and adequacy of company policy/ies on indigenous peoples' rights and on human rights defenders, including environment and land rights defenders</p>	<p>Review both regularly and ad hoc</p> <ul style="list-style-type: none"> Review implementation of policy regularly with staff When complaints are made to the company about rights violations, assess whether the company's policy/ies address the situation or need to be updated to include it 	<ul style="list-style-type: none"> <i>Sufficient coverage:</i> Does the policy recognise indigenous rights as defined by international human rights law? Does the policy recognise the rights of human rights defenders, including indigenous or environment and land rights defenders, as defined by international human rights law? Does the policy cover specific situations of rights violations the company has identified in its value chains? <i>Widespread communication:</i> Are the company's board, shareholders, and staff all knowledgeable about the policy? Have the company's board and shareholders endorsed the policy? Are the policies easily accessible to indigenous rightsholders? This includes whether the policy is available in local languages and in different formats. Have those policies been communicated to relevant government bodies to help inform government expectations and behaviour? <i>Clarity:</i> Does the policy commit to specific, clear actions to ensure respect for indigenous rights and for rights defenders throughout the company's operations and its value chains? Does the policy commit to specific measures to prevent future targeting of rights defenders, and to support investigations and redress for those who have experienced intimidation, criminalisation, and violence, including where that is being directly caused by third parties? <i>Implementation:</i> Is there a timebound plan to implement specific commitments in the policy? Are the company's policies incorporated or referenced in the company's contracts with suppliers/investees? Have company staff, suppliers, investors, and other relevant actors completed the actions in the plan in the time specified? <i>Response:</i> Have the commitments and actions in the policy adequately addressed identified rights violations in the company's value chains? 	<p>If any of the answers to the indicator questions is "no", make a timebound plan to revise the policy and/or implementation plan as necessary to ensure that the policy is fit for purpose and is guiding the company's appropriate and adequate response to address rights violations in its operations and value chains.</p>



Establishment of human rights team	<p>Review both regularly and ad hoc.</p> <ul style="list-style-type: none">Review composition of and resources provided to the team at staff meetingsWhen complaints are made to the company about human rights violations, assess whether the team has the necessary expertise and resources to respond	<ul style="list-style-type: none">Are there staff members on the team who are experts in human rights, including indigenous peoples' rights?Does the human rights team have resources to hire external consultants with specific areas of expertise as needed?Are there company executives with assigned and specific responsibilities for overseeing the functioning of the human rights team?Does the human rights team have sufficient resources (staff members, funding) to ensure the company can meet its HRDD responsibilities?	<p>If the answer to any of the indicator questions is "no", make a timebound plan to improve the functioning of the human rights team. This should include allocation of additional resources to the team, e.g., to hire new staff and/or for the staff to hire external consultants for specific situations.</p>
Indigenous representation on company's advisory board and staff	<p>Review both regularly and ad hoc.</p> <ul style="list-style-type: none">Review representation of indigenous peoples within the organisation at annual board, shareholder, and staff meetingsWhen complaints are made to the company about its lack of representation, assess whether the company has adequate indigenous rightsholder representation among its advisory board and staff	<ul style="list-style-type: none">Is there a position on the advisory board for an indigenous rightsholder representative?Are there indigenous staff members? For example, indigenous peoples with experience working with communities on land rights issues may be important members to include in the human rights team.	<p>If the answer to any of the indicator questions is "no", review the reason for the lack of representation and make a plan to increase representation of indigenous peoples on the advisory board and staff.</p>

<p>Staff trainings</p>	<p>Review both regularly and ad hoc.</p> <ul style="list-style-type: none"> Review staff training plan annually. Seek feedback following each staff training on content and quality of training. When complaints are made to the company about a failure to adhere to its human rights commitments, assess whether staff need additional human rights training. 	<ul style="list-style-type: none"> Are trainings on human rights topics provided regularly for all staff, particularly for staff on the human rights, procurement, and investment decisions teams? Are staff trainings on the company's human rights policies provided for new staff? Are the trainings carried out by human rights experts, including those with expertise in indigenous rights? Do staff trainings cover scenarios of indigenous rights violations that the company has found through its HRDD processes? 	<p>If the answer to any of the indicator questions is "no", revise the training plan to ensure that staff are properly trained on the company's human rights commitments and how to implement them.</p>
<p>Grievance mechanism</p>	<p>Review both regularly and ad hoc.</p> <ul style="list-style-type: none"> Review numbers and types of complaints, as well as response time and type of response, regularly. When staff on the grievance mechanism (perhaps a sub-team within the human rights team) complain that they do not have the resources or authority needed to properly address complaints, assess the adequacy of the grievance mechanism. 	<ul style="list-style-type: none"> Does the grievance mechanism acknowledge all complaints received? Does the grievance mechanism have capacity and resources to investigate all complaints received? Does the grievance mechanism have the authority to provide appropriate remedy, as determined by international human rights standards, for complaints deemed valid? Has the grievance mechanism addressed complaints within reasonable time frames? Has the grievance mechanism received feedback that the remedies it has provided are appropriate for the complaint? Does the grievance mechanism protect complainants and whistle-blowers, e.g., by providing anonymity? Does the grievance mechanism allow for complainants to have a choice of contact points where complaints can be lodged, e.g., in case some are more trusted than others, or in case there are gender issues and complainants would be more comfortable working with staff members of a particular gender? 	<p>If the answer to any of the indicator questions is "no", assess what additional capacity or resources the grievance mechanism needs to ensure it can function as an effective mechanism for providing remedy for rightsholders.</p>

Report impacts on collective land and associated rights

Summary

The principle of transparency should generally underlie company human rights reporting to ensure that reports are useful for rightsholders and stakeholders. Exceptions would be where there is sensitive information, such as information that could expose a human rights defender to harassment or violence or information about an indigenous community's sacred sites.

Purpose of this component of HRDD

In the context of collective land and associated rights, the “reporting” component of HRDD serves one main objective: documenting – for company employees, shareholders, investors, business partners, government, civil society, and rightsholders – the company's self-assessed progress of implementation of its human (including indigenous peoples) rights commitments. Where a company has engaged in prioritisation in its due diligence obligations, the limits of its due diligence should be clearly described, and it should set out in clear, measurable terms its annual progress towards compliance with the obligation of comprehensive due diligence across all its value chains.



Reporting also serves to provide indigenous communities with information with which they can assess the company's own perceived implementation of its human rights commitments against their experiences. Such reports can help rightsholders decide whether they trust the company to adhere to its commitments and to decide upon strategies for protecting their rights. For example, where a report of a downstream or investor company fails to mention an indigenous community as being affected by its operations and/or business relationships, and the community knows it is a relevant rightsholder, it may decide to write to the company or issue a press release to call attention to that omission. Where a report seems to indicate that a particular rights complaint has been resolved but the community does not feel that it was, the community may alert the company to the unresolved grievance.

How downstream and investor companies should report rights impacts



Companies should refer to guidance such as the [UNGPs Reporting Framework](#) and the [AFi Operational Guidance on Reporting, Disclosure, and Claims](#) for general guidance on HRDD reporting best practice.

When reporting on their impacts on indigenous peoples' collective land and associated rights, downstream and investor companies should consider the following, as appropriate:

- **Ensure that the reports explain how the company identified and is monitoring the impacts of its value chains on indigenous rights.** This information is important for rightsholders to understand how the downstream or investor company may be alerted to rights impacts and to make any suggestions for improved identification and monitoring systems.
- **Where the company has prioritised certain geographies, sectors, or types of human rights impacts, explain in the report the rationale for such prioritisation.** Providing an explanation of the company's prioritisation rationale helps ensure accountability for the decisions the company takes. Rightsholders will then be aware of what areas the downstream or investor company has not evaluated in detail, and may, if they are aware of problems in these non-prioritised areas, alert the downstream or investor company to the situation.
- **Provide information on the status of FPIC negotiations and complaints resolutions.** Where rightsholders believe this information is incorrect, they can then follow up with the company regarding the FPIC process or their complaint.
- **Make translations of the report available in the languages and/or formats that are most accessible to affected rightsholders.** The relevant audiences for company reports are not only other businesses, shareholders, investors, certification bodies, and governments, but also rightsholders. Companies should consider making their reports more easily accessible to affected rightsholders.
- **Seek input and feedback from rightsholders on relevant portions of drafts of the report prior to publishing a final report.** Involving rightsholders in the report-writing process can help increase the understanding between rightsholders and the company regarding the actions the company is taking to meet its human rights commitments. It also ensures that the company will not be publishing any sensitive information, for example, the location of cultural heritage sites that are not supposed to be publicly known. In addition, it can help avoid the embarrassment of publishing information in a report that rightsholders may later assert to be false or misleading. The company may also consider (or as an alternative) seeking feedback on drafts of the report from indigenous members of their advisory board.

Importantly, although the default principle should be transparency in reporting, there are a few scenarios in which companies should exclude information from their public reporting:

Table 9. Scenarios for excluding information from reporting

Scenario	What, why, and how to exclude information from reporting
<p>There is an ongoing investigation into abuses of the rights of an indigenous rights defender or group or community of defenders.</p>	<p>Where the company has committed to protecting the anonymity of a right defender (or defenders) and/or there is a risk of reprisals, the company should not reveal identifying details about the ongoing investigation. Such omission of information would be for the purpose of protecting that land rights defender from retribution for bringing a complaint to the downstream/investor company. Where in doubt, the company should work with the land rights defender to consider what can be reported and default to not revealing the information. For example, the company might have to report merely that it is investigating scenarios of abuse of human rights defenders in certain value chains in a particular country.</p>
<p>There have been complaints that one of the company's suppliers/investees has damaged a community's sacred sites.</p>	<p>Where the company knows that certain information about a sacred site is sensitive, the company should not publish that information. Omission of such information would be for the purpose of protecting information that may be sensitive knowledge known only to a few persons in the community. Where in doubt, the company should work with the community to consider what can be reported and default to not revealing the information. For example, the company may report merely that the operation of its supplier/investee has caused cultural impacts and that it is working with the community to address such impacts.</p>

Supplier/investee reporting

Throughout this Guide, many of the suggestions for things that downstream and investor companies should do to ensure that their suppliers/investees are respecting indigenous peoples' rights involves reviewing and verifying supplier/investee reports.

Downstream and investor companies should exercise their leverage to encourage suppliers/investees to ensure that their reports share relevant information for indigenous peoples' rights and are accessible to rightsholders in both language, availability, and format. In addition, downstream and investor companies should encourage their suppliers/investees to update their reports where the downstream/investor company's verification found gaps or problems. The downstream or investor company can assist the supplier/investee in doing this by sharing the information that it found through its verification processes.



El Playon, Montes de Maria, Colombia 2019. Afrodescendant and peasant communities in Montes de Maria hold unresolved grievances relating to loss of tenure security, restricted access to drinking and irrigation water, harmful agro-chemical pollution and threats to human rights defenders - all impacts are associated with industrial oil palm plantations. Credit: Vicki Brown / FPP

Annexes

Annex 1: Selected sources for elaboration of indigenous rights

*Note that this is not an exhaustive list. It is only intended to provide a sampling of resources that companies and their human rights legal teams should refer to in understanding indigenous rights.

Right	Sources for elaboration of right
Right to self-determination	ICCPR Art. 1, ICESCR Art. 1, UNDRIP Arts. 3-4, African Charter Art. 20, American Convention Art. 3, ADRIP Art. III
Right to autonomy and self-governance	UNDRIP Arts. 4-5, ADRIP Art. XXI, SRIP Report on indigenous peoples' autonomy or self-government A/74/149
Right to effective participation in decision-making	ILO Convention 169 Art. 6, UNDRIP Arts. 18, 32, EMRIP Report on FPIC A/HRC/39/62
Right to define and determine own development priorities	ILO Convention 169 Art. 7, UNDRIP Arts. 20-23, African Charter Arts. 22, 32, ADRIP Art. XXIX
Right to lands, territories, and resources	ILO Convention 169 Arts. 13-19, UNDRIP Arts. 26-28, 32, American Convention Art. 21, African Charter Arts. 14, 21, ADRIP Arts. VI, XXV
Right not to be forcibly relocated	ILO Convention 169 Art. 16, UNDRIP Art. 10
Right to culture	ICCPR Art. 27, ICESCR Art. 15, UNDRIP Arts. 11-16, 24-25, 31, African Charter Art. 8, ADRIP Arts. VI, XIII, XVI, XXVIII, CESCR General Comment 21 , EMRIP Report on cultural heritage A/HRC/30/53
Right to life, security, and physical and mental integrity	ICCPR Arts. 6-10, UNDRIP Art. 7, African Charter Arts. 4-6, 17, American Convention Arts. 4-7, ADRIP Art. XXX, SRIP Report on attacks and criminalisation of indigenous human rights defenders A/HRC/39/17
Rights to health, food, water, housing, healthy environment	ICESCR Arts. 11-12, ILO Convention Art. 25, African Charter Arts. 16, 24, American Convention Art. 26, ADRIP Art. V, XVIII, XIX, CESCR General Comment 12 , CESCR General Comment 14 , CESCR General Comment 15

Other important sources

[CERD General Recommendation 23](#)

[CESCR General Comment 24](#)

[SRIP Report on extractive industries and indigenous peoples A/HRC/24/41](#)

[IACtHR Yaxye Axa judgment](#)

[IACtHR Sawhoyamaya judgment](#)

[IACtHR Saramaka judgment and interpretation of judgment](#)

[IACtHR Lhaka Honhat judgment](#)

[AfCHPR Endorois decision](#)

[AfCtHPR Ogiek judgment](#)


[Compilation of UN treaty body and special procedures jurisprudence relating to indigenous peoples' rights](#)

Annex 2: Information and sources for contextual scoping


Business's value chains

Information to collect	Possible sources of information
<p>Value chain mapping</p>	<p>The company itself, its suppliers and investees. The company should include provisions in its contracts with suppliers and investees that require disclosure of value chain information. The contracts should also grant the downstream/ investor company a right of unannounced audit which can allow for spot-checking of information.</p> <p> Given the risks of biased or partial self-reporting, companies should seek out and assess independent information that could indicate the level of transparency of value chains in particular localities; as well as information on the sourcing and investment practices of any identified direct or indirect suppliers/investees.</p>

Rightsholders and relevant stakeholders

Information to collect	Possible sources of information
<p>Indigenous peoples in the countries that the company (directly or indirectly) sources from or invests in</p>	<ul style="list-style-type: none"> • Government ministries or agencies, including any human rights ombudsman or commission • International Work Group for Indigenous Affairs annual Indigenous World report • The LandMark Map of Indigenous and Community Lands • The Land Portal Geoportal • The Environmental Justice Atlas • Local, subregional, and national indigenous peoples' federations and associations and any published press releases or reports • Local, subregional, national, and international indigenous rights or environmental CSOs or NGOs and any published press releases or reports • Academic research articles, theses, or books <p> The assessment team must not rely on any single source of information, as many indigenous peoples or groups may not be officially recognized or may be known by different names, and none of the above-listed sources is guaranteed or comprehensive.</p>



<p>Indigenous peoples impacted by the company's value chains</p>	<p>Cross-referencing information about the location of producer operations against known information about the extent of customary lands.</p>  <p>This information can be difficult to find through solely desk-based work. Many indigenous peoples lack formal land rights, and as a result, their lands do not appear on any official maps or are otherwise invisible in formal records and land registries used by host governments to formalise concessions the company's (direct or indirect) suppliers or investees own. The assessment team should seek independent sources of information on local tenure rights and, where necessary, undertake site visits to meet with the local rightsholders, communities, and indigenous and civil society organisations to obtain information. Best practice is for downstream or investor companies to require their suppliers/investees to conduct land tenure and land use studies as part of the FPIC process prior to commencing operations. Where such studies have not been done, the downstream or investor company may need to conduct them itself or in collaboration with its suppliers/investees to ensure they understand their impacts on local indigenous communities. More information about the conduct of land tenure and land use studies can be found in the AFI Operational Guidance on the Rights of Indigenous Peoples and Local Communities.</p>
<p>Other relevant stakeholders</p>	<ul style="list-style-type: none"> • Local, subregional, and national indigenous peoples' federations and associations • Local, subregional, national, and international indigenous rights or environmental CSOs or NGOs • Indigenous communities or groups • Government commission on indigenous peoples' rights and/or human rights • Government indigenous peoples' ministry

Indigenous peoples' rights context

Information to collect	Possible sources of information
<p>Ratification and endorsement of international treaties and declarations</p>	<ul style="list-style-type: none"> • Ratifications database of the UN Office of the High Commissioner on Human Rights • Ratifications databases of the regional human rights treaties • UN article with UNDRIP voting record and subsequent endorsements • ILO ratifications database



National and subregional laws and policies relevant to indigenous peoples' rights, and domestic implementation in law and practice of human rights treaty obligations as related to those rights	<ul style="list-style-type: none">• Government database of national and subregional or local laws• Reports by domestic or international CSOs or NGOs analysing the indigenous rights, human rights, and/or legal context of the country, particularly reports analysing gaps in national implementation of human rights obligations• Jurisprudence of domestic courts• Jurisprudence of regional human rights courts, such as the Inter-American Commission or Court on Human Rights or the African Commission or Court of Human and Peoples' Rights• Observations, recommendations, and other communications of the United Nations treaty bodies, such as:<ul style="list-style-type: none">– Special Rapporteur on the Rights of Indigenous Peoples: country visit reports, communications– Expert Mechanism for the Rights of Indigenous Peoples: reports– Committee on the Elimination of Racial Discrimination: concluding observations, decisions and early warning/urgent action procedure communications– Committee on Economic, Social, and Cultural Rights: concluding observations– Committee on the Elimination of Discrimination Against Women: concluding observations– Committee on the Rights of the Child: concluding observations– Human Rights Committee: concluding observations, decisions• News reports about land and resource conflicts with indigenous peoples• The Environmental Justice Atlas database of land and resource conflicts on indigenous lands
Reports of indigenous peoples' rights violations in the company's value chains	<div data-bbox="550 1153 662 1276"></div> <p data-bbox="670 1153 1244 1332">The absence of information about a country's implementation of its human rights obligations does not evidence effective implementation of those rights or mean that there are no harmful impacts on indigenous peoples' rights in that jurisdiction. It may simply mean that such failure to protect human rights has not been brought to the attention of these global platforms.</p> <ul style="list-style-type: none">• Complaints addressed to the company or to its suppliers or investees• Complaints addressed to other grievance mechanisms, such as the OECD National Contact Points or certification body grievance mechanisms• Complaints filed to domestic, regional, or international courts or judicial bodies, including complaints to national human rights commissions or ombudsmen, shadow reports to UN human rights treaty bodies. Note: until such complaints are processed and addressed by the judicial body, they are often not made public except by the complainants, who may publish the complaint in a press release.• Reports of land conflicts or tenure disputes, and associated harassment, intimidation, or violence, documented outside formal complaints mechanisms, including in academic studies, CSO and NGO reports, news articles, and other media outlets• Previous impact assessments conducted by the company

Business context

Information to collect	Possible sources of information
<p>Supplier and investee human rights due diligence practices</p>	<ul style="list-style-type: none"> • The company itself, its suppliers and investees. The company should have contracts with suppliers that specify human rights due diligence expectations and that allow the company to review the supplier's or investee's policies, codes of conduct, and their own supplier management systems.
<p>Certification standards or industry practices that suppliers or investees have adopted</p>	<ul style="list-style-type: none"> • Suppliers and investees • Documents, audits and complaints log of certification bodies

General political, security, and socio-economic context

Information to collect	Possible sources of information
<p>The openness of civic space in the jurisdictions the company (directly or indirectly) sources from or invests in</p>	<ul style="list-style-type: none"> • Indigenous communities or groups • Local, subregional, and national indigenous peoples' federations and associations • Local, subregional, national, and international indigenous rights CSOs or NGOs • Domestic and international court and treaty body decisions and opinions • Local, national, and international news reports
<p>Systemic causes of rights violations in the jurisdictions the company (directly or indirectly) sources from or invests in</p>	<ul style="list-style-type: none"> • Indigenous communities or groups • Local, subregional, and national indigenous peoples' federations and associations • Local, subregional, national, and international indigenous rights CSOs or NGOs • Domestic and international court and treaty body decisions and opinions • Local, national, and international news reports

Annex 3: Best practices in conducting a community-level HRIA

Best practice	Potential red flag
<p>Allocate sufficient time, expertise and resources to the process. Time should be allocated for: indigenous peoples to engage in internal discussions; agreement on a process for the conduct of the HRIA; any customary land use mapping that may have to be done to determine the extent of any potential or actual impacts on land use and cultural heritage sites.</p>	<p>Time spent on HRIA is too short to have enabled effective consultation and participation of rightsholders.</p>
<p>Triangulate and gather data from already-identified indigenous peoples, indigenous advocacy organisations, and other local communities to ensure that the assessment team is not overlooking any rightsholders.</p> <p>The existence of rightsholders is not always obvious, particularly when governments do not legally recognise the lands of indigenous peoples, so their presence may not appear in any official maps or government studies of the concession area. Even where indigenous peoples are acknowledged in laws or included in government studies, the government's approach may not be coextensive with the requirements of international law. In addition, even where affected indigenous communities are identified, there may be others outside the project site who will be affected by the project, perhaps as a result of road building and associated development, or downstream effects of river or other environmental pollution.</p> <p>In addition, there may be indigenous autonomous governing bodies, federations or associations that may represent the interests of a group of communities, including the one most directly affected by the project.</p>	<p>There is no evidence that consultation has taken place with a variety of sources to identify rightsholders who may be affected by site operations.</p>
<p>Agree on a process for the conduct of the HRIA with the affected indigenous community. The agreed process should cover such issues as: who the assessment team and company should engage with as the community's representative/s (which may in some cases be the whole community); cultural practice considerations; language considerations; timing considerations; separate meetings with different groups within the community, such as women, children, elders, spiritual leaders.</p> <p>Where it appears that a community may have limited understanding of the process, the team should be prepared to spend time capacity building to ensure that the community understands why the HRIA is being conducted and what their rights are. This capacity building should happen prior to agreeing on the process for conduct of the HRIA.</p> <p>Some indigenous communities may have already developed FPIC protocols or similar rules. Where these exist, the assessment team and company must follow them.</p>	<p>There is no evidence of an agreed process for the conduct of the HRIA. There is no evidence that the indigenous community fully understood the process or their rights.</p>
<p>Check whether a land tenure and land use study has been undertaken and whether the community is still satisfied with these. If not, engage in a land tenure and land use study. This may involve supporting the indigenous community to map their customary lands to better understand how the project may impact land management or access to spiritual or cultural sites or to areas used for economic activities.</p>	<p>There appears to be no land tenure and land use study.</p>
<p>Allow (and offer to provide financial support) for the indigenous community to engage technical (including legal) advisors of their choice. There may be NGOs that the community has worked with in the past that the community trusts to support it in the HRIA process.</p>	<p>There is no evidence that the community had independent advice and support during the process.</p>
<p>Where the community-level HRIA is being done on an existing project, the assessment team should include prior or ongoing impacts that have previously been raised by the community or NGOs. The team may seek to determine whether any of those impacts have since been addressed. The team should not raise doubts about the impacts or assume that older impacts are no longer relevant.</p>	<p>The HRIA is being done on an existing project but there is no evidence that it considered past or ongoing impacts that have been raised previously.</p>

<p>Use participatory research methodologies to gather data and assess impacts. Agree on methodologies with the rightsholders and follow the agreed methodologies. It would be unlikely that the agreed methodology only includes single community visits and questionnaires. This includes developing sets of agreed-upon outcome-focused indicators with the rightsholders against which to measure rights impacts.</p>	<p>The project methodology only mentions questionnaires handed out to community members or single community visits.</p>
<p>Ensure that the HRIA is translated as necessary into a language used by the indigenous community, or otherwise delivered to the community for validation in a format that can be easily understood by community members.</p>	<p>There appears to be no version of the HRIA in the relevant indigenous or local language.</p>
<p>Assess options for impacts management with the participation of the indigenous community. The HRIA should assess alternative options for prevention and mitigation measures, as well as options for remedy in the event of actual impacts. These should guide appropriate actions the company should take if it is granted FPIC to proceed with the project.</p>	<p>There is no assessment of possible impacts management measures.</p>

Annex 4: Some questions for consideration in community-level HRIA

Questions to consider	Discussion
<p>Land rights: Are there indigenous peoples who claim rights over the lands and/or resources being affected by the producer company's operations?</p>	<p>If the community- or site-level HRIA does not indicate the presence of indigenous rightsholders, but contextual scoping suggests that indigenous peoples are present in the area and/or that violations of indigenous rights are prevalent in that geography, the downstream or investor company may need to investigate further. One particular violation to assess for is whether there had been past dispossession of indigenous lands. The assessment team should consult news sources, pending litigation or other filed claims, human rights reports, as well as local and international indigenous rights' organisations to determine whether there may be indigenous land claims. This is not only important as a serious human rights concern, it can be a business risk, as eviction from lands is an ongoing violation, which means a claim for restitution can be brought even many years after the original eviction (i.e., there is no limitations period). The Inter-American Court of Human Rights found in the <i>Sawhoyamaya Indigenous Community v Paraguay</i> case, for example, that an indigenous community whose land had begun to be acquired in the 19th century had the right to land restitution.</p>
<p>Land rights: What legally recognised land rights do the indigenous community have over the land? What land rights are claimed as customary by the indigenous community but not legally recognised?</p>	<p>Companies must recognise as rightsholders both indigenous communities that have title to the land, as well as communities that do not have title but claim the area as their traditional lands. In the latter situation, there may in fact be lands that are privately titled that an indigenous community customarily owns. If the community- or site-level HRIA only mentions titled lands, the downstream or investor company may need to investigate further to determine if there are in fact also untitled areas that indigenous peoples claim rights over. There should be some indication from contextual scoping as to whether indigenous peoples in the country are generally granted titles over the full extent of their customary lands, or only a (small) part – the latter is very common in countries where indigenous land titling occurs at all.</p>
<p>Land and self-determination rights: Did the producer company already apply for and obtain a land concession? Did the government obtain the consent of the community to grant a third-party concession over their lands?</p>	<p>If the community did not consent to the grant of the concession, then the government has already violated the community's land rights and their right to FPIC. This means the community is more likely to view the project as inherently violative of their rights and illegitimate. The community- or site-level HRIA should include an assessment of that rights impairment. If it does not and does not include explanation of how the producer company addressed the rights violation, the downstream or investor company may need to investigate further to determine if the producer company is operating without FPIC. In many cases, the grant of concession may have been influenced by the producer company, and any supposed grant of FPIC may not in fact be freely given but rather influenced by the grant of the concession.</p>
<p>Land and self-determination rights: If the project already commenced, did the community give its free, prior, and informed consent to the project commencing? Was there a participatory impact assessment conducted prior to the project commencing?</p>	<p>Note that if the answer to the second question is "no", then there necessarily was no FPIC, because participatory impact assessments are required to ensure that any consent obtained is informed. If the community- or site-level HRIA shows that FPIC had not been obtained prior to the commencement of the project, the downstream and investor company should verify whether the producer company addressed the violation by suspending operations unless and until the community granted FPIC.</p> <p>Even if there appears to be a formal FPIC agreement, there are many supposed FPIC agreements that do not comply with the requirements of international law. Where there are indications that the FPIC agreement may not be legitimate, the company should conduct further investigation.</p>

<p>Land and environmental rights: Will the producer company's operations result, or have they already resulted, in damage to the land or environment that is irremediable or difficult to remediate?</p>	<p>If the community- or site-level HRIA indicates that the producer company's operations have already resulted in extensive, non-reparable harm to the land, the downstream or investor company should investigate further to determine what remedy, if any, the producer company provided for that harm. In such situations, the appropriate remedy is often land-based compensation, such as alternative lands. Note that where an indigenous community had a strong cultural connection to the land they have lost – which is usually the case – alternative lands may not be considered adequate compensation as being equal in value to the lost lands, and additional compensation may need to be paid in addition to alternative lands.</p> <p>If the HRIA indicates extensive and potentially non-reparable harm to the land, the downstream or investor company may need to verify whether the potential impact was properly explained to the affected indigenous community. Any FPIC agreement should consider possible prevention, mitigation, remedy and compensation for such harm. If impacts have not yet occurred, the downstream or investor company may wish to prioritise addressing the situation to prevent these impacts. This could include exercising leverage to ensure the community fully understands the potential impacts during the FPIC negotiations process; and that any agreed impacts management plan is adhered to.</p>
<p>Land and self-determination rights: Who is/are the producer company communicating with as the representative/s of the indigenous community/ies?</p>	<p>Indigenous communities may be organised in many ways. For example, they may be organised as independent villages led by an individual leader or a village council, or decisions may be made by consensus of the whole community. However, these villages may be part of a larger representative institution, such as a federation or association. In some cases, these federations or associations may have little traditional authority or responsibility for land use. They may also be considered by indigenous communities to be non-representative, for example, if they are a government-imposed administrative structure rather than a representative structure accountable to communities. In other cases, these federations or associations may be responsible for overseeing shared use areas between villages, or for ensuring that projects in one village's lands do not impact other villages. Some communities may not have organised representative institutions, or those institutions may not have a mandate to engage for the whole community about the project.</p> <p>If the community- or site-level HRIA does not indicate how the appropriate representatives of the community were ascertained, the downstream or investor company may need to investigate further to determine whether consultations were done with the appropriate entities.</p>
<p>Land and self-determination rights: How does the indigenous community manage and administer its lands, resources, and development plans and priorities?</p>	<p>The community- or site-level HRIA should consider how the producer company's operations may impact or undermine the capacity of the indigenous community to administer and manage its own lands and resources. This means the HRIA should include baseline data information about the communities' current management plans and processes and development priorities. It should then include an assessment of how the company's operations affect those. For example, do site operations interfere with grounds currently used by the village for hunting? Does the project create noise pollution and interfere with any eco-tourism plans?</p> <p>Where the HRIA does not appear to have assessed these impacts, the downstream or investor company will need to investigate further. One situation to look out for may be where communities have adopted a formal rule or policy that would definitively preclude the project from proceeding in their territory, such as a no-mining policy. In such a case, there should be further investigation to determine if the producer company is proceeding without FPIC.</p>



**Land and cultural rights:
What elements make
up the indigenous
communities' cultural
heritage?**

Cultural heritage includes both tangible and intangible aspects, including for example, humanmade sites or natural sites such as mountains, rivers, or trees that have cultural, religious or spiritual significance; religious or cultural ceremonies; traditional knowledge; or cultural practices.

It is important to note that effectively considering cultural heritage may make certain projects untenable: for example, a mining project that targets a sacred mountain; or a forestry project which would target the largest trees, which are also the trees of greatest spiritual, cultural or livelihood significance.

The community- or site-level HRIA should include discussions of prevention and mitigation measures, which should have been designed by indigenous peoples themselves. If it does not, this may also indicate a lack of or inadequate FPIC process.

**Land, livelihood, and
development rights:
How do the rightsholder
communities earn their
livelihoods? Do the
proposed or current
operations interfere with
the community's vision for
its own development?**

The community- or site-level HRIA should consider the ways in which rightsholder communities depend upon their land and resources for their livelihoods and for the local economy, and how the producer company's operations might affect those economies. In many indigenous communities, subsistence activities—such as gathering forest products for food or medicine, fishing, hunting, trapping, farming, and animal husbandry—form an important part of the local economy, and there may be different groups of community members that are responsible for those tasks as well as customary laws governing those practices. The HRIA should also consider the communities' expectations of their land and resources for both current and future generations.

The HRIA may consider potential positive benefits arising from site operations, e.g., resulting from employment of indigenous community members in the company's operations (although it should be noted that employment of this nature should not automatically be considered beneficial, unless it accords with preferences of those in the communities). It should include disaggregated consideration of impacts on indigenous workers within its labour rights assessment. As part of this, it should consider the skills indigenous community members may gain from the proposed operations and the transferability of those skills following the closure of operations, as well as the viability of the livelihoods in which those indigenous workers engaged prior to their employment. It should also consider how many community members may gain employment, compared with how many people may lose access to livelihood opportunities and benefits, and consider who within the community this may be (youth, women, elders), to consider the collective impact.

Where the HRIA appears to only have a simplistic discussion of the jobs benefits that may arise from the project, the downstream or investor company will need to investigate further to determine what negative impacts the project may be having on livelihoods.

Endnotes

- 1 This Guide draws from and supplements existing international guidelines on responsible corporate conduct, sustainable supply chain management and human rights and environmental due diligence. Key guidelines on human rights due diligence principles and approaches include the United Nations Guiding Principles on Business and Human Rights (UNGPs) and the OECD Due Diligence Guidance for Responsible Business Conduct, OECD (2018), Paris, <https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm>. Other resources provide guidance on due diligence in specific sectors or for particular types of actors, such as investors. These include: OECD (2011), *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264111110-en>; OECD/FAO (2016), *OECD-FAO Guidance for Responsible Agricultural Supply Chains*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264251052-en>; and OECD (2017), *Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises*, <https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>. In addition to specific resources cited in this Guide, other useful references include, inter alia, IWGIA (2014), *Business and Human Rights: interpreting the UN Guiding Principles for Indigenous Peoples*, IWGIA and European Network on Indigenous Peoples, Copenhagen https://www.iwgia.org/images/publications/0684_IGIA_report_16_FINAL_eb.pdf; and DIHR (2019), *Respecting the rights of indigenous peoples: a due diligence checklist for companies*, Danish Institute for Human Rights, Copenhagen https://www.humanrights.dk/sites/humanrights.dk/files/media/migrated/dihr_-_respecting_the_rights_of_indigenous_peoples_-_a_due_diligence_checklist_for_companies.pdf
- 2 CESCR, *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, E/C.12/GC/24, 10 August 2017 (hereinafter "CESCR 2017"), para 5; OHCHR, "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", HR/PUB/11/04, 2011 (hereinafter "UNGPs"), https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf, para 11 Commentary
- 3 See CESCR, *Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights*, E/C.12/2011/1, 20 May 2011 (hereinafter "CESCR 2011"), para 1 (emphasising the "obligation of States Parties to ensure that all economic, social and cultural rights laid down in the Covenant are fully respected and rights holders adequately protected in the context of corporate activities"); see also CESCR 2017, para 1; UNGPs, para 1; IACHR 2019, pp 93-103
- 4 UNGPs, para 17. See also CESCR 2017, paras 16, 33; FAO, "Voluntary Guidelines on the Responsible Governance of Tenure of Land, Forests and Fisheries in the Context of National Food Security", Rome, 2012 (hereinafter "VGGT"), <http://www.fao.org/3/i2801e/i2801e.pdf>, para 3.2; IACtHR, *Case of the Kaliña and Lokono Peoples v. Suriname*, Judgment of November 25, 2015 (Merits, Reparations and Costs), Series C No. 309; IACHR, "Business and Human Rights: Inter-American Standards", 2019 (hereinafter "IACHR 2019"), <https://www.oas.org/es/cidh/informes/pdfs/EmpresasDDHH.pdf>; ACHPR, "Extractive Industries, Land Rights and Indigenous Populations'/Communities' Rights: East, Central and Southern Africa", 2017, <https://www.iwgia.org/images/documents/extractive-industries-africa-report.pdf>
- 5 *Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, Relationship between private military and security companies and the extractive industry from a human rights perspective*, A/HRC/42/42, 29 July 2019, para 55
- 6 See, e.g., FPP, Pusaka, Tuk Indonesia, SDI, APA, FECONAU, FAPI, SCPDA and SRDC, "Closing the gap: rights-based solutions for tackling deforestation", 2018, https://www.forestpeoples.org/sites/default/files/documents/Closing%20The%20Gap_0.pdf
- 7 CESCR 2017, paras 12, 17. See also CERD, *Decision 1(100) under Early Warning and Urgent Action Procedure: Canada*, 13 December 2019 (calling upon the state to "take the necessary steps to incorporate free, prior and informed consent in domestic legislation, in consultation with indigenous peoples, in compliance with international human rights obligations and jurisprudence")
- 8 CESCR 2017, para 17. See also *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, A/HRC/15/37, 19 July 2010 (hereinafter "SRIP 2010"), Part III.C; IACtHR, *Case of the Saramaka People v. Suriname*, Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations, and Costs), Series C No. 172 (hereinafter "IACtHR 2007"), para 134
- 9 CESCR 2017, para 17. See also SRIP 2010, Part III.C; IACtHR 2007, para 129; IACtHR, *Case of the Saramaka People v. Suriname*, Judgment of August 12, 2008 (Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs), Series C No. 185, para 40
- 10 CESCR 2017, para 17. See also SRIP 2010, Part III.C; IACtHR 2007, para 138
- 11 Companies are recommended to refer to this [thought paper](#) on the rights of non-indigenous forest peoples and this [position paper](#) on the use of the term "local communities" for further reading.
- 12 The Inter-American Court has extended its jurisprudence on the rights to legal personality and to property to apply to both indigenous peoples and tribal peoples who share similar characteristics as indigenous peoples. See, e.g., Inter-American Court of Human Rights, *Case of the Moiwana Community v Suriname*, Judgment of June 15, 2005 (Preliminary Objections, Merits, Reparations, and Costs), para 133; IACtHR 2007 Part VII
- 13 See, e.g., AfCHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003, 4 February 2010, para 238; AfCtHPR, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Application No 006/2012, Judgment of 26 May 2017, para 123
- 14 The right to property is also an individual property right of all persons, including indigenous persons, and indigenous individuals may hold private property that must be respected as such.

- 15 International human rights law makes clear that indigenous peoples' participation in impact assessments, FPIC, and agreement on measures for compensation and benefit-sharing are necessary elements of the respect for indigenous peoples' rights. See, e.g., CESCR 2017, para 17; IACtHR 2007, para 129 (calling the above-mentioned three processes "safeguards" that help "preserve, protect and guarantee the special relationship [that the indigenous peoples] have with their territory, which in turn ensures their survival" as an indigenous/tribal people).
- 16 FPP, "Wampis Nation act against illegal logging to protect territory and denounce threats to defenders in the Peruvian Amazon", 30 November 2020, <https://www.forestpeoples.org/en/lands-forests-territories/news-article/2020/wampis-nation-act-against-illegal-logging-protect>
- 17 The Akwé:Kon Guidelines have been cited by the Inter-American Court of Human Rights as representing international standards and best practices in the conduct of environmental and social impact assessments for operations affecting indigenous peoples' lands. *Case of the Saramaka People. v. Suriname*, Judgment of August 12, 2008 (Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs), Series C No. 185, para 41, fn 23
- 18 More information about GVL's improper FPIC processes and MOUs can be found in the *Hollow Promises report*. FPP, *Hollow promises: An FPIC assessment of Golden Veroleum and Golden Agri-Resource's palm oil project in south-eastern Liberia*, April 2015 (hereinafter "Hollow Promises Report"), <https://www.forestpeoples.org/sites/default/files/publication/2015/04/hollow-promises-report.pdf>
- 19 This case study and other similar ones are described in more detail in this paper: Chabaud, C., "Ending years of solitude? The Round Table on Sustainable Palm Oil and access to land in Colombia", BRICS Initiative for Critical Agrarian Studies, Conference Paper No. 6, 13 October 2017, <https://www.tni.org/en/publication/ending-years-of-solitude>
- 20 This case study is described in more detail in a series of press releases on the matter. FPP, "Bittersweet victory for indigenous community in the 'Heart of Borneo' as logger's FSC certificate is revoked but ignored", 6 October 2017, <https://www.forestpeoples.org/en/private-sector-timber-pulpwood-and-fsc/press-release/2017/bittersweet-victory-indigenous-community>; MacInnes, A., FPP, "Logging the Heart out of Borneo: the distressing case of Long Isun", 14 November 2017, <https://www.forestpeoples.org/index.php/en/rights-based-conservation/news-article/2017/logging-heart-out-borneo-distressing-case-long-isun>; and MacInnes, A., FPP, "Press release: Indigenous community files FSC Policy of Association complaint against Roda Mas Group in Indonesia", 27 January 2020, <https://www.forestpeoples.org/index.php/en/indonesia-long-isun-files-FSC-complaint-against-roda-mas>
- 21 FSC, Unacceptable Activities: Cases: Roda Mas of the Harita Group, <https://fsc.org/en/unacceptable-activities/cases/roda-mas-of-the-harita-group>
- 22 See, e.g., Luckstead, J. Tsiboe, F., and Nalley, L., "Estimating the economic incentives necessary for eliminating child labour in Ghanaian cocoa production", PLoS ONE 14(6): e0217230, 7 June 2019, <https://doi.org/10.1371/journal.pone.0217230>; UNICEF, "Children's Rights in the Cocoa-Growing Communities of Côte d'Ivoire: Synthesis Report", 2018, <https://www.unicef.org/csr/css/synthesis-report-children-rights-cocoa-communities-en.pdf>; NORC, "NORC Final Report: Assessing Progress in Reducing Child Labour in Cocoa Production in Cocoa Growing Areas of Côte d'Ivoire and Ghana", October 2020, https://www.norc.org/PDFs/Cocoa%20Report/NORC%202020%20Cocoa%20Report_English.pdf
- 23 FPP, "Breaking the Heart of Borneo: A Plan to Plunder Borneo's Final Frontier", 2020 (hereinafter "Breaking the Heart of Borneo Report") <https://www.forestpeoples.org/sites/default/files/documents/Breaking-the-heart-of-Borneo-ENG-digital.pdf>, p 45
- 24 Breaking the Heart of Borneo Report, p 18

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